REIMBURSEMENT:
STATUTORY AND COMMON LAW RECOVERIES

MICHAEL P. GEARY
GEARY, PORTER & DONOVAN, P.C.
16475 Dallas Parkway, Suite 400
Addison, Texas 75001
mgeary@gpd.com
Telephone: (972) 931-9901
Facsimile: (972) 931-9208

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CHAPTER 4.2

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I. INTRODUCTION

Beginning in 2001, the Texas Family Code, for the first time, contained statutory provisions with respect to reimbursement claims. Tex. Fam. Code Ann. §3.408 was enacted and specifically set forth two (2) statutory reimbursement claims. One was for the payment by one marital estate of the unsecured liabilities of another marital estate. The second claim was for the "inadequate compensation for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse." Since 2001, these two statutory reimbursement provisions remained unchanged and were not modified by the 2009 amendments, but instead became part of the new §3.402.

In 2009, as a part of the elimination of the economic contribution provisions, the statutory reimbursement provisions have been expanded to include a number of additional types of reimbursement claims. The statutory reimbursement provisions, for the most part, are a codification of existing common law.

After the 2009 amendments, and the repeal of economic contribution, the family law bar appears to be focused on the extent of the new reimbursement provisions and the ramifications of those new provisions.

Two of these areas are: (1) whether common law reimbursement claims still exist; and (2) what does the reimbursement claim involving inadequate compensation for time and effort of a spouse by a business under the control and direction of that spouse mean? As to the latter claim, the author has not located a case that specifically discusses the former §4.08(b)(2) [now §3.402(a)(2)], what it means, and how it is to be determined.

II. COMMON LAW REIMBURSEMENT - DOES IT STILL EXIST?

Some have questioned the continued viability of common law reimbursement claims as a result of the significant expansion of the statutory reimbursement provisions. At the beginning of the reimbursement provisions in the 2001 provisions and the 2009 revisions, the opening sentence provides that "a claim for reimbursement includes. . ."

Under the Texas Government Code §311.001, otherwise known as the Code Construction Act, the general definition provisions, Tex. Gov't Code §311.005(13) provides that **"'Includes' and 'Including' are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded."** (Emphasis added.)

Two Texas family law cases, *Nelson v. Nelson*, 193 S.W.3d 624 (Tex. App. – Eastland 2006, no pet.) and *Bigelow v. Stephens*, 286 S.W.3d 619 (Tex. App. – Beaumont 2009, no pet.) have addressed the issue of the continued viability of common law reimbursement claims in light of the statutory provisions.

The Court in *Nelson v. Nelson, supra,* discussed the provisions contained in Tex. Fam. Code Ann. §7.007(b) (2005), directing the trial courts to apply equitable principles in resolving reimbursement claims (now §7.007) and the then existing two (2) statutory reimbursement claims contained in Tex. Fam. Code Ann. §3.408(b) with regard to the trial court's authority to award reimbursement for prenuptial expenditures. The Appellate Court stated that "Section 3.408 is simply a non-exhaustive list of two potential reimbursement claims. . .Consequently, we do not believe that the legislature intended that a reimbursement claim could never exist for prenuptial expenditures."

Bigelow v. Stephens, supra, stated:

> We disagree that section 3.408(b) necessarily excludes a reimbursement claim that is premised on the payment of a secured debt. In our opinion, "[t]he definition of reimbursement in section 3.408[b] 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.

Bigelow, 286 S.W.3d at 622.

Additionally, in order for a statute to completely replace a common law remedy, the statutory provisions must expressly provide that the statutory scheme is exclusive.

In the case of *Holmans v. Transource Polymers, Inc.*, 914 S.W.2d 189 (Tex. App. – Ft. Worth 1995, writ denied), the Court held that "abrogation by implication of a cause of action and remedy recognized at common law is disfavored and requires a clear repugnance between the common law and statutory causes of action." [citing *Coppedge v. Colonial Savings and Loan Ass'n*, 721 S.W.2d 933, 938 (Tex. App. – Dallas 1986, writ ref'd n.r.e.)]

Finally, in the case of *Sanders v. Construction Equity, Inc.*, 45 S.W.3d 802, 803-04 (Tex. App. – Beaumont 2001, no pet.)(op. on reh'g), the Court of

Appeals 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)."

III. REIMBURSEMENT UNDER THE FAMILY CODE

A. New Statutory Provisions

Effective September 1, 2009, for all cases filed after that date, the Family Code, beginning at Subchapter E, contains the following provisions:

§ 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.

§ 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 [Note: old §3.408(b)(1)];
(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 [Note: old §3.408(b)(2)];
(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; and
(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. [Note: old §3.408(c)]
(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. (Emphasis added.)

(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 benefitted marital estate.
(e) The party seeking an offset to a claim for reimbursement has the burden of proof with respect to the offset. [Note old §3.408(e); Now §3.402(b)]

§ 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 benefitted estate by the contributing estate. The claim matures on dissolution of the marriage or the death of either spouse.

§ 3.405. Management Rights

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

§ 3.406. Equitable Lien

(a) On dissolution of a marriage, the court may impose an equitable lien on the property of a benefitted 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.

(But see discussion below regarding equitable liens on property designated as homestead.)

§ 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.

§ 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.

IV. COMMON LAW REIMBURSEMENTS

A. In General

Common law reimbursement between the three marital estates is purely an equitable one. The contexts in which a common law reimbursement claim may be asserted between the marital estates are numerous. However, as indicated above, §3.409 of the Family Code has statutorily abolished reimbursement claims for the payment of child support, alimony, spousal maintenance, living expenses of a spouse or child of a spouse, the payment of a student loan owed by a spouse, contributions of property of a nominal value and the payment of a liability of a nominal amount.

B. Overview

The Family Code defines marital estates as: (1) the community estate; (2) Husband's separate property estate; and (3) Wife's separate property estate.

The cases of *Garcia v. Garcia*, 170 S.W.3d 644 (Tex. App. – El Paso 2005, no pet.), *Hailey v. Hailey*, 176 S.W.3d 374 (Tex. App. – Houston [1st Dist.] 2004, no pet.), *Garza v. Garza*, 217 S.W.3d 538 (Tex. App. – San Antonio 2006, no pet.) and *Phillips v. Phillips*, 296 S.W.3d 656 (Tex. App. – El Paso 2009, pet. denied)

contain a good overview of the basic principals involving common law reimbursement. These cases and others provide that:

1. The rule of reimbursement is purely an equitable one and a court of equity is bound to look at all facts and circumstances and determine what is fair, just and equitable. *Penick v. Penick*, 783 S.W.2d 194, 197 (Tex. 1988); *Vallone v. Vallone*, 644 S.W.2d 455, 458 (Tex. 1982); *Phillips*, 296 S.W.3d at 664.
2. It is not an interest in property or an enforceable debt, *per se*, but an equitable right which arises upon dissolution of the marriage through death or divorce. *Id.*
3. An equitable right of reimbursement arises when the funds or assets of one estate are used to benefit and enhance another estate without itself receiving some benefit. *Id*.
4. A claim for reimbursement includes payment by one marital estate of the unsecured liabilities of another marital estate. *Id.*
5. The trial court resolves a claim for reimbursement by using equitable principles, including the principle that claims for reimbursement may be offset if the court determines it to be appropriate. *Id.* (Tex. Fam. Code Ann. §3.402(b)).
6. Benefits for the use and enjoyment of property may be offset against a claim for reimbursement for expenditures to benefit a marital estate. . . *Id.* (Tex. Fam. Code Ann. §3.402(c) with limitation).
7. The party seeking reimbursement has the burden of pleading and proving that the expenditures and improvements were made and that they are reimbursable. *Id. Vallone*, 644 S.W.2d at 459; *Gutierrez v. Gutierrez*, 791 S.W.2d 659, 663 (Tex. App. – San Antonio 1990, no writ).
8. Reimbursement is not available as a matter of law but lies within the discretion of the court. *Zieba v. Martin*, 928 S.W.2d 782, 787 (Tex. App. – Houston [14th Dist.] 1996, no writ)(op. on reh'g); *Vallone*, 644 S.W.2d at 459.
9. An equitable claim for reimbursement is not merely a balancing of the ledgers between the marital estates. *Penick*, 783 S.W.2d at 198.
10. The discretion to be exercised in evaluating a claim for reimbursement is equally as broad as the discretion exercised in making a just and right division of the community estate. *Penick*, 783 S.W.2d at 198; *Gutierrez*, 791 S.W.2d at 663; *Zieba*, 928 S.W.2d at 787.
11. Mathematical precision in determining the amount of a reimbursement claim is not required. *Smith v. Smith*, 715 S.W.2d 154 (Tex. App. – Texarkana 1986, no writ) and *Gutierrez*, 791 S.W.2d at 663.

According to *Penick v. Penick*, 783 S.W.2d at 198, because the principals of reimbursement provide that it is an equitable claim and not a claim available as a matter of law, reimbursement is another element, along with the earning capacity of the spouses, length of marriage, age, health and education of the spouses, business opportunities, and employability of the spouses, etc. that a court should consider in awarding a reimbursement claim and determining the amount of the award.

Finally, in *Anderson v. Gilliland*, 684 S.W.2d 673 (Tex. 1985), the Supreme Court 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. Likewise, it is necessary to ascertain that the benefitted estate pays no less than it has been benefitted. *Id*. at 675.

C. When a Claim Arises

A claim for reimbursement, both at common law and under the Family Code, arises in one of the following situations:

1. When one marital estate utilizes its funds or assets to pay the debts and liabilities of another marital estate. Tex Fam. Code Ann. §3.402(a)(1),(3),(4),(5),(6),(7) and (9);
2. When funds belonging to one marital estate are used to make capital improvements to another marital estate. Tex. Fam. Code Ann. §3.402(a)(8);
3. When a spouse is inadequately compensated for his/her time, toil, talent and effort by a business entity under the control and direction of that spouse. Tex. Fam. Code Ann. §3.402(a)(2); and
4. "When community time, talent and labor are utilized to benefit and enhance a spouses' separate estate, beyond whatever care, attention and expenditure are necessary for the proper maintenance and preservation of the separate estates, without the community receiving adequate compensation." *Vallone*, 644 S.W.2d at 459.

In *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984), the court held that "the community will be reimbursed for the value of time and effort expended by either or both spouses to enhance the separate estate of either,

other than that reasonably necessary to manage and preserve the separate estate, less the remuneration received for that time and effort in the form of salary, bonus, dividends and other fringe benefits, those items being community property when received." *Jensen*, 665 S.W.2d at 109.

The first form of reimbursement involves the use of money to pay the debts of a marital estate, and in fact out of the nine (9) types of statutory reimbursement claims, seven (7) of them involve the use of money belonging to one marital estate for the benefit of another marital estate.

The second form of reimbursement, both statutorily and at common law, involves the construction of capital improvements to the benefit of a marital estate.

The final two forms of reimbursement involve the utilization of community time and effort for which there has been inadequate compensation paid to the community estate for such time and effort.

When analyzing a potential reimbursement claim, the questions that should be considered are: (1) Is reimbursement available; (2) who has the burden of pleading and producing evidence; (3) how is it measured; (4) if applicable, has there been an enhancement in value to the benefited estate; (5) if applicable, did the expenditures exceed the benefits received; and (6) what offsetting benefits are available and how do you prove them? Because the award of a reimbursement is determined in the sole discretion of the trial court, the trial court cannot be reversed with regard to an error involving a reimbursement claim unless it results in the overall property division being an abuse of discretion.

V. PLEADINGS, BURDEN OF PROOF AND EVIDENTIARY ELEMENTS

A. Pleadings

1. General

Reimbursement must be pled in order for it to be awarded. Where there is no pleading whatsoever for reimbursement, a property division which includes reimbursement will be reversed. *Gay v. Gay*, 737 S.W.2d 94, 96 (Tex. App. – El Paso 1987, writ denied).

In *Vallone v. Vallone*, *supra*, the wife was deemed to have waived her claim for reimbursement for the value of uncompensated community time, talent and labor expended by the husband in enhancing his separate estate because she pled only for reimbursement for community funds expended, and not for the husband's toil. In the subsequent case of *Jensen v. Jensen*, *supra*, the wife, who was seeking reimbursement for the uncompensated community time, talent and labor expended by the husband to enhance the husband's separate estate, was given a remand "in the interest of justice," to allow her to replead her case and seek reimbursement upon retrial.

In *Holloway v. Holloway*, 671 S.W.2d 51 (Tex. App. – Dallas, 1983, writ dism'd) the appellate court found that the appellant waived her claims for reimbursement when she failed to affirmatively plead her reimbursement claims and failed to request or submit special issues on some of the claims.

In *Lindsay v. Clayman*, 151 Tex. 593, 254 S.W.2d 777 (1952), the Supreme Court said that "there being no pleadings, evidence, or jury finding on which to base any judgment for any reimbursement of the community estate, no judgment can be given in favor of Petitioner. . ." In *Lindsay*, the Petitioner had no pleadings requesting reimbursement for the enhanced value as a result of improvements made to separately owned lots, but instead had simply requested, in the prayer, reimbursement for the cost of the improvements, which was the incorrect request for relief. *See also Burton v. Bell*, 380 S.W.2d 561 (Tex. 1964) and *Morgan v. Morgan*, 725 S.W.2d 485 (Tex. App. – Austin 1987, no writ).

Notwithstanding the "in the interest of justice" remand in *Jensen*, reimbursement claims should always be pled.

B. Burden of Proof

The statutory reimbursement provisions do not address who has the burden of proof with respect to a reimbursement claim. However, the case law is clear. The party claiming the right of reimbursement has the burden of pleading and proving "the expenditures and improvements were made and are reimbursable." *Vallone*, 644 S.W.2d at 459.

In *Gutierrez v. Gutierrez*, *supra*, the court stated that the party seeking reimbursement has the burden to prove that he/she is entitled to it. In *Zeptner v. Zeptner*, 111 S.W.3d 727 (Tex. App. – Ft. Worth 2003, no pet.), the court stated that "the party claiming reimbursement bears the burden of establishing the net benefit to the payee estate." (*See also Zieba v. Martin*, 928 S.W.2d at 788-89.

Additionally, if the marital estate seeking reimbursement is the separate estate of a spouse, that spouse also has the burden to prove, by clear and convincing evidence, that separate funds were used for the benefit of the community estate or the other spouse's separate estate. *Beard v. Beard*, 49 S.W.3d 40 (Tex. App. – Waco 2001, pet. denied).

C. How and When to Measure

1. Principal Payments

The Family Code reimbursement provisions draw a distinction between the use of money belonging to one marital estate to pay the unsecured liabilities of another marital estate as opposed to the use of money belonging to one marital estate to pay the principal amount on a loan secured by real property owned by another marital estate.

In the first instance, no distinction has been drawn with respect to the principal amount of an unsecured debt versus the interest that accrues on the unsecured debt. Tex. Fam. Code Ann. §3.402(a)(1) and (9). Therefore, do the common law principles apply when seeking reimbursement under these two statutory provisions for the interest paid on the unsecured debt?

In the later situation, the Family Code provides for reimbursement for the reduction of the principal amount of a debt which is secured by real property. In §3.402(a)(3),(4),(5),(6) and (7), the Family Code provisions specifically reference "reduction of the principal amount" of a debt as a basis for reimbursement. Again, would the common law apply when seeking reimbursement on the interest paid on this type of loan.

In 1988, the Texas Supreme Court decided *Penick v. Penick*, 783 S.W.2d 194 (Tex. 1988). Prior to the *Penick* decision, the Appellate Courts had been inconsistent in their treatment of reimbursement claims for the payment of the principal amounts on a pre-marriage liability. However, *Penick* finally set forth the principle that reimbursement for principal payments was to follow the same standard set out in the Supreme Court decision in *Anderson v. Gilliland*, *supra*.

The *Penick* Court said:

> Of these two cases, *Anderson* is more closely analogous to our present case.
>
> . . . In resolving this conflict we emphasized the equitable nature of the claim and selected what we considered the fairest measure, holding 'that a claim for reimbursement for funds expended by an estate for improvements to another estate is to be measured by the enhancement in value to the benefited estate.' *Anderson*, 684 S.W.2d at 675.
>
> The court of appeals, however, distinguishes *Anderson* because it concerned reimbursement for a capital improvement to separate property rather than reimbursement for a prenuptial purchase money debt. A distinct and different set of rules have evolved for evaluating a reimbursement claim for capital improvements as opposed to one for purchase money.
>
> Why we should have two distinct sets of rules for two very similar claims for reimbursement is another matter which is not entirely clear. . . . We view the advancement of funds by one marital estate to another under either transaction, payment of a purchase money debt or as a capital improvement, as essentially identical and therefore subject to the same kind of measurement.

Id. At 197.

Other than the court's reference to its holding in *Anderson v. Gilliland*, the *Penick* decision makes no further reference to "enhancement in value" and instead has a detailed discussion involving offsetting benefits, and a need to show that the expenditures exceeded the benefits received. Therefore, in asserting a claim for reimbursement for the payment of principal amounts due on a debt owed by one of the marital estates, one is left with the following questions:

1. Does the contributing estate have to show an enhancement in value to the receiving estate as a result of the principal payments made on the loan (in accordance with *Anderson v. Gilliland*, *supra*) and
   that the expenditures made by the contributing estate exceeded the benefits received by the contributing estate?

   Or is proof of the latter sufficient?

2. If it is shown that the expenditures made on the principal amount of the loan are in excess of the benefits received, is this evidence of enhancement in value?
3. If a showing of enhancement in value is required, what does the enhancement have to be?

   - an increase in the value of the property; or
   - a reduction in the outstanding principal amount on the loan; or
   - both?

4. What happens if you prove that the principal amount of the loan was reduced, but due to market conditions, there was no enhancement in value from the fair market value

perspective? Does this defeat the reimbursement claim?

2. What about Interest, Taxes, and Insurance?

In light of the new Family Code provisions, does a marital estate have a common law claim for reimbursement as a result of the payment of interest, taxes (ad valorem) and insurance on behalf of another martial estate? The simple answer is yes.

The statutory provisions do not mention interest, and therefore, under the rules of statutory construction, the reimbursement for the payment of interest expense is not precluded from a claim for reimbursement.

The problem with obtaining a reimbursement award for the payment of interest expense associated with a debt that is secured by a lien on real property becomes one of trying to defeat the claim of offsetting benefits, primarily through the utilization of the interest expense as a tax deduction on the parties' tax return. (Use and benefit would not be an offset if the property is the primary or secondary residence due to the statute, or if it was a rental property.)

However, it would seem that the offsetting benefits argument for the payment of interest expense on the unsecured debt owed by a marital estate is impaired due to the fact that, as a general rule, interest expense on unsecured debt such as credit cards, is not tax deductible. On the other hand, if the interest expense is in the nature of investment interest expense, which may be deductible, then the offsetting benefits arguments would be revived.

With respect to a reimbursement claim involving the payment of ad valorem taxes, the payment of ad valorem taxes are generally deductible on a primary residence, secondary residence or rental property. Therefore, the offsetting benefits argument becomes even stronger and will limit or may, depending upon the circumstances, completely eliminate the reimbursement claim.

As it relates to the payment of insurance, unless the insurance premiums paid involve rental property, insurance premiums paid on a homeowner's insurance policy for a primary or secondary residence are not tax deductible. Therefore, because the "use and benefit" argument does not exist for a primary or secondary residence, reimbursement for the payment of homeowner's insurance premiums by one marital estate for the benefit of another marital estate would seem to be more attainable.

In the case of *Cook v. Cook*, 665 S.W.2d 161 (Tex. App. – Ft. Worth 1983, writ ref'd n.r.e.) the court, when discussing the way to measure a reimbursement claim involving the payment of principal payments as opposed to payments of interest and taxes, stated:

> For the reasons above stated, we respectfully decline to follow the rule announced in the *Pruske* and *Brooks* cases for we believe the proper rule to be as stated in *Colden v. Alexander*, 171 S.W.2d 328, 334 (Tex. 1943):
>
> [W]here the husband purchases land on credit before marriage, and pays the purchase-money debt after marriage out of community funds, equity requires that the community estate be reimbursed. . . .The rule of reimbursement, as above announced, is purely an equitable one (citation omitted). Such being the case, we think it would follow that interest paid during coverture out of community funds on the prenuptial debts of either the husband or the wife on land, and taxes, would not even create an equitable claim for reimbursement, unless it is shown that the expenditures by the community are greater than the benefits received. (Emphasis added).
>
> Janet Cook contends that application of the rule of *Colden v. Alexander*, *supra*, is inequitable where the property in question is non-income producing property such as the Montecito property. . . The rule of *Colden v. Alexander*, *supra*, contemplates a benefit to the community without specification of the form of the benefit.

As will be pointed out later, the *Cook* holding was correct in its analysis of a reimbursement involving interest and taxes. However, its analysis and ruling on reimbursement claims involving the reduction of principal amounts on a pre-marriage loan was incorrect. (*See Penick v. Penick*, 783 S.W.2d 194 (Tex. 1988).)

D. Enhancement in Value

1. How to Measure

In accordance with §3.402(d), reimbursement for the expenditure of funds by one marital estate for improvements to another marital estate is to be measured by the enhancement in value to the benefitted marital estate. This statutory provision is in line with the prior decisions including *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).

Prior to the *Anderson v. Gilliland* decision, there had been some confusion as to whether enhancement in value or the cost, whichever was less, was the measure for reimbursement. This confusion was the result of purportedly conflicting statements made by the *Dakan*

court. However, since the *Anderson v. Gilliland* decision, and now by the statutory provisions, enhancement in value is the measure for this type of reimbursement claim.

2. When to Measure the Enhancement

Another issue that exists in determining the enhancement in value, is when do you determine the amount of enhancement? Is it immediately following the enhancement or is it at the time of the termination of the marriage?

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 placed thereon."

In *Anderson v. Gilliland*, *supra*, a probate case, the Supreme Court indicated that the courts are to measure the enhanced value as of the date of death of a spouse.

Since the claim for reimbursement does not mature until termination of the marital relationship (i.e. divorce or death), then measuring enhancement in value on the date of death or divorce would seem to be the logical answer.

Furthermore, Tex. Fam. Code Ann. §3.404 provides that "the claim (for reimbursement) matures on dissolution of the marriage or the death of either spouse." However, this provision logically goes towards when the claim can be asserted and not on what date the enhancement in value is to be determined.

For example, what if at the time of marriage Husband owns an unimproved lot and three years later the parties decide to build, with community funds, a new residence on the lot. The new house is completed after two years of construction and the parties move in and reside in the property for ten years at which time a divorce is filed. While the reimbursement claim matures on the filing of the divorce, what date do you use to determine the enhancement in value to the Husband's separate property lot? Is it at the time of divorce, as the *Dakan* and *Anderson* cases seem to suggest which is ten years after the completion of the residence? Should it be at the time of the completion of the construction? What if at the time of completion of the construction, the value of real estate was at an all time high but, ten years later, the value of residential property, in general, had substantially diminished?

What if, using the same time line as above, the house was already built at the time of marriage, but two years were spent doing a complete remodeling of the house? Again, what date(s) do you use?

In the first example, it would seem that the best way to proceed would be to present evidence of the value of the unimproved lot immediately prior to construction and value the property immediately after the completion of the improvements. Additionally, in following *Dakan* you would probably also want to put on evidence as to the value of the property both improved and unimproved as of the current date (i.e. as close to the date of divorce as possible).

This author found only three cases that discuss this issue - when (i.e. what date you should use to determine the enhancement in value). They are *Girard v. Girard*, 521 S.W.2d 714 (Tex. Civ. App. – Houston [1st Dist.] 1975, no writ), *Ogle v. Jones*, 143 S.W.2d 644 (Tex. Civ. App. – Waco 1940, writ ref'd), and *Nelson v. Nelson*, 193 S.W.3d 624 (Tex. App. – Eastland, no pet.) The appellate courts either do not discuss the issue, presumably because there was no evidence or insufficient evidence introduced at trial on this issue, or the evidence was unclear or the point was never raised.

In *Girard v. Girard*, *supra*, Mr. Girard owned an improved lot in the River Oaks area in Houston at the time of marriage. Following the parties' marriage, the existing house was torn down and a new house was built. Construction began in January 1969 and was completed in May 1970. The divorce was apparently filed in 1972 (no specific date is indicated) and the trial was apparently in 1974 (again, no specific date is mentioned). At trial, the parties stipulated to the accuracy of the appraisals prepared by Robin Elverson. Those appraisals provided Ms. Elverson's opinions as to the value of the lot both unimproved and improved on the date construction was completed (i.e. 1970) and as of February 6, 1974.

The Appellate Court found that there was sufficient evidence in the record to support a reimbursement award based upon enhancement in value. However, the Court did not specifically address the question of at what time is the enhancement in value to be determined?

Ogle v. Jones involved the enhancement in value of the deceased husband's separate real property. In this case, the widow had a life estate in the homestead of the husband's separate property. The separate property had been improved during the parties' marriage. The appellee (the only child of the deceased husband and her spouse) however, argued that the widow's right of recovery could not be determined until the expiration of her homestead right in the property, rather than as of the date of death. (Emphasis added.) The Appellate Court stated as follows:

> Appellees suggest that the widow's right of recovery in such case cannot be determined until the expiration of her homestead right in the property, because the estate of the deceased husband should be held liable only to the extent of the enhancement in value as of the time it receives possession of the property.

> **The general rule, however, is that the extent of the enhancement in value and the consequent measure of the widow's recovery is determined as of the time of partition.** (Emphasis added.)

In *Nelson v. Nelson*, *supra*, Kenneth Nelson and Bessie Mae Nelson were married on April 9, 1995. Prior to the marriage, Kenneth purchased five acres of land from his parents and at the time of marriage owed $8,000.00 toward the purchase price. Bessie Mae owned property prior to marriage which was sold, and the sale proceeds of $17,500.00 were deposited into Kenneth's checking account.

Several months before marriage, the parties began construction of a home on Kenneth's five acre tract. The construction was essentially completed at the time of their marriage. The parties did most of the work on the construction themselves, prior to marriage, and $16,616.51 from Bessie's house sale proceeds were used on the construction. The trial court awarded Bessie reimbursement of $16,600.00 as a result of the use of her separate funds toward the pre-marriage construction of the residence.

On appeal, Kenneth, argued that because the funds were used before their marriage, and based upon the statutory definition of "marital estate", Bessie was not entitled to reimbursement.

First, the court, in analyzing the provisions of the Family Code, indicated they did not believe that the Legislature intended that a reimbursement claim would be limited to the two claims then in existence in §3.408 (now §3.402). As a result, the Appellate Court ruled that the trial court had the authority to award reimbursement for pre-marital expenditures made to benefit Kenneth's separate property.

Kenneth next argued that the trial court erred in awarding a reimbursement for the enhancement in value to his property because the appellee failed to prove the enhancement in value of the property. The court, in following *Anderson v. Gilliland*, *supra*, indicated that "the enhancement in value is the difference between the fair market value before and after any improvements." *Anderson*, 684 S.W.2d at 675.

Kenneth argued that Bessie failed to prove the value of the property on April 9, 1995, which was the date of the parties' marriage. Bessie, without objection, introduced the then current tax assessed value for the property which indicated that the value of the improvements was $43,750.00

During the trial, it was clear that the testimony did not establish the value of the property at the time of the parties' marriage (April 9, 1995), but instead valued the property on January 1, 1995, the time when construction began. Additionally, all the trial court's findings of value were as of the date of marriage. There were no trial court findings prior to that time. Furthermore, the parties did not disagree as to the value of the property on January 1st. Both parties agreed that the value of the property should be as of January 1st. However, because the trial court's findings were as of the date of marriage, the Appellate Court ruled that the reimbursement award for the enhancement in value to Kenneth's separate property was an abuse of discretion and the Court remanded the case back to the trial court.

Notwithstanding the *Dakan* and *Anderson* decisions, it would appear that the proper date to measure the enhancement in value is undecided. This author believes that the proper date to measure the enhancement in value is fact specific and should be determined based on the circumstances of the particular case. Going back to the example, would it not be more prudent to measure the enhancement value on both dates (i.e. on completion of the construction and at the time the divorce is filed) in light of the fact that the trial courts have an enormous amount of discretionary power in determining these claims?

3. Evidentiary Issues

(a) Elements of Proof

As a result of the question involving what date do you use when asserting a reimbursement claim for enhancement in value due to the construction of capital improvements, the evidentiary issues could be summarized as follows:

Need to prove:

(1) Value of property unimproved;
(2) Value of property improved;
(3) Cost of the improvements; and
(4) The improvements are capital improvements.

Questions:

(1) What if the lot was already improved?
(2) What if you have a complete remodeling?
(3) What dates do you use?
    - Date of filing of divorce (improved and unimproved)
    - Date immediately before and after the completion of the improvements regardless of date of filing
    - All four dates
(4) Do you always show the value of the property as unimproved?

(5) Can the enhanced value ever be the cost of the improvement and therefore support a reimbursement award?

(b) Testimony

Who is allowed to testify with respect to the enhancement in value?

In most cases, the parties will retain appraisers to provide expert testimony on the issue. However, in the cases of *Snider v. Snider*, 613 S.W.2d 8 (Tex. Civ. App. – Dallas 1981, no writ) and *Smith v. Smith*, 715 S.W.2d 154 (Tex. App. - Texarkana 1986, no writ), the parties testified as to their opinions on the enhancement in value.

In *Snider v. Snider*, the wife testified, without objection, that in her opinion the enhanced value to her deceased husband's property was equal to the cost of the improvements. The reimbursement award to wife was affirmed.

In *Smith v. Smith*, both parties testified as to their opinion on the enhancement in value to Mr. Smith's property with and without the improvements. The trial court's award of reimbursement for the enhancement in value to the husband's property was affirmed on appeal.

Two questions arise from these holdings. The first is can an award of reimbursement for enhancement in value be the same as the cost of the improvements? The *Snider* case was decided before the Supreme Court's decision in *Anderson v. Gilliland*, *supra*. However, would it not be plausible that given the state of the economy and other market factors that the enhancement in value would equal the cost of the improvements?

The second question is can the testimony of the parties, without expert testimony, be sufficient to sustain a reimbursement award for enhancement in value? In *Smith v. Smith*, which was decided after the *Anderson* decision, the wife, the non-owner spouse, gave her opinion as to the enhancement in value to her husband's separate property. Is this proper evidence or does it conflict with the principle that only an owner of the property can provide his or her opinion as to value, and even then only when he/she has a proper basis in which to form an opinion as to value?

See also *Kamel v. Kamel*, 760 S.W.2d 677 (Tex. App. – Tyler 1988, writ denied) where the trial court also allowed the non-owner spouse to testify and give her opinion as to the enhancement in value to her husband's separate property as a result of the improvements constructed thereon.

VI. OFFSETS

A. General

Since 2001, the Family Code has specifically provided that the party seeking an offset to a reimbursement claim has the burden of proof with respect to the offset. (Currently §3.402(c) and formerly §3.408(c).

One of the first cases to address offsets is *Colden v. Alexander*,141 Tex. 134, 171 S.W.2d 328 (1943), and the need to show that expenditures exceeded benefits received. However, probably the most important decision to discuss offsetting benefits is *Penick v. Penick*, 783 S.W.2d 194 (Tex. 1988).

In *Penick*, community funds (mostly income from husband's separate property) were used to retire husband's separate property indebtedness. The principal question was whether or not the resulting tax benefits to the community estate should offset the reimbursement claim. The Court of Appeals held that the reduction of principal indebtedness was not subject to any offsets. The Supreme Court disagreed.

After disregarding the distinction between reimbursement claims for purchase money debt and for capital improvements, the Supreme Court then looked to the Court of Appeals' conclusion in *Penick* that the measure for reimbursement for sums used to reduce principal indebtedness on "separate" debts was to be without regard to benefits received in return and its conclusion that the trial court had abused its discretion in considering such benefits. The *Penick* Court disagreed with the Court of Appeals' conclusion:

> The outright rejection of offsetting benefits is inconsistent with the equitable nature of a claim for reimbursement. Most recently in *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. Sup. 1984) we embraced the concept of offsetting benefits. In *Anderson v. Gilliland*, we did not consider or mention offsetting benefits but did emphasize that reimbursement is an equitable claim. As such, a court of equity is bound to look at all the facts and circumstances and determine what is fair, just, and equitable. 27 Am. Jur. 2d, Equity Section 102 at 624 (1966). The rule applied here by the Court of Appeals does not serve equity because it forecloses consideration of some facts and circumstances material to the reimbursement claim.

The Court stated further:

> In the final analysis, great latitude must be given to the trial court in applying equitable

> principles to value a claim for reimbursement....The discretion to be exercised in evaluating a claim for reimbursement is equally as broad as that discretion subsequently exercised by the trial court in making a "just and right" division of the community property. Tex. Fam. Code Ann. Section 3.63 (Vernon Supp. 1988). In the present case the trial court did not abuse its discretion by considering the tax benefits returned to the contributing community estate and the effect the depreciation deduction had on the value of Robert's separate property.

B. Should Offsets be Pleaded?

1. Affirmative Defenses

Under Rule 94 of the Texas Rules of Civil Procedure, a party is required to "set forth affirmatively. . . any other matter constituting an avoidance or affirmative defense." Therefore, notwithstanding the fact that "offsets" are provided for by statute, is a party required, or should a party plead "offsets" to a reimbursement claim?

The only case that this author has found that specifically discuss the requirement, or lack thereof, to plead offsetting benefits is the case of *Hilton v. Hilton*, 678 S.W.2d 645 (Tex. App. – Houston [14th Dist.]1984, no writ). *See also Morgan v. Morgan*, 725 S.W.2d 485 (Tex. App. – Amarillo 1987, no writ) which followed the *Hilton* holding.

In the *Hilton* case, Mr. Hilton had generally pled for reimbursement to his separate estate as a result of the sale of his separate property stock to pay community debts. There was no specific discussion in the case as to what community debts were paid. Nevertheless, the court ordered reimbursement to Mr. Hilton's separate estate in the form of awarding him the same number of shares of stock in Hilton Corporation that he had originally sold in order to pay community debts.

On appeal, Mrs. Hilton argued that Mr. Hilton's pleadings were inadequate to support the trial court's award of reimbursement to Mr. Hilton because Mr. Hilton had failed to allege that the expenditures made by his separate estate for the benefit of the community estate were greater than the benefits received by his separate estate.

In other words, although Mr. Hilton had pled reimbursement in general, he did not plead that the expenditures exceeded the benefits.

The Appellate Court ruled that "the spouse who expends his or her separate funds to reduce the community estate indebtedness is entitled to reimbursement **without the necessity of pleading or proof that such expenditures exceeded the benefits received."** (Emphasis added.) *Hilton*, 678 S.W.2d at 648.

The Appellate Court went on to state that "a pleading that the benefits bestowed by the expenditure is greater than the benefit received is unnecessary because a separate estate which is not specifically subject to community liabilities cannot directly benefit from the use of separate funds to retire that community debt." *Id.*

2. Gifts

Is "gift" a viable "offset" to a reimbursement claim and, if so, should it be pled as an affirmative defense?

In *Hilton v. Hilton*, *supra*, Mrs. Hilton also tried to argue that the expenditures made by Mr. Hilton's separate property for the benefit of paying off community debt constituted a gift of his separate property to the community estate. The Appellate Court ruled that Mrs. Hilton waived this contention because she had no pleadings or presented no proof on her gift theory at the trial court. [*See also Beard v. Beard*, 49 S.W.3d 40 (Tex. App. – Waco 2001, pet. denied) where the wife failed to allege gift in her pleadings and therefore, it was waived.]

Obviously, when trying to defeat a reimbursement claim as a result of the use of separate funds for the benefit of the community estate, it would be hard to use, as an offset or affirmative defenses, "gift" since a party cannot make a gift to the community estate.

However, a gift would seem to be a viable offset or affirmative defense to a reimbursement claim if the community estate used funds for the benefit of a spouse's separate property estate or, if separate funds from one marital estate were used for the benefit of other spouse's separate estate. In those situations, the argument of gift would be a viable defense. Nevertheless, it is this author's opinion that offsetting benefits, either generally or specifically, should be pleaded.

3. Liens on Homesteads

The Family Code authorizes the trial court to place an equitable lien on the property subject to the reimbursement claim. However, it appears that the holding in *Heggen v. Pemelton*, 836 S.W.2d 145 (Tex. 1992), discussed later in this article, does not allow an equitable lien to be placed on a homestead, unless it meets the conditions set forth in the Texas Constitution. Therefore, should "homestead" be pled as an affirmative defense to such a lien?

In the case of *Smith v. Smith*, *supra*, the Appellate Court found that Mr. Smith waived his right to assert homestead as a defense against the equitable lien placed on his property because he failed to plead and present evidence of homestead during the trial.

C. What Offsets are Available?

What are the offsets available to a spouse seeking to negate or defeat a reimbursement claim? While the type of offset available will be fact specific, offsets will usually fall into one or more of the following categories:

1. Use and benefit of the property (subject to the statutory exception);
2. Receipt/use of the income stream generated by a property;
3. Tax benefits attributable to the property utilized by the parties on their federal income tax returns such as interest, expense, ad valorem taxes, and depreciation; and

4. Compensation received.

D. Competing Reimbursement Claims

In the case of *Hunt v. Hunt*, 952 S.W.2d 564 (Tex. App. – Eastland 1997, no writ), the trial court found that the community estate was entitled to be reimbursed in the amount of $47,765.73 for community funds spent by the appellee on his separate estate. However, the trial court allowed an offset of $16,213.16 against the reimbursement for separate funds that the husband had deposited into community bank accounts.

The Appellate Court, in affirming the trial court's offset, indicated that, in determining the community's equitable claim for reimbursement, the trial court was required to consider "all the facts and circumstances and determine what is fair, just and equitable. . ." We presume that the trial court properly exercised its discretion. . . Katherine has not shown a clear abuse of discretion." *Id*. At 569.

The offset as set forth in *Hunt* is an example of where a reimbursement claim might exist from one estate to another but there are other competing reimbursement claims or offsets not directly related to each other that the trial court has available to it in order to offset or set aside other reimbursement claims between the marital estates. In *Hunt*, it was presumably shown by clear and convincing evidence that the $16,213.16 was in fact the sole and separate property of the appellee at the time that the funds were deposited into community bank accounts.

E. Burden of Proof

Since 2001, the Texas Family Code makes it clear that the party asserting the offsets has the burden of proof to show what the offsetting benefits are and, if applicable, the amount of the offsetting benefit(s).

F. Use and Benefit

Prior to the 2009 amendments, former §3.408(d) provided that 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 2009 amendments specifically exclude a party from asserting "use and benefit" as an offset to a reimbursement claim as a result of expenditures made to benefit a martial estate, if the property the subject of the reimbursement claim was the parties' primary residence (presumably the marital residence) or was a secondary residence (presumably a vacation home) which was owned, in any proportion, by the separate estate of a spouse. Tex. Fam. Code Ann. §3.402(c).

VII. TYPES OF REIMBURSEMENT CLAIMS

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). A more detailed discussion of some of the more important or interesting reimbursement cases is set forth in Article XI.

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 1981, 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 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. *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*, 644 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.).

5. Reimbursement for Use of Separate Property for the Benefit of the Community Estate

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

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.o.j.).
    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. Cigainero*, 305 S.W.3d 798 (Tex. App. – Texarkana 2010, no pet.).

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).

B. Other Reimbursement Issues

1. Property Disposed of During Marriage

It has been specifically held that reimbursement is not available for improvements made to separately owned property which was lawfully disposed of during the marriage. *Jones v. Jones*, 804 S.W.2d 623 (Tex. App. – Texarkana 1991, no writ).

2. Interest on Reimbursement Awards

(a) Pre-Judgment Interest

The case of *Pearce v. Pearce*, 824 S.W.2d 195, 210 (Tex. App. – El Paso 1990, writ denied), suggests that a right exists to recover for pre-judgment interest on a reimbursement claim. In *Pearce*, the trial court denied the wife's request to amend her pleadings to seek pre-judgment interest on her reimbursement claim. The Appellate Court reversed the trial court, saying that the request to amend the pleadings to seek pre-judgment interest on the wife's reimbursement claim should have been granted. That indirectly suggests the court of appeals believed that the wife had such a claim.

(b) Post-Judgment Interest

A money judgment in favor of a spouse on a reimbursement claim must include interest at the statutory rate, compounded annually, in accordance with the Texas Finance Code, § 304.003 and § 304.006. *Kimsey v. Kimsey*, 965 S.W.2d 690 (Tex. App. – El Paso 1998, no writ) and *Gutierrez v. Gutierrez*, 791 S.W.2d 659 (Tex. App. – San Antonio 1990, no writ).

VIII. WHERE REIMBURSEMENT MIGHT BE AVAILABLE

A. Use of Community Credit

In *Thomas v. Thomas*, 738 S.W.2d 342 (Tex. App. – Houston [1st Dist.] 1987, writ denied), one of the issues was whether the community estate had a reimbursement claim where community credit was used to refinance a spouse's separate property debt. In *Thomas*, a debt of husband's separate property corporation was refinanced with husband's personal guarantee, which subjected the community estate to liability.

Justice Dunn, in her concurring and dissenting Opinion, stated:

> Neither the parties' research nor ours has revealed a Texas case deciding the question of whether the community has a right to reimbursement for the use of its credit to secure a loan to refinance the husband's separate property debts. However, I am not willing to state, at this time, that this new reimbursement theory is without merit. I would analogize this situation to cases where separate debts are discharged with community funds. See *Villarreal v. Villarreal*, 618 S.W.2d 99 (Tex. Civ. App. – Corpus Christi 1981, no writ); *Hawkins v. Hawkins*, 612 S.W.2d 682 (Tex. Civ. App. – El Paso 1981, no writ). However, there is an important difference between the case before us and cases involving the discharge of a separate debt with community funds. When 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.
>
> In the case before us, there is no testimony concerning the cost to the community resulting from the use of their credit to guarantee the refinancing of the separate property debt. Further, there is evidence in the record that even though the guarantee was for $2,200,000, and the net community assets were approximately $660,000, the appellant was nevertheless able to negotiate a loan from the River Oaks Bank & Trust Co. subsequent to the guarantee. The appellee has, therefore, failed to meet her burden of establishing the community's right to reimbursement for the use of the community credit.

B. Reimbursement for Payment of Sub-Chapter S Earnings

In *Thomas v. Thomas*, *supra*, the court held that retained earnings of husband's separate property Subchapter S corporation were neither separate property nor community property, since they were assets of a corporation and not assets of a spouse. This was true despite the fact that the corporation's earnings were reported on the spouse's federal income tax return and community funds were used to pay the income tax liability.

Question: If the community estate paid income tax on the earnings that remained inside husband's separate property corporation, would the community estate have a claim for reimbursement to the extent of the federal income taxes paid?

C. Use of Community Funds to Defend Litigation

As previously indicated, the use of community funds to pay for previously court-ordered child support or alimony payments is generally not reimburseable. However, what about the use of community funds for the purposes of prosecuting or defending a motion to modify those obligations which resulted from a prior marriage during an existing marriage? In *Farish v. Farish*, 982 S.W.2d 623 (Tex. App. – Houston [1st Dist.] 1998, no pet.) the trial court determined that the community estate had a claim for reimbursement from the appellant as a result of the use of community funds to pay attorneys' fees resulting from litigation involving his child support obligations from a prior marriage. Although the trial court did not order reimbursement of the $31,000.00 in legal fees that were expended by the husband, it clearly factored that amount of money when making a division of the community estate.

The Appellate Court, in affirming the trial court's right to factor in the use of community funds to pay attorneys' fees resulting from litigation involving child support obligations arising from a prior marriage stated as follows:

> Other than reflecting that the fees were related to modification and contempt proceedings, there is no indication in the record of who initiated the proceedings, the basis of the proceedings, what evidence was heard or who prevailed. There is no indication that the attorneys fees were incurred for the benefit of

> George's (the appellant) children from his prior marriage. . . Therefore, the trial court did not abuse its discretion by factoring in a reimbursement claim for $31,000.00 when it divided the community estate.

The Appellate Court went on to state, in a footnote, as follows:

> Our holding is not to be interpreted as stating that, had the record established that the attorneys fees were for the benefit of George's children, a claim for reimbursement would not lie. Rather, we base our holding on the state of the record before us and leave for another day the issue of whether a claim for reimbursement may attach to such fees.

IX. DISPOSITION, REMEDIES AND ENFORCEMENT

A. Disposition of Reimbursement Claims

As previously indicated, Texas recognizes three types of marital estates. They are the community estate, the separate estate of the husband and the separate estate of the wife. The principle of reimbursement applies to all three. Therefore, there may be claims for reimbursement from the community estate to the separate, from the separate estate to the community, and from the separate estate of the husband to the separate estate of the wife and vice versa.

As a general rule, you will have only the following types of reimbursement claim: (1) a claim for reimbursement for funds expended by an estate to pay another estate's debt, taxes, interest, and/or insurance; (2) a claim for reimbursement as a result of the expenditure of funds owned by one estate for improvement to real property which is owned by another estate; and (3) a claim for reimbursement as a result of the use by a spouse of his or her community time, talent, and labor or effort to benefit or enhance that particular spouse's separate estate.

Each one of these claims for reimbursement, as developed by case law, can be offset by showing that the contributing estate received a benefit as a result of the expenditure of funds and/or the use of a spouse's time, talent, and labor for the benefit of the receiving estate.

In § 7.007 of the Family Code, trial courts are required to "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..."

Furthermore, §3.402(b), in addition to instructing trial courts to use equitable principles when resolving reimbursement claims, provides the trial court with authority to offset competing reimbursement claims if the court believes that it is appropriate.

Finally, §7.008 authorizes the trial court to consider the tax consequences attributable to specific assets when dividing the parties' marital estates, including whether a specific asset will be subject to taxation and if so, when the tax will be required to be paid. This could be important in determining whether the trial court should award a reimbursement claim involving funds spent to maintain or improve rental property owned by a spouse's separate estate.

B. Money Judgments

While the reimbursement award is usually in the form of money or a money judgment, the trial court can award specific property in satisfaction of the reimbursement claims. *Hilton*, 678 S.W.2d at 649 (court awarded community shares of stock to husband to satisfy reimbursement claim in favor of husband's separate estate).

C. Judicial/Equitable Liens

Tex. Fam. Code Ann. §3.406, specifically provides the trial court with authority to 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."

There are a number of cases which, prior to the statutory provisions, discuss the trial court's ability to impose an equitable lien on real property to secure a reimbursement award. These cases include *Kamel v. Kamel*, *supra*, *Smith v. Smith*, *supra*, *Cook v. Cook*, *supra; Magill v. Magill*, *supra;* and *Kimsey v. Kimsey*, *supra.*

In *Jensen v. Jensen*, however, the Supreme Court specifically held that no equitable lien would be placed on Mr. Jensen's separate property stock to secure a reimbursement award. The cases subsequent to *Jensen* have distinguished this holding and the Family Code now provides that liens may be attached to the property of the benefited marital estate. Presumably, this would now include stock in a separately owned corporate entity.

D. What about the Homestead?

In the case of *Kamel v. Kamel*, *supra*, the trial court awarded an equitable lien to secure not only the interest in the homestead, but also a reimbursement award.

(Emphasis added.) *Smith v. Smith*, *supra*, and *Cook v. Cook*, *supra*, also approved an equitable lien on property. In *Kamel*, the court did state that a court has authority to place an equitable lien on one spouse's homestead if the lien secures the amount awarded to the other spouse "for his or her interest in the homestead." However, it did not directly discuss homestead as it relates solely to a reimbursement claim.

In *Smith v. Smith*, 715 S.W.2d at 158, Mr. Smith argued that the court could not provide an equitable lien against his property because it was his homestead and therefore was protected under the Texas Constitution, Article XVI, Section 50. The Appellate Court in discussing the *Eggemeyer v.Eggemeyer* decision, 623 S.W.2d 462 (Tex. App. – Waco 1981, writ dism'd) stated that the *Eggemeyer* court found that equitable liens on a homestead are proper to secure reimbursement for taxes and lien indebtedness. However, there are no cases that discuss equitable liens on a homestead which involve improvements. The *Smith* court held that the Constitution adds an additional requirement for improvement liens in that a lien on a homestead for improvements has to be in writing with the consent of both spouses.

The *Smith* court also discussed *Barber v. Barber*, 223 S.W 866 (Tex. Civ. App. – Ft. Worth 1920, writ dism'd) which specifically held that an equitable lien will not be allowed to secure the payments for improvements where the property is a homestead. Furthermore, the case of *McCanless v. Devenport*, 40 S.W.2d 903 (Tex. Civ. App. – Dallas 1931, no writ) also held that a lien would not attach for improvements to a homestead unless they were contracted for in writing as required by the Constitution.

The *Smith* court, after referring to these cases, held that the equitable lien granted against Mr. Smith's property should be affirmed because Mr. Smith failed to plead and prove that the property was in fact his homestead.

In the case of *Magill v. Magill*, 816 S.W.2d 530 (Tex. App. – Houston [1st Dist.] 1991, writ denied), Mr. Magill argued that the trial court erred in placing an equitable lien on his separate property because it was his homestead. However, there was no pleading or proof by Mr. Magill that the property was in fact his homestead and the trial court's equitable lien was affirmed.

In 1992, the Texas Supreme Court decided *Heggen v. Pemelton*, 836 S.W.2d 145 (Tex. 1992) which discussed the trial court's authority to grant an equitable lien to secure a reimbursement award on a party's homestead. In reversing and remanding the Appellate Court's decision, the Supreme Court held that:

1. "Although courts may impress equitable liens on separate real property to secure reimbursement rights, they may not impress such liens, absent any compensable reimbursement interest, simply to ensure a just and right division;
2. The lien imposed on Mrs. Heggen's separate property homestead was invalid for two reasons. First, it burdened her separate real property for reasons other than to secure Mr. Pemelton's reimbursement interest; that is the trial court impermissably imposed it to secure a just and right division, and second, **it imposed a lien on Mrs. Heggen's homestead that, based on the record, did not fit into any of the categories allowed by the Texas Constitution; that is, it was not a tax lien, it was not a purchase money lien, nor was it an improvement lien for which the "work and material [had been] contracted for in writing with the consent of both spouses."**

Id. At 146-47 (citing Tex. Const. Art. XVI, Section 50.)

In light of the *Heggen* decision, when faced with a reimbursement claim involving a homestead, the practitioner should probably plead and prove that the property which is subject to the reimbursement claim is the homestead of one of the spouses. As indicated, there are cases which have upheld the granting of an equitable lien against a spouse's separate property homestead because there was no pleading or proof that the property was the homestead. To this author's knowledge, in the context of a divorce action, the improvement cases which provide for an equitable lien for the sole purpose of securing a reimbursement award, do not have an executed contract for the improvements signed by both spouses. Therefore, and notwithstanding the Tex. Fam. Code Ann. §3.406(a), it would appear that an equitable lien on a homestead property, if pleaded and proven, would be constitutionally impermissable.

X. QUESTIONS AND OBSERVATIONS REGARDING THE STATUTORY PROVISIONS

A. What is the purpose of having both §3.402(a)(1) and (9)? Paragraph (1) is clearly the broader of the two. Is a distinction somehow being made between unsecured liabilities in (1) versus unsecured debt in (9)? Is there a difference? Neither provision makes the distinction between the principal amount of the debt versus the payment of interest.

B. §3.402(a)(2) appears to be an attempt to replicate the *Jensen* reimbursement claim. However, the statutory provisions do not

contain all of the elements of a common law *Jensen* claim.

1. The *Jensen* Holding

Under the holding of *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984), the Texas Supreme Court set out the following elements necessary to prove a reimbursement claim for the use of community time and effort to benefit a spouse's separate estate:

- the value of time and effort expended by either or both spouses;
- to enhance the separate estate of either;
- other than that reasonably necessary to manage and preserve the separate estate;
- less remuneration received for that time and effort in the form of salary, bonus, dividends and other fringe benefits (those items being community property when received.)

Presumably, everyone will agree that a claim for reimbursement under *Jensen* is not limited to a claim involving a business. There are cases involving *Jensen* claims that do not involve a spouse's separate property business entity.

However, contrary to the *Jensen* holding, the statutory provisions only discuss inadequate compensation for time, toil, talent and effort by a spouse by a business entity under the control and direction of that spouse.

The statutory provisions do not contain any reference to (i) an enhancement in the value of the business; (ii) a spouse's ability to spend a reasonable amount of his or her time to manage and preserve the separate estate; or (iii) the fact that the business has to be a separate property business entity of a spouse.

Also, what does "under the control and direction of" mean? Does it mean that a spouse need not have an ownership interest in the business? Logic would say that an ownership interest should be present. However, does a spouse have to be the majority owner? Are there not businesses under the "control and direction" of an individual who are not the owners of the business?

Therefore, is the statutory "inadequate compensation" claim for reimbursement a new type of claim that does not require evidence of two elements contained in the *Jensen* decision, i.e.:

- proof of what a reasonable time would be appropriate to manage and preserve the separate estate; and
- proof of the amount of enhancement to the separate property business.

Does the statute prohibit the use by a spouse of any of his time and effort to manage the business?

Is it necessary to prove the value of a spouse's time and effort? Or do you only have to prove that the spouse was inadequately compensated? Could the necessary proof needed to show inadequate compensation be determined by the type of business or industry in which a spouse is employed?

Finally, in light of the Code Construction Act and the appellate decisions regarding the non-abrogation of a common law cause of action, unless the statute specifically provides that the statutory cause of action is the exclusive remedy, doesn't the new statutory "*Jensen*" claim create a new form of reimbursement in addition to the common law *Jensen* reimbursement claim?

Since a literal reading of the statutory "inadequate compensation" reimbursement claim is not solely limited to a separately owned business, what if the business entity under the control and direction of a spouse is a community property business entity in which the spouse in control intentionally retains substantial cash within the business and who intentionally undercompensates him/herself for tax purposes, but who pays a lot of personal expenses through the business? In this situation, does the spouse not in control have a reimbursement claim for inadequate compensation?

C. Since §3.402(a)(3),(4),(5),(6) and (7) only speak in terms of the reduction of the principal amount of debt on property, does a claim for reimbursement also exist for the payment of the interest, insurance, and ad valorem taxes on the same piece of property? Would it be an error by the trial court to award both reimbursement claims to a marital estate, assuming all of the other elements necessary for such a recovery were proven (i.e. insufficient or no offsetting benefits)?

D. In §3.402(a)(7) does refinancing of the principal amount also include the right to recover reimbursement for the closing costs paid at the time of the refinancing?

E. What constitutes a "capital improvement" referred to in §3.402(a)(8)?

1. "Capital improvements" have been defined as costs related to making changes to improve capital assets, increase their useful life, or add to the value of these assets. Capital improvements may be structural improvements or other renovations to a building, or they may enhance usefulness or productivity.

Presumably, a capital improvement also means the same thing as a "capital expenditure." Capital expenditures, for tax purposes, include amounts paid or incurred to add to the value, or to substantially extend the useful life, of property owned by the taxpayer. (Internal Revenue Code § 263; Reg. § 1.263(a)-(1).

It should be noted that there is a distinction between capital improvements and deductible repairs. Deductible repairs would include, as it relates to a rental property or other investment property, wallpapering, painting, caulking, repairing a roof, repairing or replacing plaster, replacing retaining walls. Items that would be considered capital improvements are installation of new doors or windows, or replacement of doors or windows, replacement as opposed to repairing of a roof, installation of an air conditioner or ventilation system, installation of a burglar alarm system, or improvement of a storefront in the case of a retail shop. All of these expenditures can affect the outcome of a reimbursement claim under § 3.402(a)(8).

If capital improvements and capital expenditures are synonymous, and capital improvements are made to rental property owned by one of the spouse's separate estate, the cost for the capital improvement is added to the basis of the property and depreciated over a certain period of time based upon the life expectancy of the capital improvement. If the cost of the capital improvement is expended over the life of the property, then the marital estate that expended the money to make the capital improvement would receive the tax benefits as an offsetting benefit to any reimbursement claim.

If a capital expenditure is made for capital improvements to the parties' marital residence, rather than a rental property, then the only tax treatment that could be made would be to add the cost of the capital improvement to the basis of the property. In this event, since the basis will increase as a result of the expenditure, when the property is sold, the capital gains tax on the gain would be less as a result of the increase in basis.

When discussing offsets and tax benefits, one must also analyze the ultimate impact of taking of depreciation on the parties' federal income tax returns as a result of the ownership of rental properties by another spouse's separate property estate. In theory, at the time of the divorce, the community estate would argue that the separate estate has benefitted as a result of the use of community funds to maintain and pay for the separate property rental property. However, the spouse owning the separate property would argue that the community estate received all the rental income, as well as the deduction of depreciation and interest payments attributable to the rental property.

The real problem becomes when the rental property is sold, assuming it is sold for an amount in excess of basis, because of all the depreciation that was previously taken on the prior years tax returns is recaptured by the selling of the separate property estate.

Since §7.008 of the Family Code authorizes the trial court to consider the tax consequences attributable to specific assets when dividing the parties' marital estates, including whether a specific asset will be subject to taxation and, if so, when the tax will be required to be paid, would it not be important for the trial court to consider the future recapturing of depreciation by the separate estate as a part of an award of reimbursement involving rental property?

F. What is the purpose of §3.402(a)(9) ("unsecured debt") since it would seem to be covered in §3.402(a)(1) ("unsecured liabilities")?

There is case law that says a tax liability owed by a marital estate is not a debt. If true, then if the community property estate paid off a separate property tax liability of the other spouse, would this be a claim for reimbursement covered under §3.402(a)(1), but would not be reimburseable under §3.402(a)(9)?

G. §3.402(b) and (d) appear to be a codification of existing common law.

H. §3.402(c) is a codification of existing case law, with exception that the use and benefit by the community estate of a spouse's separate property as the parties' primary marital residence or of a secondary residence can not be used to offset a reimbursement claim made by the community estate.

I. §3.402(e) finally makes it clear that the marital estate seeking to offset a reimbursement claim has the burden to prove what the offset is and the value of the offset.

J. §3.406, makes clear that the trial court has the authority to impose an equitable lien on property owned by a marital estate to secure the reimbursement award owed to another marital estate.

However, as discussed above, it appears that the trial court does not have authority to impose an equitable lien on property that is proven to be a spouse's homestead unless it meets the requirements of the Texas Constitution. *Heggen v. Pemelton, supra.*

XI. CASE LAW

Below is a discussion of what are believed to be the most important or interesting cases that discuss reimbursement claims. The cases are set forth in date order.

A. *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. Civ. App. – Houston [14th Dist.] 1975, writ dism'd w.o.j.).

This case involved two types of reimbursements.

Mr. Horlock entered into the marriage with a sizeable separate property estate. During the marriage, Mr. Horlock sold some of his separate property real estate for $700,000.00 and, during the marriage, Mr. Horlock received payments of approximately $221,000.00 as a result of contracts that he had entered into prior to the marriage and for which Mr. Horlock had already performed under the contracts.

It was stipulated that Mr. Horlock deposited $921,000.00 of separate property funds into a community account and that the separate property funds were hopelessly commingled; therefore, tracing was impossible.

Nevertheless, the Court, as a 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 separate property and which he utilized for the benefit of the community estate."

The second form of reimbursement involved Mr. Horlock's ownership interest in a company called Collegiate Services Corporation. Prior to the marriage, Mr. Horlock owned approximately 800 shares of a company called Student Housing, Inc. During the marriage, Student Housing, Inc. merged with Collegiate Services Corporation and as a result of the merger, Mr. Horlock's stock in Student Housing was exchanged for 14,152 shares of Collegiate Services.

During trial, evidence was introduced to show that $100,000.00 of community funds were used to maintain Mr. Horlock's stock ownership position in Collegiate Services. Nevertheless, the trial court refused to award the community estate reimbursement. Furthermore, the trial court also determined, notwithstanding the evidence, that the 14,152 shares of Collegiate Services stock was community property instead of Mr. Horlock's separate property.

The Appellate Court in reversing, first found, as a matter of law, that the 14,152 shares of stock were Mr. Horlock's separate property. The Court then stated that "the community estate is entitled to reimbursement from the separate estate of the appellee (Mr. Horlock) for that portion of the community estate expended on the maintenance of the CSC investment. The appellant (Mrs. Horlock) had the burden to establish the right of equitable reimbursement of the community estate from the separate estate of the appellee (Mr. Horlock). The Court stated that "The appellant is aided in meeting her burden by the presumption that assets purchased and money spent during marriage are community rather than separate property."

The Court concluded, "Based upon the presumptions favoring the position of the appellant, the community estate is entitled to a reimbursement from the separate estate of the appellee in the sum of $100,000.00 expended during the period of the marriage. The $100,000.00 to be reimbursed to the community estate shall be divided $50,000.00 to the appellant and $50,000.00 to the appellee."

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

In this case, the appellant, Mrs. Brooks, and the appellee, Mr. Brooks, were married on January 17, 1973, and ceased to live together as husband and wife on March 12, 1979. Mrs. Brooks and her two children from a prior marriage were supported during the marriage solely through funds of Mr. Brooks' separate property entity called Brooks Construction Company, Inc.

The trial court ordered the parties' marital residence sold and from the proceeds to be received ordered that

Mr. Brooks was to be reimbursed for $48,020.88 as a result of the use of corporate funds during the marriage to support the family. The trial court also awarded an additional sum of $7,392.68 payable to Mr. Brooks as additional reimbursement for the decrease during the marriage, of the cash values of Mr. Brooks' separate property life insurance policies.

The trial court made numerous and specific detailed findings of facts and conclusions of law. The trial court indicated that the $48,020.88 which was to be reimbursed to Mr. Brooks represented the "loss in corporate assets suffered by the corporation during the marriage and used for the purchase and payment of the community assets that are now owned by the parties."

The trial court also ruled that at the time of the marriage Mr. Brooks owned separate property life insurance policies that had no liens or debts against them. At the time of the marriage, the cash value of the policies totaled $17,210.50. At the time of the divorce, the cash values equaled $37,760.50, but there were loans against the cash value of the life insurance policies totaling $27,942.68, leaving a net cash value of $9,817.82. The trial court further found that the monies borrowed from the life insurance policies were used to acquire community property during the marriage.

The Appellate Court, in affirming the $48,020.88 in reimbursement to Mr. Brooks, stated that the trial court's judgment recited that the sum of $48,020.88 "represents the loss in corporate assets suffered by the corporation during the marriage and used for the purchase and payment of community assets now owned by the parties."

"The corporation was the vehicle out of which came the money that paid not only the living expenses of Mr. And Mrs. Brooks and Mrs. Brooks' two minor children by a former marriage, but was also the source of money to acquire and pay for the community property accumulated by the parties during the six years of the marriage."

The trial court further found that the parties, during the marriage, withdrew $166,575.00 which went to "pay for living expenses, as well as for the acquisition of and paying for community assets."

The Appellate Court stated that:

> The parties not only withdrew from the corporation all the money it earned during the marriage, but in addition thereto, the parties withdrew an added $48,020.88 from the corpus or capital structure of the corporation. The community assets acquired by the parties during the marriage was greatly in excess of $48,020.88, together with other reimbursements made to Appellee, Mr. Brooks. . . The figures above shown clearly point out, in our opinion, that during the marriage the parties not only withdrew from the corporation all the money it made, but $48,020.88 in addition thereto.

As a result, not only did the parties, during the six-year period, withdraw all the earnings from the corporation, "but also depleted the corpus of the corporation by $48,020.88.

The Appellate Court ruled that due to the capital depletion and the undisputed evidence that the funds were used to acquire community assets which were in excess of the amounts due to be reimbursed, the trial court's reimbursement award should be affirmed.

Regarding the evidence of the reimbursement award for the decrease in the cash values of Mr. Brooks' separate property life insurance policies, the Appellate Court could not conclude that the trial court abused its discretion in ordering reimbursement "particularly since the value of the community estate acquired by the parties greatly exceeded the total of reimbursements to Mr. Brooks' separate estate."

Finally, in a concurring opinion, Justice Hall disagreed with the majority's rulings on the reimbursement issues. Specifically, Justice Hall argued there is no right of reimbursement because the separate property expended was for the general use and well-being of community living and therefore constituted a gift to the community, citing *Norris v. Vaughn*, 152 Texas 491, 260 S.W.2d 676, 683 (1953). "However, the principle of reimbursement does apply to expenditures from the separate estate which may be traced to a specific enhancement of the community estate." *Id.*, at 260, S.W.2d 682.

Justice Hall concluded, "In our case, it is my view that the portions of appellee's separate estate for which reimbursement was granted (depletion of corporate capital assets and decrease in cash values of insurance policies) were so grossly commingled with the community funds (the company earnings) that they cannot be separately identified nor traced to a specific community benefit."

C. *Snider v. Snider*, 613 S.W.2d 8 (Tex. Civ. App. – Dallas 1981, no writ).

The *Snider* case involved a cause of action brought by the widow against her deceased husband's estate for various reimbursement claims. Following a trial, the executors appealed.

The first complaint by the executors related to the trial court's holding that the cost of improvements to the homestead (which was the separate property of the husband) was the measure of reimbursement in favor of

the community, rather than the enhancement in value to the separate property.

The Court of Appeals held, based upon the widow's testimony, which was not objected to or contradicted, the cost of the improvements produced an equal amount of enhancement in the value of the husband's separate property and that the trial court had sufficient testimony to award reimbursement based upon such enhancement. (Emphasis added.)

Because the executors failed to object or contradict the testimony of the widow, the cost and the enhancement in value were in fact the same amount, and the trial court had authority to award reimbursement based on such testimony.

Next, the executors complained about the trial court awarding the community estate reimbursement for taxes and insurance on the husband's income-producing interest in a farm for the interest paid on the outstanding debt.

The executors argued that the taxes, interest, and insurance (which totaled $10,935.14) were proper expenditures by the community estate because the community estate enjoyed the income of the separate property. Furthermore, the community estate also was able to take income tax deductions on those expenses.

The Appellate Court, in reversing the trial court, indicated that although the record was not clear as to the total actual income that the community estate enjoyed from the husband's separate property income-producing farm, the record did reflect that the community estate did in fact deduct from reportable income taxes the insurance premiums as a cost of producing the income.

In citing the case of *Ames v. Ames*, 188 S.W.2d 689, 690 (Tex. Civ. App. – Galveston 1945, no writ), the Appellate Court indicated that:

> Indeed it seldom happens that the husband comes into possession of separate funds. The income from his separate property is community. Since under the facts of this case [being the Ames case], the husband as manager of the community estate, had the absolute right to pay the taxes in question with community funds, he did not become answerable, upon dissolution of the marital status, to his former wife in an amount equal to half of the sum of the taxes so paid.

The Appellate Court held that, because (1) the widow was not claiming any fraud on the part of the husband, (2) there was no income that would be separate, and (3) the community did in fact benefit from the income tax deductions, the taxes, interest, and insurance on the husband's separate property paid by the community did not entitle the community to reimbursement of the $10,935.14.

D. *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982).

During the marriage, Tony Vallone, who successfully operated a high-end restaurant, received assets by way of gift from his father. The assets were utilized in the operation of Tony Vallone's sole proprietorship restaurant business. During the marriage, he incorporated the business and contributed those assets that he received as a gift from his father as a part of the capitalization of the new business. The gifted assets constituted approximately 47% of the initial capitalization of the corporation.

During the trial, the court found that the business was worth $1,000,000.00 and that because 47% of the initial capitalization was traceable to Tony's separate estate, it awarded proportionate shares of corporate stock in Tony's separate property. The trial court then awarded his wife 70% of the remaining stock of the community property business and also ordered the corporation to redeem the stock awarded to Mrs. Vallone in the way of a cash payment of $77,000.00 and a $300,000.00 note personally guaranteed by Mr. Vallone individually and secured by all of the stock in the restaurant.

On an appeal, the Appellate Court found that the division of property was manifestly unfair and abuse of discretion in that the trial court in making its division of the estate "did not take into consideration the large increment to appellee's separate property by reason of community labor."

The Supreme Court, in reversing the Court of Appeals and affirming the trial court, made the following findings:

1. "Characterization of property as separate, however, does not necessarily preclude the right to reimbursement. Questions concerning the right to reimbursement do not concern which estate owns legal or equitable title in certain property."
2. "It is fundamental that any property or rights acquired by one of the spouses after marriage by toil, talent, industry or other productive faculty belongs to the community estate. Nevertheless, the law contemplates that a spouse may expend a reasonable amount of talent or labor in the management and preservation of his or her separate estate without impressing a community character upon that estate." *Norris v. Vaughn*, 152 Texas 491, 260 S.W.2d 676 (1953).

3. "The rule of reimbursement is purely an equitable one. *Colden v. Alexander*, *supra*. 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."
4. "The right of reimbursement arises when the funds or assets of one estate are used to benefit and enhance another estate without itself receiving some benefit. *Dakan v. Dakan*, *supra*."
5. "We hold it also arises when community time, talent and labor are utilized to benefit and enhance a spouse's separate estate, beyond whatever care, attention, and expenditure are necessary for the property maintenance and preservation of the separate estate, without the community receiving adequate compensation."
6. "To the extent that *Hale v. Hale*, *supra*, held that the expenditure of community time, talent and labor may under no circumstances give rise to an equitable right of reimbursement in the community's favor, it is hereby disapproved."

The Supreme Court went on to hold, based upon the lack of sufficient pleadings by Mrs. Vallone at trial, that she waived her right to complain on appeal and therefore the trial court's ruling was affirmed primarily on the lack of specific pleadings requesting reimbursement for the use of community time, talent or labor to benefit the separate estate.

E. *Cook v. Cook*, 665 S.W.2d 161 (Tex. App. – Fort Worth 1983, writ ref'd n.r.e.).

The *Cook* decision is a very well written opinion involving reimbursement on three different levels.

The appellant, Gary Cook, owned three pieces of property acquired before marriage, two of which were improved and one of which was not improved. The parties stipulated that these three pieces of property were Mr. Cook's separate property. The parties further stipulated that the community estate paid $10,000.00 in principal, interest and taxes to reduce Mr. Cook's separate property purchase money indebtedness on the unimproved lot located on Montecito Road in Denton, Texas. The parties also stipulated that the total principal reduction on the debt was $1,000.00. Therefore, $9,000.00 was paid toward interest and taxes. The trial court ordered reimbursement by the community estate for the full $10,000.00 used for the reduction in the principal, interest and taxes during the marriage.

The parties further stipulated that during the marriage the community expended funds to construct the parties' residence on the unimproved Montecito property and pay for improvements to one of the other pieces of property owned by Mr. Cook as his separate property. The trial court calculated the enhancement in value attributable to those improvements and awarded a reimbursement amount to the community estate. The trial court further placed a lien on Mr. Cook's separate property to secure the payment of the reimbursement claims.

Mr. Cook first complained that the trial court erred in ordering a reimbursement for the full $10,000.00 in expenditures paid to reduce the purchase money indebtedness. It was his position that since Mrs. Cook presented no evidence, and there was no finding that the amounts applied toward the payment of interest and taxes exceeded the benefit to the community from its use and occupancy of the Montecito property, that Mrs. Cook was not entitled to reimbursement. Mrs. Cook obviously took the position that she did not need to show the expenditures exceeded the benefit during the marriage.

The Appellate Court acknowledging cases supporting Mrs. Cook's position, i.e., *Brooks v. Brooks*, 612 S.W.2d 233 (Tex.Civ.App. – Waco 1981, no writ) and *Pruske v. Pruske*, 601 S.W.2d 746 (Tex. Civ. App. – Austin 1980, writ dis'd), declined to follow the *Brooks* or *Pruske* case. (All three of these cases held that the rule was to allow reimbursement for the full amount of community funds expended without requiring proof that the expenditures exceeded the benefits received by the community estate.)

The Fort Worth Court of Appeals stated that they believe that the proper rule is the one stated in *Colden v. Alexander*, 171 S.W.2d 328, 334 (Tex. 1943).

> [W]here the husband purchases land on credit before marriage, and pays the purchase-money debt after marriage out of community funds, equity requires that the community estate be reimbursed.... The rule of reimbursement, as above announced, is purely an equitable one. (Citation omitted.) Such being the case, we think it would follow that **interest paid during coverture out of community funds on the prenuptial debts of either the husband or the wife on land and taxes, would not even create an equitable claim for reimbursement, unless it is shown that the**

> **expenditures by the community are greater than the benefits received**. (Emphasis added.)

Mrs. Cook contended that the rule in *Colden v. Alexander, supra*, was inequitable in that the marital residence was a non-income-producing property. The Fort Worth Court of Appeals stated that the fact that the benefit to the community is the use and occupancy of the property, rather than income from the property, does not negate the requirement of a balancing of equities in reimbursing the community estate. The rule of *Colden v. Alexander, supra*, contemplates a benefit to the community without specification of the form of the benefit. "The community is entitled to reimbursement for funds expended to reduce the principal amount of the debt, **but in the absence of proof that the amount expended for interest and taxes was greater than the benefit received by the community from its use and occupancy of the Montecito property, and proof of the amount of such excess, the community is not entitled to reimbursement therefore**."

Next, Mr. Cook argued the trial court erred in ordering reimbursement from his separate estate to the community estate for improvements made on his separate property. Mr. Cook contended the test for reimbursement for the use of community funds to improve his separate property was the lesser of cost of the improvement versus the amount of the enhancement in value. Mr. Cook claimed that because the cost of the improvements to his separate property was less than the resulting enhancement in value, the community should have been reimbursed only for the cost of the improvements.

Following the *Dakan v. Dakan* opinion, 83 S.W.2d 620, 628 (Tex. 1935) the Court of Appeals stated:

> [W]e have concluded that enhancement in value is the proper measure of reimbursement to the community for funds expended to improve the separate property of a spouse. . . The right of reimbursement between marital estates is based upon equitable principles. *See Ogle, supra*. The estate benefitted must account for such benefit to the estate which funded the improvements. *Lindsay, supra*. Conversely, if there has been no benefit by virtue of the improvements, then nothing is due the estate which advanced the funds. It is in accord with these principles that the Supreme Court in *Dakan, supra*, held that "the community estate must be reimbursed for the cost of the buildings" but that "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." Neither *Dakan* nor the subsequent cases are authority for the proposition that cost of improvements is the measure of reimbursement. Rather, *Dakan* and the above-cited cases stand for the proposition that the recovery to the estate advancing funds for improvements to another marital estate is measured by enhancement in value. Where enhancement in value is *less* than the cost of the improvements, the amount of enhancement does operate as a limitation upon the recovery; however, where enhancement in value *exceeds* the cost of the improvements, equity requires that the estate advancing the funds recover the amount of the enhancement in value. Given the fact that enhancement in value is the measure of recovery to the marital estate advancing funds for the improvements, use of the term "reimbursement" *may* be a misnomer for the recovery since that term implies only a repayment of the funds expended. However, we believe that in determining the measure of the recovery to the estate advancing the funds, the underlying purpose for the recovery, and not its appellation, should control.
>
> To adopt the measure urged by Gary Cook in the instant case would be, in all practicality, to limit recovery strictly to the cost of the improvements, an inequitable result both where the improvement greatly enhances the value of the property and where it results in little or no enhancement in value. In light of the nature of reimbursement as an *equitable* remedy between marital estates, we believe the amount of enhancement in value is the proper measure of reimbursement.

F. *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984)(op. on reh'g).

The Jensen case was decided approximately fourteen (14) months following the Supreme Court's holding in *Vallone v. Vallone, supra*.

In *Jensen*, the Texas Supreme Court adopted a reimbursement theory, rather than a community ownership theory with respect to increases in value during marriage of separate property owned by a spouse. The Supreme Court ruled that the community is to be **"reimbursed for the value of the time and effort expended by either or both spouses to enhance the separate estate of either spouse, other than that reasonably necessary to manage and preserve the separate estate, less the renumeration received for that time and effort in the form of salary, bonus,**

dividends and other fringe benefits." (Emphasis added.)

In this case, Mr. Jensen owned a separate property printing business. The trial court record reflected the amount of compensation Mr. Jensen received in the form of salary, bonuses and dividends. However, the record at the trial did not reflect that any valuation of the printing stock (known as RLJ Printing Company, Inc.) was made as of the date of marriage. Therefore, at trial, the only evidence as to the value of the stock was that the value per share was $13.48 according to Mr. Jensen's expert and $25.77 per share according to Mrs. Jensen's expert.

In findings of fact and conclusions of law, the trial court specifically found Mr. Jensen had been adequately and reasonably compensated in the form of salary, bonuses and dividends as a result of his efforts in working for his separate property entity. The trial court further found that the successful operations of RLJ Printing Company, Inc. were primarily due to the time, toil and effort of Mr. Jensen.

Finally, there was evidence in the record that four (4) months prior to the parties' marriage, the value of the RLJ Printing Company, Inc. stock was $1.56 per share.

The Supreme Court noted they were being asked, on a point of first impression, to determine how to "treat, upon divorce, corporate stock owned by a spouse before marriage but which has increased in value during marriage due, at least in part, to the time and effort of either or both spouses."

The Supreme Court, in adopting the reimbursement theory, stated:

> This theory requires adoption of the rule that the community will be reimbursed for the value of time and effort expended by either or both spouses to enhance the separate estate of either, other than that reasonably necessary to manage and preserve the separate estate, less the remuneration received for that time and effort in the form of salary, bonus, dividends and other fringe benefits, those items being community property when received.

The opinion went on to state that the trial court found Mr. Jensen had been adequately compensated for his time and effort expended in enhancing the value of the RLJ shares and that if this finding were sustained, Mrs. Jensen's claim for reimbursement would be precluded because that compensation was community property.

However, the Supreme Court went on to state that the only evidence at trial regarding the compensation to Mr. Jensen dealt with reasonable compensation which was primarily based on Mr. Jensen's stock ownership and not upon the salary, bonuses and dividends received by the community due to the time, toil and effort of Mr. Jensen. As a result, the Supreme Court upheld the trial court's finding that Mr. Jensen's compensation was reasonable but that the compensation was "primarily based upon Mr. Jensen's percentage of the stock ownership."

The Supreme Court, remanding the case back to the trial court for retrial, stated:

> The right to reimbursement is only for the value of the time, toil and effort expended to enhance the separate estate other than that reasonably necessary to manage and preserve the separate estate, for which the community did not receive adequate compensation. (Citing its earlier opinion of *Vallone v. Vallone*, *supra*.)
>
> Therefore, pursuant to the Tex. R. Civ. P. 505, we remand this cause to the trial court for the limited purpose of determining the amount of reimbursement, if any, due to the community as a result of the time, toil and talent expended by Mr. Jensen towards the enhancement of the stock of RLJ. **From the value of the time, toil and talent expended is to be subtracted the compensation paid to Mr. Jensen for such time, toil and talent in the form of salary, bonuses, dividends and other fringe benefits. Any remainder is the reimbursement due the community.** (Emphasis added.)

The Supreme Court also ruled that the burden of proof to prove the amount of reimbursement under the time, toil, talent and effort theory would be on Mrs. Jensen.

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

A divorce case in which the husband appealed the trial court's award of several reimbursement claims. First, Mr. Jacobs complained of the trial court awarding the community estate reimbursement for the enhancement in value of his separate property corporation.

The trial court found that the value of Mr. Jacob's separate property corporation had been enhanced through his efforts and that the community estate received no "quid pro quo" and, as a result, the community was entitled to reimbursement for the time, talent and labor expended by the appellant. However, the trial court set no dollar value for this reimbursement.

The Appellate Court held, in accordance with the *Jensen* case, that the community should be reimbursed for the time and effort expended by each spouse for the separate property of either spouse, less that which was paid in salary, bonuses, dividends and other fringe benefits.

The Appellate Court also stated that "Mrs. Jacobs had the burden of pleading and proving that Mr. Jacobs' time, talent, and labor enhanced the value of the stock. . ., that such time, talent, and labor was beyond the attention necessary for proper maintenance of the Company, and that the community did not receive adequate compensation for such time, talent and labor." The Appellate Court found that Mrs. Jacobs failed to meet her burden. While there was evidence of Mr. Jacob's annual salary which increased during the marriage, as well as contributions by the company to the employee benefits plans for Mr. Jacobs as well as the use of an automobile, the Court stated:

> There is no evidence that his work went beyond that necessary for the maintenance of the Company. Although there is some evidence that the value of the Company increased between 1974 and the selling date in 1980, there is no evidence that Mr. Jacobs' compensation was inadequate. Absent such evidence, the trial court erred in awarding reimbursement to the community.

Second, Mr. Jacobs complained of the trial court's award of reimbursement to the community estate as a result of certain expenditures for the benefit of his separate estate. Specifically, the complaint involved the reimbursement to the community estate of the payment by the community estate for the following separate property expenses of Mr. Jacobs: 1) $30,351.06 for professional fees paid relating to the acquisition of Grow Group stock; 2) $53,606.00 for the payments made by Mr. Jacobs to reduce his separate debts during the marriage; and 3) Payment of $21,000.00 for contributions to appellant's land partnerships.

The Appellate Court in using an abuse of discretion standard held that the trial court did not abuse its discretion in awarding these reimbursement claims.

Lastly, Mr. Jacobs complained that the trial court erred in failing to reimburse the community estate for the payments it made on his wife's separate debts. Specifically, these payments involved the use of community funds for the upkeep and improvements to Mrs. Jacob's separate property. There is no dispute that the property was her separate property. The court, in analyzing these claims, stated the residential properties that were Mrs. Jacob's separate properties were used by both parties during the marriage and that Mr. Jacobs benefitted from them. The Appellate Court then stated in "the absence of evidence that the community was without benefit from Mrs. Jacob's separate estate, reimbursement is inappropriate."

H. *Trawick v. Trawick*, 671 S.W.2d 105 (Tex. App. – El Paso 1984, no writ).

In *Trawick*, the widow of the deceased filed a declaratory judgment against her deceased husband's estate seeking to be reimbursed for the increase in value of his separate property stock held in a closely-held business. This case was tried before the decision in *Jensen v. Jensen* and as a result, the El Paso Court of Appeals remanded the case back to the trial court for the case to be retried in accordance with the *Jensen* opinion.

The Court of Appeals in *Trawick* held that the widow's pleadings, proof, special issues and jury findings supported both elements of increase in value of separate property attributable to community effort and undercompensation of community for that effort to entitle the community to reimbursement. The Appellate Court then proceeded to analyze the case in light of the *Jensen* opinion. First of all, the jury found that the deceased had been undercompensated for his efforts in increasing the value of the stock of his closely-held business and that fifty-five percent (55%) of the increase in the overall value of the separate estate's stock was attributable to the deceased's efforts.

[Question: What evidence is needed to prove this last finding?]

At the time of the death of Stuart Trawick, he owned 750,000 shares of stock or three-fourths (3/4ths) of all the issued stock in the Sabine Machinery Company. It was found that Mr. Trawick devoted his full business life to the corporation, was its actual day-to-day leader and was primarily responsible for its profit and growth. The parties' stipulated that during the marriage, the value of the corporation increased by $505,901.30.

Expert testimony from a CPA indicated that just over one-half (1/2) of the increase in value of the corporate stock was solely attributable to Mr. Trawick's efforts. As a result, the jury found that fifty-five percent (55%) of the increase in value was the result of Mr. Trawick's efforts.

The Appellate Court noted that under the *Jensen* theory of recovery, the burden of establishing the various mathematical factors for reimbursement rest with, in this case, the surviving spouse, the appellant.

The El Paso Court of Appeals, while acknowledging the *Jensen* decision had clarified this type of reimbursement claim, indicated that:

> We are still without a simple mathematical formula for resolution of this or any other such

case. The facts of this case clearly pinpoint the factors which remain in shadow. The *Jensen* decision states:

> [T]he community will be reimbursed for the value of time and effort expended by either or both spouses to enhance the separate estate of either, other than that reasonably necessary to manage and preserve the separate estate, less the remuneration received for that time and effort in the form of salary, bonus, dividends and other fringe benefits, those items being community property when received.

The El Paso Court, in analyzing the *Jensen* standard, indicated it was "confronted with two primary factors: (1) increase in the value of separate property attributable to community effort and (2) undercompensation of the community for that effort."

The *Trawick* court stated that:

> the remaining difficulty arises from the fact that the undercompensation elements consist of two sub-factors–1) what the reasonable value of the effort was and 2) what actual remuneration was received. A simple formulation of the reimbursement could be shown as:
>
> Attributable increase in value
> \- Actual remuneration
> = Reimbursement
>
> This would be neither realistic nor equitable. Such a formula would automatically equate the sum total of the increased value with the "value of time and effort expended by the community." Under *Jensen III* the enhanced value of the stock is one of the factors to be considered by the fact finder in determining the value of the community time and effort. Consequently, the appropriate computation is to determine the discrepancy between the reasonable value of the effort expended and the actual compensation received and then look to the enhanced value of the separate estate to satisfy that discrepancy (citing *Faulkner v. Faulkner*, 582 S.W.2d 639 (Tex. Civ. App. – Dallas 1979, no writ.))

During the trial, there was sufficient evidence to address all of the factors comprising the elements set forth above as far as the formula was concerned. The parties stipulated that the increase in value of the stock was $505,901.30. The deceased owned seventy-five percent (75%) of the stock and the jury found, based upon expert testimony, that fifty-five percent (55%) of the enhanced value of the stock was attributable directly to Stuart Trawick's work. The Court then took seventy-five percent (75%) of the overall enhanced value of the stock and multiplied it by fifty-five percent (55%), arriving at $208,684.29 "that was available to satisfy any claim by the community for undercompensation."

The Appellate Court then did an analysis of the total amount of bonus, salary and other benefits Mr. Trawick received during the marriage and determined that the total compensation received was $126,432.66, plus the value of an automobile for forty-eight (48) months.

The Appellate Court also analyzed what items were not to be included as far as Mr. Trawick's salary, bonuses and other benefits. The independent executrix of Mr. Trawick's estate attempted to include additional items to be counted toward salary, bonuses and other benefits, but the Appellate Court determined otherwise. (See the opinion for detailed analysis of the benefits not allowed by the El Paso Court of Appeals.)

The final factor to be determined in order to compute the degree of undercompensation, and hence reimbursement due, is the reasonable value of Trawick's labor and effort during that forty-eight month period. Some evidence was offered on this issue. However, no specific jury finding was sought or obtained.

There was conflicting evidence at trial regarding some of the factors that make up a reimbursement claim based upon time, talent and labor. The jury found that over $208,000.00 in increased value during the four-year period was solely attributable to the efforts of Mr. Trawick, which finding is favorable to the appellant. On the other hand, the appellee offered conflicting evidence as to Mr. Trawick's salary and other fringe benefits that were appropriate for someone in his position. There was expert testimony by a CPA that based upon his experience in dealing with similar companies and individuals in similar positions as Mr. Trawick that for the same period of time the range of salary would be between $60,000.00-$100,000.00 per year in addition to fringe benefits. The Court found that this compensation range would be $144,000.00-$304,000.00 which would either be a deficit in the amount of remuneration or an amount in excess of what should have been paid. "On its face, this evidence favors the appellees, but perhaps it merely demonstrates an across-the-board undercompensation for labor and "excessive" retainage of value in the corporate entity.

I. *Anderson v. Gilliland*, 684 S.W.2d 673 (Tex. 1985).

This case sets forth the rule with respect to the measure of reimbursement when one estate advances monies to make improvements to another marital estate.

In this case, the community estate made certain improvements to Mr. Gilliland's separate property realty during the marriage. It was determined that the community expended $20,237.89 but that Mr. Gilliland's separate property, at the time of Mr. Gilliland's death had an enhanced value of $54,000.00.

[It is interesting to note that there are no specific dates mentioned in the opinion as to when the improvements were made versus the time of death.]

The Court, in doing an analysis of the previous decisions, indicated that one line of cases followed the enhancement in value as the sole way to recover regardless of cost. Another view was the enhancement in value or cost, whichever is less. Finally, the third measure of reimbursement under these types of circumstances is cost regardless of enhancement.

The Supreme Court, in discussing these various reimbursements, stated that the "cost only" rule, if followed, would provide an easy-to-apply measure but that measure of reimbursement would permit the owner of the benefitted estate to be enriched at the expense of the contributing estate. Likewise, the enhancement or cost, whichever is less rule, would permit the benefitted estate the maximum recovery at the expense of the contributing estate. Therefore, the Court held that a claim for reimbursement for funds expended by an estate for improvements to another estate is to be measured by the enhancement and value to the benefitted estate.

The Supreme Court reversed the Appellate Court in part and ordered that the independent executrix (the appellee) to include one-half (1/2) of the enhancement in value to her separate property, less one-half (1/2) of the outstanding mortgage on the property.

Question: If the "enhancement in value is equal to the cost of the improvements", are you entitled to be reimbursed under those circumstances for the cost amount? It is clear that if the enhancement in value exceeds the cost, you may be entitled to be reimbursed for a portion of the enhanced value, subject to the court's discretion. However, it is not clear that if the expenditures made did not enhance the property or did not enhance the property anymore than the expenditures, that a reimbursement award, essentially based on the cost amount would be proper.

Question: What happens if the "enhancement in value" to the property is less than the expenditures made for the improvements? Would the contributing estate then be entitled to a portion of the cost amount or be entitled to zero? A prime example is when installing an expensive pool in a residential home. The cost of the pool will, in almost every case, be more than the enhanced value to the property as a result of the installation of the pool.

J. *Smith v. Smith*, 715 S.W.2d 154 (Tex. App. – Texarkana 1986, no writ).

The husband, Joe Frank Smith, appealed the property division made by the trial court. The parties had been married for 27 years and the couples' ranching operation constituted most of their community estate.

The Appellate Court noted that Mrs. Smith did not plead any rights of reimbursement either to her separate estate or to the community estate. The Appellate Court ruled that since Mr. Smith did not object to the absence of the reimbursement pleadings or the evidence offered, the issue was tried by consent.

The first complaint by Mr. Smith dealt with the trial court's award of a $15,000.00 reimbursement claim to Mrs. Smith for expenditures by the community estate for improvements to Mr. Smith's separate real property.

Mr. Smith argued Mrs. Smith had not previously requested reimbursement, and therefore, the trial court could not properly consider reimbursement in dividing the estate. Mr. Smith further argued the evidence was insufficient to find that the community investment exceeded the benefit received by the community estate and the use of Mr. Smith's separate real property.

During the trial, the parties testified as to the types of expenditures made for the types of improvements to Mr. Smith's separate property including the building of a barn, an office building, and a lighted roping arena. However, the only evidence of enhancement in value involved the 22.7 acre tract of land owned by Mr. Smith. The trial court found that there was a range in which the court could have found the enhancement in value. However, there is no evidence reflected in the opinion as to the cost of the improvements. The appellate decision only discussed the range of enhancement in value to the acreage owned by Mr. Smith. The Appellate Court found the trial court had sufficient evidence as to the value of the property without improvements and the value of the property with improvements to sustain the trial court to award the enhancement in value.

Next, Mr. Smith complained of the placing of a equitable lien against his property. The court, citing various previous decisions including *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977) and *Cook v. Cook*, 665 S.W.2d 161 (Tex. App. – Fort Worth 1983, writ ref'd, n.r.e.), stated that the trial court had authority to order an equitable lien against the specific asset in which the reimbursement claim is granted. The court, citing various opinions, said that "[a]lthough it may finally result in the loss of title if sold under execution,

the ultimate divestiture by foreclosure is essentially voluntary, since the owner may prevent this by complying with the court's order to pay."

It should also be noted the trial court in discussing the equitable lien placed on Mr. Smith's property, and in referencing the *Anderson v. Gilliland* decision that the mere fact that Mr. Smith only owned a portion of the property in which Mrs. Smith's reimbursement claim for enhancement of value due to the use of community funds to make improvements did not negate her right to the claim. The court citing *Anderson* stated that a party does not have to own 100% of the property in order for the reimbursement claim to be a valid request.

Mr. Smith then complained that the lien the trial court granted was on his separate property homestead.

The Appellate Court held that in most cases the homestead claimant, (in this case Mr. Smith) is required to plead the existence of the homestead right. However, because Mrs. Smith's pleadings did not put Mr. Smith on notice that she was claiming the reimbursement claim that the pleading requirement with respect to the homestead issue would not apply to Mr. Smith in this case. The Appellate Court stated however that when Mrs. Smith presented evidence on improvements and enhancement in value, Mr. Smith at that point had the burden to establish the fact of homestead to use this claim as a defense. The Appellate Court held that in the absence of proof of homestead, Mr. Smith waived his right to object to the equitable lien.

Finally, Mr. Smith objected to the reimbursement for improvements on the basis that Mrs. Smith had the burden of proving that the benefits received by his separate estate were greater than the benefits received by the community estate from the use and benefit of his separate property realty. The Appellate Court stated that, during the trial, there was no evidence presented as to what the fair market rental value of the entire property was or that Mr. Smith was paying rent from the community to himself for his separate property interest.

K. *Rogers v. Rogers*, 754 S.W.2d 236 (Tex. App. – Houston [1st Dist.] 1988, no writ).

This case involves a reimbursement claim with respect to the enhancement in value as a result of improvements made on the wife's separate property and a reimbursement claim based on the use of funds to pay interest, taxes and insurance on a condominium which was wife's separate property. (Note: this case was decided before *Penick*.)

The appellant, wife, filed a pro se brief challenging the trial court's division of the community estate and awarding her husband a reimbursement in the amount of $17,500.00.

The parties were married on July 5, 1984, and the appellant filed for divorce on April 30, 1986. The divorce was granted on December 5, 1986.

Prior to marriage, the appellant owned a condominium in Lubbock and ten (10) acres in Ledbetter for which she started building a residence.

After the marriage, the wife had a dispute with the contractor, fired the contractor and the parties subsequently moved into an incomplete residence built on her separate property land in January 1985. The house was eventually completed with some work being contracted out and some work being performed by the parties themselves and/or members of their family. (Emphasis added.)

After both sides rested, the trial court, over the appellant's objection, allowed the appellee to amend his answer to include reimbursement claims based on the use of community funds to pay separate property indebtedness and to improve the wife's separate property estate. During the trial, there was conflicting testimony as to the source and character of funds used. Furthermore, the appellee testified only generally as to his claims for reimbursement.

Nevertheless, the trial court awarded the husband, appellee $17,500.00 for "reimbursement for community efforts made to the separate estate of appellant."

The Appellate Court, based upon the state of the record, indicated that the trial court's award was based on three (3) theories of reimbursement:

1. Funds expended to discharge purchase money obligations on one spouse's separate property;
2. Funds expended for improvements that enhance the value of one spouse's separate property; and
3. The value of uncompensated community time and labor that enhanced one spouse's separate property.

With respect to the time, talent and labor claim of the appellee for labor done by him on the separate property house, the appellant argued that the appellee failed to prove (1) the amount and value of his labor; and (2) that any reimbursement that might be due the community estate was less than the benefits received by the community from living there rent free.

The Appellate Court, in citing the holding in the *Jensen* decision, indicated that "the contributing spouse is not entitled to the enhanced value of the separate property, but only to the value of the uncompensated time and labor." *Jensen* and *Vallone*.

In this particular case, contrary to *Jensen* or *Vallone*, which arise from the use of community time, talent and labor to benefit a spouse's separate property business,

Mr. Rogers' claim for reimbursement involves the use of his labor to benefit his wife's separate property estate. Therefore, in this context, the *Rogers* Appellate Court indicated that Mr. Rogers, the contributing spouse, was not entitled to the enhanced value of the separate property, but had a claim to recover the value of his uncompensated time and labor. It is important to note the distinction made by the Appellate Court in this case. Both claims are based upon *Jensen* and *Vallone* but involve entirely different concepts.

The Appellate Court stated:

> We need not decide whether the *Vallone* and *Jensen* reimbursement of time, toil and labor would apply to the fact situation in this case. The burden would still be on the claimant to establish the value of community time and labor expended on the spouse's separate property, over that which was reasonably necessary for management and preservation, and over the value of any compensation or benefit received by the community. Appellee fails to point to, nor do we find, any evidence establishing the value of appellee's alleged uncompensated labor, nor that any such labor was greater than any benefits received.

The Court, in addressing the enhancement in value reimbursement claim, in *Anderson v. Gilliland* and the *Cook v. Cook* cases, stated that "the enhanced value is determined by the difference between the fair market value before and after improvements made during marriage."

In this case, there was some evidence to establish the current market value. There was no evidence to establish the value of the property at the time of marriage so as to determine the enhanced value.

> Furthermore, even if the enhanced value had been shown, this amount would have been contributed to by improvements resulting from several sources, including separate funds of both appellant and appellee, community funds, and uncompensated labor on the part of both parties. (We have already found that there was no right to reimbursement for appellee's labor, for which enhanced value is not even the proper measure of reimbursement.) Appellant, therefore, would have had the burden not only to show what improvements were paid for with his separate funds and any community funds, but also what portion of the enhanced value was attributable to these expenditures. (*Jensen v. Jensen*, *supra*.)

L. *Kamel v. Kamel*, 760 S.W.2d 677 (Tex. App. – Tyler 1988, writ denied)(opinion following remand).

Another divorce case where the wife appealed the trial court's award to her of a reimbursement amount for the expenditure of her separate funds.

It was undisputed that the husband owned a residential lot before marriage. During the marriage, the parties built their marital residence on the property, and it was designated as their homestead. The improvements to the property were financed with promissory notes, one in the amount of $27,000.00 payable to a savings & loan, and another one in the amount of $9,000.00 payable to husband's father. The husband's dad died before their first trial. Neither the husband or the wife made payments on the notes. Instead, the husband's father and the husband's brother made payments on the notes. The husband tried to argue that all the note payments made by his deceased father and brother were gifts to him, whereas the wife argued that they were joint gifts. The trial court found the $9,000.00 note forgiven by the father and the $12,300.00 paid by the brother on the savings & loan note were separate property gifts to the husband. The trial court also found that the separate estate of each party had a ½ interest in the $14,700.00 paid by the father toward the savings & loan note. The wife further argued that the community estate was entitled to reimbursement from husband's separate estate for the enhanced value of the husband's separate property.

The trial court did not allow any reimbursement to the community estate. The trial court further refused to give wife an equitable lien on the husband's homestead to secure the reimbursement for her interest in the homestead.

On appeal, in discussing the wife's claim that she was entitled to a lien against the husband's separate property homestead, the Court of Appeals discussed the cases of *Wren v. Wren*, 702 S.W.2d 250, 253 (Tex. App. – Houston [1st Dist.] 1985, writ dism'd) and *Brunell v. Brunell*, 494 2d 621 (Tex. Civ. App. – Dallas 1973, no writ).

The trial court found it did not have authority to place a lien against the separate property of the husband due to its homestead classification. This Appellate Court stated however, based on *Wren v. Wren* and *Brunell v. Brunell*, the trial court did, in fact, have the authority to secure a reimbursement claim by awarding an equitable lien against the homestead property.

In the *Smith v. Smith* case, cited above, the Appellate Court indicated, because the reimbursement claim involved improvements to the separate property homestead, that you could not have a lien against the homestead to secure the reimbursement claim unless there is a written agreement based upon the Texas Constitution. However, it is also important to note that in *Smith*, the court ruled that because the husband failed to put on evidence of the homestead that they allowed the lien.

The *Kamel* decision, while discussing the *Smith v. Smith* case, ignores the homestead issue altogether. On rehearing, this is where the Appellate Court discussed the ability for the trial court to place an equitable lien on the husband's separate property homestead to secure the reimbursement claim. As indicated, this Appellate Court does discuss the *Smith v. Smith* case, but ignores the homestead issue altogether, and simply refers to the *Jensen v. Jensen* decision with respect to its wording, wherein it disallowed a reimbursement lien or equitable lien to secure a reimbursement based upon Mr. Jensen's separate property stock. This court stated that language in *Jensen* has been misinterpreted and they noted that in the *Cook v. Cook* case, the Supreme Court found no reversible error in a post *Jensen* case wherein the trial court imposed a equitable lien on one spouse's separate property, and real property secured the award of reimbursement for community funds advanced to improve that property.

Ms. Kamel argued that the trial court erred in refusing to award reimbursement to the community estate for the enhancement of the separate real property of appellee.

In sustaining this point of error, the court referred to the cases of *Anderson v. Gilliland, supra*, and *Dakan v. Dakan*, which stand for the proposition that the community estate is entitled to reimbursement where community funds are used to make improvements to the separate property of one spouse. The community is entitled to reimbursement in the amount of the resulting enhanced value of the separate estate.

In this case, it was not in dispute that the house the parties built was built on the husband's separate property, and was built with community property loan proceeds.

Notwithstanding the husband's argument that there should be no reimbursement claim on the basis that all of the payments on both notes (discussed above) were ultimately made with separate funds, that the house ceased to be a community estate improvement, the Appellate Court dismissed this argument and found that the community estate was entitled to reimbursement from husband's estate for the enhanced value (in this case $92,900).

Furthermore, the trial court went on to state that the separate estates of each party are entitled to be reimbursed from the community estate in the amount of each marital estate's respective contributions to the payment of the community indebtedness for the homestead improvements. That meant the wife's separate estate was entitled to be reimbursed for $7,350.00, and the husband's separate estate for $28,650.00. As indicated above, the trial court found with respect to the gift arguments by both parties that there was a joint gift made by the husband's father of $14,700.00 in loan payments to the savings & loan, 50% to the husband as his separate property, and 50% to the wife as her separate property.

M. *Penick v. Penick*, 783 S.W.2d 194 (Tex. 1988).

The *Penick* case involves the community estate paying a separate property obligation of Mr. Penick.

Prior to trial, the parties stipulated that the community estate paid $104,500.00 to reduce the principal indebtedness on Mr. Penick's separate real property. However, Mr. Penick also testified at trial that the tax benefits to the community estate from the depreciation of his separate property exceeded the $104,500.00 expended by the community to reduce the separate property debt. (It should be noted that the separate property referred to in the opinion was not the property in which the parties resided.)

The trial court, based upon the tax benefits received by the community estate, denied any reimbursement claim on behalf of the community estate citing the fact that the benefits received exceeded the expenditures.

The Supreme Court went through an analysis of the various types of reimbursement claims and the theories that have been applied with respect to the use of monies belonging to one estate being used to pay down on separate property purchase money obligations of another estate. The *Penick* case does not involve improvements under the *Anderson v. Gilliland* case or the use of time, talent and labor as discussed in *Vallone* and *Jensen v. Jensen*.

The *Penick* case involves the use of community monies used to pay separate property indebtedness (principal payments) on real property owned by Mr. Penick. The case does not draw any distinction nor is there any evidence apparently in the record with respect to what portion of the funds paid by the community estate was used to reduce the principal amount of the separate property obligation as opposed to what portion was used to pay taxes and interest.

The Supreme Court went on to state and discuss that the *Penick* case was more closely analogous to the *Anderson v. Gilliland* case. It further indicated that the court did not believe there should be a distinct and different set of rules for a reimbursement claim involving

capital improvements as opposed to a reimbursement claim for purchase money indebtedness.

Finally, the court indicated that the reversal of the Appellate Court was required due to its outright rejection of offsetting benefits stating the following:

> "The outright rejection of offsetting benefits (by the Appellate Court) is inconsistent with the equitable nature of a claim for reimbursement." *Jensen* and *Anderson*.

N. *Gutierrez v. Gutierrez*, 791 S.W.2d 659 (Tex. App. – San Antonio 1990, no writ).

The *Gutierrez* case, decided approximately two years after *Penick*, held that the claim for reimbursement, whether a claim for expenditure of community monies to pay for an improvement on separate property land (or vice versa) and a claim for reimbursement for the use of the monies belonging to one marital estate to pay the purchase money indebtedness on another marital estate, is measured by the enhancement in value to the benefitted estate.

Roberto Gutierrez, the appellant, appealed the trial court's ruling that his separate estate must reimburse the community estate for various expenditures of community funds to pay separate debts.

The trial court awarded Mrs. Gutierrez a judgment for $85,406.65. This award, based on the trial court's finding of facts and conclusions of law, represents the sum of seven different items of reimbursement for community funds spent on her husband's separate estate during the marriage. In the footnotes, the reimbursement claims included the use of community funds to pay separate property debts, use of community funds expended to enhance or make improvements to a separate property land and reimbursement for the use of time and effort expended by the petitioner (the wife) to "enhance respondent's separate property cattle." (Emphasis added.)

First, the Appellate Court recited the *Penick* ruling that a "claim for reimbursement for funds expended by an estate for improvements to another estate is to be measured by the enhancement in value to the benefitted estate."

The Court again cites the *Penick* case and makes no distinction between a reimbursement claim involving the use of funds belonging to one estate to pay the purchase money indebtedness versus a reimbursement claim for use of funds belonging to one estate to make capital improvements. This Court says that enhancement is the measure of reimbursement under either scenario.

The *Gutierrez* Appellate Court further indicates that the trial court is required to at least consider offsetting benefits. The Appellate Court indicated that there was nothing in the trial record to suggest that the trial court considered in any way the benefit the community may have received when the parties lived in Mr. Gutierrez's separate property without paying rent. The Court stated:

> We do not necessarily say that the court, in its exercise of discretion, had to calculate reimbursement differently because of this factor. But we do hold that a court must at least consider offsetting benefits when a litigant asks it do to so, as Robert did in this case. We reverse and remand to the trial court for consideration of the offsetting benefits that Robert asked the court to take into account.

The *Gutierrez* case also involved a request for reimbursement by Mrs. Gutierrez for the use of her time, talent and labor to increase the size of Mr. Gutierrez's separate property cattle. (Emphasis added.) **The Appellate Court found that there was no evidence of the value of her services or whether they exceeded what was necessary to maintain and preserve the herd.**

The Court stated:

> Under *Jensen*, she was entitled to seek reimbursement for "the value of the time, toil and effort expended to enhance the separate estate other than that reasonably necessary to manage and preserve the separate estate, for which the community did not receive adequate compensation." Patsy's proof in this case fails because there is no indication that her efforts did more than was required to maintain the herd. Nor is there evidence of the value of her uncompensated labor. While mathematical certainty is not required, there must be some proof of value. *Rogers v. Rogers*, *supra*."

O. *Pearce v. Pearce*, 824 S.W.2d 195 (Tex. App. – El Paso 1991, writ denied).

In the Pearce case, the parties entered into a "trust indenture" following the marriage. The trust indenture provided that there would be no creation of a community estate. However, there was no waiver of any claims of reimbursement set forth in the trust indenture.

In analyzing Dorothy Pearce's claims, the Appellate Court first found that the trust indenture was in effect a post-marital agreement and that it was valid and enforceable.

In analyzing whether or not the trust indenture had any specific language whereby Dorothy had waived her claims for reimbursement against her husband's separate

estate, the Appellate Court found none. The trust indenture specifically waived Dorothy's right to community property or the creation of community property. Since a reimbursement claim is not property, she did not waive her claims for reimbursement. (Emphasis added.)

In this case, the jury awarded reimbursement to the community estate in the amount of $1,825,639.00. However, the only expert testimony during the trial was that the value of Roy Sr.'s time, toil, talent and effort was estimated to be worth a high of $1,277,000.00, or $500,000.00 less than the jury's award.

Based upon the evidence, the Appellate Court held that there was insufficient evidence to support the jury award. It should be noted that it wasn't the fact that there was insufficient evidence in the record to support the reimbursement claim. It was just that the award itself was in excess of what the evidence supported. The case does not discuss offsetting benefits and does not go into great detail about the value of Roy Pearce's time, talent and labor. It does mention that the Trust had substantial financial success during the marriage and that Roy Sr. spent the majority of his time operating the Trust assets.

P. *Zieba v. Martin*, 928 S.W.2d 782 (Tex. App. – Houston [14th Dist.] 1996, no writ)(op. on reh'g).

The appellant (Lorraine Zieba) complained of the trial court's actions on various points, one of those being reimbursement. The trial court refused to fully reimburse the community estate for community payments made on a purchase money note for improvements to Mr. Martin's separate property and for use of community funds for certain personal expenditures.

The Appeals Court first of all noted:

> Reimbursement is an equitable doctrine, and a court of equity is bound to look at all the facts and circumstances and determine what is fair, just and equitable (*Penick*, *supra*; *Gutierrez*, *supra*), The trier of fact should consider the benefits and detriments of each estate. (*Gutierrez*, *supra*) "Reimbursement is not available as a matter of law but lies in the discretion of the court." (*Vallone v. Vallone*) Great latitude must be given to the trial court in applying equitable principles to value a claim for reimbursement. (*Penick*, 783 S.W.2d at 198.) An equitable claim for reimbursement is not merely a balancing of the ledgers between the marital estates. *Id.* 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.

Id.; *Gutierrez*, 791 S.W.2d at 663.

With respect to the use of community funds to pay a separate property indebtedness of Mr. Martin, the payments made (both principal and interest) was $212,185.00 for principal and $159,897.00 in interest, or a total of $372,082.00.

The Appellate Court in citing the *Penick* decision and the *Gutierrez* decision indicated that the measure of reimbursement was the enhancement in value whether it be for the use of funds to pay a separate property indebtedness or whether it be for capital improvements. "That is, the trier of facts should consider the benefits and detriments to each estate."

In this case, it was undisputed what the total amount of principal and interest payments were made on the mortgage. However, it was also uncontroverted that the community business benefitted by the use of the land. "Although it is not entirely clear how the trial court determined the reimbursement amount, the court reasonably concluded there was some offsetting benefit to the community. As the party seeking reversal of the judgment based on her reimbursement claim, Zieba has the burden to prove what that benefit was. Zieba has failed to carry that burden."

It should be noted that while there is a breakdown between the amount of funds used for principal payments and for the payment of interest, there was no discussion of tax benefits; there was no discussion relating to how much money was used to pay insurance or to pay ad valorem taxes.

Practice pointer: When facing a reimbursement claim for payment of a separate property indebtedness, the practitioner should always prove up not only the total reduction of the principal amount of the loan but also all interest paid on the loan. Even though the statutory schemes only talk about a reduction in principal, so far there is no case that clearly says that someone is not entitled to seek reimbursement for interest payments made on the loan. However, there is a different burden of proof for a reimbursement claim involving payments of interest.

Next, the Appellate Court considered the reimbursement claim for improvements.

Zieba's expert testified that the renovations and improvements to Mr. Martin's ranch enhanced its value by $189,000.00. Mr. Martin's expert, on the other hand, testified to and appraised the overall value of the ranch with the improvements. He also testified that the improvements did not enhance the value of the ranch and disagreed with the costs of certain improvements as testified to by Zieba's expert. The trial court awarded

Zieba $70,000.00 for her share of the community reimbursement claim. The Appellate Court also stated that there was evidence to show that the couple benefitted from these improvements inasmuch as they lived on the ranch during the marriage. Therefore, the Appellate Court indicated that the trial court reasonably could have concluded that this benefit to the community offset the community's expenditures on improvements to Mr. Martin's separate property. "**Zieba has not shown the extent, if any, of that benefit to the community which was her burden to do.**" (*Penick* at 197 and *Gutierrez* at 665.) (Emphasis added.)

Q. *Pelzig v. Berkebile*, 931 S.W.2d 398 (Tex. App. – Corpus Christi 1996, no writ).

In *Pelzig*, the appellant, complained of numerous expenditures by her husband with community funds to benefit or enhance his separate estate, including payments to his former spouse, child support, as well as payments on separate property purchase money debt involving a New York residence.

The Appellate Court dismissed all the reimbursement claims except for the reimbursement claim for the use of community funds to make payments for the appellee's New York house. The Appellate Court stated Pelzig is entitled to reimbursement for her share of the community funds that went toward the mortgage, tax and insurance for the New York house.

The Court went on to state that the measure of the reimbursement claim should be guided by *Penick*. This Appellate Court states that:

> The Texas Supreme Court held that the community reimbursement claim should be measured according to the enhancement of value of the separate estate, **subtracting any benefit to the community estate**. *Id.* at 196-98. *Anderson v. Gilland*, *supra*. Appellant urges that, to find the amount the couple saved on their taxes by being able to deduct the mortgage interest, the amount deducted from taxable income should be multiplied by the applicable tax rates. We believe appellant states the correct formula. Appellee's formula would offset the reimbursement by the full amount of the deduction from the taxable income, overstates the tax savings by assuming that a dollar deducted from taxable income is a dollar saved. Appellee leaves out the fractional tax rates that determine how much of taxable income will actually be paid (or saved) in taxes. (Emphasis added.)

The opinion does not go into great detail regarding a breakdown between the reduction in principal versus funds used to pay on taxes, insurance and interest. It simply refers to the fact that the parties were able deduct the interest paid on the principal amount of the debt and the taxes paid on the parties' federal income tax returns.

R. *Winkle v. Winkle*, 951 S.W.2d 80 (Tex. App. – Corpus Christi 1997, pet. denied).

In this case, the appellant, James Winkle, challenged the trial court's ruling with respect to the denial of all of his various reimbursement claims.

The Winkles were married on May 10, 1975. At the time of the marriage, in addition to a pharmaceutical corporation that Mr. Winkle owned, he owned a residence located at 104 Shore Drive in Portland, Texas, as his separate property. During the marriage, the parties sold the Shore Drive residence and purchased a vacant lot at 904 Waterview. When the sale of the Shore Drive property closed, $23,750.00 of the sale proceeds were applied by the title company directly to the amount due on the lot at 904 Waterview. The appellant then paid for much of the construction of the home on this lot from his separate estate.

The appellant complained that the trial court erred when imposing a lien on 100% of the community property estate awarded to the appellant to secure his obligations to the appellee. Some of these obligations included reimbursement awards made to the appellee against the appellant's separate property.

The Appellate Court in addressing the liens stated the following:

> When dividing marital property upon divorce, and absent a reimbursement interest to the community, trial courts may not impose liens on a spouse's separate property for the general purpose of securing a just and right division of marital property. *Heggen v. Pemelton*, 836 S.W.2d 145, 146 (Tex. 1992). But trial courts generally may impose equitable liens on one spouse's separate property as a means for securing the discharge of payments owed by one spouse to the other. *Id.*; *In Re Marriage of Jackson*, 506 S.W.2d 261, 267 (Tex. Civ. App. – Amarillo 1974, writ dis'd); *see also Mullins v. Mullins*, 785 S.W.2d 5, 11-12 (Tex. App. – Fort Worth 1990, no writ); *Day v. Day*, 610 S.W.2d 195, 198 (Tex. Civ. App. – Tyler 1980, writ ref'd n.r.e.).) Such liens, however, are permissible only against the separate property to which improvements were made at community expense.

The Appellate Court in reversing the trial court ruled that based upon the court's ruling, it was error for the trial court to impose a lien against all of the community assets awarded to the appellant for a reimbursement claim granted in favor of the appellee involving the appellant's separate estate.

Next, the appellant argued that the trial court erred in finding that the property located at 904 Waterview was his separate property. Appellant argued that it was acquired during marriage and therefore was community property. The Appellate Court found that the 904 Waterview property was, in fact, community property.

Next, it was undisputed that $23,750.00 for the construction of the house on the Waterview property was taken directly from the appellant's separate property house on Shore Drive. The Appellate Court ruled as follows:

> The $23,750.00 for the construction of the house taken directly from the sale of appellant's separate property house, however, should be reimbursed rather than treated as a community living expense. As a general rule, where separate funds are expended toward the living expenses of the community, they constitute a gift to the community. *See* Norris v. Vaughn, 152 Texas 491, 260 S.W.2d 676, 683 (Tex. 1953); *Trevino v. Trevino*, 555 S.W.2d 792, 802 (Tex. App. – Corpus Christi 1977, no writ). Using separate property to pay a community debt, however, creates a **prima facie** right to reimbursement, as the separate property may be said to have enhanced the community estate. *See Penick v. Penick, supra*. The lump-sum use of separate property to retire community obligations on a debt does not amount to a community living expense and gives right to a prima facie right to reimbursement. *Graham v. Graham*, 836 S.W.2d 308 (Tex. App. – Texarkana 1992, no writ). The $23,750.00 from the sale of appellant's separate property was applied in one lump sum for the purchase of a community asset. The additional payments from appellant's separate estate toward construction of the house also should be reimbursed rather than treated as community living expenses. Unlike living expenses such as food or rent, the property acquired was not transitory. Rather, it enhanced the value of the community estate and endured after the dissolution of the marriage. We hold that the trial court erred in denying the claim of reimbursement to appellant's separate estate for expenses toward the community house at 904 Waterview and enhancement of the lot. (Emphasis added.)

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

In this case, the husband appealed a trial court award based upon the overall division of the community estate and the trial court's award of a reimbursement to the community estate from his separate estate in the amount of $30,000.00 and the award of attorney's fees.

With respect to the reimbursement award to the community estate, during the marriage and without the knowledge of his wife, Stan had multiple extra-marital affairs and fathered one child with one of his girlfriends. Stan provided financial support for the woman and his illegitimate child during the marriage, again without the knowledge of his wife.

On appeal, Stan objected to the reimbursement award on the basis that his obligation to provide child support is a debt acquired during his marriage, and because it is an expense for living expenses and a community obligation, no right of reimbursement exists.

The Appellate Court first indicated that as a general proposition no right of reimbursement attaches to expenditures for living expenses. *Norris v. Vaughan*, 152 Tex. 491, 260 S.W.2d 676, 683 (1953). However, the exception for living expenses only applies to the living expenses of the marital family, for which each spouse is obligated to provide even from separate property if necessary. Citing *Pelzig v. Berkebile*, 931 S.W.2d 398, 400 (Tex. App. – Corpus Christi 1996, no writ).

This Appellate Court found that they had no authority to support Stan's contention that the living expenses of a child borne outside the marriage are exempt from reimbursement under the same living expenses obligation that a spouse has toward the marital family.

Stan further argued that the appellate decision prohibits reimbursement to the community estate for funds expended to meet the child support obligations of one spouse. However, this appellate court stated that in *Pelzig*, the husband had a pre-existing child support and alimony obligation when he married and that his second wife had full knowledge of these obligations. As a result, the second wife in *Pelzig* was not entitled to reimbursement. However, in this case, the child support obligation did not materialize until after the marriage commenced, and Stan hid the existence of the child from his wife, satisfying his child support obligations out of the community funds without her knowledge.

The court also went on to quote from the case of *Morrison v. Morrison*, 713 S.W.2d 377, 379 (Tex. App. – Dallas 1986, writ dis'd), wherein the Dallas Court of

Appeals held that the trial court did not abuse its discretion in awarding equitable reimbursement for the community funds husband spent during the marriage on women other than his wife.

T. *In Re Marriage of Gill*, 41 S.W.3d 255 (Tex. App. – Waco 2001, no pet.).

This is a divorce case in which the wife, Katherine, appeals from a final decree granting her a divorce from her husband, Todd.

Katherine, on appeal, asserts that the evidence is factually insufficient to support the court's $23,500.00 valuation of the community's claim for equitable reimbursement in her separate property house. The Court of Appeals reverses that portion of the divorce decree.

During the marriage, Todd claimed that the community was entitled to reimbursement for community funds spent to improve Katherine's house, and also to pay down a $40,000.00 debt obligation.

The court, citing the *Anderson v. Gilliland* case, *supra*, and *Kimsey v. Kimsey*, *supra*, decisions stated that "a claim for equitable reimbursement for community funds spent to improve a spouse's separate property is measured by the 'net enhanced value' of the property, i.e., the value of the property on the date of marriage compared to the value of the property on the date of divorce."

During the marriage, the parties borrowed $40,000.00 from Community State Bank. The debt was secured with Katherine's separate property. The note that the parties executed contained no significant recitals and the loan proceeds were deposited into the parties' community account. The trial court ruled that the loan, absent an expressed showing that the creditor agreed to look solely toward Katherine's separate property for repayment, was presumptively a community property obligation.

It is clear that the $40,000.00 loan proceeds were used to pay down on the separate property note obligation of Katherine and to make improvements to the property. However, the Appellate Court found that there was insufficient evidence of the enhanced value of the property as a result of the improvements, and that there was no evidence as to the amount of the loan proceeds that were used toward principal payments on the note. As a result, the Appellate Court reversed.

U. *Lifshutz v. Lifshutz*, 199 S.W.3d 9 (Tex. App. – San Antonio 2006, pet. denied).

This is the second appeal of the Lifshutz case. On appeal, Mr. Lifshutz challenged the trial court's reimbursement award to his wife based upon the *Jensen* reimbursement claim in the amount of $492,835.00.

The Appellate Court indicated Mrs. Lifshutz, the party seeking reimbursement, had the burden to prove the community estate was entitled to reimbursement under *Jensen*. Furthermore, "while mathematical certainty is not required, there must be some proof of the value of which the time, toil and effort exceeded that necessary to manage and preserve the separate estate." *Gutierrez*, 791 S.W.2d at 665.

"The party seeking reimbursement must establish that the value of the time and effort expended to enhance separate property exceeds both: (1) the time and effort reasonably necessary to manage and preserve his separate estate; and (2) the remuneration received from the corporation as compensation for that time and effort." (Citing *In Re Marriage Cassel*, 1997 WL 260099, at 3 (Tex. App. – Amarillo, May 19, 1997, no pet.). In order to establish that the efforts did more than was required to maintain the separate estate, evidence must be introduced to show the amount of time that was reasonably necessary for the party to spend managing and preserving the separate estate. *Gutierrez*, 791 S.W.2d at 665."

In this case, Kimberly (Mrs. Lifshutz) presented no evidence of the amount of time that was reasonably necessary for her husband to spend managing and preserving his separate property entities. Furthermore, one of the experts called to testify in the case refused to give an opinion on this particular element. Additionally, although there was apparently testimony from Mr. Wolverton (the expert who did not have an opinion on the amount of time that was reasonably necessary for Mr. Lifshutz to spend managing and preserving his separate property) did provide expert testimony as to whether Mr. Lifshutz was undercompensated and that the value of the entities increased as a result of his efforts. The court held that Mrs. Lifshutz is not entitled to the enhanced value of the separate property, but only to the value of time, toil and labor utilized to benefit the entities beyond that which was reasonably necessary for Mr. Lifshutz to spend managing and preserving the entities.

The Appellate Court acknowledged the trial court had great latitude in its application of the equitable principles to value a reimbursement claim. However, in this case, because Mr. Wolverton did not give an opinion on the value of James' time or effort reasonably necessary to manage his separate estate, and based on Mr. Parks, the other expert who testified regarding the *Jensen* reimbursement claims, that the increased value or enhancement of the entities was not attributable to the time and effort expended by Mr. Lifshutz and the reimbursement claim failed. "Although 'mathematical certainty' is not required, some evidence was required to be presented regarding the value of time reasonably

necessary to manage and preserve the separate property." *Gutierrez*, 791 S.W.2d at 665.

XII. CONCLUSION

When dealing with reimbursement claims, it is important to have pleadings on file setting forth your specific claims and defenses. The cases that talk about the various forms of reimbursement are not always a picture of clarity. The cases that discuss the payment of pre-marital debts do not always specifically identify what was paid (i.e. principal, interest, taxes or insurance), yet some of these cases are affirmed based upon the "no abuse of discretion standard."

If faced with a reimbursement claim involving enhancement in value involving capital improvements or time, talent, toil, and effort, analyze what specifically you need to prove, the time frame in which you need to prove it, and how you are going to prove it. Due to the discretionary powers of the trial court, the failure to prove all essential elements of your specific claim will usually result in your claim being denied by the trial court or reversed on appeal.

TABLE OF CASES