REIMBURSEMENT

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I. INTRODUCTION

Almost every family law practitioner recognizes that the 2009 amendments to the Texas Family Code were the most significant changes to Texas marital property law in many years. The problems involved in the application of Economic Contribution resulted in its repeal and the adoption of a statute that codified nine defined reimbursement claims, Tex. Fam. Code §§3.402(a)(1) – (9), and the codification of certain basic reimbursement "rules," Tex. Fam. Code §§3.402(b) – (e). These specific, codified reimbursement claims and basic "rules" work in tandem with the already existing statutes on the effect and application of management rights, inception of title, marital property agreements, equitable liens, and statutorily-identified "nonreimbursable claims." Tex. Fam. Code §§ 3.404-3.406, and §§3.409 and 3.410. This article will help the practitioner navigate through the current reimbursement statutes and provide a play book for asserting and defending reimbursement claims, whether statutory or common law, as well as address lingering questions about this relatively new statute. Tex. Fam. Code §3.402(a)(1) – (9).

As will be evident from the review of the "new" legislation, it leaves many serious issues involving reimbursement unresolved and creates a small set of new and equally perplexing issues.

II. AN ANALYSIS OF SUBCHAPTER E, CLAIMS FOR REIMBURSEMENT

A. An Overview of the Statutory Reimbursement Claims

There are nine specific types of reimbursement claims available under the new statute at sections 3.402(a)(1)-(9). The statutory reimbursement claims clearly incorporate many of the common law principals developed in our Texas case law. It appears that the legislature attempted to codify the most common forms of common law reimbursement with the idea that this would make the outcome of reimbursement claims more uniform and predictable.

While this may have worked to a certain extent, there are still unresolved questions concerning the current statute that should be acknowledged and discussed. These questions are also addressed below and additional comments about application of the statute are included.

B. The Definitions and "Rules" Regarding These Claims

Also included in this subchapter at sections 3.402(b)-(e) are the following definitions and "rules," as it were, that apply to the new reimbursement claims. They are discussed first in order to assist the discussion of the nine codified reimbursement claims which follows.

1. Texas Family Code Section 3.401

This section defines "marital estate" as being one of three estates: the community, husband's separate, and wife's separate. This concept is critical to the understanding of the balance of the statute.

2. Texas Family Code Section 3.402(b).

This section explains how a court shall resolve a reimbursement claim, "by using equitable principles including the principle that claims for reimbursement can be offset against one another."

Does the court have discretion to deny all or part of a valid reimbursement claim for any reason, or for no reason at all, or is the only discretion the Court has spelled out in this subsection where the term "may" is specifically used in determining whether competing reimbursement claims "may" be offset against each other by use of equitable principles? While a reading of this section alone might lead one to believe that this is an open question, see the discussion of Tex. Fam Code Section 7.007 which follows later. Section 7.007 makes it clear that the granting of claims are left to the discretion of the court.

3. Texas Family Code Section 3.402(c)

This section defines one form of offsets, that being, "benefits for the use and enjoyment of property," but specifically prohibits a claim for any offset by the separate estate of a spouse for the use and enjoyment of his or her primary or secondary home.

This section of the reimbursement "rules" was likely included in the new statute as an appeasement to those who saw merit in the concept behind Economic Contribution. If the community can't share in the increase in value of a spouse's separate property primary or secondary home where community contributions were made to the property, at least we can prevent the community from being "charged" for the use and enjoyment of such property.

This section of the statute essentially clarifies the common law principle established long ago in *Dakan v. Dakan*, 125 Tex. 305, 83 S.W.2d 620, 628 (1935) ("[t]he rule has been announced that in adjusting the respective rights of the parties the equities shall be balanced"), and re-iterated in *Colden v. Alexander*, 171 S.W.2d 328 (Tex. 1943). The court in *Colden* held that when community funds are used to pay interest on unpaid debt acquired for the purchase of land, and the ad valorem taxes on the separate property of the husband, such expenditures "would not create an equitable claim for reimbursement, unless it is shown that the expenditures by the community estate are greater than the benefits received."

Query: Since the term "residence" is singular, what if there is more than one "secondary residence"? Are you limited to one offset, regardless of the number of secondary residences?

4. Texas Family Code Section 3.402(d)

This section states that the measure for reimbursement of funds spent by one marital estate for improvements to another is the enhancement in value to the benefited estate and not the actual total dollars spent on the improvements.

This subsection codifies *Dakan v. Dakan*, 125 Tex. 305, 83 S.W.2d 620, 628 (1935), and *Anderson v. Gilliland*, 684 S.W.2d 673, 675 (Tex. 1985).
In *Dakan*, the court states:

> "…[i]n allowing a reimbursement for funds spent, if any portion of the purchase money for said land can be shown to have been paid with separate funds of Mrs. Dakan, and with community funds of plaintiff and G. W. Dakan, Mrs. Dakan will be entitled to reimbursement for the amount of her separate funds and her share of the community funds so paid; and 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." *Id*. at 318.

Subsequently, in *Anderson v. Gilliland*, the court held:

> "…The principle is well established in equity that a person who in good faith makes improvements upon property owned by another is entitled to compensation therefor [sic]. The measure of compensation to the claimant is not the original cost of the improvements, but the enhancement in value of the land by reason of the improvement." *Id*. at 675.

5. Texas Family Code Section 3.402(e)

This section places the burden of proof for offsets on the party seeking the offset. If the petitioning party proves up the reimbursement claim, the burden then shifts to the other party to request an offset. Bear in mind that Section 3.402(b) allows the court to offset one reimbursement claim against another if the court determines the offset to be appropriate for the sake of equity. There is also case law that speaks to "competing" offsets, further complicating the prosecuting and/or defense of such a claim. *See Penick v. Penick*, 783 S.W.2d 194, 197 (Tex. 1988); *Zieba v. Martin*, 928 S.W.2d 782, 788-789 (Tex.App.—Houston [14th Dist.] 1996, no writ).

C. Other Statutory Provisions Which Effect Reimbursement Claims

The following code sections, also part of Subchapter E, likewise clarify important points that apply to the nine codified reimbursement claims.

1. Texas Family Code Section 3.404

Sec. 3.404. APPLICATION OF INCEPTION OF TITLE RULE; OWNERSHIP INTEREST NOT CREATED.

(a) This subchapter **does not affect the rule of inception of title** under which the character of property is determined at the time the right to own or claim the property arises.

(b) A claim for reimbursement 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.

This section of the code codifies well established common law principles found initially in *Dakan v. Dakan*, 125 Tex. 305, 83 S.W.2d 620 (1935) and reiterated by the Texas Supreme Court in opinions such as *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1983) and *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984).

2. Texas Family Code Section 3.405

Sec. 3.405. MANAGEMENT RIGHTS.

> "This subchapter does not affect the right to manage, control, or dispose of marital property as provided by this chapter."

The reference to "this chapter" means Chapter 3 – "Marital Property Right and Liabilities," section §3.102, "Managing Community Property" and section §3.306, "Court Order for Management, Control and Disposition of Community Property."

3. Texas Family Code Section 3.406

Sec. 3.406. EQUITABLE LIEN.

(a) On dissolution of a marriage, **the 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.

(b) On the death of a spouse, a court may, on application for a claim for reimbursement 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 by a contributing marital estate.

What is an equitable lien? If a claim for reimbursement is granted, the court may award a spouse a money judgment for that claim (as opposed to an award of specific items of community property, which is another option used to "reimburse" the contributing estate.) The court should specifically state whether or not the award of a money judgment is to be secured by an equitable lien, which attaches to the property that benefitted from the reimbursable contribution. *Kimsey v. Kimsey*, 965 S.W.2d 690 (Tex.App. –El Paso 1998, pet. Denied.) When a lien is expressly placed on the property to secure the money judgment in a decree, the lien will be considered an equitable lien, as opposed to a judicial lien which exists only by virtue of statute and which may be satisfied by levy on all non-exempt property owned by one party against whom the judicial lien is awarded. *Day v. Day*, 610 S.W.2d 195 (Tex.App.—Tyler 1980, writ ref'd n.r.e.); *Faires v. Billman*, 849 S.W.2d 455, 456 (Tex. App. – Austin 1993, no writ). An equitable lien arises once judgment is rendered; a judicial lien does not arise until an abstract of judgment is filed. *Day*, 610 S.W.2d at 197-98. Note that an equitable lien, unlike a general judicial lien, may attach to the homestead that benefitted from a reimbursable claim. *See Heggen v. Pemelton*, 836 S.W.2d 145 (Tex. 1992). In order to secure payment ordered by a judgment pursuant to a right to reimbursement, Texas courts have "found it desirable to place an equitable lien on the separate property with the concomitant right to foreclose and sell if the judgment is not paid. . . .it has been surmised that the very reason that this device was formulated by the courts was to avoid. . . . the assertion of a homestead claim by the debtor spouse to defeat a money judgment obtained by the other spouse in a divorce action." *Day*, 610 S.W.2d at 198.

4. Texas Family Code Section 3.409

Sec. 3.409. NONREIMBURSABLE CLAIMS.

The court may not recognize a marital estate's claim for reimbursement for:

(1) the payment of child support, alimony, or spousal maintenance;
(2) the living expenses of a spouse or child of a spouse;
(3) contributions of property of a nominal value;
(4) the payment of a liability of a nominal amount; or
(5) a student loan owed by a spouse.

a. Open Issues

As to payment of child support, alimony or spousal maintenance, are there any limits to those payments? What if the child in question was born during the parties' marriage but is not "of" the marriage?

For help with these questions, see the following case analyses:

1.) Are There No Limits on Living Expenses of Spouse or Child of a Spouse?

As to the living expenses for a spouse or child of a spouse, payment for "necessaries" of a spouse or a spouse's child from a current or former marriage were not grounds for reimbursement even at common law. "Necessaries" typically include food, clothing, shelter, medical care, dental care and educational costs, but other expenditures such as a vehicle, or even cosmetics, might qualify as necessaries. *See Marynick v. Bockelmann*, 773 S.W.2d 665, 671 (Tex. App.—Dallas 1989), *rev'd on other grounds*; 788 S.W.2d 569 (Tex. 1990); *Gabel v. Blackburn Oper.Corp.*, 442 S.W.2d 818, 819-20 (Tex. App.—Amarillo 1969, no writ); *Fallin v. Williamson Cadillac Co.*, 40 S.W.2d 243, 244 (Tex. App.—San Antonio 1931, no writ).

In *Norris v. Vaughan*, 260 S.W.2d 676, 683 (Tex. 1953), the Texas Supreme Court held:

> "…It is fundamental that the husband is obligated to furnish support for the community living and if no community funds are available he should utilize his separate funds. ... It is his duty to provide for the community and in this instance he chose to expend a portion of his separate estate so that the community standard of living could be as it was. Separate funds spent for community living in such a manner should be deemed a gift to the community for its well-being and use. Allowing a right of reimbursement at a later date would be inconsistent with the fundamental concept that a man should provide for his home and community."

The case of *Pelzig v. Berkebile*, 931 S.W.2d 398 (Tex.App.—Corpus Christi 1980, no writ), may offer guidance on the logic behind and the interpretation of some of these issues. The wife lodged a claim for reimbursement of her share of the community funds sent to husband's former wife and his daughter for the following expenditures, which were all court-ordered obligations retained by the husband from his previous marriage: mortgage payments for his former wife's house totaling $54,435.41; alimony payments totaling $8,794.00; child support totaling $9,089.19; college

costs of his daughter totaling $18,183.19; and legal fees from his first divorce totaling $2,229.50. In doing so, the wife characterized these payments as "relieving the duties of husband's separate estate." Contrary to the wife's position, the husband characterized these payments as "living expenses," for which no reimbursement is allowed. In affirming the trial court's decision that no right of reimbursement attached to such payments, the Corpus Christi Court of Appeals stated that there was no evidence that the wife was deceived about these obligations, or that she ever sought to require the husband to meet these obligations out of his separate estate, either during their marriage or in the form of a prenuptial agreement. The Court even found that there was no evidence that these expenses benefitted the husband's separate estate.

2.) What About Reimbursement of Spouse's Separate Funds?

In circumstances where one spouse's separate funds were used to pay the expenses of their spouse's former wife or child from a prior marriage, is a reimbursement claim really barred? While this may seem unfair, this appears to be what section 3.409 requires as the statute prohibits such a claim by any "marital estate."

3.) Treatment of Expenses for a Child Born Outside Marriage

In *Butler v. Butler*, 975 S.W.2d 765, 769 (Tex. App.—Corpus Christi 1998, no pet.),the court dealt with the issue of a child conceived with someone other than a spouse during marriage. Here, the court carved out an exception – "living expenses" under section 3.409 only apply to the living expenses of the ***marital family***, (emphasis added) for which each spouse is obligated to provide, even from separate property if necessary. The court did not agree with the husband's contention that the living expenses of a child born outside the marriage (while engaging in a extramarital affair) are exempt from reimbursement under the same "living expenses" obligation that a spouse has toward the marital family. *See also Mazique v. Mazique*, 742 S.W.2d 805, 808 (Tex. App.—Houston [1st Dist.] 1987, no writ).

b. Suggestions for Other Related Reimbursement Claims

If the spouse incurred legal expenses paid by the community in defending an increase in alimony or child support or the setting of child support, especially where the child was born "during" the marriage but not "of" the marriage, consider asserting a reimbursement claim for the legal costs associated with such defenses as discussed in the section to follow that deals with common law claims.

c. What is a Nominal Amount

As to section 3.409(3) concerning contributions of property of a nominal value and the payment of a liability of a nominal amount:

1.) What is a nominal amount?
2.) Is the term "nominal" dependent on the wealth of the parties?

d. Definition of Child

Finally, see later comments in the article regarding the definition of "child" under Texas statute.

5. Texas Family Code Section 3.410

Sec. 3.410. EFFECT OF MARITAL PROPERTY AGREEMENTS.

"A premarital or marital property agreement, whether executed before, on, or after September 1, 2009, 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, unless the agreement provides otherwise."

This subsection clearly states that a valid pre- or post-marital agreement that exempted claims under the former reimbursement/economic contribution statues will also exempt claims under the new reimbursement statute.

D. The "Hidden" Statute – Tex. Fam. Code Section 7.007

Far removed from the bulk of the reimbursement sections, the statute governing the disposition of a reimbursement claim is found "buried" in the Code at section 7.007. Often overlooked, but equally important, this statute states:

"In a decree of divorce or annulment, the court shall determine the rights of both spouses in a claim for reimbursement 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."

Section 7.007 clearly allows the court to recognize and, by implication, ignore a reimbursement claim, and apply the same just and right concepts that apply to the division of the marital estate as a whole.

Now, bearing in mind the "rules" which govern statutory reimbursement claims, we move to a discussion of the actual claims.

III. A DISCUSSION OF EACH STATUTORY REIMBURSEMENT CLAIM

A. 3.402(a)(1) - Relating to the Payment of Unsecured Liabilities

A payment made by one marital estate for the unsecured liabilities of another marital estate is reimbursable under section 3.402(a)(1) of the Texas Family Code. (emphasis added)

1. Necessary Elements to be Proved
   a. the existence of an unsecured liability by one marital estate; and
   b. the payment of that unsecured liability by another marital estate.

2. Practical Example of Such a Claim

Often, this type of reimbursement will be very straight forward. For example, in the case of *McDaniel v. McDaniel*, No. 03-03-00521-CV (Tex.App.—Austin 2004, no pet.) (memo op.; 3-18-04), the wife's payment out of her separate property funds of an unsecured debt for taxes and credit card debt for the benefit of the community estate was reimbursed dollar-for-dollar.

3. Defenses to Such a Claim
   a. The claim is for payment of an unreimburseable expense at Tex. Fam. Code, Section 3.409.
   b. The liability was secured.

4. Unanswered Questions

Note that this section of the statute refers to "payment" of "unsecured liabilities," whereas 3.402(9) speaks to the "reduction" of "unsecured debt." What is the difference between "payment" and "reduction"? Did the Legislature intend there to be a difference between liabilities and debt? Webster's Dictionary defines a liability as a debt. However, at common law, debt was defined as "money held to be due" while a liability was "owed but not necessarily due." For a continued discussion of the issues created by these similar forms of reimbursement, see the author's comments concerning section 3.402(a)(9) that will follow.

B. 3.402(a)(2) - Relating to a Statutory *Jensen* Claim - Inadequate Compensation for Time, Toil, Talent & Effort

"Inadequate compensation for the time, toil, talent and effort of a spouse by a business entity under the control and direction of that spouse." Tex. Fam. Code §3.402(a)(2)

1, Necessary Elements to be Proved

a. Inadequate compensation

The statute does not provide any explanation of or bright line test for what constitutes "inadequate" compensation. It's unclear whether the requirements at common law extend to a *Jensen* claim under the statute, that is, demonstrating that the spouse's uncompensated (or undercompensated) time, toil, talent, and effort spent on that spouse's separate property exceeded what was reasonably necessary to preserve and maintain the property. *Jensen v. Jensen*, 665 S.W.2d 107, 110 (Tex. 1984). While this author believes that common law claims have not been extinguished, it is unclear whether the elements of a common law *Jensen* claim still apply to claims made under the statute, or whether codification of a *Jensen* claim eliminates grafting of the elements of the common law claim on to the statutory requirements. However, the Pattern Jury Charges Committee for Family Law has commented that the jury instructions on a spouse's time, toil, talent, or effort is based on *Jensen*, and goes on to say that "[t]he submission does not contain all the elements stated in Tex. Fam. Code § 3.402(a)(2), which provides that a claim for reimbursement includes inadequate compensation for the time, toil, talent, and effort of a spouse by a business entity under the direction and control of that spouse.'" The committee states: "Because use of the term "includes" in section 3.402(a) indicates that other types of claims may also be cognizable as claims for reimbursement (Tex. Gov't Code § 311.005(13)) the committee has concluded that section 3.402(a)(2) does not alter the requirements for a *Jensen* claim as set forth in the foregoing submissions." State Bar of Texas, Texas Pattern Jury Charges, Family Law PJC 204.1, comment (2010).

b. Time, Toil, Talent, and Effort

It should be noted that no court has definitely addressed what evidence is needed to prove the value of a spouse's time, toil, talent, and effort under the current statute. It has been suggested that reimbursement claims based upon time, toil, talent, and effort may still be controlled by the standards set out above in *Jensen*, and the Pattern Jury Charges Committee comments support that position. As recognized by the San Antonio Court of Appeals in *Lifshutz v. Lifshutz*, 199 S.W.3d 9, 28 (Tex. App. – San Antonio 2006, pet denied), "although mathematical certainty is not required," some evidence must be presented to establish the value of the parties' time, toil, talent, and effort. The cases which have analyzed the sufficiency of the evidence have typically focused upon the expert testimony offered to show the value of

the spouse's contribution. *See Delancey v. Delancey*, 03-10-00240-CV, 2011 WL 677401 (Tex. App. – Austin, February 24, 2011, no pet); *Bell v. Bell*, 12-04-00244-CV, 2005 WL 1538275 (Tex. App. – Tyler September 23, 2005, no pet); *Pearce v. Pearce*, 824 S.W.2d 195 (Tex. App. – El Paso 1991, writ denied); *Thomas v. Thomas*, 738 S.W.2d 342 (Tex. App. – Houston [1st Dist.] 1987, writ denied); *Beavers v. Beavers*, 675 S.W.2d 296 (Tex. App. – Dallas 1984, no writ).

Evidence on the value of uncompensated labor must also be presented, although courts have provided little guidance on just what kind of evidence will suffice. A *Jensen*-type claim arose in *Gutierrez v. Gutierrez* where the wife asserted a reimbursement claim based on the time, toil, talent and effort *she* contributed to increase the size of the husband's separate property cattle herd. Although the court held the wife was entitled to seek reimbursement under the theory of inadequate compensation established in *Jensen*, her claim was denied because there was no evidence of the value of her contribution. 791 S.W.2d 659 (Tex. App. – San Antonio 1990, no writ). Thus, the proponent of the claim should be prepared to put on evidence of what compensation a person of similar skill, experience, and education would have received for doing the same job.

Also, bear in mind that in industries where salary comparables are available, a financial expert can often quantify the value of time invested by comparing the average compensation for someone engaged in a similar position and in the same line of work, to the time expended by a spouse in a business under his or her control and direction.

c. Business Entity was Under the Spouse's Control and Direction

Once again, we are left guessing as to the meaning of "control and direction" as the Code fails to provide any guidance for proof of this element. Is it sufficient if the business is the spouse's separate property? Must it also be shown that the spouse plays a significant role in the management of the business? These and other important questions arise when examining statutory *Jensen* claims, and may explain why the Pattern Jury Charges Committee declined to alter its instructions for a *Jensen* claim following the adoption of the new statute.

2. Practical Example of Such a Claim

To date, this author has found no cases that have been decided which apply new section 3.402(a)(2). However, a review of prior case law is instructive.

In *Bell v. Bell*, No. 12-04-00244, (Tex.App.—Tyler 2005, no pet.), the community was reimbursed for work the wife did for a business that was 49% owned by the husband. The record showed that the community received a benefit valued at $236,690.72 ($135,461.72 in salaries, plus $101,229.00 spent from the husband's funds acquired from the sale of the stock in the broadcasting company) from his separate property. The wife did not point the appellate court to, nor could it find, any evidence to show how the $40,000.00 reimbursement award to the community was not adequate compensation when it had already received $ 236,690.72 in value for the time, toil, and effort expended to enhance the husband's separate property. Thus, the trial court did not abuse its discretion by awarding the $40,000.00 reimbursement award to the community.

1. Defenses to Such a Claim

Defenses to the statutory claim may include:

a. Compensation was adequate for the worked performed.

b. If common law defenses still apply to a statutory claim, the defense that any uncompensated time did not exceed what was necessary to preserve and maintain the spouse's separate business may defeat the claim.

c. The entity for which the spouse was employed was not an entity under the spouse's control and direction.

3. The Difference Between the Statutory Claim and Common Law *Jensen* Claim

There are marked the differences between the statutory *Jensen* claim and the common law claims established by *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984), and *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982).

The statute varies from case law in that there is no requirement that the time, toil, talent, and effort expended on a spouse's separate estate exceed what is reasonably necessary to manage and preserve the separate estate, as required by case law. *Jensen v. Jensen*, 665 S.W.2d at 109.

The statute also includes a requirement that a spouse must have "control and direction" of the business entity into which the community efforts have flowed, but fails to define those terms, and even fails to state whether the business entity must be solely owned by the spouse as separate property. Could a spouse who works in a business owned as separate property jointly with his brother avoid this type of reimbursement claim if he held a minority interest in the business, thus lacking complete "control and direction," even though his salary was below par for his profession, and he devoted his time exclusively to this entity to the detriment of the community?

At least one commentator has suggested that the marital estate need not even own the business in question in order to make this claim. *See* Goranson,

Reimbursement, Family Law on the Front Lines (2010).

C. 3.402(a)(3) - Relating to the Reduction of the Principal Amount of a Secured, Pre-Marriage Debt

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;

1. Necessary Elements to be Proved

a. The property was acquired by a spouse before marriage.
b. The debt was still in existence at the time of marriage.
c. The debt was secured by a lien on the spouse's separate property.
d. The community estate (or the other spouse's separate estate) contributed to the reduction of the principal balance on that separate property debt.

2. Practical Example of Such a Claim

Recall with this type of reimbursement claim, if the principal reduction was for a primary or secondary home, there is no offset for the use and enjoyment of the home at issue. However, a rental home is another matter, and recall reimbursement claims need not only involve land. Such a claim could also be made, for example, for the reduction of the principal balance on a loan for a boat, where the boat itself is security for the loan, and was owned by a spouse before marriage. In this situation, a "use and enjoyment" defense might arise.

3. Defenses to Such a Claim

Defenses to such a claim are likely to be limited to:

a. Property is community.
b. A request for offset for use and enjoyment of the property whether real or personal (recalling there is no offset for the use of a primary or secondary residence, but that offset is available for rental property where income flowed to the community estate and tax savings flowing from property benefitted the community.)
c. Proof that the debt did not exist at the time of marriage.
d. Debt was not secured by the property in question.
e. Payments were nominal.

D. 3.402(a)(4) – Relating to the Reduction of the Principal Amount of a Secured Debt on Gifted or Inherited Property

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 marriage to the extent the debt existed at the time the property was received.

This statute is identical to section 3.402(a)(3) but speaks to a marital estate reducing the principal amount of the debt secured by property received during marriage by gift or inheritance.

1. Necessary Elements to be Proved

a. The benefitted property must have been acquired during marriage by gift or inheritance, thus, characterizing it as the separate property of one of the spouses.
b. The debt was secured by a lien on that property and existed when the property was received.
c. The community estate, or the other spouse's separate estate, reduced the principal amount of the debt.

2. Practical Example of Such a Claim

During marriage, one spouse inherits a parent's residence, which has a mortgage. The community estate pays down that mortgage, giving rise to a reimbursement claim at the time of divorce. In this instance, the principles in *Penick v. Penick*, 783 S.W.2d 194 (Tex. 1988) apply - the proponent of the reimbursement claim has the burden of establishing that community funds were used to pay down the secured debt on the separate property, as well as proving the exact amount of the funds expended, <u>less</u> permitted offsets.

3. Defenses to Such a Claim

See defenses set out above at section 3.402(a)(3).

E. 3.402(a)(5) – Relating to the Reduction of the Principal Amount of Debt for Capital Improvements

The reduction of the principal part of a debt, including a home equity loan:

(A) Incurred during marriage;
(B) Secured by a lien on property owned by a spouse; and
(C) Incurred for the acquisition of, or capital improvements to, property.

1. Necessary Elements to be Proved

a. The debt was incurred during the marriage.

b. The debt was secured by a lien on property owned by a spouse (i.e. spouse's separate property).
c. The debt was incurred for the acquisition of, or for capital improvements to, the property.
d. And apparently, although not so stated, a marital estate (other than the marital estate which incurred the debt at issue) reduced the principal of debt at issue.

Note as stated by Goranson in his article on reimbursement, in failing to reference that the marital estate had to be benefitted by the acquisition or improvement, this statute "seems to have left something out." Goranson, *supra*, note 5.a., at 7.

2. Practical Example of Such a Claim

Wife enters the marriage with a separate property home. During the marriage she obtains a home equity loan secured by the home, and makes improvements to the home with the loan proceeds. Her husband's separate estate, or the community estate, makes payments to reduce the principal of the home equity loan. Upon divorce, reimbursement is available to the separate estate of the spouse contributing funds to reduce the principal debt or to the community estate making such reduction.

3. Defenses to Such a Claim

a. Proceeds from loan secured by property were not spent for acquisition of, or capital improvements, to property.

Note: Although the Code does not define the term in the context of reimbursement claims, a capital improvement has generally been described as "any structure or component erected as a permanent improvement to property that adds to its value and useful life." Penn, *Theory of Economic Contribution*, Family Law Forum (Dec. 2004). If only ordinary repairs and maintenance were made, rather than "capital improvements," reimbursement should not be granted solely pursuant to this particular code section.

b. Debt was not secured by lien on spouse's separate property.
c. Offset for use and enjoyment (but not for primary or secondary home.)
d. Payments were nominal.

F. 3.402(a)(6) – Relating to the Reduction of Debt When a Creditor Agreed to Look to Separate Property for Repayment:

The reduction of that principal amount of a debt:

(A) Incurred during 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;
(D) Incurred for the acquisition of, or for capital improvements to property.

1. Necessary Elements to be Proved

a. The debt was incurred during the marriage.
b. The debt was secured by a lien on a spouse's separate property.
c. Lender agreed to look solely to the spouse's separate property estate for repayment of debt.
d. The debt was incurred for the acquisition of, or capital improvements to, the spouse's separate property.
e. The community estate (or the other spouse's separate estate) expended funds to reduce principal of the separate property debt.

2. Practical Example of Such a Claim

During marriage, the wife obtains a home equity loan to add a pool and build a guest house on her separate property ranch. The loan is secured by a lien on the ranch. The proceeds are used for the pool and guest house. The lender agrees to look only to the wife's separate estate for repayment of the debt. Nonetheless, the community estate reduced the principal on the debt during marriage. The parties use the ranch as a secondary residence.

3. Defenses to Such a Claim

a. Debt not incurred during marriage; and/or
b. Not secured by lien on property owned by spouse; and/or
c. Creditor did not agree to look solely to separate estate of spouse for repayment.
d. Payments were nominal.
e. Offset for use and enjoyment.

In the example, since the community estate made the payments, the wife could not assert the defense of use and enjoyment of a secondary residence. (*See* § 3.402(c)). If, however, the husband's separate estate made the loan payments, as opposed to the community estate, wife could raise the claim of offset for use and enjoyment by husband's separate estate, especially if a pre-marital agreement prohibited the creation of a community estate. *Id.*

One might also argue that the addition of the pool and guest house did not materially increase the

use of the ranch by the community, so it added nothing to the use and enjoyment of the ranch beyond what was enjoyed before the improvements.

G. 3.402(a)(7) – Relating to the Refinancing and Reduction of the Principal Amount of Debt Described in 3.402(a)(3)-(6)

"The refinancing of the principal amount described in subdivisions (3)-(6), the extent the refinancing reduces the principal amount in a manner described by the applicable subdivision;"

1. Necessary Elements to be Proved

This is a very literal claim, and the same necessary elements of proof and corresponding defenses addressed in Section 3.402(a) subsections (3) – (6) apply.

2. Practical Example of Such a Claim

If, for example, the credit of the marital estate is used to refinance the debt of a spouse's separate estate, a reimbursement claim arises only when the principal amount of the debt is reduced at the time of the refinance.

3. Defenses to Such a Claim

If no principal reduction occurs, but the community credit obtains a more favorable interest rate than the separate estate enjoyed, no reimbursement claim arises under this statute. However, a claim for reduction of an interest rate may exist at common law and is a defense worth considering when community credit benefits a spouse's separate estate in this manner. *See* later discussions on this issue in the section to follow entitled "Common Law Claims and Defenses".

H. 3.402(a)(8) – Relating to Capital Improvements When No Debt Incurred

"Capital improvements to property other than by incurring debt."

Again, this section makes no reference to property being benefited by one estate to the detriment of the other-thus, the analysis must make certain logical presumptions.

(Note: Goranson, *Reimbursement* supra, note 8.a., at 7-8) states "this provision appears to have no purpose".)

1. Necessary Elements to be Proved:

Although not plainly stated, this statute seems to require proof that

a. One marital estate made capital improvements to another marital estate; and
b. No debt was incurred to make such improvements.

2. Practical Example of Such a Claim

Wife owns a separate property ranch and the community estate makes capital improvements to the ranch for a barn worth approximately $150,000.00, from existing community funds. A request to reimburse the community for the capital improvement is made. *See Cardwell v. Cardwell*, 195 S.W.3d (Tex. App. – Dallas 2006, no pet).

3. Defenses to Such a Claim

a. Despite the making of capital improvements, the value of the property to which such improvements were made was not enhanced. (See 3.402(d).)
b. An attack on the methods used to obtain the value of the property at the time the capital improvements were made, especially where the improvements were made many years before the claim matures.
c. Payments were of nominal value.
d. Offsetting benefits for use and enjoyment (other than for community contributions to primary or secondary home belonging to a spouse's separate estate.)

4. Value of Capital Improvement

A contribution for a capital improvement under this statute is measured by the enhancement in value to the benefited marital estate. Tex. Fam. Code §3.402(d). Enhancement in value is typically established by presenting evidence of the value of the benefited estate immediately before the improvements were made compared to the value at the time the claim matures on divorce or death.

Coming up with a value for the property before the improvements were made can be tricky, especially when the reimbursement claim matures years later. Often, the only evidence will be the tax appraisal district value of the property at the last valuation date before the improvements were made, or sales of comparable properties at the time in question.

This subsection also seems to clarify that capital improvements made with cash, or with the physical efforts of a spouse, are also reimbursable.

When the physical labor of one spouse contributed to the capital improvement, an offset for the value of such separate efforts could be made.

I. 3.402(a)(9) - Relating to the Reduction of an Unsecured Debt by the Community Estate

"The reduction by the community property estate of an unsecured debt incurred by the separate estate of one of the spouses."

1. Necessary Elements to be Proved

a. An unsecured debt incurred by a spouse's separate estate which,
b. was reduced by the community estate.

2. Practical Example of Such a Claim

One spouse has an unsecured line of credit due and owing by his separate estate and sums owed on that line of credit are reduced by payments from the community estate.

3. Defenses to Such a Claim

See applicable defenses at Section 3.402(a)(1).

4. Discussion of Differences Between 3.402(a)(1) and 3.402(a)(9)

As discussed earlier in the article, one question that often comes to mind when reading section 3.402(a)(9) is "What is the difference between this subsection and section 3.402(a)(1) [payment by one marital estate for unsecured liabilities of another marital estate]?"

Many practitioners have wondered why the legislature included both sections 3.402(a)(1) and 3.402(a)(9) in the list of reimbursement claims when (a)(1) seems to subsume (a)(9).

a. Payment vs. Reduction

Note that section 3.402(a)(1) (payment by one marital estate of the unsecured liabilities of another marital estate) is broader than this section, which provides for a reimbursement claim for a reduction by the community property estate of an unsecured debt incurred by the separate estate of one of the spouses. Some argue that there is a difference between the concept of payment as opposed to reduction of debt, with payment meaning extinguishment of debt, with reduction meaning only a diminishment.

b. Debt vs. Liabilities

Section 3.402(a)(9) also uses the terms reduction of "unsecured debt" as opposed to payment of "unsecured liabilities" as is used in section 3.402 (a)(1). To better understand the difference, it makes sense to characterize what constitutes a "liability" and what constitutes a "debt" under Texas law. A "debt' implies the existence of a contract, while a "liability" indicates some presence of an obligation, legal or otherwise, like taxes and tort liability. Also, a debt is presumed to be "due and owing" while a liability may be owed but not yet "due," such as a liability incurred with credit, which is owed but typically may be paid in installments. The word "liabilities is a broad term and, while it may include debts, it is not generally limited to such term." *Burnett v. Chase Oil & Gas, Inc*., 700 S.W.2d 737, 742 (Tex. App. – Tyler 1985, no writ). Liability has a more comprehensive meaning than the word debt, and includes "almost every character of hazard or responsibility, absolute, contingent or likely, and has been defined as the condition of being responsible for a possible or actual loss, penalty, evil, expense or burden." *Id., citing to Reconstruction Finance Corp. v. Gosset*t, 130 Tex. 535, 111 S.W.2d 1066 (1938), and *Cochran v. US*, 157 U.S. 286, 15 S.Ct. 628, 39 L.Ed. 704 (1895).

c. What is the Difference?

Some practitioners argue there is a difference in these concepts. While there may be subtle differences in the definitions of payment versus reduction and liabilities versus debt, as a practical matter, these nearly identical statutes seem to be one of those legislative "glitches" as there is nothing in the bill analyses to indicate that there was any particular purpose in including section 3.402(a)(9) when section 3.402(a)(1) seems to cover both concepts.

d. Principal Reduction Not Required

Note, neither statute limits the reimbursement claim to principal reductions.

IV. COMMON LAW REIMBURSEMENT

What constitutes a reimbursement claim at common law?

Early on, our Texas courts began to recognize a spouse's common-law right to seek reimbursement for contributions made from one marital estate to another to remedy the inequities often created by the inception-of-title rule, which states that property takes its character as either separate or community based on the time and manner in which an ownership interest in the property is first acquired, with the contribution of money or effort from one marital estate to another having no effect on the character of the benefited estate. *See Rice v. Rice*, 21 Tex. 58 (1858); *Vallone v. Vallone*, 644 S.W.2d 455, 458-9 (Tex. 1982).

Long before the first reimbursement statute was enacted in 2001, creative family lawyers asserted claims which resulted in the establishment of common law reimbursement claims through developing case law. These claims also resulted in holdings that defined the limits on reimbursement claims. What follows here is a re-cap of the seminal cases which established common law reimbursement claims, as well as the limits and defenses to such claims.

1. Case law established that common law claims for reimbursement are equitable rights that arise upon dissolution of the marriage, by death, annulment, or divorce, when funds or assets of one marital estate have been used to benefit another marital estate. *Anderson v. Gilliland*, 684 S.W.2d 673 (Tex. 1985);

Lucy v. Lucy, 162 S.W.3d 770, 776 (Tex. App. –El Paso 2005, no pet.).

2. Case law continuously reiterates that 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).

3. More specific rules were also established through case law, such as, a spouse asserting a claim for improvements made to a spouse's separate estate through the use of community funds is required to prove that the community expenditures were greater than the benefit received by the community. *Gutierrez v. Gutierrez*, 791 S.W.2d 659, 663 (Tex.App.—San Antonio 1990, no writ).

4. Case law established that the party seeking reimbursement is charged with the burden of pleading and proving that expenditures and improvements were made, and that they are, in fact, reimbursable. *Vallone* at 459.

5. The common law principle that when a claim for reimbursement is asserted by the community estate against a separate estate, the value of the reimbursement claim is based on the enhanced value of the separate estate, not the actual dollar amount spent, was also established through a series of cases, chief of which are *Anderson v. Gilliland*, 684 S.W.2d 673, 675 (Tex. 1985); *Penick v. Penick*, 783 S.W.2d 194, 197 (Tex. 1988); and *Pemelton v. Pemelton*, 809 S.W.2d 642, 651 (Tex. App.—Corpus Christi 1991, writ granted). The Supreme Court in *Anderson* also stated that equity requires the courts to ensure that the benefitted estate is not required to pay more in reimbursement than the amount by which it was benefitted. *Id.* at 675. Likewise, the benefitted estate should pay no less than the amount by which it has been benefitted. *Id*.

6. The courts also held that an equitable claim for reimbursement is not merely a balancing of the ledgers between the marital estates. *Penick v. Penick*, 783 S.W.2d at 198 (Tex. 1998). 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. According to the *Penick* court, reimbursement is simply another element, along with factors including, but not limited to, the earning capacity of the spouses, length of the marriage, age, health and education of the spouses, business opportunities and employability of the spouses, that a court should consider in awarding a reimbursement claim and determining the amount of the award. *Id.*

V. THE EFFECT OF STATUTORY REIMBURSEMENT ON COMMON LAW REIMBURSEMENT CLAIMS

A. The Big Question – Effect of Statute on Claims at Common Law

Now that our Legislature has enacted a law that identifies nine very specific reimbursement claims, a frequently debated question at recent CLE events has been "is common law reimbursement dead?"

The answer to that question seems to be "No". The list of reimbursement claims at Texas Family Code §3.402 may appear to be exhaustive, but the Legislature has not codified all of the potential common-law claims for reimbursement, and the statute should not be read as the exclusive list of reimbursable claims. Both case law and the rules of statutory construction support this position, as well as the position taken by the Pattern Jury Charges Committee in the Comment to Pattern Jury Charge 204.1 on Reimbursement. State Bar of Texas, Texas Pattern Jury Charges PJC 204.1 (2010).

1. Prior Case Law – Statute is "Non-Exhaustive" List

In the case of *Bigelow v. Stephens*, the court stated that:

> "In our opinion, '[t]he definition of reimbursement in section 3.408(b) [now repealed] is simply a non-exhaustive list of two potential reimbursement claims.' *Caro v. Lewis-Caro*, No. 04-07-00759-CV, (Tex. App. –San Antonio April 9, 2008, no pet.) (mem. op.); *Nelson v. Nelson*, 193 S.W.3d at 632. We do not believe that the legislature, by providing two examples of reimbursement claims in section 3.408(b), intended to limit the trial court's power to use equity to achieve a fair division of the parties' property." 286 S.W.3d 619 (Tex.App.—Beaumont 2009, no pet.).

Although the *Bigelow* court dealt with the interpretation of the now repealed section 3.408(b) of the Code, which codified only two reimbursement claims, this earlier statute is similar to our current statute in that it did, in fact, codify certain reimbursement claims, making the holding in *Bigelow* still applicable.

Also, the Court of Appeals in *Sanders v. Construction Equity, Inc.*, 45 S.W.3d 802, 804-804 (Tex. App.—Beaumont 2001, no pet.) held that "[t]he Supreme Court has consistently declined to construe statutes to deprive citizens of common law rights unless the

Legislature clearly expressed that intent." *Cash America Int'l Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000)."

2. Effect of the Use of the Term "Includes"

Texas Family Code § 3.402 states, before enumerating the claims for reimbursement, that "a claim for reimbursement **includes**"… According to Texas Government Code §311.005(13), "**include**" is not a term of limitation, and no presumption of exclusivity arises. This further confirms the notion that the statute is not intended to replace the common-law claims for reimbursement, but affords the practitioner leeway to assert common law reimbursement claims.

3. Bill Analysis for Applicable Senate Bill 866

Bill analysis is also some evidence of the legislative intent. *See State of Texas v. Rodriguez*, ___ S.W.3d ___, 2011 WL 1266862 (Tex. Crim. App. 2011) (concurring opinion); *City of Stephenville v. Walker*, 841 S.W.2d 566 (Tex. App. – Eastland 1992, no writ). The bill analyses for Senate Bill 866 (the bill which introduced the changes to our reimbursement statute) from introduction through enrollment provide that the purpose of the bill is to amend "Section 3.402 of the Family Code to limit a claim to include only certain reasons, including reasons that would justify a claim," and to clarify that the party seeking a claim has the burden of proof. Tex. S.B. 866, 81st Leg. (2009). Further, S.B. 866 requires the court to use "equitable principles." *Id.* Taken literally, this language could be read to mean that the purpose of the amendments were to limit reimbursement claims to the claims listed in the statute and no others.

That, however, is not how the statute itself reads. The statute itself begins: "For purposes of this subchapter, a claim for reimbursement includes . . . ."

4. No Current Case Law

It should be noted that there has been no case decided since the enactment of the new reimbursement statutes that addresses the issue of whether the law now limits us to the statutory claims found at Tex. Fam. Code § 3.402, or whether common law claims and defenses may still be recognized.

5. Consensus of Opinion

It is this writer's opinion that the statute does not foreclose common law claims of reimbursement, even though the bill analysis for Senate Bill 866 indicates such might have been the intent. Appellate courts generally insist on only implementing "plain statutory language" in interpreting a statute for, as noted in the concurring opinion of *Rodriguez*, such is often regarded as "the best evidence of the legislative intent." *State of Texas v. Rodriguez*, ___ S.W.3d ___, 2011 WL 1266862 (Tex. Crim. App. 2011) (concurring opinion). Indeed, the "text of the statute is *the law* in the sense that it is the only thing actually adopted by the legislators, probably through compromise, and submitted to the Governor for her signature. We focus on the literal text also because the text is the only definitive evidence of what the legislators . . . had in mind when the statute was enacted into law." *Gonzales v. State*, 915 S.W.2d 170, 171 (Tex. App. – Amarillo 1996, no pet), *citing Boykin v. State*, 818 S.W.2d 782, 785-86 (Tex. Crim. App. 1991).

Common law reimbursement claims and statutory reimbursement claims are equally important tools for courts striving to achieve a just and right division. It is this author's opinion that a claim for reimbursement recognized under common law is likely still viable as long as it is not specifically classified as "nonreimbursable" under Texas Family Code section 3.409.

VI. EXAMPLES OF COMMON LAW REIMBURSEMENT CLAIMS

The following claims existed at common law, but were not expressly codified in the 2009 changes to the reimbursement statute. They also are not specifically listed among the nonreimbursable claims at Texas Family Code section 3.409. While the common law clauses are good examples of other reimbursement claims that exist outside the statute, the common law is not static. Assuming common law reimbursement claim survive the statute, creative lawyers will continue to find ways to expand the universe of reimbursement claims.

A. *Jensen* Claim at Common Law

As we established earlier in this article, while Section 3.402(a)(2) appears to codify some elements of the *Jensen* claim, the statute differs from case law in some respects. The *Jensen* court held that inadequate compensation to the community estate for a spouse's time, toil, talent, and effort to enhance the spouse's separate property resulted in a claim for reimbursement to the extent the contributing spouse's time, toil, talent, and effort exceeded what was reasonably necessary to preserve and maintain his or her separate property of either spouse. *Jensen*, 665 S.W.2d at 110.

1. Nature of the Claim

A *Jensen* claim asserted at common law must meet the following requirements, which differ from those required under the statute:

a. At common law, the spouse asserting the claim must prove that the other spouse's separate estate was actually enhanced by the time, toil, talent, and effort expended in order to receive an award for

reimbursement. *See Garza v. Garza*, 217 S.W.3d 538, 547 (Tex. App.—San Antonio 2006, no pet.)

b. At common law, there is a requirement that the time, toil, talent, and effort exceed what is reasonably necessary to manage and preserve the separate estate. *Jensen*, 665 S.W.2d at 109 (Tex. 1984).

Although the proponent of the claim may be successful in proving 1) the value of the uncompensated labor, 2) that this value exceeded what was reasonably necessary to manage and preserve a spouse's separate property estate, and 3) the enhancement of the spouse's separate estate by such efforts, the spouse seeking reimbursement is not entitled to the enhanced value of the separate property, but only to the value of the uncompensated time and labor. *Jensen* at 109; *Rogers v. Rogers*, 754 S.W.2d 236, 239(Tex.App.—Houston [1st Dist.] 1988, no writ).

In the *Garza* case, the wife had no claim for reimbursement because she could not demonstrate that the increase in the value of a restored car was due to the husband's time and talent. *Id.* Thus, she failed to meet the first prong of the common-law *Jensen* test – establishing that the husband's time, toil, talent, and effort was the factor that enhanced the value of the car. Enhancement in value is generally established by presenting evidence of the value of the spouse's separate property before and after the time, toil, talent, and effort is expended. *Holloway v. Holloway*, 671 S.W.2d 51, 58 (Tex. App.—Dallas 1983, writ dism'd). Had Ms. Garza met this burden, her claim likely would have been granted.

2. Practical Example of Such a Claim

When would a common-law *Jensen* claim be used in lieu of a claim under the statute? The statute limits reimbursement to inadequate compensation for time, toil, talent, and effort on behalf of a business the spouse controls and directs. But what if the time, toil, talent, and effort was expended in enhancing something other than a business? What about the carpenter who uses his community time, toil, and talent to remodel his separate property home, or, as in *Garza*, the spouse who uses his expertise to restore a separate property car? A common law *Jensen* claim would rectify the inequities created in these scenarios if the party asserting the claim for reimbursement only had the statute to rely on for relief.

3. Defenses to Common Law *Jensen* Claim

a. No enhancement to property at issue.
b. Adequate compensation for time, toil and effort.

If the community estate receives adequate compensation for the time and effort expended in the form of salary, bonus, dividends, and other fringe benefits, no reimbursement claim exists. *Jensen* at 109. Further, an increase in the value of a separate property business "resulting from fortuitous circumstances and unrelated to an expenditure of community effort will not entitle the community estate to reimbursement." *Harris v. Harris*, 765 S.W.2d 798, 805 (Tex. App.—Houston (14th Dist.) 1989, writ denied). In *Harris*, Mr. Harris testified that the enhancement in his interest in a law partnership was not attributable to his labors, thus, the wife's reimbursement claim was denied. *Id.* at 803. If the separate estate is proven to be enhanced by market forces, or sheer luck, during the marriage, there is no claim for reimbursement under common law.

B. Noncapital Improvements to Real Property

1. Nature of the Claim

When the Legislature repealed the Economic Contribution statute in 2009, the prohibition of recovery for expenditures made for "ordinary maintenance and repair" was also removed. Expenditures for ordinary maintenance and repair will not qualify as capital improvements, but they might qualify as reimbursable, noncapital improvements to real property under common law.

2. Practical Example of Such a Claim

For instance, the court in *Hailey v. Hailey*, 176 S.W.3d 374, 385 (Tex. App.—Houston [1st Dist.] 2004, no pet.), awarded a reimbursement claim to the community estate for $1,500.00 in improvements to the husband's separate property house, including a new roof, paint, and new flooring; $218.00 in supplies; $1,028.00 for utility payments; and $2125.00 in other repairs to the house.

With the express prohibition against reimbursement for *Hailey*-type expenditures repealed, noncapital improvements may now be reimbursable under common law, as long as they are not expressly reimbursable, or nonreimbursable as the case may be, under the current reimbursement statute.

3. Defenses to Such a Claim

If such a claim is asserted, the defenses to be raised may include arguments that the improvements failed to enhance the value of the property. *See* Tex. Fam. Code section 3.402(d). Of course, this presumes that statutory defenses are not restricted to statutory claims, and are equally applicable to claims under the common law.

Recall this author's commentary on the effect of the statute on common law reimbursement at Section VI. of this article.

It should also be noted that Section 3.402(d) speaks only to "improvements" and not "capital" improvements.

C. Contributions to Initial Purchase Price

1. Nature of the Claim

When one marital estate contributes money for the initial purchase price of property owned by another estate, the contribution becomes reimbursable at the time of partition by divorce, annulment or death. *Garcia v. Garcia*, 170 S.W.3d 644, 650 (Tex. App.—El Paso 2005, no pet.); *see also In re Marriage of Royal*, 107 S.W.3d 846, 851-52 (Tex. App.—Amarillo 2003, no pet.).

2. Practical Example of Such a Claim

If the wife contributes her separate funds toward the down payment for the purchase of the community home, she may assert a reimbursement claim at the time of divorce. *Garcia* at 650. At common law, the contributing estate can recover the dollar amount of the contribution toward the initial purchase price of property. *Id.* But remember the inception-of-title rule, which prescribes that character is determined at the time the property is acquired. The wife in the *Garcia* case could have also made a claim that the residence was mixed character property, part her separate property and part community property.

3. Defenses to Such a Claim

There is no enhanced value to the community estate from the contribution made by the separate estate. See *In re Marriage of Royal*, 107 S.W.3d 846, 851-52 (Tex. App.—Amarillo 2003, no pet.) (noting that there must be enhancement in value).

4. Reasons to Assert Such a Claim

Why assert a common-law reimbursement claim when a mixed character argument is available? Perhaps the value of the home has dropped since its purchase and it is now worth less than the debt. When one spouse persuaded another to invest in a "bad deal," the concept of reimbursement may be the only avenue for recovery-assuming your jurisdiction does not follow the lead of the Amarillo Court of Appeals.

D. Life Insurance Premiums

1. Nature of the Claim

A common-law claim for reimbursement also arises when the community estate pays the premiums for a separate property life insurance policy. *McCurdy v. McCurdy*, 372 S.W.2d 381, 384 (Tex. Civ. App.—Waco 1963, writ ref'd).

2. Practical Example of Such a Claim

The appellate court in *McCurdy* upheld the trial court's decision regarding the appellant's late husband's life insurance policies. The policies were acquired by the deceased before marriage, and named his estate the beneficiary. Community funds were used to pay the premiums on these policies during the marriage. In keeping with the inception-of-title rule, which is reiterated at Tex. Fam. Code § 3.404(a), the proceeds from the policies were determined to be a part of the husband's estate on death. However, the community estate of husband and wife was entitled to reimbursement for the total amount of the payments made out of community funds for premiums, thus allowing the wife to recoup half of the payments made toward each policy. *Id.* at 382-84. This claim could be asserted in divorce when one marital estate paid premiums for another during marriage. The inequities that arise under this scenario would be most compelling when dealing with a whole life policy (also called a universal life policy) where the policy accumulates cash value, thus creating value for the spouse's separate estate.

3. Defense of Such a Claim

a. Life insurance is for non-reimbursable matter (such as security for child support for child from former marriage).
b. community estate benefits from the life insurance policy.
c. no benefit to the separate estate (term policy has lapsed) and/or cost to community estate was nominal.
d. election of remedies under the will, *see Dakan v. Dakan*, 125 Tex. 305, 83 S.W.2d 620, 628 (1935).

E. Guarantees of Debt by the Community Estate

1. Nature of the Claim

The community estate may even have a right to reimbursement for the use of its credit to secure a loan to refinance a spouse's separate property debt.

2. Practical Example of Such a Claim

In *Thomas v. Thomas*, 738 S.W.2d 342, 346 (Tex. App.—Houston [1st Dist.] 1987, writ denied), debts of the husband's separate property corporation were refinanced after marriage with husband's now "community" guarantee, thus subjecting the community estate to liability. In her concurring and dissenting opinions, Justice Dunn aptly points out that the wife's reimbursement claim based on the use of community credit to enhance the [husband's] separate property has merit. However, in *Thomas*, the wife failed to meet her burden of proof as to the issue of the cost to the community resulting from the use of community credit to guarantee the refinancing of the separate property debt. *Id.* Since guarantees of debt are not expressly excluded under section 3.409 of the statute, a claim for reimbursement under this fact scenario appears to be permissible if proof of the cost to the community can be established.

3. Defenses to Such a Claim

a. Cost to community was nominal.
b. Community cannot demonstrate any harm to the community such as reduction in its credit worthiness or ability to borrow funds.

4. Measuring the Value of the Contribution

Although it is not clear what the contributing estate can recover for a guarantee of debt, it is clear that the cost to the community is not as obvious in this circumstance as when community funds are used to retire separate property debt. Justice Dunn further states in the *Thomas* opinion that the value of a claim would have to be based on the percentage of risk undertaken by the contributing estate to secure a loan, and a dollar value would have to be assigned to this risk through expert testimony at trial. *Id*. Although not discussed in *Thomas*, had the wife been able to show, for example, that this "community guarantee" given for debt related to the husband's separate estate precluded a later refinance of the community home, which would have significantly reduced interest payments over the life of the community loan, and quantified the actual "cost" to the community, the wife might have prevailed in her claim. This hypothetical argument seems even more plausible than the one suggested by the *Thomas* opinion.

F. Premarital Contributions to a Spouse's Separate Property

1. Nature of the Claim

In this day and age, many couples take up residence together prior to marriage. Is there any recourse for expenditures made by one party or the other when the happy couple, literally, start building for their future before marriage? Indeed, there is.

2. Practical Example of Such Claim

In 2006, the Eastland Court of Appeals awarded a claim of reimbursement to the wife's separate estate for capital improvements made to the husband's separate property before the parties were married. *Nelson v. Nelson,* 193 S.W.3d 624 (Tex. App.—Eastland 2006, no pet.)

In *Nelson v. Nelson,* the wife, prior to the marriage, sold separate real property and deposited the sale proceeds in the husband's bank account. The proceeds were then used for the construction of the parties' intended marital residence on the husband's separate (unimproved) real property. The trial court not only determined that the wife was entitled to reimbursement for pre-marital expenditures made to benefit the husband's separate property, but also found that the wife successfully established the enhancement in value by demonstrating "the difference between the fair market value before and after any improvements." It appears the trial court was reversed because the trial testimony did not establish the value of the property at the time of the parties' marriage, but was valued at the time construction began 3 months prior to the date of marriage. Because all of the trial court's findings of value were as of the date of marriage, the appellate court found that the award of reimbursement for the enhancement in value to the husband's separate property was an abuse of discretion and the case was remanded back to the trial court. *Nelson,* 193 S.W.3d at 632.

3. Defenses to Such a Claim

a. Gift intended.
b. Contribution was of nominal value.
c. Violates the Statue of Frauds (which provides that agreements concerning real property, agreements on consideration of marriage, promises to answer for the debt of another, and agreements which are not to be performed within one year must be in writing and signed by the party to be bound.)

4. Measuring the Value of the Contribution

Determining the value of the contribution will depend on the type of contribution made, whether it be a capital improvement or payments made to reduce the principal on separate property debt of the other spouse. Recall that reimbursement claims for capital improvements to another estate are measured by enhancement in value of the benefitted estate at common law. *See Penick* at 197; *Kimsey v. Kimsey*, 965 S.W.2d 690, 700 (Tex. App.—El Paso 1998, pet. denied). It is not simply the cost of the improvements made that determines the value of the contribution. *Sharp v. Stacy,* 535 S.W.2d 345 (Tex. 1976).

Much like the wife in the *Nelson* case, the proponent of a reimbursement claim for prenuptial expenditures on capital improvements has the burden of putting on evidence of the fair market value of the property both before and after the improvements were made. *Anderson* at 675.

G. Use of One Marital Estate's Funds to Defend Litigation Related to Another Marital Estate

1. Nature of the Claim

If you've seen it once, you've seen it a dozen times. A former client comes in to consult with you about a modification of custody, visitation, or support, or one of a myriad of other disputes with a former spouse – even one involving property issues such as an enforcement matter. Former client is now "happily" re-married. When that subsequent "happy" re-marriage "hits the skids," what equitable remedies exist to compensate the community estate for footing the bill for a spouse's legal bills unrelated to any "community" problem, or to compensate a spouse's

separate estate for contributions to community legal problems, such as defense of a lawsuit filed against a community business? What about reimbursement for a spouse's separate estate or contributions to a suit stemming from their spouse's prior marriage?

2. Practical Example of Such Claim

In *Farish v. Farish*, 982 S.W.2d 623 (Tex. App.—Houston [1st Dist.] 1998, no pet.), the Court established such a remedy. Here, a claim for reimbursement was awarded to the wife against her husband for some $30,000 in community funds spent during marriage for litigation stemming from his child support obligation from a prior marriage. Although the community was not given a dollar for dollar credit, the court considered this expenditure in making a just and right division.

3. Defenses to Such a Claim

What if a spouse's request to modify custody is successful, but no fees are recovered? What if the modification of custody is found to be in the best interest of the party's child from the previous marriage? Can this arguably be non-reimbursable under section 3.409(2), i.e. an expenditure benefiting a child of this spouse? What if the spouse asserting a claim for reimbursement instigates the litigation, for which they invested separate funds that they now want reimbursed? What might qualify as sufficient proof to demonstrate that the current spouse acquiesced to, or completely spearheaded the litigation? All of these issues raise potential defenses to such a claim. When considering these points, never forget that the driving principle behind all reimbursement claims is the concept of equity.

H. Payment of Living Expenses - Community Funds Available, but Not Used

1. Nature of the Claim

A spouse who contributes separate property funds to pay for day-to-day expenses to support the community, when community funds are otherwise available, has recourse through reimbursement. The court may consider a common law claim for reimbursement under these circumstances if the spouse asserting the claim can show:

a. that separate funds were used for the parties' living expenses;
b. the amount of separate property money expended; and
c. that community funds were available, but not used for these living expenses.

2. Practical Example of Such a Claim

The trial court in *Graham v. Graham*, 836 S.W.2d 308 (Tex. App.—Texarkana 1992, no writ), awarded the husband reimbursement for separate property funds used to retire community debt (i.e., the mortgage on the community property home), because the use of separate property funds to pay off a community debt resulted in a reimbursement claim, regardless of the purpose of the debt (i.e., to maintain the community residence). But *see, Hudspeth v. Hudspeth*, 198 S.W.2d 768 (Tex. Civ. App. – Amarillo 1946, writ ref'd n.r.e) (property was community property even though purchased with Wife's separate property credit and even though community property funds existed for purchase).

3. Defenses to Such a Claim

a. Consent to the expenditure.
b. Commingled funds.
c. Estoppel: party whose separate properties funds were used was in control of separate and community funds and chose to make payments out of separate property funds.
d. Estoppel: party paying separate property funds created, incurred or willingly participated in expenses at issue.
e. Balancing of equities – relative size of estates and total of expenses.

VII. PROPERLY ASSERTING AND PRESENTING YOUR REIMBURSEMENT CLAIM

A. Pleading a Claim for Reimbursement and Responding to Discovery Regarding Same

1. Pleadings by Petitioner

A claim for reimbursement must be specifically pled in order to obtain relief at trial. *Vallone* 644 S.W.2d at 459. The Dallas Court of Appeals found that the wife waived her claims for reimbursement when she failed to affirmatively plead for it, nor did she request or submit special issues on some of these claims. *Holloway v. Holloway*, 671 S.W.2d 51 98 (Tex.App. –Dallas 1983, writ dism'd).

However, some appellate courts have given leeway to parties who failed to affirmatively plead a claim for reimbursement. Approximately 13 months after the decision in *Vallone*, the Texas Supreme Court remanded the case "in the interest of justice" to allow the wife to amend her pleading to assert a reimbursement claim for re-trial. *Jensen* at 110. Similarly, the 1st Court of Appeals at Houston permitted the petitioner to amend her pleading to include a reimbursement claim after trial was concluded. *Rogers v. Rogers*, 754 S.W.2d 236, 238 (Tex.App.—Houston [1st Dist.] 1988, no writ). The appellate court in Texarkana relied on the prayer for general relief in the petitioner's pleadings to award a claim for reimbursement and found that the issue had

been tried by consent. *Smith v. Smith*, 715 S.W.2d 154, 156 (Tex.App.—Texarkana 1986, no writ); *see also Jensen* at 110.

While reimbursement claims must be specifically pled, a brief review of the Texas Family Law Practice Manual will show that reimbursement claims are pled very generally, stating only what estate is seeking reimbursement, the estate from which reimbursement is sought, and the nature of the reimbursement claim. State Bar of Texas, Texas Family Law Practice Manual § 3-1 (2010). But remember that each claim is unique and fact-specific, so don't be afraid to deviate from the Texas Family Law Practice Manual forms.

Further, referring at the beginning of your case to the Texas Pattern Jury Charge, which contains essential questions the trier of fact must answer in order to award or deny a claim, will assist you in tailoring your initial pleading to ensure a favorable outcome at trial. *See* Texas PJC—Family (2010) PJC 204.1-204.3.

2. Responsive Pleadings

Must a respondent seeking offsets to a reimbursement claim plead these offsets?

There seems to be no definitive case law on this point, but considering Tex. R. of Civ. P. 94 "Affirmative Defenses" where a party is required to "set forth affirmatively … any matter constituting an avoidance or affirmative defense," it would seem prudent to plead any offsets.

3. Responding to Discovery Regarding a Reimbursement Claim

If you are required to respond to discovery regarding a reimbursement claim, your responses must be very specific or your claim may be barred. For example, each element of your claim must be set out as a legal theory in response to a 194 Request, not just the general theory of a reimbursement claim. You must also list the specific facts supporting your claim. The same holds true for interrogatories that ask for information regarding your claim. Obviously, requests for production may ask for all documents which support reimbursement claims and the production must be thorough and complete.

When experts are used in tracing a reimbursement claim or proving the value of property involved in a claim, detailed discovery responses pertaining to the experts will also be required.

B. Tracing and Reimbursement Claims

1. Overcoming the Community Property Presumption

When asserting a reimbursement claim involving a request to reimburse your client's separate estate for expenditures made for another martial estate, the first hurdle is showing that the funds spent were actually your client's separate property. In these circumstances, you must recall that one of the biggest hurdles involves overcoming the broad community property presumption found at Tex. Fam. Code section 3.003(a). Under this statue, all marital property is presumed to be community property unless proven otherwise.

The community property presumption is typically rebutted by utilizing the inception-of-title rule and tracing principles to clearly define the character of the property. The party attempting to establish that property is, indeed, his or her separate property has the burden of proving this by *clear and convincing evidence*. *Chavez v. Chavez*, 269 S.W.3d 763, 767 (Tex.App.—Dallas 2008, no pet.)

Evidence presented should establish the time and manner in which 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. *See, e.g.*, *Faram v. Gervitz-Faram*, 895 S.W.2d 839, 843-44 (Tex.App.—Fort Worth 1995, no writ); *Newland v. Newland*, 529 S.W.2d 105, 108-09 (Tex.App.—Fort Worth 1975, writ dism'd).

2. Utilizing Expert Testimony

Typically, expert testimony is necessary to establish the character of property when using tracing methods, especially when separate property income has been commingled with community property income. *See Beard v. Beard*, 49 S.W.3d 40, 61-62 (Tex.App.—Waco 2001, pet. denied); *see; e.g.*, *Loaiza v. Loaiza*, 130 S.W.3d 894, 906-07 (Tex.App.—Fort Worth 2004, no pet.). The cost of hiring an expert to prove the character and value of funds involved in a reimbursement claim must be factored into the decision of whether to pursue a claim for reimbursement of separate funds.

Your client may trace every dollar spent by his separate estate to retire community debt, but if offsets exist or the equities of the situation make his recovery seem dim, is the cost of preparing and proving the claim worth the expense?

3. Practical Example – *Horlock v. Horlock*

In *Horlock v. Horlock*, the Fourteenth Court of Appeals at Houston addressed claims for reimbursement when commingling has occurred. Mr. Horlock entered the marriage with a sizeable separate estate. It was stipulated that $921,000.00 of his separate property funds were deposited into a community account, which then became "hopelessly commingled," rendering tracing virtually impossible. Nevertheless, the trial court, as part of its award, ordered reimbursement to Mr. Horlock as a basis to

"recover an amount substantially equal to the amount of capital which he brought into the marriage as a separate property and which he utilized for the benefit of the community estate." Amazingly, even though Mr. Horlock could not specifically trace his funds, equity prevailed when the trial court made its just and right division.

C. Measuring the Value of Contributions by One Marital Estate to Another

Establishing the value of the contribution made is an essential element to proving your reimbursement claim. Value does not need to be established to a mathematical certainty, but some evidence of value must be presented. *Gutierrez* at 665. Once again, the burden of proving the value of the contribution lies with the spouse asserting the claim. However, the party *defending* the reimbursement claim has the burden of placing a value on offsetting benefits, as section 3.402(a) of the Code effectively overrules earlier court decisions that require the petitioner to prove the value of any offsetting benefits received. *See Zeptner*, 111 S.W.3d 727, 739 (Tex. App.—Fort Worth 2003, no pet.); *Rogers v. Rogers*, 754 S.W.2d 236, 240 (Tex.App.—Houston [1st Dist.] 1988, no writ).

D. Enhancement in Value

1. How to Measure

The courts have long debated what method of measurement applies to claims for reimbursement – the lesser of either enhanced value or the actual cost of the contribution? After the *Anderson* decision, and the 2009 amendments to the statutes on reimbursement, it appears enhancement in value is the measure of the claim. *Anderson* at 675; *Dakan* at 628; *see also* Tex. Fam. Code section 3.402(d).

2. When to Measure

The next conundrum is "when" to measure the enhancement in value to the benefitted estate. Is it at the time of the enhancement or at the time of the divorce? The statute only tells us when we can actually assert the claim (i.e., upon divorce or death), not the date on which the enhancement in value is to be determined. *See* Tex. Fam. Code section 3.402(d). So we look to the opinions in *Dakan* and *Anderson* to guide us.

In *Dakan v. Dakan*, the Supreme Court 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 places thereon." *Id.* Fifty years later, the Texas Supreme Court in *Anderson*, a probate case, stated that the courts are to measure enhanced value as of the date of the death of a spouse. *Id.* Thus, it stands to reason that enhancement in value must be measured at the time the claim matures, i.e. upon dissolution of marriage or death.

3. Case Law - Post 1985

A review of the case law since the *Anderson* opinion in 1985 lacks definitive guidance on when enhancement should be measured, and in at least one case, *Girard v. Girard*, 521 S.W.2d 714 (Tex. Civ. App.-Houston [1st Dist] 1975, no writ), reimbursement was granted even though the enhancement was measured at the date of construction of improvements rather than at the date of divorce.

4. Practice Tip

In cases where enhancement in value is at issue, the date on which the initial value before enhancement is measured is clearly fact specific. Each claim should be assessed on a case-by-case basis in deciding whether or not to retain an expert to testify as to the value of the property. Nevertheless, in light of the *Dakan* and *Anderson* opinions, the practitioner should offer evidence of the value of the property immediately before the improvement was made, and immediately after the improvement. Expert or lay testimony of what the value of the unimproved land would be on the date of divorce (or close thereto), both with and without the improvements factored into the value, should also be provided. This author wonders if the Appellate Court would have upheld the award of reimbursement if the wife in *Nelson v. Nelson* (supra) had only presented evidence of value at the time of completion of the construction and at the time of divorce (i.e. partition). Remember the trial court has a considerable amount of discretion in whether or not to award a claim for reimbursement, so it would behoove the practitioner to present as much evidence on enhanced value as possible.

E. Burden of Proof

It is clear from case law that the party asserting a right of reimbursement has the burden of pleading and proving the claim. *Vallone* 644 S.W.2d at 459. But what threshold of proof is required and is it the same for each type of claim?

1. Contribution by Community Estate

The courts tend to be split on the burden of proof necessary to establish character when a spouse is pursuing a reimbursement claim for a contribution made by the community estate to the other spouse's separate estate.

The Austin and Waco Courts of Appeals squarely place the burden on the petitioning spouse to prove by a *preponderance of the evidence* (emphasis added) that the contributions came from the community estate. *See, Jenkins v. Robinson*, 169 S.W.2d 250, 251 (Tex.App.—Austin 1943, no

writ)(The burden to prove that community funds were used to pay part of a real estate note on a party's separate property "is not met by merely showing that the indebtedness was paid" during the marriage . . . . This burden of proof "is not aided by the statutory presumption [of] community property; because this presumption would defeat the rule that the burden of proof is on the proponent of the reimbursement claim."); *see also*, *Younger v. Younger*, 315 S.W.2d 449, 452 (Tex.App.—Waco 1958, no writ); *see, e.g.*; *Williams v. Clark*, No. 03-03-00585-CV (Tex.App.—Austin 2004, no pet.) (memo op.; 5-27-04). Conversely, the Fourteenth Court of Appeals at Houston and the Dallas and El Paso Court of Appeals hold that a petitioner seeking reimbursement to the community estate is aided by the presumption that all contributions made during the marriage come from the community estate. *Horlock*, 533 S.W.2d at 60 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dism'd); *Kimsey v. Kimsey*, 965 S.W.2d 690, 702 (Tex.App.—El Paso 1998, no pet.); *McCann v. McCann*, 22 S.W.23d 21, 23 (Tex.App.—Houston [14th Dist.] 2000, pet. denied); *Henry v. Henry*, 48 S.W.3d 468 (Tex.App.—Houston [14th Dist.] 2001, no pet.); *Zagorski v. Zagorski*, 116 S.W.3d 309, 321-22 (Tex.App.—Houston [14th Dist.] 2003, pet. denied); and *Cardwell v. Cardwell*, 195 S.W.3d (Tex. App. – Dallas 2006, no pet).

When practicing in a jurisdiction that does not have definitive authority on whether the preponderance-of-the-evidence standard or community-property presumption will apply, the practitioner should try to determine the judge's preference ***before*** trial in order to insure the best possible outcome.

2. Contribution by a Spouse's Separate Estate to Another Marital Estate

When a spouse seeks reimbursement to a separate estate, he or she must prove by clear and convincing evidence that the funds for which reimbursement are sought were separate property. *Nurse v. Nurse*, No. 13-01-515-CV, 2002 WL 1289898 (Tex. App.-Corpus Christi 2002, no pet.); *Henry v. Henry*, 48 S.W.3d 468, 477 (Tex. App.-Houston [14th Dist.] 2001, no pet.); *Williams v. Williams*, No. 2-04-230-CV (Tex. App.-Ft. Worth 2005, no pet.); *McDaniel v. McDaniel*, No. 03-03-00521-CV (Tex. App.-Austin 2004, no pet). (memo op; 3-18-04). However, the burden to prove the value of the requested reimbursement remains preponderance of the evidence.

VIII. FINAL ANALYSIS

In the real world very few cases arrive in your office with a single, clear cut reimbursement claim. More often you are presented with a case involving multiple reimbursement claims on both sides of the case, often competing and involving accompanying potential offsets.

Clients generally have no concept of what a reimbursement claim is and often times do not even understand the concept of separate and community property. It is our task as lawyers to conduct a complete interview with our clients in order to identify any potential reimbursement claims as early as possible in the case.

Early identification is critical, as these claims often involve obtaining years' old records from title companies, banks, or mortgage companies in order to prove a claim. Experts may be needed to trace separate property claims and to appraise property. Discovery may be needed from the other party. All of this occurring before you begin developing strategies for defending competing claims or requests for offsets.

Additionally, as the article makes clear, research may be needed as many issues involving reimbursement claims remain unsettled.

When thinking about these points, consider their application in the following fact scenario drawn from the author's practice:

Tom comes to see you. Age 60, he wants to divorce his wife, Jane, who is also 60. They have been married 20 years. It is the second marriage for both.

Tom tells you he entered the marriage with:

1. Twin girls, Sue and Sarah, now 24, who primarily resided with their mother.
2. A separate property home in which he and Sue lived. At marriage, the home had 15 years left on an original 20 year mortgage.
3. $250,000.00 in cash and a brokerage account which he says he has not comingled.

Jane is reported by Tom to have entered their marriage with:

1. $100,000.00 in sales proceeds from her separate home.
2. A rental home she owned with her mother.
3. Boys, Mike and Mac, ages 35 and 30, who primarily resided with Tom and Jane.

This all sounds pretty simple at this stage of the case. However, after additional discussions with Tom and the filing of pleadings you learn that:

1. After marriage, Jane insisted on adding a pool to Tom's house. Tom was opposed to the idea so Jane agreed to pay for the pool (cost: $25,000.00) from her funds from the sale of her separate home.

2. Five years after marriage, Tom took out a home equity loan for $125,000.00. The proceeds were used to pay off credit card debt incurred by Jane before

and after marriage totaling $45,000.00, and to add a new master bedroom for about $80,000.00. At the time of filing, the home equity debt has been reduced by the community to $15,000.00.

3. For the first ten years of the marriage, Tom also paid court-ordered alimony of $5,000.00 a month to his ex-wife. With his girls still in a public high school zoned to the home and ex-wife unable to stay in the family home without his help, Tom voluntarily continued a reduced payment of $3,000.00 a month for four years towards his ex-wife's mortgage solely to keep his children in their school. These "bonus" payments totaled $144,000.00.

4. When Sue and Sarah graduated from college in 2009, he sent both girls on an extended European vacation for which he paid a total of $46,000.00. The trip was an issue for Jane.

5. Jane sued her ex-husband for an increase in child support several years after marriage. She spent $15,000.00 on legal fees and received no increase in support, as her ex-husband was laid off a month before trial. When the requested increase failed, Tom and Jane paid for the private school tuition for Mike and Mac which totaled over $300,000.00 by the time high school graduation occurred. Tom believes the balance of the private school tuition was paid for with his separate funds; Jane believes it was paid with community funds.

6. During the marriage, Jane replaced the roof and all windows on her rental property with funds that Tom believes were his separate property. In 2008, she bought out her mother's interest in the home with $50,000.00. Jane believes the majority of the funds for the buyout came from her remaining separate property funds.

Now the simple fact scenario has turned into something much more complex. Tom wants reimbursement of:

1. His separate property funds spent on Mike and Mac's private school tuition.
2. Reimbursement of the community funds spent on Jane's pursuit of an increase in child support.
3. His separate funds spent for the improvements to Jane's rental home and the community reimbursement for the $50,000.00 buyout of her mother (which he insists was done with community funds).

Jane tells her lawyer that she wants:

1. Her separate estate reimbursed for the pool she added to Tom's home.
2. The community reimbursed for the addition of the master bedroom to Tom's home.
3. The community reimbursed for the alimony paid to Tom's ex-wife (she said he failed to disclose this obligation to her until shortly after their marriage) and all of the "bonus" support.
4. Furious about the European vacation for Sue and Sarah, she wants the community reimbursement for the total cost of the trip.

An analysis of Tom's reimbursement requests related to his separate or the community estate and potential defenses and offsets follows:

1. You must tell Tom to forget reimbursement of Mike and Mac's tuition, as Tex. Fam. Code section 3.409(2) prohibits reimbursement of "the living expenses of a spouse or child of a spouse" by a "marital" estate, which by definition (section 3.401) includes Tom's separate estate. As this expense was incurred while both boys were 18 or under, there is no argument that they were not "children" when the payments were made.

2. Tom may have a shot at recouping the community funds spent on Jane's failed request for an increase in child support. This claim may be allowed by statute should this be considered an unsecured liability of her separate estate, (section 3.402(a)(1)) or at common law (see *Farish*, supra), but the equities allowed by Tex. Fam. Code Section 7.007 will weigh heavily in this consideration.

3. As to Tom's request to reimburse his separate estate for the new roof and windows added to Jane's rental property, he has a two prong burden. First this must be a capital improvement as per section 3.402(a)(8), and second the expenditure must have "enhanced" the value of Jane's rental home, as such is the measure for reimbursement for capital improvements made by one marital estate for another. See 3.402(d). However, if these are not deemed "capital improvements" they may be reimbursable under common law. (See *Hailey*, supra.)

4. The buyout of Jane's mother's interest in the rental home is not a reimbursement claim. However, Tom may be happy to know that if he is correct about the source of funds for the buyout, the community now owns an interest in the home.

5. Tom has missed the potential reimbursement claims for:

a. Reimbursement to the community for pay off of Jane's unsecured pre-marital credit card debt. See Section 3.402(a)(1) though this will require work to determine the balance of this debt at marriage.

b. Reimbursement to the community for payment of the principal reduction on the mortgage for the rental home.

As to this claim, Jane can raise the defense of offset for the use and benefit the community received from the net income from the rental property and/or tax benefits associated with the rental property.

Bear in mind that if Tom's assumptions are correct and the community paid for the "buyout" of Jane's mother's interest, the complexity of this analysis increased significantly.

The following is an analysis of Jane's reimbursement claims related to her separate estate and the community estate, as well as potential defenses and/or offsets:

1. Jane will fail in her separate estate's reimbursement request for the addition of the pool to Tom's home unless she can show that the pool was a capital improvement and enhanced the value of Tom's home. See Section 3.402(a)(8) and 3.402(d).

2. Jane's claims for reimbursement to the community for the pay down of the home equity loan for the addition of a bedroom to Tom's home will be limited to "principal" reduction. See Section 3.402(a)(5). Tom has no right of offset for the use and enjoyment of this "primary" home. Section 3.402(c). If Jane proves this claim, she may request an equitable lien on Tom's separate property home for her share of the community reimbursement claim.

3. Jane will lose her claim to reimburse the community for court-ordered alimony payments (*see* section 3.409(1)) but may succeed with the request for reimbursement to the community for the "bonus" payments as they may not fall under 3.409.

Tom may have an additional defense to this claim, as he asserts payments were for his children so they could remain in their childhood home through high school graduation. See Section 3.409(2).

4. Jane may well succeed in her reimbursement claim on behalf of the community estate for the European trip if you assume that the Family Code definition of child (see Tex. Fam. Code §101.003) applies to the term "child" as used in section 3.409(2).

Tom can argue equity as to Jane's claim for this community reimbursement claim, and considering the tuition spent on Jane's boys this may have merit.

5. Jane has failed to recognize a potential community reimbursement claim for:

The pay down of the principal amount of the original mortgage on Tom's separate home. (*See* Section 3.402(a)(3).)

Tom has no offset for this claim for the "use and enjoyment". (*See* Section 3.402(c).)

The analysis of this fact situation could continue, but this cursory overview should be enough to demonstrate the complexity of reimbursement claims, even with folks of middle class means.

In reviewing this analysis, you must also consider the expense involved in establishing, prosecuting or defending against these claims. Remember that a sound cost/benefit analysis should be the starting point for evaluating every potential reimbursement claim. To take one small example from our fact pattern, assume Tom is correct and his separate estate paid for the roof and windows for Jane's rental property. Also assume the total cost for both projects was only $20,000.00. Is it worth it to pursue this claim if it may potentially require hiring a real estate appraiser to assess the "enhancement" in value to the rental property and a forensic accountant to trace Tom's separate funds into the improvements? Bear in mind there will be additional costs for discovery associated with locating and obtaining old bank/brokerage statements. Also bear in mind that for every action, there is a reaction and the community estate will also bear the cost of Jane's defense or her assertion of and request for offsets.

Reimbursement may have been somewhat simplified by the new statute of 2009, but there is still much to think about before pursuing such a claim and much to do if such a claim is to be successful. The task is complex, but with hard work and careful analysis you can help your clients increase their "take" from a divorce settlement or trial.

APPENDIX A

Subchapter E. Claims for Reimbursement

Sec. 3.401. DEFINITIONS. In this subchapter:

(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.

Sec. 3.402. CLAIM FOR REIMBURSEMENT; OFFSETS.

(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) 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;

(4) 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;

(5) 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;

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

(6) 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;

(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** to property other than by incurring debt; and

(9) 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.

Sec. 3.404. APPLICATION OF INCEPTION OF TITLE RULE; OWNERSHIP INTEREST NOT CREATED.

(a) This subchapter **does not affect the rule of inception of title** under which the character of property is determined at the time the right to own or claim the property arises.

(b) A claim for reimbursement 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.

Sec. 3.405. MANAGEMENT RIGHTS.

This subchapter does not affect the right to manage, control, or dispose of marital property as provided by this chapter.

Sec. 3.406. EQUITABLE LIEN.

(a) On dissolution of a marriage, **the 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.

(b) On the death of a spouse, a court may, on application for a claim for reimbursement 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 by a contributing marital estate.

Sec. 3.409. NONREIMBURSABLE CLAIMS.

The court may not recognize a marital estate's claim for reimbursement for:

(1) the payment of child support, alimony, or spousal maintenance;

(2) the living expenses of a spouse or child of a spouse;

(3) contributions of property of a nominal value;

(4) the payment of a liability of a nominal amount; or

(5) a student loan owed by a spouse.

Sec. 3.410. EFFECT OF MARITAL PROPERTY AGREEMENTS.

A premarital or marital property agreement, whether executed before, on, or after September 1, 2009, 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, unless the agreement provides otherwise.

§ 7. 007. Disposition of Claim for Reimbursement

In a decree of divorce or annulment, the court shall determine the rights of both spouses in a claim for reimbursement as provided by Subchapter E, Chapter 3, 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.

APPENDIX B

Types of Reimbursement Claims and Corresponding Case Law

A. General

The types of reimbursement claims that might arise out of the marital relationship are numerous. Below is a non-exhaustive categorization of reimbursement claims that are available either by statute or by common law along with references to specific cases that discuss the specific claim. A word of caution: in reviewing the cases on reimbursement for this article, a substantial number of the cases discuss more than one type of reimbursement claim. A number of these cases will have the correct holding on the proper measurement to be applied to a particular reimbursement claim, but will have an incorrect holding on how another form of reimbursement claim is to be measured. For instance, in the case of *Brooks v. Brooks,* 612. S.W.2d 233 (Tex. Civ. App.- Waco 1981, no writ) it appears that the court correctly decided reimbursement claims involving the use of company assets and the cash value of separately owned life insurance policies for the benefit of the community estate, but used the incorrect method for determining reimbursement for the payment of the principal amounts of separate property obligation by the community estate (holding that there was no requirement to show that the expenditures exceeded the benefits received.) This list, first compiled by Mike Gehry for his article Reimbursement for the 2010 New Frontiers of Marital Property course, has been updated with the addition of cases decided since that date.

1. Reimbursement for Improvements
   (measured by the enhancement in value)

   a. *Dakan v. Dakan,* 125 Tex. 305, 83 S.W.2d 620 (1935).
   b. *Lindsay v. Clayman,* 151 Tex. 593, 254 S.W.2d 777 (1952).
   c. *Girard v. Girard,* 521 S.W.2d 714 (Tex. Civ. App. – Houston [1st Dist.] 1975, no writ).
   d. *Snider v. Snider,* 613 S.W.2d 8 (Tex. Civ. App.- Dallas 1981, no writ).
   e. *Cook v. Cook*, 665 S.W.2d 161 (Tex. App – Ft. Worth 1983, writ ref'd n.r.e.); appeal after remand, 693 S.W.2d 785 (Tex. App. – Ft. Worth 1985, no writ).
   f. *Padon v. Padon,* 670 S.W.2d 354 (Tex. App. – San Antonio 1984, no writ).
   g. *Anderson v. Gilliland,* 684 S.W.2d 673 (Tex. 1985).
   h. *Smith v. Smith,* 715 S.W.2d 154 (Tex. App. – Texarkana 1986, no writ).
   i. *Rogers v. Rogers,* 754 S.W.2d 236 (Tex. App.- Houston [1st Dist.] 1988, no writ).
   j. *Kamel v. Kamel*, 760 S.W.2d 677 (Tex. App. – Tyler 1988, writ denied).
   k. *Gutierrez v. Gutierrez*, 791 S.W.2d 659 (Tex. App. – San Antonio 1990, no writ).
   l. *Magill v. Magill,* 816 S.W.2d 530 (Tex. App. – Houston [1st Dist.] 1991, writ denied).
   m. *Zieba v. Martin*, 928 S.W.2d 782 (Tex. App. – Houston [14th Dist.] 1996, no writ) (op. on reh'g).
   n. *Kimsey v. Kimsey,* 965 S.W.2d 690 (Tex. App. – El Paso 1998, pet. denied).
   o. *Zeptner v. Zeptner,* 111 S.W.3d 727 (Tex. App. – Ft. Worth 2003, no pet.) (op. on reh'g).
   p. *Hernandez v. Hernandez*, 2009 WL 1547746 (Tex. App. – San Antonio 2009, no pet.) (mem. op.).

q. *Baker v. Baker*, 2009 WL 3382242 (Tex. App. – San Antonio 2009, pet. denied) (mem. op.).
r. *In Re Marriage of Gill*, 41 S.W.3d 255 (Tex. App.- Waco 2001, no writ).
s. *Nelson v. Nelson*, 193 S.W. 3d 624 (Tex. App. – Eastland 2006, no pet.)
t. *Garza v. Garza*, 217 S.W.3d 538 (Tex. App.- San Antonio 2006, no pet.).

2. Reimbursement for Payment of Pre-Marriage Purchase Money Indebtedness (Principal Reduction)

a. *Dakan v. Dakan*, 125 Tex. 305, 83 S.W.2d 620 (1935)
b. *Allen v. Allen*, 704 S.W.2d 600 (Tex. App. – Ft. Worth 1986, no writ).
c. *Penick v. Penick*, 783 S.W.2d 194 (Tex. 1988).
d. *Kamel v. Kamel*, 760 S.W.2d 677 (Tex. App. – Tyler 1988, writ denied).
e. *Zieba v. Martin*, 928 S.W.2d 782 (Tex. App. – Houston [14th Dist.] 1996, no writ) (op. on reh'g).
f. *Pelzig v. Berkebile*, 931 S.W.2d 398 (Tex. App. –Corpus Christi 1996, no writ).
g. *Rusk v. Rusk*, 5 S.W.3d 299 (Tex. App. – Houston [14th Dist] 1999, pet. denied).
h. *Beard v. Beard*, 49 S.W.3d 40 (Tex. App. – Waco 2001, pet. denied).

These cases followed the old form of measurement:
i. *Nelson v. Nelson*, 713 S.W.2d 146 (Tex. App. – Texarkana 1986, no writ).
j. *Smith v. Smith*, 715 S.W.2d 154 (Tex. App.- Texarkana 1986, no writ).
k. *Martin v. Martin*, 759 S.W. 2d 463 (Tex. App. – Houston [1st Dist.] 1988, no writ).
l. *Brooks v. Brooks*, 612 S.W.2d 233 (Tex. Civ. App.- Waco 1981, no writ).
m. *Snider v. Snider*, 613 S.W.2d 8 (Tex. Civ. App. – Dallas 1981, no writ).
n. *Cook v. Cook*, 665 S.W.2d 161 (Tex. App. – Ft. Worth 1983, writ ref'd n.r.e.); appeal after remand, 693 S.W.2d 785 (Tex. App.- Ft. Worth 1985, no writ.)
o. *Fyffe v. Fyffe*, 670 S.W.2d 360 (Tex. App. – Texarkana 1984, writ dism'd w.o.j).

3. Reimbursement for Payment of Interest, Taxes, Insurance

a. *Colden v. Alexander*, 141 Tex. 134, 171 S.W.2d 328 (1943).
b. *Snider v. Snider*, 613 S.W.2d 8 (Tex. Civ. App.- Dallas 1681, no writ).
c. *Cook v. Cook*, 665 S.W.2d 161 (Tex. App.- Ft. Worth 1983, writ ref'd n.r.e.); appeal after remand, 693 S.W.2d 785 (Tex. App. –Ft. Worth 1985, no writ).
d. *Jacobs v. Jacobs*, 669 SW.2d 759 (Tex. App. – Houston [14th Dist.] 1984, *affm'd in part, rev. in part*), 687 S.W.2d 731 (Tex. 1985).
e. *Fyffe v. Fyffe*, 670 S.W.2d 360 (Tex. App. – Texarkana 1984, writ dism'd w.o.j.).
f. *Smith v. Smith*, 715 S.W.2d 154 (Tex. App. – Texarkana 1986, no writ).
g. *Rogers v. Rogers*, 754 S.W.2d 236 (Tex. App. – Houston [1st Dist.] 1988, no writ).
h. *Martin v. Martin*, 759 S.W.2d 463 (Tex. App. – Houston [1st Dist.] 1988, no writ).
i. *Zieba v. Martin*, 928 S.W.2d 782 (Tex. App. – Houston [14th Dist.] 1996, no writ) (op. on reh'g).
j. *Pelzig v. Berkebile*, 931 S.W.2d 398 (Tex. App. – Corpus Christi 1996, no writ).
k. *Hunt v. Hunt*, 952 S.W.2d 564 (Tex. App. –Eastland 1997, no writ).

4. Reimbursement Involving Time, Talent and Labor

    a. *Vallone V. Vallone*, 664 S.W.2d 455 Tex. (1982).
    b. *Holloway v. Holloway*, 671 S.W.2d 51 (Tex. App. –Dallas 1983, writ dism'd).
    c. *Jensen v. Jensen*, 665 S.W.2d 107, Tex. (1984).
    d. *Jacobs v. Jacobs*, 669 S.W.2d 759 (Tex. App. –Houston [14th Dist.] 1984, *affm'd in part, rev. in part)*, 687 S.W.2d 731 (Tex. 1985).
    e. *Trawick v. Trawick*, 671 S.W.2d 105 (Tex. App. – El Paso 1984, no writ).
    f. *Rogers v. Rogers*, 754 S.W.2d 236 (Tex. App. – Houston [1st Dist.] 1988, no writ).
    g. *Gutierrez v. Gutierrez*, 791 S.W.2d 659 (Tex. App. – San Antonio 1990, no writ).
    h. *Pearce v. Pearce*, 824 S.W.2d 195 (Tex. App. – El Paso 1991, writ denied).
    i. *Alsenz v. Alsenz*, 101 S.W.3d 648 (Tex. App.-Houston [1st Dist.] 2003, pet. denied).
    j. *Lifshutz v. Lifshutz*, 199 S.W.3d 9 (Tex. App.-San Antonio 2006, pet. denied).
    k. *Cassel v. Cassel*, 1997 Tex. App. LEXIS 2641(Tex. App.-Amarillo).
    l. *Zeptner v. Zeptner*, 111 S.W.3d 727 (Tex. App. – Ft. Worth 2003, no pet.).
    m. *Garza v. Garza*, 217 S.W.3d 538 (Tex. App.- San Antonio 2006, no pet.).
    n. *Delancey v. Delancey*, 2011 Tex. App. LEXIS 1457 (Tex. App.—Austin).

5. Reimbursement for Use of One Marital Estate for the Benefit of Another Marital Estate

    a. *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. Civ. App- Houston [14th Dist.] 1975, writ dism'd w.oj.).
    b. *Hilton v. Hilton*, 678 S.W.2d 645 (Tex. App. – Houston [14th Dist.] 1984, no writ).
    c. *Graham v. Graham*, 836 S.W.2d 308 (Tex. App. – Texarkana 1992, no writ).
    d. *Winkle v. Winkle* , 951 S.W.2d 80 (Tex. App.- Corpus Christi 1997, pet. denied).
    e. *Beard v. Beard*, 49 S.W.3d 40 (Tex. App. – Waco 2001, pet. denied).
    f. *Sikes v. Sikes*, 2010 Tex. App. LEXIS 3963 (Tex. App.– Eastland).
    g. *Sonnier v. Sonnier*, 331 S.W.3d 211; Tex. App. LEXIS 361 (Tex.App.—Beaumont).
    h. *Norton v. Norton*, 2010 Tex. App. LEXIS 5653 (Tex. App.—Amarillo).
    i. *Collier v. Collier*, 2011 Tex. App. LEXIA 13 (Tex. App.—Amarillo).

6. Reimbursement for the Use/Loss of Corporate Assets (Capital) Used for the Purchase and Payment of Community Assets

    a. *Brooks v. Brooks*, 612 S.W.2d 233 (Tex. Civ. App.) – Waco 1981, no writ).

7. Reimbursement for the Decrease in Cash Value of Separately Owned Life Insurance Policies

    a. *Brooks v. Brooks*, 612 S.W.2d 233 (Tex. Civ. App. – Waco 1981, no writ).

8. Reimbursement for Contributions to Separate Property Partnerships

    a. *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. Civ. App- Houston [14th Dist.] 1975, writ dism'd w.oj.).

b. *Jacobs v. Jacobs*, 669 S.W.2d 759 (Tex. App. – Houston [14th Dist.] 1984, *affm'd in part, rev. in part);* 687 S.W.2d 731 (Tex. 1985).

9. Reimbursement for the Payment of Separate Property Judgment

a. *Knight v. Knight*, 301 S.W.3d 723 (Tex. App. – Houston [14th Dist.] 2009, no pet.).

10. Reimbursement for Payment of Secured and Unsecured Debt

a. *Winkle v. Winkle*, 951 S.W.2d 80 (Tex. App. – Corpus Christi 1997, pet. denied).
b. *Bigelow v. Stephens*, 286 S.W.3d 619 (Tex. App.- Beaumont 2009, no pet.).
c. *Knight v. Knight*, 301 S.W.3d 723 (Tex. App. –Houston [14th Dist.] 2009, no pet.).
d. *Zeptner v. Zeptner*, 111 S.W.3d 727 (Tex. App. – Ft. Worth 2003, no pet.).
e. *Hailey v. Hailey*, 176 S.W.3d 374 (Tex. App.- Houston [1st Dist.] 2004, no pet.).
f. *Cigainero v. Cignainero*, 305 S.W.3d 798 (Tex. App. – Texarkana 2010, no pet.)
g. *Taylor v. Taylor*, 2010 Tex. App. LEXIS 4750 (Tex.App.—Houston [14th Dist.]).
h. *Norton v. Norton*, 2010 Tex. App. LEXIS 5653 (Tex. App.—Amarillo).

11. Reimbursement for the Payment of Professional Fees

a. *Jacobs v. Jacobs*, 669 S.W.2d 759 (Tex. App. – Houston [14th Dist.] 1984, *affm'd in part, rev. in part),* 687 S.W.2d 731 (Tex. 1985).
b. *Farish v. Farish*, 982 S.W.2d 623 (Tex. App.- Houston [1st Dist.] 1998, no pet.).

12. Reimbursement for Support Paid to Support Illegitimate Child

a. *Butler v. Butler*, 975 S.W.2d 765 (Tex. App. – Corpus Christi 1998, no writ).

13. Reimbursement for Pre-Marriage Expenditures on Improvements to Separate Estate

a. *Nelson v. Nelson*, 713 S.W.2d 146 (Tex. App.- Texarkana 1986, no writ).