EQUITABLE RELIEF/REIMBURSEMENT

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The author thanks Warren Cole, Gary Nickelson and Chris Nickelson for their gracious agreement for sections of their prior writings to be included in this paper. Specifically, section II B of this paper (Common Law – "Traditional" Reimbursement) is taken from Warren Cole's *Reimbursement & Economic Contribution* paper from the 2008 Marriage Dissolution Institute. Section III of this paper (Various Forms of Equitable Relief Available to a Party) is an condensed version of a portion of the paper authored by Gary Nickelson and Chris Nickelson entitled *Equitable Remedies: Getting Out of Traps, Messes, and Other Problems to Which You or Your Client May Have Unintentionally Agreed* from the 2009 Advanced Family Law Course.

I. INTRODUCTION

The 2009 Texas Family Code amendments to the reimbursement statutes brought significant change and clarification regarding statutory reimbursement. In addition to the statutory reimbursement provisions, common law "traditional" reimbursement claims remain important tools for the court in fashioning a just and right division of the marital estate. Additionally, various other forms of equitable relief may be available to a divorcing party. The practitioner should give appropriate consideration to the rules and effect of those remedies.

II. REIMBURSEMENT

A. Statutory Reimbursement

1. The Death of Economic Contribution

At the conclusion of the 2009 Legislative Session, Texas Family Code §3.403 was repealed. This action eliminated claims based on the former concept of Economic Contribution in all suits filed after September 1, 2009.

2. New and/or Modified Reimbursement Statutes

Concurrently, a number of Texas Family Code provisions were modified regarding claims for reimbursement.

a. *Texas Family Code §3.402*. Claim for Reimbursement; Offsets

(1) What is Included in a Claim for Reimbursement?

A statutory claim for reimbursement includes the following:

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

(b) inadequate compensation for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse;

(c) 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;

(d) 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;

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

(i) incurred during a marriage;
(ii) secured by a lien on property; and
(iii) incurred for the acquisition of, or for capital improvements to, property;

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

(i) incurred during a marriage;
(ii) secured by a lien on property owned by a spouse;
(iii) 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
(iv) incurred for the acquisition of, or for capital improvements to, property;

(g) the refinancing of the principal amount described by sections (c)-(f) above, to the extent the refinancing reduces that principal amount in a manner described by the applicable subdivision;

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

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

(2) Equitable Principles and Offsets

The court shall use equitable principles to resolve a claim for reimbursement. The court may offset claims for reimbursement against each other if the court determines it to be appropriate. Benefits for the use and enjoyment of property may be offset against a claim for reimbursement for expenditures to benefit a marital estate. However, 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.

The standard to be applied for reimbursement for funds expended by a marital estate for improvements

to another marital estate is "the enhancement in value to the benefited marital estate." The party seeking an offset to a claim for reimbursement has the burden of proof with respect to the offset.

b. *Texas Family Code §3.404*. Application of Inception of Title Rule; Ownership Interest Not Created

The new reimbursement provisions in Subchapter C of Chapter 3 do 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. Similarly, a claim for reimbursement under Subchapter C does not create an ownership interest in property, but does create a claim against the property of the benefited estate by the contributing estate. That claim matures on dissolution of the marriage or the death of either spouse.

c. *Texas Family Code §3.406.* Equitable Lien

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.

d. *Texas Family Code §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 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.

e. *Texas Family Code § 3.409*. Nonreimbursable Claims

Texas Family Code §3.409 was not modified in the September 2009 changes. However, this section remains an important and often overlooked section.

The court may <u>not</u> 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.

B. Common Law – "Traditional" Reimbursement

The common law claim for reimbursement is based in equity and courts are seldom reversed for refusing to honor a reimbursement claim. While a claim for equitable reimbursement can take many forms, courts have impliedly adopted the "offsetting benefit" concept when dealing with credit purchases. *Colden v. Alexander*, 171 S.W.2d 328, 334-335 (Tex. 1943). The principle of reimbursement applies from community to separate, from separate to community, and from separate to separate, estates. *Dakan v. Dakan*, 125 Tex. 375, 83 S.W.2d 620, 627 (1935). Such claims can be asserted not only upon divorce, but also by heirs of a spouse, when the community estate is dissolved by death. *See Anderson v. Gilliland*, 684 S.W.2d 673 (Tex. 1985). In *Vallone v. Vallone*, 644 S.W.2d 455, 458-59 (Tex. 1983), the Supreme Court defined marital property reimbursement in very broad terms: "The rule of reimbursement is purely an equitable one. *Colden v. Alexander*, 141 Tex. 134, 171 S.W.2d 328 (1943). It obtains when the community estate in some way improves the separate estate of one of the spouses (or vice versa). The right of reimbursement is not an interest in property or an enforceable debt, per se, but an equitable right which arises upon dissolution of the marriage through death, divorce or annulment. *Burton v. Bell*, 380 S.W.2d 561 (Tex. 1964)."

In *Penick v. Penick*, 783 S.W.2d 194, 197 (Tex.1988), the Texas Supreme Court opined: "Admittedly it is difficult to announce a single formula which will balance the equities between each marital estate in every situation and for every kind of property and contribution."

When funds from the community are used to pay for a separate debt, reimbursement should be denied unless it is shown that the community expenditures are greater than the benefit received by the community. *Gutierrez v. Gutierrez*, 791 S.W.2d 659, 663 (Tex.App.—San Antonio 1990, no writ). While many cases talk of the "right" of reimbursement, it is not a guarantee or something to which the claimant was entitled. *Id.* Courts have typically taken a different approach when community funds are expended to improve the separate property of a spouse. The value of the reimbursement claim is based on the enhanced value of the separate estate, not the actual dollar amount spent. *Pemelton v. Pemelton*, 809 S.W.2d 642, 651 (Tex. App.-Corpus Christi 1991, writ granted), reversed on other grounds, 836 S.W.2d 145 (Tex. 1992).

1. <u>Typically Proven Reimbursement Claims</u>

The following types of reimbursement claims have been granted upon proper presentation of evidence supporting the claim(s):

a. Credit Purchases

To properly assert a reimbursement claim for funds expended by one estate to pay for credit purchases made by another estate, the claimant must prove: (1) community funds were used to pay for a separate estate's purchase money debt, other than interest, taxes, and insurance; and (2) the amount of the funds expended on such debt, less the value of the benefit(s) received by the community estate. *See Penick v. Penick*, 783 S.W.2d at 195-196.

b. Capital Improvements to Separate Property

To properly assert a reimbursement claim for funds expended for capital improvements to a separate estate, the claiming party must plead and prove: (1) community funds were used to improve separate property; and (2) the value of the separate property at the time of divorce, less the value of the property before the improvements were made. *Anderson v. Gilliland*, 684 S.W.2d at 675.

c. Living Expense- When Community Funds are Available and Not Used

A court can consider reimbursing a spouse who has advanced separate monies to pay community indebtedness if the paying spouse can establish: (1) separate funds were used to pay for living expenses of the parties; (2) community funds were available, but not used for said expenses; and (3) the amount of separate funds expended. However, if no community funds are available to pay for such expenses, reimbursement should be denied. *Oliver v. Oliver*, 741 S.W.2d 225, 228 (Tex.App.—Fort Worth 1987, no writ). *See also Graham v. Graham*, 836 S.W.2d 308, 310-311 Tex.App.—Texarkana 1992, no writ).

d. Jensen Claims

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). However, the community estate has a claim for reimbursement for uncompensated or undercompensated time, toil and talent expended by a spouse for the benefit and enhancement of his or her separate property interests, beyond that necessary to maintain the separate asset. *Id.* at 805. *See Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984). A *Jensen* reimbursement claim against a husband's interest in a law partnership was rejected in *Harris v. Harris* based on the husband's uncontroverted testimony that the enhancement was not attributable to his labors. 765 S.W.2d at 803.

e. Excess Profits From Separate Property Business

Reimbursement from the community estate to husband's separate estate was held to be proper upon a showing that distributions from the husband's closely-held separate property corporation exceeded profits, and that community assets were acquired with those excess distributions. *Brooks v. Brooks*, 612 S.W.2d 233, 238 (Tex.Civ.App.—Waco 1981, no writ).

f. Commingling of Separate Property Assets

When one spouse demonstrates that the proceeds from the sale of his separate property have become commingled with community monies and are not traceable, the trial court may grant reimbursement to the harmed spouse by virtue of the fact that his separate funds have enhanced, improved, and increased the value of the community estate. *Horlock v. Horlock*, 533 S.W.2d 52, 58 (Tex.Civ.App.—Houston [14th Dist.] 1975, writ dism'd).

g. Payment of Life Insurance Premiums

When the community estate pays the premiums for a separate property life insurance policy, a claim for reimbursement arises. *McCurdy v. McCurdy*, 372 S.W.2d 381, 384 (Tex.Civ.App.—Waco 1963, writ ref'd). It should be noted that the beneficiary of the life insurance policy in McCurdy was the deceased spouse's estate and the case did not arise from a divorce proceeding. Would the surviving spouse who is named the beneficiary of the separate property policy still be entitled to reimbursement? In *Gray v. Bush*, 430 S.W.2d 258, 267 (Tex.Civ.App.—Fort Worth 1968, writ ref'd n.r.e.), the court held that a party who in good faith pays premiums on a life insurance policy for another can be reimbursed out of the proceeds of the policy.

h. Credit Extended by One Estate For Benefit of Other Estate

Interesting questions arise when a spouse extends (or exposes) credit of one estate to secure debt of another estate. In *Thomas v. Thomas*, 738 S.W.2d 342, 346 (Tex.App.—Houston [1st Dist.] 1987, writ denied) husband's separate property corporation's debt was refinanced and secured by his personal guarantee, thereby subjecting the community to potential liability for the debt. In rejecting wife's claim for reimbursement the court stated, "[w]hen a debt is discharged, the cost to the community is obvious, but when a separate property debt is refinanced with the community acting as a guarantor, the cost to the community is not so readily ascertainable. In the latter situation, expert testimony would be required on the percentage risk undertaken by the community, and a dollar value would have to be assigned to that risk…The appellee has, therefore, failed to meet her burden of establishing the community's right to

reimbursement for the use of the community credit." *Id*. It is worth noting that there now may be a way to pursue this type of claim as a claim for economic contribution.

2. The Concept and Application of Offsetting Benefits

The concept of offsetting a reimbursement claim with the benefit received by the estate claiming the reimbursement was aptly enunciated in *Colden v. Alexander*, 171 S.W.2d at 334-335. The concept has been carried forward since that time. *Vallone v. Vallone*, 644 S.W.2d at 459. In *Penick*, the Court reiterated that consideration of the offsetting benefits in determining marital property reimbursement is a necessary factor, regardless of the nature of the reimbursement claim. 783 S.W.2d at 197. This ruling created many questions, including: 1) Is the reimbursement claim a "net" amount after proof of offsetting benefits? 2) Is the offsetting benefit a dollar for dollar offset against the total amount of the reimbursement claim? 3) Are offsetting benefits merely a factor a court may consider with discretion to acknowledge or not allow the offset?

A historical look at the Pattern Jury Charges treatment of this issue provides some guidance. In 1989, the PJC essentially required the jury to "net out" the offsetting benefits from the total claim. 5 STATE BAR OF TEXAS PATTERN JURY CHARGES PJC 204.1 (1989). This approach was changed by the PJC committee in 1996. Instead of "netting out" the claim, the 1996 PJC suggested that the fact finder should determine the amount of the reimbursement claim, and then make a separate determination and finding regarding the value of the offsetting benefit. 5 STATE BAR OF TEXAS PATTERN JURY CHARGES PJC 204.1 (1996). Regardless of the jury's findings, the court retained the discretion to honor or ignore either or both of the jury's findings. In *Beavers v. Beavers*, 675 S.W.2d 296, 298 (Tex.Civ.App.—Dallas 1984, no writ) the appellate court upheld the trial court's ruling that each of two competing separate property reimbursement claims washed out the other. In *Harris v. Holland*, 867 S.W.2d 86, 88 (Tex.App.—Texarkana 1993, no writ) the trial court granted a reimbursement claim in favor of the separate estate against the community, but refused to offset the amounts paid by the community toward the other spouse's separate debt.

While courts clearly consider offsetting benefits, absent an abuse of discretion, the failure to give a spouse credit for the offsetting benefit will not be reversed on appeal. *Kimsey v. Kimsey*, 965 S.W.2d 690, 700 Tex.App.—El Paso 1988, pet. den.).

There is great inconsistency in the caselaw regarding which party had the burden of proof to establish the value of offsetting benefits. In *Hawkins v. Hawkins*, 612 S.W.2d 683, 685 (Tex.Civ.App.—El Paso 1981, no writ) the court denied a reimbursement claim for payment of purchase money debt on separate property because the claimant failed to prove the value of the offsetting benefits. *Jensen* suggests that the burden to prove offsetting benefits was on the party seeking reimbursement. 665 S.W.2d at 109. In *Martin v. Martin*, 759 S.W.2d 463, 465 (Tex.App.—Houston[1st Dist.] 1988, no writ) the court held that the burden to prove the value of offsetting benefits was part of the overall proof required of a claimant in seeking reimbursement and failure to meet that burden defeated the claim. This theory was also enunciated in *Zieba v. Martin*, 928 S.W.2d 782, 788-789 Tex.App.—Houston [14th Dist.] 1996, no writ).

III. VARIOUS FORMS OF EQUITABLE RELIEF AVAILABLE TO A PARTY

A. The Relationship Between Contract Law, Family Law and Equitable Relief

The vast majority of family law cases are resolved by written agreement rather than a conventional trial on the merits. Parties to a family law case may execute a written agreement to compromise a variety of issues, including temporary orders, property division, and child related issues. Sometimes the parties' written agreement is evidenced by a Rule 11 agreement, or a mediated settlement agreement, which is later incorporated into an agreed decree of divorce. However, sometimes the parties' agreement is evidenced by nothing more than an agreed decree of divorce.

Regardless of the form in which the written agreement exists (i.e., agreed decree of divorce, or final decree that incorporates an agreement of the parties), the law of contracts requires that the written agreement be the product of mutual assent. If mutual assent is lacking, then the agreed decree or agreement incorporated into the decree is vulnerable to being altered, modified, or set aside at a later date due to the lack of mutual assent. *See, e.g.*, *Allen v. Allen*, 717 S.W.2d 311, 313 (Tex.1986)(holding that final decree of divorce based on property settlement agreement is subject to reformation based on mutual mistake); *Weynard v. Weynard*, 990 S.W.2d 843, 846 (Tex.App.—Dallas 1999, pet. denied) (same); *Pate v. Pate*, 874 S.W.2d 186, 188 (Tex.App.—Houston [14th Dist.] 1994, writ denied)(same); *Boyett v. Boyett*, 799 S.W.2d 360, 362 (Tex.App.—Houston [14th Dist.] 1990, no writ)(same).

The fact that an agreed decree is vulnerable to attack, based on lack of mutual assent, is often overlooked by Texas lawyers because they fail to understand that an agreed decree of divorce is different from a judgment entered after a conventional trial on the merits.

When a divorce decree is entered after a conventional trial on the merits, the force and effect of the decree is controlled by the rules relating to judgments. *See Soto v. Soto*, 936 S.W.2d 338, 340 (Tex.App.—El Paso 1996, no writ). However, when a divorce decree is entered based on the agreement of the parties, the force and effect of the decree is controlled by the law of contracts. *See Wagner v. Warnasch*, 156 Tex. 334, 339, 295 S.W.2d 890, 893 (1956); *Allen*, 717 S.W.2d at 313; *Boyett*, 799 S.W.2d at 362; *Soto*, 936 S.W.2d at 341.

Once it is understood that an agreed decree is different from a decree entered after a conventional trial on the merits, then it should become readily apparent that there are a number of equitable remedies available for undoing and avoiding agreements reached to end a divorce based on the fact that the agreements do not rest upon mutual assent.

For example, in *Allen v. Allen*, husband and wife signed an agreement incident to divorce ("AID") which awarded husband his veterinarian practice. *Id.*, 717 S.W.2d at 312. At the time the AID was signed, both parties mistakenly believed that the real property, on which the practice was located, was held in the name of the practice, not the parties. *Id.* at 312-313. The AID was incorporated into the parties' final decree of divorce. *Id.* at 312. After the time for filing a post-judgment motion and appeal had passed, husband filed a lawsuit seeking an order compelling wife to convey her interest in the real property to husband. *Id.* In the alternative, husband sought relief under a variety of theories, including the equitable theories of reformation, bill of review, and constructive trust. *Id.* The trial court signed an order compelling wife to convey her interest in the real property to husband. *Id.* The court of appeals reversed holding that the trial court's order amounted to a modification of the decree in excess of the court's inherent power to clarify or enforce its decrees after time for an appeal had passed. *Id.* Husband appealed to the Texas Supreme Court. The Texas Supreme Court reversed stating:

> A marital property agreement, although incorporated into a final decree, is treated as a contract and its legal force and meaning are governed by the law of contracts, not by the law of judgments. *McGoodwin v. McGoodwin*, 671 S.W.2d 880, 882 (Tex.1984). Contract law provides that the property settlement agreement may be reformed to correct the mutual mistake and to reflect the true intent of the parties. *Thelman v. Martin*, 635 S.W.2d 411, 414 (Tex.1982).
>
> The trial court's judgment is affirmed on [husband's] request for reformation. We reverse the judgment of the court of appeals and affirm the judgment of the trial court.

Id. at 313.

Given the fact that so many contested issues in family law are resolved by written agreements and agreed decrees of divorce, a Texas family lawyer must be cognizant of the equitable remedies for modifying, altering, cancelling and rescinding contracts based on lack of mutual assent to the contract's terms.

B. General Rules of Equity

Before discussing the equitable remedies available for litigating the enforceability of a written agreement, the reader should understand a few basic rules which govern the power of Texas courts to grant equitable relief.

1. What is Equity?

"Equity" is the name of a system of justice which arose in the courts of chancery in England, and was later adopted by numerous states of the United States of America. The equitable principles used by courts of chancery, or courts of equity, were designed to alleviate the harsh results caused by a rigid application of legal principles used by courts of law. *See Slaughter v. Cities Service Oil Co.*, 660 S.W.2d 860, 862 (Tex.App.—Amarillo 1983, no writ).

In Texas, there are no separate courts of law and equity. Rather, the trial court has power to render judgment under principles of both law and equity. *See Lyons-Gray Lumber Co. v. Gibraltar Life Ins. Co.*, 269 S.W. 80 (Tex. Comm'n App. 1925); *Mathews v. First Citizens Bank*, 374 S.W.2d 794 (Tex.Civ.App.—Dallas 1963, writ ref'd n.r.e.). Nonetheless, there are a few rules, discussed below, which govern when it is appropriate to render equitable relief as opposed to legal relief.

2. Purpose of Equity

A court of equity is a court of conscience. *Davis v. Carothers*, 335 S.W.2d 631, 641 (Tex.Civ.App.—1960, writ dism'd). It assumes jurisdiction when the legal remedy is not as complete as, less effective than, or less satisfactory than the equitable remedy. *First Heights Bank, FSB v. Gutierrez*, 852 S.W.2d 596, 605 (Tex.App.—Corpus Christi 1993, writ denied). Courts of equity are not bound by cast-iron rules, but are governed by rules which are flexible and adapt themselves to particular exigencies, so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer gross wrong at the hands of the other. *Warren v. Osborne*, 154 S.W.2d 944, 946 (Tex.Civ.App.—Texarkana 1941, writ ref'd w.o.m.).

The favorite targets of equitable relief include unfair results caused by fraud accident, mistake, or any other form of inequitable conduct or unjust enrichment. *See e.g., Conn v. Hagen*, 93 Tex. 334, 55 S.W. 323, 338 (1900)(allowing equitable relief from a unilateral mistake accompanied by fraud or other inequitable conduct); *McGowen v. Montgomery*, 248 S.W.2d 789, 793 (Tex.Civ.App.—Amarillo 1952, no writ)(holding that equitable relief is available to remedy unjust results caused by fraud, accident or mistake); *Heights Bank, FSB*, 852 S.W.2d at 605 (holding that equity seeks to prevent unjust enrichment).

At its heart, equity is based upon the avoidance of irreparable injury. *Gulf Oil Corp. v. Walton*, 317 S.W.2d 260, 263 (Tex.Civ.App.—El Paso 1958, no writ). Thus, before granting equitable relief, a trial court must weigh several factors to determine whether a party's request for equitable relief should be granted, including:

a. the probability of irreparable damage to the moving party in the absence of relief;
b. the possibility of harm to the nonmoving party if the requested relief is granted; and
c. the public interest.

See Jackson Law Office v. Chappell, 37 S.W.3d 15, 26 (Tex.App.—Tyler 2000, pet. denied).

3. Effect of Legal Remedy

Equitable relief is not available where there is a complete and adequate remedy at law. *See Rogers v. Daniel Oil & Royalty Co.*, 130 Tex. 386, 110 S.W.2d 891, 894 (1937); *Frost Nat'l Bank v. Burge*, 29 S.W.3d 589, 596 (Tex.App.—Houston [14th Dist.] 2000, no pet.). For example, one court denied a contractor's request to impose an equitable lien on improvements because the court found that the contractor had a complete and adequate remedy through exercise of the contractor's constitution mechanic's lien. *See Hoarel Sign Co. v. Dominion Equity Corp.*, 910 S.W.2d 140, 143 (Tex.App.—Amarillo 1992, writ denied).

It must be emphasized that the party requesting equitable relief, will not be barred from seeking such relief unless the remedy at law is complete and adequate. *Repka v. Amer. Nat. Ins. Co.*, 143 Tex. 542, 186 S.W.2d 977 (1945)(holding that legal remedy is not adequate as it leads to additional lawsuits over the same subject matter). To preclude the granting of equitable relief, the remedy at law must be as complete, practical and efficient as that of an equitable remedy. *Repka*, 186 S.W.2d at 980; *McGonagill v. Hide-A-Way Lake Club, Inc.*, 566 S.W.2d 371, 374 (Tex.Civ.App.—Tyler 1978, no writ).

In *Brazos River Conservation & Reclamation Dist. V. Allen*, the defendant reclamation district sought to condemn two parcels of land from one tract owned by plaintiff through two separate condemnation proceedings. 141 Tex. 208, 171 S.W.2d 842, 846-47 (1943). Plaintiff contested both proceedings, and sought an injunction to prevent the commissioners from determining the second condemnation action before the first was resolved because it would be prejudicial to determine the value of the second parcel without knowing the value of the first parcel. The Texas Supreme Court held that the legal remedies of filing exceptions, an appeal, a plea in abatement, or motion to dismiss, were inadequate when compared to the remedy of an injunction. The court determined that an injunction was proper to eliminate delay, confusion, expense and probable futility of the second proceeding. *Id.* at 847.

A party seeking equitable relief is not entitled to such relief when it is shown that the party had an adequate legal remedy, but simply failed to use it. For example, in *Hoarel Sign Co.*, the court denied the contractor's request for an equitable lien on improvements because the contractor failed to pursue its constitutionally protected mechanic's lein in a timely manner. *Hoarel Sign Co.*, 910 S.W.2d at 143.

C. Equitable Remedies

1. Reformation

Reformation is the term used to describe the equitable power of the courts to correct a written agreement which, due to mistake, fails to embody the actual understanding reached by the parties. *See e.g., Cherokee Water Co. v. Forderhause*, 741 S.W.2d 377, 379 (Tex. 1987); *Champlin Oil & Refining Co. v. Chastain*, 403 S.W.2d 376, 382 (Tex. 1966); *Brinker v. Wobaco Trust Ltd.*, 610 S.W.2d 160, 163 (Tex.Civ.App.—Texarkana 1980, writ ref'd n.r.e.).

It is basic to the remedy of reformation that an actual agreement was reaches by the parties prior to the drafting of the written agreement. *Continental Oil Co. v. Doornbos*, 402 S.W.2d 879, 883 (Tex. 1966). Reformation is only proper when the parties have reached a definite and explicit agreement, understood in the same sense by both parties, but, due to mistake, the written contract fails to express their agreement. *Chastain*, 403 S.W.2d at 383. Reformation will be denied in absence of proof of a definite agreement made between the parties prior to the drafting of the erroneously worded written agreement because the court has no power to make a contract that the parties themselves did not make. *Doornbos*, 402 S.W.2d at 883.

Thus, in order to obtain the remedy of reformation, the party seeking such relief must prove: (1) an original agreement; and (2) a mistake, made after the original agreement, in reducing the original agreement to writing. *Forderhause*, 741 S.W.2d at 379.

Not all mistakes made by parties in negotiating and drafting a written agreements will authorize relief by way of reformation. The remedy of reformation is limited to only certain categories of mistakes.

a. Mutual Mistake

A court is authorized to use its equitable powers to correct mutual mistakes made in transferring a prior agreement into a later written agreement. *Forderhause*, 741 S.W.2d at 379. A mutual mistake is defined as a mistake which is "common to both parties, wherein each labors under the same misconception respecting a material fact, the terms of the agreement, or the provisions…designed to embody such agreement." *See RGS Cardox Recovery, Inc. v. Dorchester Enhanced Recovery Co.*, 700 S.W.2d 635 (Tex.App.—Corpus Christi 1985, writ ref'd n.r.e.); *Zurich Ins. Co. v. Bass*, 443 S.W.2d 371, 374 (Tex.Civ.App.—Dallas 1969, no writ).

There are several well recognized types of mutual mistakes. The following list of mutual mistakes is not exclusive:

(1) Misdescriptions

Reformation is proper to correct erroneous descriptions of property included in written agreements, such as deeds, leases, and other instruments, where the erroneous description was included by mutual mistake of the parties. *See e.g.*, *Jones v. Kelly*, 614 S.W.2d 95 (Tex. 1981). *Dungan v. Foust*, 404 S.W.2d 685, 687 (Tex.Civ.App.—Fort Worth 1966, no writ).

(2) Omissions and Inclusions

Reformation is appropriate to correct terms that are unintentionally omitted or excluded from written agreements. *See e.g., National Resort Communities, inc. v. Cain*, 526 S.W.2d 510, 514 (Tex 1975). *Laredo Medical Group v. Lightner*, 153 S.W.3d 70, 74 (Tex.App.—San Antonio 2004, pet. denied).

(3) Scrivener's Mistake

Reformation is proper to correct mistakes made by a scrivener or typist in transferring the parties true agreement into writing. *See e.g., Ford v. Ford*, 492 S.W.2d 376, 377-78 (Tex.App.—Texarkana 1973, writ ref'd n.r.e.). *Van Deventer v. Dallas Brush Mfg. Co.*, 443 S.W.2d 426, 429 (Tex.Civ.App.—Eastland 1969, writ ref'd n.r.e.). *Hill v. Brockman*, 351 S.W.2d 934, 936 (Tex.Civ.App.—Fort Worth 1961, no writ).

(4) Mistakes of Law

As a general rule, it is not proper to reform a written agreement based on a mutual mistake of law alone. *See Brinker v. Wobaco Trust, Ltd.*, 610 S.W.2d 160, 163 (Tex.Civ.App.—Texarkana 1980, writ ref'd n.r.e.). *Hermann v. Lindesy*, 136 S.W.3d 286, 292-93 (San Antonio 2004, no pet.).

However, reformation is proper when the parties are mutually mistaken as to the legal effect of the terms used in a written agreement. *Brinker*, 610 S.W.2d at 163.

b. Defenses to Reformation

There are several defenses to reformation which are worthy of noting:

(1) Superior Right of Third Party

Reformation of a written instrument will not be granted when to do so would disturb the rights of a bona fide purchaser. *Henderson v. Odessa Building & Finance Co.*, 24 S.W.2d 393, 394 (Tex.Comm.App.1930); *Walters v. Pete*, 546 S.W.2d 871, 876 (Tex.Civ.App.—Texarkana, writ ref'd n.r.e.). The burden of proof is on the one party seeking reformation to prove that a subsequent purchaser is not a bona fide purchaser. *Miles v. Martin*, 159 Tex. 336, 321 S.W.2d 62, 67-68 (1959); *Walters*, 546 S.W.2d at 876.

(2) Ratification

Ratification is a defense to a claim for reformation. *Hatch v. Williams*, 110 S.W.3d 516, 523 (Tex.App.—Waco 2003, no pet.); *Williams v. Morris*, 333 S.W.2d 184, 189 (Tex.App.—Beaumont 1960, no writ). Ratification requires knowledge of the voidable nature of a prior act and intent to adopt such act as binding. *Williams*, 333 S.W.2d at 189.

(3) Estoppel

Estoppel is a defense to a claim for reformation. *Hatch*, 110 S.W.3d at 523.

(4) Waiver

Waiver requires proof that a party intentionally relinquished a known right, or intentionally engaged in conduct that is inconsistent with claiming that right. *Sun Exploration & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987).

(5) Plaintiff's Own Negligence

In some cases, the negligence of the plaintiff constitutes a valid defense to a request for reformation.

(6) Statute of Limitations

The statute of limitations provides a defense to a claim for reformation. *McClung v. Lawrence*, 430 S.W.2d 179, 181 (Tex. 1965).

(7) Laches

Laches is a defense to a claim for reformation. *Hatch v. Williams*, 110 S.W.3d 516, 523 (Tex.App.—Waco 2003, no pet). To prevail, the party claiming

laches must prove an unreasonable delay by one having legal or equitable rights in asserting those rights, and a good faith change in position by another to his or her detriment because of the delay. *Texas Enterprises, Inc. v. Arnold Oil Co.*, 59 S.W.3d 244 (Tex.App.—San Antonio 2001, no pet.).

2. Cancelation or Rescission

Cancellation or rescission (hereinafter "rescission") is an equitable remedy that operates to set aside a contract that is legally valid but is marred by fraud or mistake or, for some other reason, the court must set it aside to avoid unjust enrichment. *Barker v. Roelke*, 105 S.W.3d 75, 84 (Tex.App.—Eastland 2003, pet. denied); *Humphrey v. Camelot Retirement Community*, 893 S.W.2d 55, 59 (Tex.App.—Corpus Christi 1994, no writ). A party may not demand rescission as a matter of right. Rather, rescission lies strictly with the discretion of the trial court. *Humphrey*, 893 S.W.2d at 59. Rescission is considered by the courts to be a harsh remedy, and will not be granted when other relief is available or when it would be inequitable to do so. *Lanford v. Parsons*, 237 S.W.2d 425, 430 (Tex.Civ.App.—Austin 1951, writ ref'd n.r.e.).

To be entitled to the equitable remedy of rescission, a party must show either: (1) that he and the other party are in the *status quo*, i.e., that he is not retaining benefits received under the instrument without restoration to the other party; or (2) that there are special equitable considerations that obviate the need for the parties to be in the *status quo. Texas Co. v. State*, 154 Tex. 494, 281 S.W.2d 83 (1955); *Texas Employers Ins. Assoc. v. Kennedy*, 135 Tex. 486, 143 S.W.2d 583, 585 (1940); *Boyter v. MCR Const. Co.*, 673 S.W.2d 938, 941 (Tex.App.—Dallas 1984, writ ref'd n.r.e.).

There are numerous grounds for which rescission is available, including the following:

(a) lack of consideration;
(b) breach of contract;
(c) contracts with minors;
(d) lack of mental capacity;
(e) forgery;
(f) usury;
(g) fraud;
(h) mistake;
(i) duress; and undue influence.

Many of the defenses to a claim seeking rescission are the same as the defenses to a claim seeking reformation; however, a few are different. The available defenses include the following:

(a) adequate remedy at law;
(b) lack of irreparable harm;
(c) superior right of third party;
(d) estoppel;
(e) waiver;
(f) ratification;
(g) plaintiff's own negligence;
(h) statute of limitations;
(i) and laches

IV. FRAUD ON THE COMMUNITY

A. *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998)

In the *Schlueter* decision, the Texas Supreme Court answered the question of "what remedies are available to a spouse alleging fraud on the community committed by the other spouse?" The Supreme Court's specific rulings included the following:

1. A wronged spouse has an adequate remedy for fraud on the community through the "just and right" property division upon divorce.

2. Because the "just and right" property division is an adequate remedy, there is no independent tort cause of action between spouses for damages to the community estate.

3. Because there is no independent tort cause of action for wrongful disposition by a spouse of community assets, the wronged spouse may not recover punitive damages from the other spouse.

4. Generally, "heightened culpability" does not change the essential character of the wrong -- the "just and right" standard "with accompanying consideration of a wrongdoer spouse's fraud on community assets provides wronged spouses … with redress."

5. Therefore, "if the wronged spouse can prove the heightened culpability of actual fraud, the trial court may consider it in the property division." (emphasis added)

B. On the Horizon

The Legislative Committee of the Family Law Section of the State Bar of Texas is seeking new legislation to clarify and codify claims for loss of value to the community estate resulting from fraud on the community. Such legislation addresses the inclusion of the loss of value in the community estate for purposes of making a just and right division. The proposed legislation also provides for the available remedies to include a money judgment in favor of the wronged spouse when the resulting value of the community estate is inadequate to effect a just and right division. This proposed legislation is expected to be considered in the 2011 Legislative Session.

V. CONCLUSION

In Texas, various tools of equity are available for use in order to accomplish a just and right division. These tools of equity include statutory and common law reimbursement claims. Additionally, various other forms of equitable relief should be considered by the practitioner in developing case strategy. When utilized appropriately, equitable concepts help put the "just and right" into the division of the marital estate.