DIFFERENT WAYS TO TRACE SEPARATE PROPERTY

Moderator:
JIMMY VAUGHT, *Austin*

Panelists:
ROBERT L. BAILES, *Tyler*

WILLIAM C. BRADLEY, *San Antonio*

MICHAEL R. DEBRUIN, *Dallas*

RICHARD R. ORSINGER, *San Antonio*

Written by:
RICHARD R. ORSINGER, *San Antonio*

State Bar of Texas
35TH ANNUAL
ADVANCED FAMILY LAW COURSE
August 3-6, 2009
Dallas

CHAPTER 62

JAMES A. VAUGHT
McCullar ✯ Vaught, P.C.
3200 Steck Avenue, Suite 300
Austin, Texas 78757
(512) 342-9933 (512) 342-9996 facsimile
e-mail jimmy@mccullarvaught.com www.mccullarvaught.com

The firm's practice includes family law, divorce, child custody, collaborative law, mediation and civil appeals

PROFESSIONAL ACTIVITIES

Shareholder, McCullar ✯ Vaught, P.C.

Board Certified, Civil Appellate Law (1988-present)
Board Certified, Family Law (2000-present)
Texas Board of Legal Specialization

PROFESSIONAL MEMBERSHIPS & HONORS

Martindale-Hubbell - "AV" rating
Martingale-Hubbell Bar Register of Preeminent Lawyers

Texas Super Lawyer 2003, 2004 & 2006 Family Law (Texas Monthly)

Fellow, American Academy of Matrimonial Lawyers

Secretary (2008-2009), Treasurer (2007-2008), Texas Chapter of American Academy of Matrimonial Lawyers

Member, Council, State Bar Family Law Section 2006-2011

Member, Legislative Committee, Pro Bono Committee, & Membership and Member Services Committee, State Bar Family Law Section

Member, Board of Editors, Family Law Section Report, State Bar Family Law Section 2007-present

Member, Family Law Pattern Jury Charge Committee, State Bar of Texas (2009-present)

Member, The Collaborative Law Institute of Texas

Co-Chair, Texas Academy of Family Law Specialists Trial Institute (2010)

Member, Planning Committee, Advanced Family Law Drafting Course (2008)

SELECTED LAW RELATED PUBLICATIONS & PRESENTATIONS

"Different Ways to Trace Separate Property", New Frontiers in Marital Property Law, Napa, California, October 2008.

"The Marital Residence: There's No Place Like Home,"31st Marriage Dissolution Seminar, Galveston, Texas, April 2008.

"Dealing with Unusual Trusts", New Frontiers in Marital Property Law, Memphis, Tennessee, October 2007.

"Post Judgment Issues: Sometimes Its Heaven, Sometimes Its Hell, and Sometimes You Don't Even Know," 33rd Annual Advanced Family Law Course, San Antonio, Texas, August 2007.

"Issues in ADR,"30th Marriage Dissolution Seminar, El Paso, Texas, May 2007.

"Marital Property Agreements: Still Crazy After All These Years," 32nd Annual Advanced Family Law Course, San Antonio, Texas, August 2006.

"Appeals and Mandamus - How to Repair Your Case and Prevent the Need for Repairs (or What to Do When Your Case is in the Ditch)", 29th Annual Advanced Family Law Course, San Antonio, Texas, August 2003.

"Family Law Court v. Probate Court: What Every Family Lawyer Should Know", 26th Annual Advanced Family Law Course, San Antonio, Texas, August 2000.

ROBERT L. BAILES, CPA/ABV
1357 Dominion Plaza
Tyler TX 75703-1013
903.561.5859
903.561.0295 (fax)

Professional Experience

- Bailes & Co., P.C.
  Officer/Shareholder

Prior

- Henry & Peters, PC (1978 - 1991)
  Officer/Shareholder

Certifications

- Certified Public Accountant (CPA)
- Accredited in Business Valuation (ABV)

Areas of Practice

- Federal income tax
- Business valuation
- Litigation support

Education

- Baylor University
  Bachelor of Business Administration in Accounting (1976)
- Baylor University
  Master of Professional Accountancy (1978)

Professional Associations

- American Institute of Certified Public Accountants
- Texas Society of Certified Public Accountants
- East Texas Chapter of the Texas Society of Certified Public Accountants
- Institute of Business Appraisers

Community Activities

- Board of Directors — Tyler Teen Court
- Advisory Board — Tyler Independent School District Foundation
- Board of Directors — Heart of Tyler
- Board of Directors — Tyler Tennis & Swim

WILLIAM C. BRADLEY, CPA/ABV

Mangum, Schieffer, Bradley & Co., PLLC

San Antonio, Texas

Bill Bradley is a partner with Mangum, Schieffer, Bradley & Co., PLLC. Bill is a member of the AICPA, accredited in business valuations and also is a member of the Family Law Section of the State Bar of Texas. Bill is a frequent speaker at the Advanced Family Law Course and the New Frontiers in Marital Property Law seminar. Bill practices in both the areas of tax and forensic accounting having prepared tracing reports and business valuations for over 20 years.

MICHAEL R. DeBRUIN

KOONS, FULLER, VANDEN EYKEL & ROBERTSON, P.C

2311 Cedar Springs, Suite 300

Dallas, Texas 75201

(214) 871-2727

Telecopy: (214) 871-0196

EDUCATION:

B.A., 1977, University of Minnesota
J.D., 1980, South Texas College of Law

PROFESSIONAL ACTIVITIES/HONORS:

Partner: Koons, Fuller, Vanden Eykel & Robertson, A Professional Corporation
Board of Legal Specialization Board Certified, Texas : Family Law 1990

Member - American Academy of Matrimonial Lawyers
Member - Texas Academy of Family Law Specialists
Member - State Bar of Texas (Family Law Section)
Member - Dallas Bar Association

2009 Texas' Best Family Law Lawyers

PUBLICATIONS AND/OR LECTURES:

"Different Ways to Trace Separate Property" Panelist/Presenter at the New Frontiers In Marital Property Law Conference (2008)

"Property: Tracing Economic Contribution Reimbursement" Panel Moderator at the 32nd Advanced Family Law Course (2006)

"Mediation Prep: From The Advocate's Viewpoint" at the 25th Advanced Family Law Course (1999)

"Property Experts: Who to Hire, What They Do, What to Ask" at the 21st Advanced Family Law Course (1995)

"Trial Skills with the Experts" at the 1994 17th Annual Marriage Dissolution Institute (1994)

"Basics Of Family Law In Texas" at the 3rd Annual Dallas Chapter TSCPA Divorce Conference (1994)

"Tax Aspects Of Divorce In Texas" and *"Tax Issues Of The Marital Residence"* for the Tax Aspects Of Divorce In Texas Seminar (1993)

"The Basics of Asset Tracing" at the Dallas Chapter of the Texas Society of CPAs seminar (1992)

"Problems And Pitfalls Regarding Child Support" for the Family Law in Texas "Winning" for Your Client Seminar (1991)

"Proving And Refuting Reimbursement Claims" for the Family Law in Texas "Winning" for Your Client Seminar (1991)

CURRICULUM VITAE OF RICHARD R. ORSINGER

Education: Washington & Lee University, Lexington, Virginia (1968-70)
University of Texas (B.A., with Honors, 1972)
University of Texas School of Law (J.D., 1975)

Licensed: Texas Supreme Court (1975); U.S. District Court, Western District of Texas (1977-1992; 2000-present); U.S. District Court, Southern District of Texas (1979); U.S. Court of Appeals, Fifth Circuit (1979); U.S. Supreme Court (1981)

Board Certified: Texas Board of Legal Specialization Family Law (1980), Civil Appellate Law (1987)

Organizations and Committees:

Chair, Family Law Section, State Bar of Texas (1999-2000)
Chair, Appellate Practice & Advocacy Section, State Bar of Texas (1996-97)
Chair, Continuing Legal Education Committee, State Bar of Texas (2000-02)
Vice-Chair, Continuing Legal Education Committee, State Bar of Texas (2002-03)
Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-2011); Chair, Subcommittee on Rules 16-165a
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-2005)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member and Civil Appellate Law Exam Committee (1990-2006; Chair 1991-1995); Family Law Advisory Commission (1987-1993)
Member, Supreme Court Task Force on Jury Charges (1992-93)
Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
Member, Board of Directors, Texas Legal Resource Center on Child Abuse & Neglect, Inc. (1991-93)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Associate, American Board of Trial Advocates
Fellow, American Academy of Matrimonial Lawyers
Director, San Antonio Bar Association (1997-1998)
Member, San Antonio, Dallas and Houston Bar Associations

Professional Activities and Honors:

Listed as Texas' Top Family Lawyer, Texas Lawyer's *Go-To-Guide* (2007)
Listed as one of Texas' Top 100 Lawyers, and Top 50 Lawyers in South Texas, *Texas Monthly* Super Lawyers Survey (2003-2009)
Texas Academy of Family Law Specialists' *Sam Emison Award* (2003) for significant contributions to the practice of family law in Texas
Association for Continuing Legal Excellence Best Program Award for *Enron: The Legal Issues* (2002)
State Bar of Texas *Presidential Citation* "for innovative leadership and relentless pursuit of excellence for continuing legal education" (June, 2001)
State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1995, June 1996, June 1997 & June 2004
Listed in the BEST LAWYERS IN AMERICA: Family Law (1987-2009); Appellate Law (2007-2009)

Continuing Legal Education and Administration:

Course Director, State Bar of Texas:
- Practice Before the Supreme Court of Texas Course (2002 - 2005 & 2007)
- *Enron, The Legal Issues* (Co-director, March, 2002) [Won national ACLEA Award]
- Advanced Expert Witness Course (2001, 2002, 2003,

2004)
- 1999 Impact of the New Rules of Discovery
- 1998 Advanced Civil Appellate Practice Course
- 1991 Advanced Evidence and Discovery
- Computer Workshop at Advanced Family Law (1990-94) and Advanced Civil Trial (1990-91)
- 1987 Advanced Family Law Course

Course Director, Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada (1987)

BOOKS AND JOURNAL ARTICLES

—Editor-in-Chief of the State Bar of Texas' TEXAS SUPREME COURT PRACTICE MANUAL (2005)
---Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)
---Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)
---*A Guide to Proceedings Under the Texas Parent Notification Statute and Rules,* SOUTH TEXAS LAW REVIEW (2000) (co-authored)
---*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal*, 41 SOUTH TEXAS LAW REVIEW 111 (1999)
---*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994 and Feb., 1995)
---Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)
---*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)
---*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage That Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

SELECTED CLE ARTICLES AND SPEECHES

State Bar of Texas' [SBOT] **Advanced Family Law Course**: Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001); Private Justice: Arbitration as an Alternative to the Courthouse (2002); International & Cross Border Issues (2002); Premarital and Marital Agreements: Representing the Non-Monied Spouse (2003); Those Other Texas Codes: Things the Family Lawyer Needs to Know About Codifications Outside the Family Code (2004); Pearls of Wisdom From Thirty Years of Practicing Family Law (2005); The Road Ahead: Long-Term Financial Planning in Connection With Divorce (2006); A New Approach to Distinguishing Enterprise Goodwill From Personal Goodwill (2007); The Law of Interpreting Contracts: How to Draft Contracts to Avoid or Win Litigation (2008); Effect of Choice of Entities: How Organizational Law, Accounting, and Tax Law for Entities Affect Marital Property Law (2008)

SBOT's **Marriage Dissolution Course**: Property Problems Created by Crossing State Lines (1982); Child Snatching and Interfering with Possess'n: Remedies (1986); Family Law and the Family Business: Proprietorships, Partnerships and Corporations (1987); Appellate Practice (Family Law) (1990); Discovery in Custody and Property Cases (1991); Discovery (1993); Identifying and Dealing With Illegal, Unethical and Harassing Practices (1994); Gender Issues in the Everyday Practice of Family Law (1995); Dialogue on Common Evidence Problems (1995); Handling the Divorce Involving Trusts or Family Limited Partnerships (1998); The Expert Witness Manual (1999); Focus on Experts: Close-up Interviews on Procedure, Mental Health and Financial Experts (2000); Activities in the Trial Court During Appeal and After Remand (2002)

UT School of Law: Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998); Judicial Perspectives on Appellate Practice (2000)

SBOT's **Advanced Evidence & Discovery Course**: Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997-1998); Making and Meeting Objections (1998 & 1999); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000 & 2001); Building Blocks of Evidence (2002); Strategies in Making a Daubert Attack (2002); Predicates and Objections (2002); Building Blocks of Evidence (2003); Predicates & Objections (High Tech Emphasis) (2003)

SBOT's **Advanced Civil Appellate Practice Course**: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002); New Appellate Rules and New Trial Rules (2003); *Supreme Court Trends* (2004); Recent Developments in the *Daubert* Swamp (2005); Hot Topics in Litigation: Restitution/Unjust Enrichment (2006); The Law of Interpreting Contracts (2007); Judicial Review of Arbitration Rulings: Problems and Possible Alternatives (2008)

Various CLE Providers: SBOT Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991), Offering and Excluding Evidence (1995), New Appellate Rules (1997), The Communications Revolution: Portability, The Internet and the Practice of Law (1998), Daubert With Emphasis on Commercial Litigation, Damages, and the NonScientific Expert (2000), Rules/Legislation Preview (State Perspective) (2002); College of Advanced Judicial Studies: Evidentiary Issues (2001); El Paso Family Law Bar Ass'n: Foreign Law and Foreign Evidence (2001); American Institute of Certified Public Accounts: Admissibility of Lay and Expert Testimony; General Acceptance Versus Daubert

TABLE OF CONTENTS

DIFFERENT WAYS TO TRACE SEPARATE PROPERTY

by

Richard R. Orsinger
Board Certified in Family Law
& Civil Appellate Law by the
Texas Board of Legal Specialization

I. INTRODUCTION. Texas courts have entertained a variety of approaches to proving separate property. Other states, as well, have published appellate cases about how to tracing commingled property, not only for marital property purposes but also to sort out proceeds from the sale of exempt assets that were mixed with non-exempt cash, or to allocate funds in which the monies of different people have been mixed. This article discusses the popular line-item-approach to tracing, as well as other alternatives to proving separate property claims.

II. TRACING; MUTATIONS. "[T]he question whether particular property is separate or community must depend upon the existence or nonexistence of the facts, which, by the rules of law, give character to it . . . ." *Hilley v. Hilley*, 161 Tex. 569, 342 S.W.2d 565, 568 (Tex. 1961). "Tracing involves establishing the separate origin of the property through evidence showing the time and means by which the spouse originally obtained possession of the property." *Boyd v. Boyd*, 131 S.W.3d 605, 612 (Tex. App.--Fort Worth 2004, no pet.). As noted in *Pace v. Pace*, 160 S.W.3d 706, 711 (Tex. App.--Dallas 2005, pet. denied): "Where an asset is purchased during marriage with monies traceable to a spouse's separate estate, the asset may appropriately be characterized as separate property."

The Supreme Court said, in *Rose v. Houston*, 11 Tex. 324, 1854 WL 4287, *2 (Tex. 1854):

> It has been decided, not only that property received in exchange for the separate property of one of the parties to the nuptial contract remains separate property, but that property purchased with money which was obtained upon the sale of the separate property of either husband or wife, also remains separate property. (*Love v. Robinson*, 7 Tex. R., 6; *McIntyre v. Chappell*, 4 Id.) The consequence is, that to maintain the character of separate property, it is not necessary that the property of either husband or wife should be preserved in specie, or in kind. It may undergo mutations and changes, and still remain separate property; and so long as it can be clearly and indisputably traced and identified, its distinctive character will remain.

In *Smith v. Bailey*, 66 Tex. 553, 1 S.W. 627, 628 (Tex. 1886), the Supreme Court said: "Another principle, equally well settled, is that the wife's separate property may undergo mutations and changes, yet retain its separate character; but the proof to trace and identify it in its changed condition must be clear and satisfactory." Again in *Norris v. Vaughan*, 152 Tex. 491, 496-97, 260 S.W.2d 676, 679 (1953), the Supreme Court said: "so long as separate property can be definitely traced and identified it remains separate property regardless of the fact that the separate property may undergo 'mutations and changes.'"

In *Celso v. Celso*, 864 S.W.2d 652, 654 (Tex. App.--Tyler 1993, no writ), the court said: "Separate property will retain its character through a series of exchanges so long as the party asserting separate ownership can overcome the presumption of community property by tracing the assets on hand during the marriage back to property that, because of its time and manner of acquisition, is separate in character."

The court in *Faram v. Gervitz-Faram*, 895 S.W.2d 839, 842 (Tex. App.--Fort Worth 1995, no writ), described tracing in the following way:

> [T]he party claiming separate property must trace and identify the property claimed as separate property by clear and convincing evidence. Tracing involves establishing the separate origin of the property through evidence showing the time and means by which the spouse originally obtained possession of the property. *Hilliard v. Hilliard*, 725 S.W.2d 722, 723 (Tex. App.--Dallas 1985, no writ). Separate property will retain its character through a series of exchanges so long as the party asserting separate ownership can overcome the presumption of community property by tracing the assets on hand during the marriage back to property that, because of its time and manner of acquisition, is separate in character. *Cockerham v. Cockerham*, 527 S.W.2d 162, 167 (Tex. 1975).

In *Legrand-Brock v. Brock*, 246 S.W.3d 318, 321(Tex. App.--Beaumont 2008, pet. denied), the court said:

> Generally, when a spouse owns separate-property stock in a dissolving corporation and receives distributions of liquidated assets, the distributions remain the stockholder's separate property. . . . The character of property is not altered by the sale, substitution, or exchange of the property; separate property that merely undergoes mutations or changes in form remains separate property.

Thus, a liquidation of an interest in a business is a form of mutation.

Despite the current popularity of tracing separate property using line-item-tracing based on the community-out-first “rule,” there is no case saying that this is the only way to trace separate property, and that all other ways are wrong. As noted in *Gibson v. Gibson*, 614 S.W.2d 487, 489 (Tex. Civ. App.--Tyler 1981, no writ):

> Courts dealing with the tracing of separate property commingled with community funds have required varying degrees of particularity in identifying separate property. See 6 St. Mary's L. J. 234 (1974). Many Texas cases have been strict in demanding a "dollar for dollar" accounting of separate funds used to purchase an asset, the ownership of which is in dispute. *e.g.*, *Schmeltz v. Gary*, 49 Tex. 49 (1878); *Latham v. Allison*, *supra*; *West v. Austin National Bank*, 427 S.W.2d 906 (Tex. Civ. App.-San Antonio 1968, writ ref'd n.r.e.); *Stanley v. Stanley*, 294 S.W.2d 132 (Tex. Civ. App.-Amarillo 1956, writ ref'd n. r. e., *cert. den'd*, 354 U.S. 910, 77 S.Ct. 1296, 1 L.Ed.2d 1428).
>
> Certain other courts have been more lenient in their treatment of the tracing problem. The philosophy prompting these decisions was expressed in *Farrow v. Farrow*, 238 S.W.2d 255, 257 (Tex. Civ. App.-Austin 1951, no writ): "One dollar has the same value as another and under the law there can be no commingling by the mixing of dollars when the number owned by the claimant is known." In *Sibley v. Sibley*, 286 S.W.2d 657 (Tex. Civ. App.-Dallas 1935, writ dism'd), the court allowed appellee to trace her separate property through a series of transactions, including the deposit of the proceeds from a sale of her separate realty into a joint account containing a substantial amount of community funds and separate funds belonging to the other spouse. According to Sibley, community funds will be presumed to have been drawn out before separate funds from a joint bank account.
>
> In still other cases, spouses have been permitted to distinguish their separate funds commingled in a bank account with community money by proving that community withdrawals, e. g. for living expenses, equaled or exceeded community deposits. For example, in *Coggin v. Coggin*, 204 S.W.2d 47, 52 (Tex. Civ. App.--Amarillo 1947, no writ), evidence was presented to show that income from the wife's property totaled approximately $1,000 per year, while family living expenses were $200-$500 monthly. The court found that such community funds could not have been used to pay for the property in question since they had already been depleted in paying for the living expenses. *See DePuy v. DePuy*, 483 S.W.2d 883, 888 (Tex. Civ. App.--Corpus Christi 1972, no writ).

A close analysis of Texas case law demonstrates that Texas courts have recognized a variety of approaches to proving a claim of separate property.

The court in *Coggin v. Coggin*, 204 S.W.2d 47, 55 (Tex. Civ. App.--Amarillo 1947, no writ), commented:

> [W]here the terms community property and separate property have been adequately defined, it is not necessary to point out specifically in special requested charges the various fact situations whereby separate property may become community property.

Coggin supports an argument that it is not the role of the court to detail to the fact-finder specific tracing methods that can and cannot be used. This suggests that whether a tracing approach is clear and convincing is a question for the fact-finder to decide.

In keeping with general rules of litigation, unless separate property identity is proven conclusively (i.e., as a matter of law), or unless there is not more than a scintilla of evidence to support a separate property claim (i.e., legally insufficient evidence), the character of property is a fact issue to be determined by the finder of fact based upon a clear and convincing evidence standard.

In a divorce case, determining the character of property involves not only investigating the facts, but also selecting the law to apply to the facts. Thus, a tracing case can involve disputes over both the facts and what law should be applied to those facts. However, some aspects of tracing methodologies are not mentioned in case law, and their use is a matter of accounting practices tracing conventions, or logic, or opinion, not law.

III. PRESUMPTIONS AND BURDEN OF PROOF. In many tracing cases, the fight over the law has to do with the use of presumptions proposed by a party to support his/her position. The role of presumptions in trying and appealing cases is a complicated area of the law. An excerpt dealing with presumptions, from Professor McCormick's treatise on evidence law, is attached to the back of this article.

A. THE COMMUNITY PRESUMPTION. The starting point law to apply to a tracing case in Texas is the presumption of community property. In *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965):

> The plain wording of the statute [Art. 4619] creates a rebuttable presumption that all property possessed by a husband and wife when their marriage is dissolved is their community property and imposes the burden upon one asserting otherwise to prove the contrary by satisfactory evidence. . . . The general rule is that to discharge the burden imposed by the statute, a spouse, or one claiming through a

> spouse, must trace and clearly identify property claimed as separate property . . . .
>
> Thus, in a divorce the spouse claiming a separate property interest must "trace and clearly identify the property in question."

All property possessed by a spouse during and on dissolution of marriage is presumed to be community property. TEX. FAM. CODE § 3.003(a). However, this presumption is rebuttable, and can be overcome by evidence that establishes that property is separate property.

B. THE BURDEN OF PERSUASION. The burden of proof (also called the "burden of persuasion") to be applied by the fact finder in determining separate property is "clear and convincing evidence." TEX. FAM. CODE § 2.002(b). Courts in marital property cases sometimes borrow the definition of "clear and convincing evidence" set out in Title 5 of the Family Code relating to parent-child suits: "'Clear and convincing evidence' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. FAM. CODE § 101.007. *See Huval v. Huval*, 2007 WL 1793771 (Tex. App.–Beaumont 2007, no pet.) (memorandum opinion) (citing Section 101.007 in a tracing case).

C. THE PRESUMPTION CAN VANISH. Some courts say that the community presumption is nullified when contrary evidence is introduced. The court of appeals in *Harris v. Harris*, 765 S.W.2d 798, 802 (Tex. App.–Houston [14th Dist.] 1989, writ denied), made the following statement regarding the community presumption:

> Property possessed by either spouse during or on dissolution of marriage is presumed to be community property. Section 5.02, Tex. Fam. Code. The party claiming property as separate has the burden to overcome this presumption by clear and convincing evidence. Id.; *Horlock v. Horlock*, 614 S.W.2d 478, 480 (Tex. Civ. App.–Houston [14th Dist.] 1981, writ ref'd n.r.e.). To discharge this burden a spouse must trace and clearly identify the property claimed as separate. *Cockerham v. Cockerham*, 527 S.W.2d 162, 167 (Tex. 1975); *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973). If separate property and community property have been so commingled as to defy resegregation and identification, the statutory presumption prevails. *Tarver v. Tarver*, 394 S.W.2d 780 (Tex. 1965). However, when separate property has not been commingled or its identity as such can be traced, the statutory presumption is dispelled. *Peaslee-Gaulbert Corp. v. Hill*, 311 S.W.2d 461, 463 (Tex.Civ.App.--Dallas 1958, no writ). **The**

> **presumption, which is not evidence, ceases to exist upon introduction of positive evidence to the contrary and is not then to be weighed or treated as evidence**. *Empire Gas and Fuel Co. v. Muegge*, 135 Tex. 520, 143 S.W.2d 763, 767 (1940); *Roach v. Roach*, 672 S.W.2d 524, 530 (Tex. App.--Amarillo 1984, no writ); *In re: Estate of Glover*, 744 S.W.2d 197, 200 (Tex. App.--Amarillo 1987, writ denied). Once determined, the character of the property is not altered by the sale, exchange or substitution of the property. *Norris v. Vaughn*, 152 Tex. 491, 260 S.W.2d 676, 679 (1953); *Horlock v. Horlock*, 533 S.W.2d 52, 60 (Tex.Civ.App.--Houston [14th Dist.] 1975, writ dism.). Property established to be separate remains separate property regardless of the fact that it may undergo any number of mutations and changes in form. [Emphasis added.]

Accord, *Patterson v. Patterson*, 1992 WL 163305, * 2 (Tex. App.--Houston [1st Dist.] 1992, no pet.) (unpublished) ("[t]he presumption of community property is not evidence and is nullified when evidence is introduced contrary to the presumption").

Given that the burden of proof (i.e., burden of persuasion) in a divorce ordinarily remains on the party asserting separate property all the way through verdict, in what sense can it be said that the community presumption is nullified by contrary evidence? The cases are not negating the role of the presumption of community as a way to assign the burden of proof. These cases are instead suggesting that the presumption of community carries no evidentiary weight in the face of contrary evidence, when the appellate court is considering the sufficiency of the evidence on the character of property. Thus, when considering the factual sufficiency of the evidence to support a finding of separate property, the appellate court should weigh evidence supporting separate property against evidence supporting community property, and the presumption of community is not added to the scales in making this comparison.

D. COUNTER-PRESUMPTIONS. Even the roll of assigning the burden of persuasion can be taken from the community presumption in some situations. The introduction into evidence of certain facts can give rise to a presumption that replaces the presumption of community property, with regard to a particular issue. For example, *Kahn v. Kahn*, 94 Tex. 114, 58 S.W. 825, 826 (1900), indicated that a deed from a third party to a spouse, which recites separate property, creates a presumption that the property is the separate property of that spouse. In *Henry S. Miller Co. v. Evans*, 452 S.W.2d 426, 431 (Tex. 1970), the Supreme Court said:

> Before Miller offered evidence to show that the property was acquired during coverture, which would give rise to the presumption that this was

> community property, the Sheriff introduced into evidence the deed to Nancy Shoaf containing the recitals to the effect that the land was conveyed to her as her sole and separate estate, and that the consideration was paid and to be paid out of her separate estate. As a result of the recitals in the deed, no presumption of community property existed. By the introduction of the deed containing these recitals into evidence, the Sheriff established a prima facie defense that the Amanda Street property was the separate property of the wife, Nancy Shoaf, and Not subject to execution; Article 4616.

Another example is the presumption that a transfer from a parent to a child is a gift. *Blair v. Blair*, 1999 WL 649082, at *4 (Tex. App.--Houston [14 Dist.] 1999, no pet.) ("When property is deeded from a parent to a child it is presumed that a gift was intended"). In *Somer v. Bogert*, 762 S.W.2d 577 (Tex.1988) (per curiam), the Supreme Court said:

> [T]he court of appeals . . . held that a presumption of gift exists when a father- and mother-in-law place property in their son-in-law's name, and the party seeking to disprove the presumption must prove lack of donative intent by clear and convincing evidence. . . . We approve the holding of the court of appeals that the burden of proof in refuting the presumption of gift is by clear and convincing evidence.

Other countervailing presumptions were set out in *Dessommes v. Dessommes*, 505 S.W.2d 673, 679 (Tex. App.--Dallas 1973, writ ref'd n.r.e.):

> The burden of proof is not necessarily determined by which party happens to be in the position of plaintiff. It may rest on broad considerations of fairness, convenience and policy, 9 J. Wigmore, Evidence § 2486 at 275 (3d ed. 1940); 1 C. McCormick & R. Ray, Texas Law of Evidence § 43 at 40 (2d ed. 1956). One of the recognized principles in determining the burden is to place it on the party having peculiar knowledge of the facts to be proved. *W. A. Ryan & Co. v. M.K. & T. Ry.*, 65 Tex. 13 (1885); *Beaumont, S.L. & W. Ry. v. Myrick*, 208 S.W. 935(Tex.Civ.App.-Beaumont 1919, writ dism'd); *Rowe v. Colorado & S.R.*, 205 S.W. 731 (Tex.Civ.App.-Amarillo 1918, writ ref'd); 9 J. Wigmore, Supra at 275; 1 C. McCormick & R. Ray, Supra at 39. This principle is consistent with authorities holding that one who has innocently commingled another's goods or funds with his own does not gain anything by the commingling, but has the burden of establishing what portion is his. *Wright v. Ellwood Ivins Tube Co.*, 128 F. 462 (C.C.E .D.Pa.1904); *Claflin v. Continental Jersey Works*, 85 Ga. 27, 11 S.E. 721

> (1890); *In re Thompson*, 164 Iowa 20, 145 N.W. 76 (1914). A fair general rule deducible from the above authorities is that if the parties are shown to have been the equal owners of a fund at a certain time, and one of them is shown to have made additions to that fund in an undetermined amount, the party who made the additions should have the burden to show the amount of the additions.

Another countervailing presumption was set out in *Giesler v. Giesler*, 309 S.W.2d 949, 950 (Tex. Civ. App.–San Antonio 1958, no writ):

> We think, in view of the fact that appellant managed the community estate and in that capacity personally was guilty of commingling said community funds into his wife's separate bank account, that it would be inequitable to permit him to profit by such action by applying the strict doctrine of commingling.

The Texas Family Law Practice Manual form premarital agreement (Form 48-3) undertakes to replace the community presumption in some instances. See Section III.E below.

E. INSTRUCTING THE JURY. A jury should not be instructed on the existence of a presumption. *Glover v. Henry*, 749 S.W.2d 502, 504 (Tex. App.--Eastland 1988, no writ) ("The sole effect of a presumption is to fix the burden of producing evidence. . . . An instruction on a presumption is improper."). Instead, the presumption of community should be used to allocate the burden of proof. The Pattern Jury Charges (Family) are constructed in this way. The PJC says that "[n]o instruction should be given on the presumption, contained in Tex. Fam. Code § 3.003, that property possessed by either spouse during or on dissolution of marriage is presumed to be community property. The sole purpose of a presumption is to fix the burden of producing evidence." PJC 202.1 *Comment*. The PJC does not tell the jury about the presumption of community. Instead it tells the jury that a finding of separate property must be based on clear and convincing evidence, and then asks whether the jury finds certain property to be separate property. PJC 202.11. This reflects the role of the community presumption as a way to assign the burden of proof, and not as evidence to be weighed by the trier of fact.

A counter-presumption would operate the same way. For example, in the event of a transfer from a parent to a child, the jury would be asked something like this: Was a gift of property X intended? Answer 'It was intended' unless you find from clear and convincing evidence that it was *not* intended as a gift. (The requirement of proving a negative makes the wording tricky.)

F. PRE- AND POST-MARITAL AGREE-MENTS. Premarital and post-marital agreements can change the rules of characterizing separate and community property. The parties can make community property separate, separate property community, and at least in premarital agreements can waive reimbursement and economic contribution claims.

The Texas Family Law Practice Manual premarital agreement form (Form 48-3) attempts to alter presumptions and methods of proving separate property.

Paragraph 18.3 says that property held in a spouse's individual name is presumed to be that spouse's separate property:

> *18.3 Presumption of Separate Property*
>
> Any property held in [**name of party A**]'s individual name is presumed to be the separate property of [**name of party A**]. Any property held in [**name of party B**]'s individual name is presumed to be the separate property of [**name of party B**]. Any property or liability inadvertently omitted from the schedules attached to this agreement is the separate property or liability of the party to whom it belongs or by whom it was incurred.

Paragraph 3.4 negates any presumptive ownership resulting from commingling:

> *3.4 No Commingling Intended*
>
> Neither party intends to commingle his or her separate property with the separate property of the other party, except when intentionally done in a joint financial account, and neither party may claim an interest in any separate property of the other party as a result of such commingling, except as provided in this agreement.

Paragraph 3.9 lists facts that cannot be considered evidence of intent to create community (why not preclude the items as "evidence of community property"?):

> *3.9 Certain Events Not Evidence of Community Property*
>
> The following events may not, under any circumstances, be considered evidence of any intention to create community property:
>
> 1. the filing of joint tax returns;
> 2. the taking of title to property, whether real or personal, in joint tenancy or in any other joint or common form;
> 3. the designation of one party by the other party as a beneficiary of his or her estate or as trustee or any other form of fiduciary;
> 4. the combining or mixing by one party of his or her separate funds or property with the separate funds or property of the other party, including the pledging of joint or separate credit for the benefit of the other party's separate estate;

5. any oral statement by either party;
6. any written statement by either party, other than a written agreement that contains an explicit statement of the party's intent to change the party's separately owned property into jointly owned property or a written agreement designating a particular piece of property as a gift to the other party;
7. the payment from the funds of either party for any obligations, including but not limited to the payment of mortgages, interest, real property taxes, repairs, or improvements on a separately or jointly held residence; and
8. the joint occupation of a separately owned residence, even though designated as a homestead.

The provisions of this section 3.9 are not comprehensive.

Paragraph 7.1 says that jointly-held property "may not be deemed to be community property," and that absent records of each party's contribution (that is, oral testimony has no probative weight), ownership is conclusively presumed to be 50-50.

The form premarital agreement, para. 12.1, provides terms on how you can and cannot prove a gift.

12.1 Gifts

* * *

To remove any uncertainty about the issue of interspousal gifts, the parties agree that:

1. Gifts of wearing apparel, jewelry, and athletic equipment may be established by parol testimony if the item or property is customarily used and enjoyed exclusively by the party claiming it as a gift to him or her;

2. Gifts of other items of personal property not covered by item 1. above, such as furnishings, artwork, cash, and collections, must be established by clear and convincing evidence; and

3. Any property that is held by title, as in a deed, in a certificate, or by account name, may not be effectively transferred to the party claiming it as a gift unless, in fact, the deed, certificate, or account is transferred by name to the party claiming the gift.

The author could find no cases across America where an appellate court ruled on a contractually-altered burden of proof. The few law review articles on point support the right to contract. In one of the author's recent cases, Dallas District Judge David Hanschen ruled that the negation of the presumption of community in a prenuptial agreement would be honored in the trial and in the jury charge.

IV. MANAGEMENT RIGHTS. An issue that has not been adequately explored in the context of marital property tracing cases is a spouse's management rights.

TEX. FAM. CODE § 3.101 provides:

> Each spouse has the sole management, control, and disposition of that spouse's separate property.

TEX. FAM. CODE § 3.102(a) provides:

> (a) During marriage, each spouse has the sole management, control, and disposition of the community property that the spouse would have owned if single, including:
>
> > (1) personal earnings;
> > (2) revenue from separate property;
> > (3) recoveries for personal injuries; and
> > (4) the increase and mutations of, and the revenue from, all property subject to the spouse's sole management, control, and disposition.

Does a spouse have the right, in the exercise of his/her management powers, to decide to expend separate property for some purposes and community property for other purposes? Or do tracing rules, mechanically applied after the fact, negate that right? To be effective, does the management intent need to exist at the time of the transaction, as opposed to the time of divorce?

V. THE MUTATION PRINCIPLE. The core principle for tracing is the concept of mutation, and the tenet that separate property does not lose its character because it changes in form. Most of the issues regarding tracing techniques have to do with the way you follow the wealth as it changes form. Some advocate that you must precisely follow the flow of wealth as it mutates in form, and if you lose track of that precise flow then the separate wealth become community property. Texas courts have, in cases stretching over many years, reflected a different view: if they know the separate property is "in there somewhere," they have allowed different methods of showing where that wealth is, or how much that wealth is.

A. ASSET EXCHANGE. In a sense, nearly all acquisitions (other than gift or inheritance) are asset exchange transactions, where one thing is swapped for another, or something is paid to purchase another thing, or where someone promises to pay something in the future in connection with buying something. The same applies when your perspective is the asset sold. "Trading in" an automobile in connection with buying a new one is an asset exchange. But then so is a corporation transferring some or all of its assets to another entity in exchange for an ownership interest in the other entity. A distribution in redemption or liquidation of corporate stock is likewise a mutation.

B. ENTITY CHANGE. Texas law now permits corporations to convert into partnerships, and partnerships to convert into corporations, and different entities to convert into limited liability companies, etc. This procedure replaced a more cumbersome process where a corporation was converted into a partnership by creating a new entity and merging the two, or by creating the new entity and then conveying all assets of the corporation to the partnership, with shareholders becoming partners in the partnership. It is valid to ask whether the character of a new business formed from an old business should depend upon the exact manner of converting the business from one form to another, or whether the concept of mutation should apply, regardless of the details.

In *Horlock v. Horlock*, 533 S.W.2d 52, 59 (Tex. Civ. App.–Houston [14th Dist.] 1975, writ dism'd), the husband owned stock in a corporation prior to marriage. During marriage, that corporation merged with two other corporations to create yet another corporation. The court found that the new stock was the husband's separate property, despite the fact that he and the other owners of the old corporation put $200,000 into the merger.

One case affirmed a trial court's finding that, in a business reorganization, the transfer of an asset from a partnership to a corporation was a constructive distribution to the married partner. *See Lifshutz v. Lifshutz*, 199 S.W.2d 9, 27 (Tex. App.–San Antonio 2006, no pet.) ("*Lifshutz II*"). The trial court found this to be a "non-liquidating community distribution" from the partnership, and held the stock of the subsidiary to be community property distributed to the husband. *Id*. at 24. After an extensive analysis of the facts and citation to *Marshall v. Marshall*, 735 S.W. 2d 587, 594 (Tex. App.–Dallas 1987, writ ref'd n.r.e.), a 2-to-1 majority of the court of appeals wrote:

> Accordingly, since partnership property does not retain a separate character, distributions from the partnership are considered community property, regardless of whether the distribution is of income or of an asset.

The court recognized that a Louisiana appellate court had "drawn a distinction between distributions of income and distributions of a capital asset," but commented the Louisiana court did not analyze the effect of the entity theory of partnerships and further noted that in the present case, "the accumulated profits of [the partnership] exceeded the aggregate distributions, which included the [subsidiary] stock distribution." Id. at 27 n. 4.

VI. SEPARATE CREDIT. Under Texas law, "debts contracted during marriage are presumed to be on the credit of the community and thus are joint community obligations, unless it is shown the creditor agreed to look solely to the separate estate of the contracting spouse for satisfaction." *Cockerham v. Cockerham,* 527 S.W.2d 162, 171 (Tex. 1975) (footnote omitted). The mere intent of the spouses does not control whether the credit is community or separate. *Gleich v. Bongio*, 128 Tex. 606, 99 S.W.2d 881 (1937). Some courts of appeals have taken a liberal view of what constitutes proof of an agreement by the creditor to look solely to the borrowing spouse's separate estate for repayment. For example, in *Brazosport: Bank of Texas v. Robertson*, 616 S.W.2d 363, 366 (Tex. Civ. App.--Houston [14th Dist.] 1981, no writ), the court held that the bank's loaning money to the wife over the husband's objection, where the note was signed by the wife alone and the title to the automobile was taken in the wife's name alone, constituted an agreement by the lender to look to the wife alone for satisfaction of the debt. In *Holloway v. Holloway, 671* S.W.2d 51, 57 (Tex. App.--Dallas 1983, writ dism'd), an implied agreement on the part of a creditor to look solely to the husband's separate estate was inferred from the fact that the loan proceeds were deposited into an account designated as the husband's separate property account, and the fact that the husband alone signed the loan papers "Pat S. Holloway, Separate Property," and the fact that only the husband's separate property was used a collateral.

The case of *Edsall v. Edsall*, 240 S.W.2d 424, 428 (Tex. Civ. App.--Eastland 1951, no writ), involved an acquisition where part of the purchase price was paid in two installments, separated over time. One spouse claimed that separate property was used for both installments. The other spouse claimed that the second installment was a instance of community credit. The appellate court said:

> It is to be noted that such 80 acre tract was acquired by appellee about one year after his marriage. It is undisputed that at the time it was acquired he delivered to his son the 11 head of cattle valued at $660.00 and that these cows were his separate property. It is likewise undisputed that the 8 cows delivered two months after the date of the deed were also appellee's separate property. This constituted a total of $1,100.00 of the consideration for such tract which came from appellee's separate estate. This evidence, in our opinion, raised a question of fact as to whether the parties intended at the time of the conveyance that such portion of the total consideration as was later satisfied by the 8 cows should be paid from appellee's separate estate. If such was the intention, the same proportion of the tract purchased thereby become separate property. It is undisputed that such portion was so paid from the separate estate. In our opinion the court was justified under these facts in holding that such 80 acre tract was 11/16ths appellee's separate property and 5/16ths community property.

VII. COMMINGLING. Commingling is the mixing of separate and community property assets, often money. In *Smith v. Bailey*, 66 Tex. 553, 554-55, 1 S.W. 627, 628 (Tex. 1886), the Supreme Court said:

> Mr. and Mrs. Bailey were married in 1877 or 1878. The goods in her store at that time were her separate property. She did business with them from that time on, selling them in the usual course of trade, and with the proceeds of the goods replenished her stock. From the date of her marriage down to the time when the witness Meeks took charge of the store, a period of about three years, we have not one particle of testimony to show how much of the profits of the business entered into the purchase of goods to keep up the stock. The stock must have gone through many mutations before passing into Meeks' charge. Separate property and profits had been mingled at various times and in varied proportions in the purchase of this and preceding stocks. The presumed community character of this stock was not disproved, and, under the evidence, was subject to the husband's debts.

The Supreme Court of Texas said this about commingling, in *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965):

> The plain wording of the statute [Art. 4619] creates a rebuttable presumption that all property possessed by a husband and wife when their marriage is dissolved is their community property and imposes the burden upon one asserting otherwise to prove the contrary by satisfactory evidence. . . . The general rule is that to discharge the burden imposed by the statute, a spouse, or one claiming through a spouse, must trace and clearly identify property claimed as separate property, Schmeltz v. Garey, 49 Tex. 49, 61 (1878); Chapman v. Allen, 15 Tex. 278, 283 (1855); . . . and that when the evidence shows that separate and community property have been so commingled as to defy resegregation and identification, the burden is not discharged and the statutory presumption that the entire mass is community controls its disposition. Hodge v. Ellis, 154 Tex. 341, 277 S.W.2d 900, 907 (1955). . . .

The Supreme Court reiterated in *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973), that "when the evidence shows that separate and community property have been so commingled as to defy resegregation and identification, the burden is not discharged and the statutory presumption prevails."

In *Martin v. Martin*, 759 S.W.2d 463, 466 (Tex. App.--Houston [1st Dist.] 1988, no writ), three lots were sold, two that were separate property and one that was community property. The lots were sold for a combined price. The appellate court held that, absent proof of the sales price for each lot, all proceeds were deemed to be community property.

In *Munoz v. Munoz*, 2003 WL 22977487, *5 (Tex. App.--El Paso 2003, no pet.) (unpublished), the appellate court considered a "commingled" personal injury recovery. The court said:

> [A]fter reviewing the record, we find a lack of clear and convincing evidence to rebut the presumption that some portion of the settlement funds were attributable to Appellee's lost earnings and lost earning capacity which are community estate assets. Since Appellee did not prove what amount of the settlement proceeds were separate or community property, a reasonable trier of fact could not have formed a firm belief or conviction that the net recovery from the settlement was entirely Appellee's separate property. . . . When some portion of a settlement may be for lost wages or lost earning capacity, the spouse receiving the settlement has the burden to show that none of the funds constitute payment for lost wages or lost earning capacity during marriage. . . . In the absence of such evidence, the entire settlement proceeds are properly characterized as community property. . . . Therefore, the trial court erred in its characterization of the settlement fund as Appellee's separate property. [Citations omitted]

Schneider v. Schneider, 2004 WL 254247, *2 (Tex. App.--Fort Worth 2004, pet. struck) (unpublished), is an odd case where spouses were fighting over a dog ("Lucky") purchased prior to marriage. The court said:

> Neither party presented any evidence to clarify the source of funds used to purchase Lucky. However, it is undisputed that appellee purchased Lucky prior to the marriage. Under the family code, a spouse's separate property consists of the property owned or claimed by the spouse before marriage. . . . However, in this case the parties lived together prior to marriage, and commingled their funds in a joint bank account. Both appellant and appellee testified that the funds used to purchase Lucky were the commingled funds from the joint bank account. Therefore, because neither of the parties established by clear and convincing evidence that Lucky was purchased with the separate property funds of either appellant or appellee, the most the evidence shows is that they own Lucky as tenants in common. . . . Thus, the trial court erred in confirming Lucky as appellee's separate property. [Citations and footnote omitted]

VIII. METHODS OF PROOF.

A. TESTIMONY OF A SPOUSE. Different appellate courts have said different things about the importance of a spouse's testimony of separate property. The cases as a whole usually (but not always) support the view that the uncorroborated testimony of a spouse (i) is more than a scintilla of evidence to support a finding of separate property, but (ii) is not so overwhelming as to cause the appellate court to overturn a negative finding on separate property. This reflects the standard of appellate review of the sufficiency of the evidence. Where the trial court finds in favor of separate property, an appellate court can reverse the finding of separate property only when the supporting evidence is (i) so weak it is effectively no evidence of separate property so that a finding of community property is required, or (ii) so outweighed by the totality of the evidence that a new trial on the issue is required. Stated differently, when the trial court refuses to find in favor of separate property, the standard of appellate review permits an appellate court to reverse the failure to find separate property only when separate property character is proven *as a matter of law* (requiring the appellate court to reverse and render judgment) or *by the great weight and preponderance of the evidence* (requiring the appellate court to reverse and remand the issue for a new trial). If the presumption of community has been supplanted by a presumption of separate property, then the reverse applies.

Some of the tracing cases commenting on the weight to be given to a spouse's testimony involve purely conclusory statements by a spouse regarding character of property. Some of the cases involve the spouse's testimony alone without corroborating evidence. Some of the cases involve testimony by a spouse that is corroborated by other information. This makes it hard to discern a uniform principle regarding a spouse's testimony regarding separate property. It does appear that some of the appellate cases that reverse trial court findings of separate property have not scrupulously observed the dictates of appellate review of the sufficiency of the evidence. And some may have been inattentive to the proper disposition of the appeal when sustaining a factual sufficiency point.

The Supreme Court has said that the testimony of an interested witness can establish a fact *as a matter of law* (which is much more than by clear and convincing evidence):

> It is the general rule that the testimony of an interested witness, such as a party to the suit, though not contradicted, does no more than raise a fact issue to be determined by the jury. But there is an exception to this rule, which is that where the testimony of an interested witness is not contradicted by any other witness, or attendant circumstances, and the same is clear, direct and positive, and free from contradiction, inaccuracies, and circumstances tending to cast suspicion thereon, it is taken as true, as a matter of law.

Ragsdale v. Progressive Voters League, 801 S.W.2d 880, 882 (Tex. 1990). The court went on to say:

> [W]e do not mean to imply that in every case when uncontradicted testimony is offered it mandates an award of the amount claimed. For example, even though the evidence might be uncontradicted, if it is unreasonable, incredible, or its belief is questionable, then such evidence would only raise a fact issue to be determined by the trier of fact.

Id. at 882.

The standard set out by the Supreme Court for testimony of an interested witness in civil cases generally precludes a rule that the uncorroborated testimony of a spouse is legally insufficient to support a finding of separate property. *See Sheikh v. Sheikh*, 2007 WL 3227683, *7 (Tex. App.--Houston [1st Dist.] 2007, no pet.) ("Wasim's position--that an interested witness's uncorroborated and contradicted testimony is no evidence, rather than its being just some evidence that raises a fact issue--runs afoul of decades of case law that is consistently to the contrary"); *Kirtley v. Kirtley*, 417 S.W.2d 847, 853 (Tex. Civ. App.--Texarkana 1967, writ dism'd w.o.j.) (a divorce property division case, where the court said: "[g]enerally the testimony of an interested party, when not corroborated, does not conclusively establish a fact even when uncontradicted, but only raises an issue of fact for a jury").

The following cases upheld tracing of separate property assets through various accounts even though, in some instances some account statements were missing, and in other instances no account statements at all were offered into evidence: *Estate of Hanau v. Hanau*, 730 S.W.2d 664, 666-67 (Tex. 1987); *Carter v. Carter*, 736 S.W.2d 775, 777-80 (Tex. App.--Houston [14th Dist.] 1987, no writ); *Holloway v. Holloway*, 671 S.W.2d 51 (Tex. App.–Dallas 1983, writ dism'd); *Huval v. Huval*, 2007 WL 1793771 (Tex. App.--Beaumont 2007, no pet.); *Newland v. Newland*, 529 S.W.2d 105, 107-08 (Tex. Civ. App.--Fort Worth 1975, no writ); *Peterson v. Peterson*, 595 S.W.2d 889, 892 (Tex. Civ. App.--Austin 1980, writ ref'd n.r.e.); *Welder v. Welder*, 794 S.W.2d 420, 424-25 (Tex. App.--Corpus Christi 1990, no writ); and *Zagorski v. Zagorski*, 116 S.W.3d 309, 316-17 (Tex. App.--Houston [14 Dist.] 2003, pet. denied). In *Holloway*, the court said: "We know of no authority holding that a witness is incompetent to testify concerning the source of funds in a bank account without producing bank records of the deposits."

In *Celso v. Celso*, 864 S.W.2d 652, 654-55 (Tex. App.--Tyler 1993, no writ), the appellate court reversed a trial court's refusal to find separate property, as follows:

> The relatively short record shows that Brian testified to the following facts. Before the marriage, Brian purchased from his father Celso's Dry Cleaners.

After Brian and Kimberly were married, the business was sold for $16,000. The couple then moved to Springfield, Missouri, where they purchased a house with the proceeds from the sale of the dry cleaner business and approximately $13,000 from a CD purchased by Bryan prior to the marriage from a New York bank. The couple then sold their house and moved to Tyler, Texas, where the proceeds of the sale were placed into a CD with First National Bank of Winnsboro. The Tyler CD was worth approximately $25,000, half of which was withdrawn by Kimberly immediately prior to Brian's filing for divorce. The Springfield house was deeded to Brian and Kimberly Celso and the proceeds from the sale were paid via check to Brian and Kimberly.

Kimberly did not dispute any of Brian's testimony. She added, however, that the Tyler CD was purchased in both their names and both spouses had the authority to withdraw funds from the CD.

The court concluded that the house purchased by the parties in Springfield, Missouri during their marriage was the community property of the parties. Brian testified that the house was purchased with the funds acquired before the marriage: the proceeds from the sale of the dry cleaners and from the New York CD. Kimberly testified that the purchase price of the house was approximately $24,000. Significantly, Kimberly affirmed that only Brian's separate property assets were used to buy the Springfield house, as evidenced by the following exchange:

Q: Do you know approximately how much money he paid for the house?

A: About twenty-four thousand, I think.

Q: Did any of that money come from any property that you owned?

A: No.

Q: In regards to the house, all the money was obtained from Brian?

A: Mm-hmm.

The evidence is uncontroverted that the sole source of purchase money to buy the Springfield house was from Brian's separate property assets. Had Brian intended a gift to Kimberly of the house, then her interest would have been her separate property, not community property as the court found. . . . Nevertheless, we note that there was no evidence that Brian intended a gift of his separate property assets to Kimberly when the house was purchased or sold. Furthermore, when separate property is conveyed and both spouses join in the instrument granting the property, the

> conveyance, without more, is insufficient to change the character of the property or the proceeds. . . . The evidence was clear and convincing that the funds used to purchase the Springfield house were traced to Brian's separate assets. The trial court, therefore, erred in concluding that the Springfield, Missouri house was the couple's community property. The evidence does not support the court's conclusion that the Springfield house was the couple's community property.
>
> The evidence is likewise uncontroverted that the proceeds of the sale of the Springfield house were deposited into a Tyler certificate of deposit in the names of Brian and Kimberly Celso. Kimberly's testimony affirms that the proceeds, in the form of a check payable to Brian and Kimberly Celso, were directly deposited into the First National Bank of Winnsboro without any commingling with community funds. Again, there was no evidence that Brian made a gift to Kimberly of his separate assets. The mere fact that the proceeds of the sale were placed in a joint account does not change the characterization of the separate property assets. The spouse that makes a deposit to a joint bank account of his or her separate property does not make a gift to the other spouse. . . . We conclude that the Appellant proved by clear and convincing evidence that the funds in the First National Bank of Winnsboro certificate of deposit were traced to his separate property. Consequently, the trial court abused its discretion in characterizing the CD as community property, subject to the court's just and right equitable division. [Citations omitted.]

In *Rojas v. Rojas*, 2004 WL 43227, *3 (Tex. App.--Corpus Christi 2004, no pet.), the appellate court affirmed a finding of separate property even where the spouse's testimony that he used separate property cash was not corroborated by records. The court said:

> The trial court found that appellee purchased the home before the marriage and he did so with monies owned by him before marriage. Evidence supporting these findings begins with the earnest money contract which was entered into in August 1989, some weeks before the couple's September 2, 1989 wedding. Although appellant is correct that the earnest contract is undated, the receipt for the same five hundred dollar earnest money, introduced into evidence without objection, is dated August 18, 1989. The title policy was issued in appellee's name alone. Appellee testified that the ten thousand dollars used to pay off the house in January 1990 came from his savings. Appellee further testified he worked forty-three years and saved the money he earned. "I had money in the bank that I had saved up. I made good

> money." A cashier's check from MBank in the same amount bore appellee's name and that of the seller. The only tax records introduced into the record showed the property taxed to appellee.

In *Pace v. Pace*, 160 S.W.3d 706 (Tex. App.--Dallas 2005, pet. denied), the appellate court affirmed a trial court's finding of separate property, as follows:

> Thomas testified at trial that the earnest money check was paid from her separate funds and Pace offered no evidence to the contrary. Evidence in the trial court included an excerpt of Pace's deposition in which he admitted the Harvest Hill house was purchased completely with Thomas's separate property. This is some evidence that the earnest money check was drawn on Thomas's separate property account. Because the evidence is uncontroverted, it is also clear and convincing evidence that the funds used to purchase the Harvest Hill house were traced to Thomas's separate assets. . . . [FN2]
>
> FN2. In fact, although not evidence, Pace's attorney even admitted during trial that the Harvest Hill house was purchased solely with Thomas's separate property.
>
> We conclude the evidence was sufficient to support the trial court's finding that the Harvest Hill house was Thomas's separate property.

In *Hilliard v. Hilliard*, 725 S.W.2d 722 (Tex. App.--Dallas 1985, no writ), the appellate court upheld a trial court's implied finding that a house acquired by the husband during marriage was community property. The husband claimed that the house was distributed out of a separate property corporation during marriage and that, under the principle of mutation, it was his separate property. The appellate court said:

> It is evident that the corporate stock was separate property, since it was acquired before coverture. However, we do not know if there are any community charges against this asset. Furthermore, we know that dividends are community income as distinguished from a mutation resulting from an exchange of corporate stock for cash or other assets. Because husband did not provide the trial court with sufficient evidence that the house was a mutation, through the introduction of corporate minutes, a deed, or other evidence, the trial court could readily have found that the presumption of community property was not rebutted and the house was community property.

Id. at 723. The appellate court also said that "Husband's uncorroborated testimony

. . . is not conclusive as to whether the house was separate or community." *Id.*

In *Miller v. Miller*, 2002 WL 31410965 (Tex. App.--Dallas 2002, pet. denied), the appellate court overturned a trial court's finding of separate property saying:

> A witness may testify concerning the source of funds in a bank account without producing bank records of the deposits. *Holloway v. Holloway*, 671 S.W.2d 51, 56 (Tex. App.--Dallas 1983, writ dism'd). Mere testimony that property was purchased with separate property funds, without any tracing of the funds, is generally insufficient to rebut the presumption. *Bahr*, 980 S.W.2d at 728; *McElwee v. McElwee*, 911 S.W.2d 182,188 (Tex. App.--Houston [1st Dist.] 1995, writ denied).

In *Miller*, despite rejecting the trial court's finding of separate property, due to the "magic finding" (that even if the asset was community property the court would still award it to the husband as part of a just and right division) the appellate court found that the error did not cause the overall property division to be an abuse of discretion, so that the characterization error was deemed to be harmless.

In *Faram v. Gervits-Faram*, 895 S.W.2d 839, 843 (Tex. App.--Fort Worth 1995, no writ), the testimony of wife, that investment accounts and T-bills were either gifts from her father or proceeds from sale of separate real estate was, standing uncontradicted, sufficient evidence to support a finding of separate property.

In *Peterson v. Peterson*, 595 S.W.2d 889, 892 (Tex. Civ. App.--Austin 1980, writ ref'd n.r.e.), the husband's testimony that realty was purchased with his separate property cash supported a finding of separate property, even without evidence of activity in the account, where the transaction occurred less than one month after marriage.

In *Gana v. Gana*, 2007 WL 1191904, *5 (Tex. App.--Houston [14th Dist.] 2007, no pet.) (memorandum opinion), the appellate court reversed the trial court's failure to find separate property, saying:

> [A]t the divorce hearing, Bradley submitted a proposed property division reflecting the Rampart Street property as his separate property. He also testified that he purchased the property before he married Susan. We conclude that this evidence, coupled with Susan's admission that Bradley owned the property before they were married, is sufficient to overcome the community property presumption and to demonstrate Bradley's separate ownership by clear and convincing evidence.

In *Klein v. Klein*, 370 S.W.2d 769 (Tex. Civ. App.--Eastland 1963, no writ), the wife testified that she made a $3,000.00 separate property cash payment for a house acquired during marriage. She said that she got the money from a safety deposit box in an unnamed bank. The trial court found that the house was community property. The appellate court affirmed, saying that the wife's testimony was not binding on the trial court. *Id.* at 773.

In *Bahr v. Kohr*, 980 S.W.2d 723, 728-29 (Tex. App.--San Antonio 1998, no pet.) a creditor's rights case reversed the trial court's finding of separate property, the appellate court saying that wife's testimony was factually insufficient to establish certain property as her separate property because the documentary evidence offered to support claim that property was purchased with monies from a separate property account did not show the date the account was opened, the running balance of the account, or identify the party receiving the wire transfer for the alleged purchase of property at issue. The case was remanded for a new trial.

In *Boyd v. Boyd*, 131 S.W.3d 605 (Tex. App.–Fort Worth 2004, no pet.), the appellate court held the evidence factually insufficient to support the trial court's finding of separate property. The appellate court said:

> When tracing separate property, it is not enough to show that separate funds could have been the source of a subsequent deposit of funds. . . . Moreover, as a general rule, mere testimony that property was purchased with separate funds, without any tracing of the funds, is insufficient to rebut the community presumption. . . . . Any doubt as to the character of property should be resolved in favor of the community estate. [Citations omitted.]

Id. at 612. (Some might argue that the court misstated the standard of appellate review of the sufficiency of the evidence. On appeal, the standard of review of the evidence favors the trial court's findings, not the community estate. Even at the trial court level, the fact finder is not required to resolve any doubt in favor of the community estate. That would be tantamount to proof beyond a reasonable doubt.) The court went on to say:

> David did not present specific tracing testimony or corroborating testimony or evidence, similar to evidence presented in cases where courts have determined that the separate nature of the property was established by clear and convincing evidence. . . . As a result, the trial court was left to surmise or speculate, based on David's testimony alone, that the proceeds from the sale of David's separate property were the source of funds that created his claim for economic contribution.

Id. at 616. The court remanded the case for a new property division. *Id.* at 618. (The court should have made it clear that it was remanding for a new trial on the characterization issue, not just a new division based upon a finding of community property, since it sustained a factual sufficiency point).

In *Brehm v. Brehm*, 2000 WL 330076 *3 (Tex. App.--Houston [14th Dist.] 2000, no pet.) (unpublished), the appellate court affirmed the trial court's finding of community property, saying:

> Here, the only testimony presented by Ralf that this CD was his separate property was his own testimony that it was purchased with proceeds from the sale of property he inherited from his uncle. Ralf testified that he inherited the property, sold it, deposited the proceeds into the joint account he shared with Angela, and purchased the CD four months later. Ralf introduced no bank records which would clearly trace the money used to buy the CD to the proceeds from his inheritance, nor did he introduce any other evidence which would show deposits and withdrawals from the account over the four month period. . . . Because Ralf failed to provide clear and convincing evidence that the CD was his separate property, we find the trial court did not abuse its discretion in dividing it with the community estate.

In *Ganesan v. Vallabhaneni*, 96 S.W.3d 345, 354 (Tex. App.--Austin 2002, pet. denied), the appellate court affirmed the trial court's denial of a separate property claim, holding that husband's testimony failed to establish that certain brokerage accounts were separate property because neither his testimony nor the exhibits offered "provid[ed] account numbers, statements of accounts, dates of transfers, amounts transferred in or out, sources of funds or any semblance of asset tracing."

In *Garza v. Garza*, 217 S.W.3d 538, 548 (Tex. App.--San Antonio 2006, no pet.), the appellate court reversed the trial court because the evidence was factually insufficient to support the trial court's finding of separate property. The appellate court said: "As a general rule, testimony that funds are separate property without any tracing of the funds is insufficient to rebut the community presumption." The court remanded the case for a new property division "based upon the correct characterization of the property." *Id.* at 551. It is not clear whether a new trial on character was contemplated, or just a new property division. The former would be the correct disposition.

In *Granger v. Granger*, 236 S.W.3d 852, 856 (Tex. App.--Tyler 2007, pet. denied), the court said: "As a general rule, mere testimony that property was purchased with separate funds, without any tracing of the funds, is insufficient to rebut the community property presumption." (The appellate court actually articulated the burden of persuasion in the trial court. The test on appeal was whether the trial court's failure to find separate property was against the great weight and preponderance of the evidence.)

In *Holcemback v. Holcemback*, 580 S.W.2d 877, 879 (Tex.Civ.App.--Eastland 1979, no writ), the appellate court affirmed the trial court's finding of community property, saying:

> [T]here is evidence that community funds came into the possession of the husband prior to the conveyance. This is some evidence to support the finding of the trial court that the thirty acre tract was purchased with community funds. The testimony of the husband, an interested witness, that he purchased the property with cash, kept in a dresser drawer, that he owned prior to the marriage was not conclusive.

In *Klein v. Klein*, 370 S.W.2d 769 (Tex. Civ. App.--Eastland 1963, no writ), the appellate court affirmed the trial court's finding of community property, where the wife testified that she made a $3,000.00 separate property cash payment for a house acquired during marriage. She said that she got the money from a safety deposit box in an unnamed bank. The appellate court said that the wife's testimony was not binding. *Id.* at 773.

In *Levesque v. Levesque*, 2006 WL 47044, *1 (Tex. App.--San Antonio 2006, no pet.) (memorandum opinion), the court affirmed a trial court's finding of community property, saying: "Mere testimony that property was purchased with separate property funds, without any tracing of the funds, is generally insufficient to rebut the presumption."

In *In re Malekzadeh*, 2007 WL 1892233 (Tex. App.--Houston [14th Dist.] 2006, pet. denied), the appellate court upheld a trial court's determination that furniture was community property despite husband's claim that the furniture was his separate property. The court said that "[m]ere testimony that property was purchased with separate property funds, without any tracing of funds, is generally insufficient to rebut the community presumption."

In *Micklethwait v. Micklethwait*, 2007 WL 1852609, *6 (Tex. App.--Austin 2007, pet. denied), the court said:

> Jonathan testified that he was employed as an assistant manager at a Mr. Gatti's Restaurant. At the time of trial, he had been working at the restaurant for four years and had a 401(K) plan with $10,800 in it. From April 2002, when he started working at Mr. Gatti's, until March 2004, when he married, any contribution would be considered separate property. But when asked when he began contributing to the retirement plan, he responded, "I would say maybe four or five months after starting with them." Our review of the record does not show any other evidence concerning the retirement plan, and Jonathan does not cite us to any relevant record references.
>
> * * *

> Based upon the evidence before it, the trial court concluded that Jonathan failed to carry his burden to establish that any portion of the retirement account was separate property. Given the paucity of testimony and Jonathan's failure to present clear and convincing evidence showing any portion of the retirement account to be his separate property, the trial court's allocation is supported by the evidence.

In *Mock v. Mock*, 216 S.W.3d 370, 373 (Tex. App.--Eastland 2006, pet. denied), the appellate court affirmed the trial court's finding of community property, saying:

> Appellant did not produce any records tracing the deposits to the account or the withdrawals from the account. As a general rule, testimony that funds are separate property without any tracing of the funds is insufficient to rebut the community presumption. *Boyd*, 131 S.W.3d at 612. Appellant failed to trace the assets in the account with any documentary evidence. In the absence of such evidence, appellant did not meet her burden of establishing by clear and convincing evidence that the balance in the savings account was her separate property.

In *Osorno v. Osorno*, 76 S.W.3d 509, 512 (Tex. App.--Houston [14th Dist.] 2002, no pet.), the appellate court affirmed the trial court's finding of community property, saying:

> Henry argues that accounts listed in the decree totaling almost $100,000 were designated his separate property in the parties' premarital agreement. But the only evidence as to the source of funds placed in those accounts was Henry's testimony; no deposit slips or bank records were offered tracing the money to support Henry's claim. Without tracing, Henry's testimony cannot overcome the community property presumption.

In *Robles v. Robles*, 965 S.W.2d 605, 616 (Tex. App.--Houston [1st Dist.] 1998, pet. denied), the court said:

> Gus testified he purchased the lot at 2319 Freeman for $27,000 with money he received as a gift from Thomas while she was alive. Irene again stated she listed the 2319 Freeman property as community property because Gus told her it was community property. Richard Sedgeley stated that, in his opinion, the 2319 Freeman lot was Gus's separate property because Gus purchased the property with money he inherited from Thomas's estate. The deed for this property does not appear to be included in the record before this Court. No documentary evidence was presented to trace the money used to purchase this property.
>
> Generally, the testimony of an interested party, when not corroborated, does not conclusively

> establish a fact even when uncontradicted. . . . Uncorroborated evidence coming from one party is not conclusive. . . .
>
> The trial court found Gus did not present clear and convincing evidence to rebut the presumption that the 2319 Freeman property was community property. The evidence presented concerning the nature of this property was, at best, conflicting. Accordingly, we conclude Gus did not present sufficient evidence to rebut the community property presumption, and the trial court did not abuse its discretion in characterizing the 2319 Freeman lot as community property.

In *In re Marriage of Santopadre*, 2008 WL 3844517 (Tex. App.--Dallas August 19, 2008, n.p.h.) (memorandum opinion), the court said:

> Wife contends there is no evidence or insufficient evidence to prove the following assets are the separate property of Husband: Texas Instrument employee pension plan, Texas Instruments retirement benefits, Texas Instruments stock, certain real property in Ruidoso, New Mexico, certain real property in Nashua, New Hampshire, Charles Schwab account PJ7785-9979, USAA IRA # 001277495, USAA Account # 65118968, E-Trade Account # 4575-0831, E-Trade Account # 4842-3269.
>
> After reviewing the record in this case, we agree with Wife's contentions.
>
> Because Husband claimed these assets to be his separate property, he bore the burden at trial of establishing by clear and convincing evidence the separate origin of each asset. To do so, he was required to show the time and means by which he originally obtained possession of each asset. Although Husband testified at trial these assets were his separate property, he presented no documentary evidence to establish that any asset was his separate property. Specifically, he did not produce deeds, closing statements, property tax statements, financial records, or other evidence to establish when any of these assets was acquired or set up on his behalf.FN1 Rather, he relied on his testimony at trial that he owned each property or asset before his September 1996 marriage to Wife. This is "insufficient to constitute clear and convincing evidence rebutting the community presumption and establishing characterization of property as separate."

In *In re Marriage of Smith*, 2003 WL 22715581, *3-4 (Tex. App.--Amarillo 2003, pet. denied) (memorandum opinion) :

> Considering that Matthew maintained complete control of the separate and community property of the parties, that he had duties as a fiduciary, that

> separate character cannot be established by his testimony without tracing and documentary support, and the absence or inadequacy of the documents to demonstrate the date and source of the acquisition of the funds which were commingled into the two accounts, we conclude the evidence was factually insufficient to establish that $15,111 and $26,623 of the two accounts were the separate funds of Matthew by clear and convincing evidence.
>
> * * *
>
> Although Matthew acknowledged that community funds had been deposited into the account, in his brief, he bases his support of the findings of the trial court on *Sibley v. Sibley*, 286 S.W.2d 657 (Tex. Civ. App.--Dallas 1955, writ dism'd), which held that where an account contains community and separate funds, it is presumed the community funds are drawn first so that the balance in the account is presumed to be separate property. **Although *Sibley* was a divorce case, it is not controlling here because it involved a "joint account," which is not presented here.** Accordingly, because Matthew's testimony standing alone is insufficient to trace the separate nature of the funds, *McElwee*, 911 S.W.2d at 188, the documentation does not show the origin or source of the funds, the referenced real estate transactions were not independently documented and community funds were admittedly deposited into the account, the evidence is insufficient to overcome the community property presumption by clear and convincing evidence. [Emphasis added.]

In *Wells v. Wells*, 251 S.W.3d 834, * 840 (Tex. App.--Eastland 2008, no pet.), the appellate court affirmed the trial court's finding of separate property, saying:

> Jacqueline's mother testified that, when her husband retired, he gave part of his farming equipment to Jacqueline and part to a son and sold part to Jacqueline and Richard. She testified that the gift was not to Jacqueline and Richard but to Jacqueline alone. She identified the twelve items of equipment in dispute as the equipment that her husband had given to Jacqueline. Richard argues that this testimony is insufficient to rebut the community property presumption, citing the general rule that mere testimony that property is separate without any tracing of the property is insufficient.FN3
>
> FN3. See *Boyd*, 131 S.W.3d at 612.
>
> The general rule is inapplicable because there was no need to trace assets. There was no dispute about what items of equipment were gifted, and there was no claim that any of this equipment had been sold, traded, or otherwise converted into any other asset.

B. ACCOUNT RECORDS. Account records can (and where available should) be used to support a claim of separate property.

In *Padon v. Padon*, 670 S.W.2d 354 (Tex. App.--San Antonio 1984, no writ), the husband successfully traced separate property funds into the parties' home. The parties agreed that husband received $160,000.00 by way of inheritance, which he deposited into an account in the name of husband and wife. The parties further agreed that they acquired a home in "early 1977," for $89,900.00. The March bank statement showed an initial deposit of $160,490.00, on February 25, 1977. The statement reflected no further deposits into the account until March 4, 1977. However, the statement reflects that a check for $89,900.00 cleared the account on March 1, 1977. The appellate court held that the husband had established that the house was his separate property, as a matter of law. *Id.* at 357.

C. TAX RETURNS. Tax returns can provide evidence to support a separate property claim. Schedule B of the Form 1040 should reflect dividend and interest income earned during the year. Thus, ownership of corporate stock during a tax year can be shown by dividends reported on Schedule B of that year (unless the stock was acquired after the last quarterly dividend). For most widely-held corporations, information is available on the internet regarding a company's historical dividend rates and dividend dates. By dividing the dividend rate into the dividend income, you can determine the number of shares held at the time the dividend was declared. Interest income on Schedule B can reflect ownership of bonds, or money on deposit in accounts at various institutions. Calculating exact balances of cash in savings from the amount of interest income reported on Schedule B is usually difficult because balances vary during the year and the interest rate is hard if not impossible to reconstruct from publicly-available information. However, the exact face amount of bonds can usually be reconstructed from the amount of interest paid because the interest rate on bonds can usually be determined from public information.

Schedule D of the Form 1040 may also permit you to reconstruct the purchase date of securities, since the taxpayer must report the date and acquisition price of the security on Schedule D in the year in which the security is sold. The taxpayer must also report the tax basis of the security, which gives you the purchase price which can help to fix the date of acquisition by comparing the tax basis to historical data on stock prices. In the event that a closely-held entity has changed forms, the tax basis will sometimes reflect whether there was a carryforward of the tax basis of a preceding entity.

Sometimes work papers supporting a Schedule C for a sole proprietorship business will contain a depreciation schedule that can be used to establish the date when equipment was acquired.

Tax returns of an entity reflect the date the entity was established. The taxpayer id. no. on a tax return can also be used as indication of whether an entity is a continuation of a prior entity or is instead a new entity.

D. CORRESPONDENCE; MEMORANDA. In *Zagorski v. Zagorski*, 116 S.W.3d 309 (Tex. App.–Houston [14th Dist.] 2003, pet. denied), two series of letters were sufficient to support a finding of separate property in a bank account, even absent the account agreement, copies of wire transfers, and more basic documents relating to the account. The evidence showed that approximately $115,000 in interest was deposited into the account during marriage, while $360,000 was withdrawn for marital living expenses. Using the community-out-first presumption, withdrawals were deemed to have depleted the community funds in the account, so that the account remained separate property.

Zagorski underscores the fact that old records, old correspondence, etc. can be the basis for an opinion of separate property even if the items are strictly-speaking hearsay. Old letters and memoranda are ordinarily not conclusive evidence. However, the job of a forensic expert or fact finder is to use available evidence to recreate past events and conditions, so that such evidence is important to consider. If the memoranda are admissions of a party opponent or are business records, or meet some other exception to the hearsay rule, they are admissible in evidence. Even if not admissible as such, they may still be used, at least by experts, in arriving at their opinions. *See* TEX. R. EVID. 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.")

E. PUBLIC INFORMATION. Public information can be used to establish facts relevant to the character of property. Deed records can establish when title to land was acquired, and sometimes the consideration paid. Records from the secretary of state, or state comptroller, can show the date an entity came into existence. Historical financial data available on the internet can establish the ex dividend date, and amounts of dividends, for widely-held companies.

IX. LINE-ITEM-TRACING. In recent years, line-item-tracing has gained wide popularity. The term "line-item-tracing" is taken to mean the re-creation of hypothetical running balances of funds in a bank account or securities in a brokerage account, or balances due on an open account, line-of-credit, or margin account. This is usually done using electronic spreadsheets like Excel. No case, to date, has mandated line-item-tracing as the only permissible form of tracing. Many times line-item-tracing is not possible, due to lack or records or gaps in records. In some cases line-item-tracing is too expensive for the litigants to afford. In other cases there is uncertainty on how to handle transactions such as margin purchases of securities, short sales of securities, the buying and selling of option contracts, day-trading in a brokerage account, etc., that may require a party to present alternate tracings, which is expensive and potentially confusing to the fact finder. There are even fundamental issues about the universality of the most popular basis for line-item-tracing, which is the "community-out-first" approach.

A. COMMUNITY-OUT-FIRST APPROACH. In *Sibley v. Sibley*, 286 S.W.2d 657 (Tex. Civ. App.--Dallas 1955, writ dism'd) (per curiam), the husband mixed community funds in a bank account with $3,566.68 of wife's separate funds. There were a number of deposits and withdrawals to the account. However, the account never dropped below $3,566.68. Seeing the husband as a trustee of the wife's separate property funds that were in his care (at a time when the disabilities of coverture existed in Texas), the appellate court invoked a rule of trust law that, where a trustee mixes his own funds with trust funds, the trustee is presumed to have withdrawn his own money first, leaving the beneficiary's on hand. Since the husband owned none of wife's separate funds, and half of the community funds, it was presumed that the husband withdrew community moneys in the bank account first, before he withdrew the wife's separate moneys. The court said:

> The community moneys in joint bank account of the parties are therefore presumed to have been drawn out first, before the separate moneys are withdrawn.

Id. at 659.

It is unfortunate that the court of civil appeals used language suggesting a fundamental rule of law, instead of using language that suggested a presumption applied to the facts of the case. Be that as it may, the *Sibley* case is said to have used the so-called "community-out-first" approach, even though the court really applied a trustee's money-out-first approach to the "minimum balance method."

The Beaumont Court of Appeals called community-out-first a "theory," and said it was "an acceptable method of tracing." The Houston Fourteenth District Court of Appeals called it a "rebuttable presumption." No court has held that the "community-out-first" approach is the *only* valid tracing approach, or that it *must* be used, or that failing to use the "community-out-first" approach is *improper* or results in a *failure* in tracing. Professor Joseph W. McKnight, a law professor at SMU School of Law for over 50 years and a noted authority on Texas marital property law, has criticized the cases which take *Sibley* as establishing a community-property-out-first rule, calling them "inequitable bastard-descendants of *Sibley*." Joseph W. McKnight, *Family Law: Husband and Wife*, 55 SMU L. REV. 1035, 1048 n. 87 (2002). Professor McKnight said:

> Other issues in *Beard* involved claims for reimbursement when the wife's separate estate was commingled with community property. Insofar as the husband made withdrawals from the commingled accounts, they should have been presumed to be community property under the actual holding in *Sibley v. Sibley* [FN87] because the husband is subject to a fiduciary duty to preserve the wife's separate property and to withdraw the community property in which he has a one-half interest. [FN88] With respect to withdrawals by the wife from an account containing her separate property and community property, the court relied on the inequitable bastard-descendants of *Sibley* [FN89] for the proposition that the wife's withdrawal should also be presumed to have been community property. But surely if her separate funds and community funds were subject to her care, she should be deemed first to withdraw the funds which were wholly hers rather than those in which her husband had a one-half interest. The court's conclusion that community funds were withdrawn first and were, as a result, depleted, leaving only her own separate funds, therefore, seems erroneous for tracing purposes. However, it should be noted that, if both spouses act in concert to make a withdrawal of funds from a commingled community account and a separate property fund of one (or both) of them, a presumption of withdrawal of community funds seems reasonable. In *Beard* [FN90] the court reached this conclusion, but for the wrong reasons, i.e. simplistic reliance on the bastard line of cases, which are contrary to all principles of equity. [FN91] If one spouse expends the other spouse's property and stands in a fiduciary position in doing so, reimbursement is due to the other spouse on fiduciary principles. [FN92] But if a spouse expends his or her own property, or the community property, for an alleged reimbursable purpose, recovery should depend on the nature of the purpose.

Id. at 1048-49.

In *Ceasar v. Ceasar*, 2000 WL 639892 (Tex. App.–Beaumont 2000, no pet.) (memorandum opinion), the appellate court said this about the community-out-first approach:

> The husband employed the community-out-first theory to trace the community estate's interest in the brokerage account. This theory has been criticized. See Stewart W. Gagnon & Christina H. Patierno,

> *Reimbursement and Tracing: The Bread and Butter to a Gourmet Family Law Property Case*, 49 Baylor L. Rev. 323, 383 (1997); Oliver S. Heard, Jr., Richard A. Strieber, & Richard R. Orsinger, *Characterization of Marital Property*, 39 Baylor L.Rev. 909, 924 (1987). But it is accepted by this court, *see Harris v. Ventura*, 582 S.W.2d 853, 855-56 (Tex. App.--Beaumont 1979, no writ), and it has received recent acceptance by other courts. *See Scott v. Estate of Scott*, 973 S.W.2d 694, 696 (Tex. App.--El Paso 1998, no writ). Accordingly, we hold it is **an acceptable method of tracing** the community estate interest in the brokerage account. [Emphasis added]

In *Smith v. Smith*, 22 S.W.3d 140, (Tex. App.--Houston [14th District] 2000, no pet.), the court said:

> We assume without deciding that the community-out-first presumption is a rebuttable one.FN5
>
> > FN5. We also note that a blind application of the community-out-first presumption does not uphold the policy reason for the presumption's original application.

B. SEPARATE MONEY PAYS SEPARATE OBLIGATIONS. An argument can be made that it should be presumed that separate funds are used to make payments for the benefit of a spouse's separate estate. Common sense supports this approach, as it is likely that a person with knowledge of Texas law would choose to spend separate property dollars on separate property expenses rather than use community dollars and thereby create a claim for reimbursement. Assuming that separate property money pays separate property expenses and community property money pays community property expenses is fair and it also avoids complexity in sorting through marital property claims and offsets at the time of divorce.

In *Rolater v. Rolater*, 198 S.W. 391-92 (Tex. Civ. App.--Dallas 1917, no writ), the appellate court said this about a presumption that separate property funds were used for separate property expenditures:

> Appellant and appellee were married in the year 1903, appellee owning at the time a 66-acre farm, against which there was a principal indebtedness of $1,200, which the evidence shows without dispute was paid during the years 1906, 1907, 1909, 1910, 1911, and while the marriage relation existed. The total amount of principal and interest paid on the note during marriage of the parties was $1,879. The jury found that the community funds contributed for that purpose $973, appellee's separate funds $810, and appellant's separate funds $96, and no complaint is made concerning the sufficiency of the evidence to support the finding that $973 of

> community funds and $96 of appellant's separate funds were applied for the purpose stated. The only proof which sustains the finding of the jury that $810 was paid out of appellee's separate funds is his statement that he sold two mules and two cows, his separate property, from which he realized $265, which amount he says at one point he applied on his note, and at another he used in payment of household expenses. Such sum falls $545 short of the amount found by the jury to have been paid out of appellee's separate estate. Likewise there is in the record no proof that said sum was paid from the community funds. Such being the facts disclosed by the record, counsel for appellant contends, in effect, that the presumption arises as matter of law that the sum not accounted for was paid from the community funds. No such presumption, we believe, may be indulged under the authorities. Suits for divorce and an accounting are not unlike all other judicial proceedings, in that proof must be adduced in support of every material issue asserted, and when such issue fails of any proof at all it cannot be established by presumption. The finding of the jury that the $810 was paid out of the separate funds of the appellee, we agree as stated, is not supported in full by the evidence. At the same time there is nothing whatever in the record that will support a finding of fact that it was paid out of the community funds. The finding of the jury that only $973 was so paid tends to deny the presumption that the $810 was paid from the community funds. It is true that the entire indebtedness was paid by appellee during the years 1906 to 1911, both inclusive, and while the marital relation existed, but the jury found, with all the facts before them, that only $973 was contributed by the community. We have found no case exactly in point as to the facts, but it has been held that payments made shortly after marriage by one of the spouses upon separate indebtedness will not be presumed to have been made out of community funds in the absence of proof in that respect. *Medlenka v. Downing*, 59 Tex. 32; *McDougal v. Bradford*, 80 Tex. 558, 16 S. W. 619; *Richmond v. Sims*, 144 S. W. 1142. It is, we believe, correct to say that, in the absence of all proof on such issue, the presumption does not arise that the money so paid was not contributed by the separate estate of the spouse bound to pay. As much is said in the *Medlenka* Case.

The appellate court in *Jenkins v. Robinson*, 169 S.W.2d 250, 251 (Tex. Civ. App.--Austin 1943, no writ) said this, in a case involving a claim for reimbursement to the community estate:

> This conclusion as to the burden of proof is clearly erroneous. The real estate was and is conceded by

appellees to have been the separate property of Cecil Jenkins. The only right or interest asserted by appellees in the proceeds of the sale of the real estate was that the community estate should be reimbursed for its funds used in paying in part the notes representing a part of the purchase price of the real estate, and which payments completed title thereto in Cecil Jenkins. Having so alleged the burden was on appellees to prove that the notes were paid in part with community funds. *Welder v. Lambert*, 91 Tex. 510, 44 S.W. 281; *Gameson v. Gameson*, Tex.Civ.App., 162 S.W. 1169; *Rolater v. Rolater*, Tex.Civ.App., 198 S.W. 391; *Price v. McAnelly*, Tex.Civ.App., 287 S.W. 77; *Gillespie v. Gillespie*, Tex.Civ.App., 110 S.W.2d 89. This burden is not met by merely showing that the indebtedness was paid during the time the marital relationship existed; but it must be established by a preponderance of the evidence as in any civil case not otherwise controlled by statute or law. This burden of proof is not aided by the statutory presumption that all property acquired during marriage is presumed to be community property; because this presumption would defeat the rule that the burden of proof is on appellees to show that the community property acquired under that presumption was actually used to pay off the indebtedness on the real estate.

See generally Welder v. Lambert, 91 Tex. 510, 44 S.W. 281, 287 (1898) ("The lands in controversy appearing to be of the separate estate of Power, we are of opinion that, in order for the heirs of the first wife to establish a charge upon them for a reimbursement of community funds expended in their acquisition, the burden was upon them to prove that the funds had been so expended"); *Price v. McAnelly*, 287 S.W. 77 (Tex. Civ. App.–San Antonio 1926, writ dism'd) (burden is on the party seeking reimbursement to show that community and not separate funds were expended to pay separate debt); *contra*, *Horlock v. Horlock*, 533 S.W.2d 52, 60 (Tex. Civ. App.–Houston [14 th Dist.] 1975, writ dism'd w.o.j.) ("It is the appellant's burden to establish the right of equitable reimbursement of the community estate from the separate estate of the appellee. 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."), citing *Hartman v. Hartman*, 253 S.W.2d 480 (Tex. Civ. App.–Austin 1952, no writ).

It certainly makes some sense, in an after-the-fact reconstruction of events, to apply separate funds to separate purposes and community funds to community purposes, rather than to require an inflexible rule of allocation that disregards what spouses probably would have intended if they had thought about it at the time and tends to replace ownership rights with equitable claims for reimbursement.

The next level of inquiry is what rule to apply when a spouse makes an investment out of a mixed fund. Actual intent (a subjective standard) may play a part. Reasonable intent (an objective standard) may play a part. Pro rata allocation may be fairest in giving all marital estates a fair share of gains and losses of the investments made.

C. MATCHING TRANSACTIONS. A recognized rule of tracing allows the proponent to match transactions that are related, without regard to other rules that might be applied. In some articles this is called the “clearing-house method” or the “identical sum inference,” but its use is not limited to commingled funds in an account, nor does it require that the sums be identical.

An example of tracing by showing a matching transaction occurred in *Higgins v. Higgins*, 458 S.W.2d 498 (Tex. Civ. App.--Eastland 1970, no writ), where the jury found that, when the husband deposited $ 71,200.00 of separate funds in a joint bank account and shortly thereafter drew out $ 70,000.00 to purchase a ranch, the ranch was the husband's separate property. That finding was affirmed by the appellate court. Whether there were community funds in the account at the time the check was issued to buy the ranch was not determinative. No community-out-first analysis was used.

Another example of a matching transaction is *In re Marriage of Tandy*, 532 S.W.2d 714, 717 (Tex. Civ. App.--Amarillo 1976, no writ), where the evidence showed that the husband mixed community property proceeds from grain sales in an account with $25,000 in proceeds from the sale of land which was half-owned by the husband as separate property. After the $25,000 was received, the husband paid $6,250 to each of his sons for their ownership interests in the land, and then paid $12,500 on the husband's separate property debt. The appellate court held that this evidence traced the separate property. Id. at 718-19.

An entirely different form of matching transactions is reflected in *Newland v. Newland*, 529 S.W.2d 105 (Tex. Civ. App.--Fort Worth 1975, no writ). In *Newland*, the husband maintained distinct bank accounts, the "general account" being for community deposits and expenditures, and the "separate account" being for business transactions relating to his separate estate. On occasion the balance of one account would run low, and Mr. Newland would "borrow" from the other account, for "short terms." The husband treated such transactions as loans, and repaid the borrowed funds "so that the two accounts were restored to the condition which would have obtained had there not been necessity for any transfer." *Id.* at 109. There was documentary proof of this type of activity for most of the 20-year plus period involved. The trial court, and the appellate court, found that the husband's methods avoided commingling of the funds, since "there was always ability to compute correct balances for purposes of resegregation." *Id.* at 109.

And yet another form of matching transaction is reflected in *Beeler v. Beeler*, 363 S.W.2d 305 (Tex. Civ. App.--Beaumont 1962, writ dism'd). In *Beeler*, the spouses purchased real property, partly with a separate property down payment made by the husband, and partly with a community loan. The collateral for the loan was a separate property promissory note of the husband. Payments on the community loan were made to coincide with payments received by the husband on the separate property note, in time and amount. During the marriage, the husband deposited his separate property note payments into a joint account, then wrote checks to make the payments on the community note. Husband sought reim-bursement for his separate funds used to pay a community debt. Wife opposed the reimbursement claim, saying that the payments from the separate property note were commingled when they were deposited into the bank account. The trial court found, however, that the parties had agreed to pay the new note with the proceeds from the old note, and that "it was not the intention of the parties to commingle such funds with the community funds of the parties." The appellate court found that the momentary deposit of such funds into a joint bank account did not convert "the $2,500.00, plus interest" into community funds. "Such sum, in each instance, was, in effect, earmarked a trust fund, in equity already belonging to the bank from the moment collected by appellee . . . . This being so, the installments paid upon the bank note were paid from the separate funds of appellee and his separate estate is therefore entitled to reimbursement therefor." Id. at 308. The case was driven by the subjective intent of the parties.

Other matching transactions are easy to imagine. Imagine that a married woman has set up an automatic payment from her bank account to pay a car loan borrowed prior to her current marriage. The car payment is automatically debited on the third day of the month. Normally the car payment is made from a payment in the same amount that she receives from her previous husband on the first day of every month, pursuant to their divorce settlement. In one instance, however, the ex-husband’s payment was delayed, so that the car payment was actually paid from the married woman’s community funds. If you don’t match the transactions, these circumstances will created a reimbursement claim for using community funds to pay separate debt, while the separate property payment, received late from the ex-husband, just mixes with other funds and will be used for some other expenditure.

As another example, a matching could be made between a check that causes an overdraft which the spouse covers by the transfer of separate property funds into the account. Some would argue that an overdraft is community credit, and if repaid with a later separate property deposit then a reimbursement claim would arise for paying community debt with separate property funds. Or you could match the transactions, giving the overdrafting check the same character as the funds used to cover the overdraft.

Matching transactions can also occur in stock brokerage accounts, such as with day trading, call options, and short sales. In day trading, the investor may buy and sell the same stock several times in the same day, or on successive days. In selling a call option, in exchange for a fee the seller sells to a third part the right to force the seller to sell on demand shares in a certain company. The fee can be matched to the call obligation. If the seller owns the shares subject to the call option at the time s/he sells the call option, then the call option is “covered.” If the call option is exercised, the seller must sell the shares to the holder of the call option, and the proceeds from sale can be matched to the call option as well as to the shares sold. In a short sale, an investor borrows a security (not dollars but shares) from his/her broker and immediately sells them. When the short sale is closed, the investor must either sell shares s/he owns, or the investor must purchase the security in order to repay the short sale loan. Closing the short position can be matched to the loan, or to the security sold when the short sale is closed.

D. SUPREME COURT TRACING.

1. *McKinley v. McKinley.* In *McKinley v. McKinley*, 496 S.W.2d 540 (Tex. 1973), the Supreme Court recounted its own tracing of funds in bank account as follows. The husband had $9,500.00 of separate property money on deposit in a savings and loan account. By year end, it had earned $472.03 in interest. On January 5, the husband withdrew $472.03. The Supreme Court said that "the $9,500.00 originally deposited remained in the account and continued to earn interest, until on December 31 of the following year [1967], the account balance was $10,453.81. There were no withdrawals after the one mentioned above. All deposits were deposits of interest. On January 2 of 1968, $10,400.00 was withdrawn and used to purchase a CD. The Supreme Court concluded that the $9,500.00 originally on deposit had been "traced in its entirety" into the CD. Thus, $9,500.00 of the $10,400.00 CD was separate property. The community-out-first approach cannot explain this analysis. The Supreme Court’s tracing in *McKinley* cannot be squared with a community-out-first approach.

2. *Estate of Hanau v. Hanau.* In the case of *Estate of Hanau v. Hanau*, 730 S.W.2d 663, 666-67 (Tex. 1987), the Supreme Court ruled that tracing was successful, as a matter of law, when it overturned the court of appeals which had reversed the trial court’s summary judgment that stock was separate property:

> [W]e must address whether the court of appeals erred in holding that the

200 shares of TransWorld stock were not properly traced.

The stipulations of the parties provided the following:

(1) Both parties owned considerable amounts of property before entering the marriage.

(2) After the marriage, both Robert and Dorris continued to keep their respective stock, bond and mutual funds accounts in their own names.

(3) During all times pertinent to this lawsuit, all transactions in Robert's account were from his income, and all transactions in Dorris' account were from her income.

(4) That the following transactions took place in the stock brokerage account of Robert:

A) On the date of marriage, there were 200 shares of Texaco stock in the account.

B) That while married and living in Illinois, the Texaco stock was sold for $5,755.00 and on the same date 200 shares of City Investing stock were purchased for $5,634.00.

C) After moving to Texas, the City Investing stock was sold for $6,021.00 and on the same date 200 shares of TransWorld stock were bought for $6,170.00.

The court of appeals held that the above stipulations did not constitute sufficient evidence to overcome the community property presumption. The court held that it is not sufficient "to show that the separate funds *could have been* the source of a subsequent deposit of funds," citing *Lantham v. Allison*, 560 S.W.2d 481, 485 (Tex. Civ. App.--Fort Worth 1978, writ ref'd n.r.e.) (emphasis in original).

The account here has not been commingled, as it was stipulated that the decedent had always kept the property in his own name and that his wife had no power over the account. It certainly does not appear that the property has so radically changed as to "defy resegregation and identification" as said by this court in *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex.1973) . . . . Because the court of appeals' holding that the TransWorld stock was not properly traced was erroneous, we reverse the judgment of the court of appeals and render judgment that the TransWorld stock be transferred to Steven Hanau.

<u>Analysis of the Case</u>. In *Hanau*, there were no account statements or share certificates admitted into evidence. There was no testimony as to whether there was community property cash in the account at the time when TransWorld Stock was

purchased. The TransWorld stock purchase required more cash than the proceeds from sale of the Texaco stock could provide. The Court of Appeals said that the husband had only shown that separate property "could have been the source" for the purchase of the TransWorld stock. The Supreme Court disagreed, noting that the husband had kept the property in his own name, and that the wife had no power over the account. The Supreme Court held that the original separate property stock had not "so radically changed as to 'defy resegregation and identification.'"

E. OVERDRAFTS. One must be careful, in considering overdrafts in checking accounts, whether the overdraft exists just in the check register or exists on the bank statement. The former is not really an overdraft. Phantom overdrafts can also be created when checks and deposits hit the bank on the same day, and it is assumed for tracing purposes that withdrawals are credited before deposits. There is no Texas appellate case telling us how to treat overdrafts in a line-item-tracing effort. Logic and general principles suggest that an overdraft is a loan, which would presumptively be community credit. One can imagine, however, someone making a deposit in an account and writing checks in reliance on the deposit, but a check clears before the deposit clears. The community credit rule would seem not to apply there. One can imagine matching transactions in which an overdraft check is written with the express intent to cover the overdraft with a transfer of separate property funds from another account or with a separate property deposit to be made afterwards.

F. LINES-OF-CREDIT. It can occur that a person will marry with a line-of-credit in place. Obviously that credit obligation cannot be community credit, because there was no community estate at the time of the extension of credit. If the transaction were a promissory note, signed before marriage, but which is funded during marriage, the credit and the borrowed funds would seem to be separate property, under the inception of title doctrine.

A line-of-credit existing at the time of marriage is likewise established by papers signed before marriage. Remember also that both the premarital and the post-marital debt can be collected out of the borrowing spouse's sole management community property and joint management community property. If a spouse draws on the line-of-credit during marriage, is the credit drawn during marriage separate or community credit? This question, which is not directly answered by case law, could affect the character of investments purchased using that line-of-credit.

G. MARGIN ACCOUNTS. Margin account credit presents a legal issue similar to the line-of-credit, when the margin account agreement was signed prior to marriage. Does the borrowing on margin during marriage somehow relate back to the premarital execution of the margin account agreement, or are sums borrowed during marriage, on a pre-marital line-of-credit, community funds arising from community credit?

X. MINIMUM BALANCE METHOD.

The minimum balance approach to tracing occurs when there has been a commingling of separate and community funds in an account, and it can be established that the account balance never dipped below a certain level. It doesn't matter what other transactions have occurred in the account; the court presumes that separate property funds "sink to the bottom" of the account, and remain in the account.

As noted above, *Sibley v. Sibley*, 286 S.W.2d 657 (Tex. Civ. App.–Dallas 1955, writ denied), applied the "sink to the bottom" approach to separate and community funds commingled in a bank account.

The case of *Hill v. Hill*, 971 S.W.2d 153, 159 (Tex. App.--Amarillo 1998, no pet.), was an instance where the court used the "sink to the bottom" approach to tracing:

> Michael testified that prior to his marriage he had a savings account at Norwest Bank, which was later converted into the Account. Into it, he made two deposits of funds which he said were his separate property. One deposit, for $10,000, represented a portion of a gift from his father. Another, for $14,678, represented the proceeds from the sale of a house that he owned before his marriage to Lucia. See Tex. Fam. Code Ann. § 3.001(1) (Vernon Pamph.1998) (stating that property owned by a spouse prior to marriage is the spouse's separate property). Receipts manifesting that both of these deposits were made were then admitted into evidence. This constitutes some probative evidence that the $24,678 sum deposited was Michael's separate property.
>
> Also admitted was a summary of the transactions in the Account. According to that exhibit, the balance in the account at the time of marriage was $7,551.99. This sum was separate property given that it was Michael's before the marriage. The lowest this balance sank before the first separate property deposit was made was $4,901.99. Thus, when the $10,000 separate property deposit was made on May 27, 1993, the total amount of separate property in the account was $14,901.99. Between this deposit and the next separate property deposit, the lowest account balance was $7,935.87. When the next, and last, separate property deposit of $14,678.20 was made on July 22, 1993, the amount of separate property in the account rose to $22,614.07.
>
> Throughout the life of the account many other deposits and withdrawals were made. Whether they involved separate or community funds is not revealed in the record. Nevertheless,

> we assume that the withdrawals consumed first the community and then the separate funds. Welder v. Welder, supra; Sibley v. Sibley, supra. Next, as the withdrawals of community funds were being made, they encroached on the $22,614.07 balance referred to above. According to the account summary, the balance of the separate property in the Account stood at $17,310.39 as of the date of divorce. And, that sum was the maximum amount which the court could have "confirmed" as Michael's separate property in the Account. Thus, the record is replete with evidence supporting the determination that the Account contained separate funds. Moreover, the contradictory evidence, such as it was, was not of such quantum so as to render the decision wrong.
>
> Nevertheless, according to Michael's amended inventory and appraisement, the total balance in the Account immediately before the final divorce hearing was $18,200.49. As can be seen, the latter sum exceeded the monies subject to being traced as his separate property by $890.10. And, to the extent that the trial court awarded him the $890.10, it did so without any evidentiary support. So, we agree with Lucia's contention that the court's decision to award Michael the Account in toto lacked legally sufficient evidentiary support, but our agreement is limited to the $890.10 sum.

In *Snider v. Snider*, 613 S.W.2d 8, 11 (Tex. Civ. App.--Dallas 1981, no writ), the Court said:

> On the date of the marriage, the balance in the account was $27,642.45. Upon dissolution of the community by the husband's death, the balance was $35,809.80. The account grew by interest from time to time, as well as by new deposits, and was reduced by withdrawals from time to time. The witness Wofford testified that an additional deposit of $10,000.00 of separate funds of the husband was made after the marriage and that the remaining deposits, as well as withdrawals, were made by the community. The passbook for this account was introduced into evidence and supports the separate character and balance of the account on the date of marriage. Between the marriage on October 3, 1972, and October 20, 1972, no interest was earned and no deposits were made, but withdrawals reduced the balance to $19,642.45. Between October 20, 1972, and April 23, 1973, there were entries of earned interest, deposits of unknown character, and withdrawals, but the balance was never below $19,642.45. On April 23, 1973, a separate property deposit of $10,000.00 was made and the identifiable separate property interest in the account became

> $19,642.45 plus $10,000.00 or $29,642.45. Subsequent interest earned, deposits, and withdrawals to the date of the husband's death never reduced the account balance to or below $29,642.45. We hold that this record traces and identifies the husband's separate interest in the Mercantile savings account to the extent of $29,642.45 with the remainder of the account being deemed community for want of tracing or identity.

XI. EXHAUSTION OF COMMUNITY APPROACH. There are several tracing approaches that consider an overall view of money in and money out as a way of tracing.

A. COMMUNITY LIVING EXPENSE PRESUMPTION. Texas courts have recognized tracing using the presumption that family expenses were paid with community money, known also as the "family expense method" in California and elsewhere. This tracing approach is described in an article in the Journal of the American Academy of Matrimonial Lawyers:

> The concept of the family expense method is to adopt the rule that in a commingled account, family ("marital" or "community") money will be used to pay family expenses before separate money will be used for family expenses. Therefore, it is not necessary to document every deposit and every expenditure as it occurred; no running balance is required. All of the family money that went into the account, up to the date in question, is calculated. Then, all of the family expenses that were paid out of the "account in the same time period are computed. If the family expenses are equal to, or greater than, the family income, what is left is separate. Hence, the remainder of the account at that date or the asset purchased on that date with the "leftover" separate money is separate property."

Kessler, Joan F., Koritzinsky, Allan R., Meyers, Marta T., *Tracing to Avoid Transmutation*, 17 J. AMER. ACAD. MATRIMONIAL LAWYERS (Sept. 2002), <http://www.aaml.org/i4a/pages/index.cfm? pageid=3392>.

The presumption that community funds were used to pay family expenses is exemplified in *Zagorski v. Zagorski*, 116 S.W.3d 309 (Tex. App.–Houston [14th Dist.] 2003, pet. denied), where the husband "introduced an exhibit showing less than $115,000 in interest was earned during the marriage. Another exhibit shows approximately $366,000 was withdrawn for marital living expenses." *Id.* at 320. The appellate court concluded that, "[b]ecause the withdrawals for community expenses depleted the community funds in the Account, the Account remained [the husband's] separate account." *Id.* The court said: "Tony's tracing of the community funds into and out of the Account rebutted the statutory presumption the Account was a community asset. . . . Here, the evidence demonstrates community funds in the Account were depleted." This was an aggregate-level (not line-item) tracing, accomplished by showing the total interest income and the total outgo for living expenses, and the court presumed that the interest income was used up in paying for the living expenses.

The case of *DePuy v. DePuy*, 483 S.W.2d 883, 887-88 (Tex. Civ. App.–Corpus Christi 1972, no writ), noted the following evidence regarding community income versus community expenses:

> There was also evidence of the income as well as living expenses of the parties during their marriage. It is apparent that the parties had net earnings which approximated their living expenses with only small amounts, if any, left over. The combined take-home pay of the parties for most of the period involved was about $750.00 per month. Mr. DePuy did not work for short periods of time. The earnings of Mrs. DePuy tended to increase, particularly after the parties moved to Corpus Christi, Texas in the summer of 1969.

Id. at 888. In finding that tracing had been successful the court cited both *Barrington v. Barrington*, 290 S.W.2d 297 (Tex. Civ. App.-- Texarkana,1956 no writ); and *Coggin v. Coggin*, 204 S.W.2d 47 (Tex. Civ. App.--Amarillo 1947, no writ), which are community expense presumption cases.

In *Coggin v. Coggin*, 204 S.W.2d 47, 52 (Tex. Civ. App.–Amarillo 1947 no writ), the wife commingled agricultural rentals with separate property in various bank accounts over a period of four years, out of which she purchased a home and several tracts of land. *Id.* at 52. However, the rental income was $1,000 per year, while living expenses ranged from $200 to $500 per month. The jury found, and the appellate court agreed, that none of the community money deposited into the accounts was used to buy the real property. *Id.* at 52.

The Family Expense Method of tracing was recognized by the Supreme Court of California in the case of *In re Marriage of Mix*, 536 P.2d 479, 484 (Cal. 1975), which expressly recognized "a presumption that family expenses are paid from community funds." *Id.* at 484. The presumption was previously recognized in *Beam v. Bank of America*, 490 P.2d 257, 263 (Cal. 1971), as the "family expense presumption," established by a long line of cases, and "universally invoked," that "it is presumed that the expenses of the family are paid from community rather than separate funds [citations] [and] thus, in the absence of any evidence showing a different practice, the community earnings are chargeable with those expenses." *Accord*, *Estate of Murphy v. Murphy*, 544 P.2d 956, 918 (Cal. 1976); *See v. See*, 415 P. 2d 776, 783 (Cal. 1966); *Estate of Neilson v. Neilson*, 371 P.2d 745, 742 (Cal. 1962); *In re Marriage of Braud*, 53 Cal. Rptr. 2d 179, 195 (Cal. App. 1996); *Frick v. Frick*, 181 Cal. App. 3d 997, 1013 (Cal. App. 1986); *Thomasset v. Thomasset*, 264 P.2d 626, 632 (Cal. App. 1953).

B. DISTRIBUTIONS FROM BUSINESSES. In *Barrington v. Barrington*, 290 S.W.2d 297 (Tex. Civ. App.--Texarkana 1956, no writ), the husband conducted throughout the marriage a sole proprietorship tire company which existed at the time he married. The trial court found that, during marriage, the husband had withdrawn more money from the business than the business earned. *Id.* at 300. The profit and loss statement reflected that withdrawals for the support, maintenance, pleasure, etc. of the parties exceeded the business's earnings. *Id.* at 304. The trial and appellate courts found that the withdrawals had depleted the community earnings and that the funds and assets remaining in the tire company were the husband's separate property. *Id.* The courts did not concern themselves with the timing of deposits and withdrawals.

In *Blumer v. Kallison*, 297 S.W.2d 898, 900-01 (Tex. Civ. App.--San Antonio 1956, writ ref'd n.r.e.), the appellate court upheld a finding that the wife's share of assets in a business were her separate property. The court said:

> It appears that the books of the Kallison Enterprises accurately disclosed the profits derived therefrom and the part thereof set aside and apportioned to the interest of Pauline Kallison, and that during the existence of her marriage with appellant she drew from the Kallison accounts an amount in excess of that apportioned to her as profits. The evidence discloses that an attempt was made to keep the books so that at all times the principal investment of Pauline Kallison (separate property) could be identified and calculated separately from the profits or earnings thereon (community property). No objection to the bookkeeping methods employed to accomplish this purpose was ever raised by appellant.

Id. at 901.

> Under these circumstances, the trial judge was correct in regarding the interest of Pauline Kallison in the Kallison Enterprises at the time of her marriage as an interest in a business and in a stock of merchandise, and further concluding that under the business practices and bookkeeping methods employed, there was no commingling of properties or funds that would prevent the identification of the separate property of Pauline Kallison.

Id. at 903.

XII. INTENT. Some tracing cases consider testimony from spouses about what they intended in a transaction as some evidence to support a tracing claim. Many have been discussed above. Obviously, corroboration of this testimony with historical memoranda or communications, or other confirming direct or circumstantial evidence, could be judged to be more credible than statements made at the time of divorce, unsubstantiated by historical evidence.

As in other areas of the law, we can use a subjective approach to intent or an objective approach. "Subjective intent" would be the intent that existed in the mind of the actor at the time of the act. "Objective intent" would be the intent of a reasonable person under the same or similar circumstances. Either approach has virtues compared to a mechanical rule that considers neither what was intended nor what is reasonable. The only advantage of the mechanical rule is that it remove the mind and the heart from the tracing practices so that a machine can tell you how to resolve the dispute.

XIII. "MAXIMUM COMMUNITY AVAILABLE" APPROACH. The case of *Duncan v. U.S.*, 247 F.2d 845 (5th Cir. 1957), reflects what might be called the "maximum community available" approach. The court said:

> The Estate's case was simply made. And, with a candid forthrightness, it insists that to the extent the record does not, or cannot, indicate the facts as to the origin of the money which produced Items I, II and III, the presumption operates to make it all community even though, without contradiction and established as an absolute fact, community income during the three years (1947, 1948, 1949) of this short three-year marriage available FN3 for investment was only $16,737.19. The result would be that, with neither showing nor purpose of showing circumstances from which gifts of the husband's separate property to the community could be inferred, the application of the presumption not only turns the sow's ear into a silk purse, but by alchemist's wizardry, fills it with gold by making the maximum of all community funds $16,737.19 turn intoFN4 $81,688.84.

Id. at 848-49. The court continued:

> For the short year 1946, disregarding altogether gains from the sale of his premarriage property, the net income for dividends, interest, professional income was $3,588.62. After deducting contributions, state and federal income taxes actually paid totaling $2,394.88, only $1,193.74 was available. The presumptions would neither permit nor require a holding that all was earned in the last two months during marriage. The Government's estimate of 1/6 ($598.10) for this purpose is conservative, although later on, for apportionment, we include the whole ($1,193.74).The maximum total available was:

1946	$ 598.10
1947	4,137.32
1948	6,024.26
1949	5,977.51
	$ 16,737.19

> This assumes that all of the income available for spending was used to accumulate Items I, II and III since the amount of living and household expenses disbursed by the wife from funds drawn out of the State National Bank account (Item III) were not established in amount.

Id. at 849. The court went on to say:

> When facts demonstrate positively and conclusively that on the assumption that every cent of community funds was invested, it was but a fraction of the cost of the property thus acquired, the presumption no longer has any basis in fact, and indeed, flying in the face of facts, it is overcome.

Id. at 851-52.

XIV. PRO RATA APPROACH. Professor Joseph W. McKnight endorsed the pro rata method in a law review article he published in 1999, Joseph W. McKnight, *Family Law: Husband and Wife*, 52 SMU L. Rev. 1155-56 (1999):

> In *Sibley* the husband as custodian for his wife of her separate property deposited her funds in a community bank account. On divorce, the wife sought return of her property. After the wife's funds had been deposited in her husband's account, many payments had been made from the account, but the account balance had never dipped below the amount of the wife's funds deposited there. The appellate court held that the husband-fiduciary was deemed to have paid out community funds before exhausting any of the wife's funds. This holding based on fiduciary principles has been often cited in support of the proposition that in any situation of commingling of separate property with community funds, the community funds will be deemed to be paid out first. [FN83] Such citation is a gross misstatement of the holding in *Sibley*. But by treating each withdrawal as a transaction, the conclusion may still be defended as an application of the community presumption. Even so, each withdrawal is more properly characterized as being of the same character as the fund from which it was taken. That is, if the fund at the time of withdrawal is forty percent separate and sixty percent community, the withdrawal should reflect the same mix. [FN84]

Professor McKnight's suggestion is a form of mutation approach: if the fund has a certain mix, what is bought out of the fund should have the same mix.

XV. "IT'S IN THERE SOMEWHERE." In *Schmidt v. Huppman*, 73 Tex. 112, 11 S.W. 175 (1889), a spouse owning a mercantile business at the time of marriage lost the separate identity of his date-of-marriage inventory to commingling. The trial court awarded the spouse monetary reimbursement for the amount of the inventory on that date, thus leaving only the growth in inventory (representing profit) as a community asset. The Supreme Court affirmed. Although the trial court in *Schmidt* awarded reimbursement, the case could be viewed as a mutation case. The Supreme Court said:

> But can it be said that in this case there was any actual mutation in this separate property of the husband? The business was carried on for a period of about 13 years, goods bought and added to the stock, and sold out from day to day, during these years. While the specific articles that made up the original stock had been sold, and their places supplied by others from time to time as the exigencies of the business required, the property was in fact the same, a stock of merchandise, and we think there was not such change in the property as would divest it of its separate character, to the extent of the goods owned by appellant at the time of the marriage.

Id. at 175-76. In a sense, *Schmidt* is a tracing case, involving the principle that mutations in form do not change the separate property character of property. The assets that mutated were the inventory and equipment in the business on the day of marriage which, although changed in form, are still somewhere in the business. In this light, *Barrington* and *Blumer v. Kallison* can be viewed as similar instances, only in those cases the profits of the business were distributed, leaving behind the separate property beginning inventory and equipment that were changed in form but were nonetheless separate property assets that had mutated but not lost their character.

In *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. Civ. App.--Houston [14th Dist.] 1975, writ dism'd), the husband lost separate property to commingling, and was awarded reimbursement to compensate. The appellate court affirmed, saying:

> The appellee commingled the proceeds of the sale of his separate property with the community property of the parties. The appellee admitted at trial and admits in his brief that the proceeds of the sale of his separate property have become completely commingled with the community estate. Appellee made no attempt at trial to trace the use of the proceeds of the sale of his separate property into any other transactions. The trial court determined in its conclusions of law that the appellee was entitled to reimbursement by reason of using his separate funds to enhance, improve and increase the value of the community estate. The trial court did not determine the amount of such

> reimbursement; however, the court did find as a fact that during the marriage specific properties owned by the appellee prior to the marriage were sold for a total sum in excess of $900,000, which was placed in the investment account at First City National Bank of Houston and thereafter used for the enhancement of the community estate.
>
> * * *
>
> Under these cases [cited in the Opinion], the trial court was justified in awarding the husband a separate estate reimbursement. The husband's separate estate served as a strong foundation upon which the community's wealth was built. Throughout the marriage the husband utilized that foundation to provide for the appellant and to establish the $3,000,000 to $4,000,000 estate. Equity is well served by reimbursing him for that initial investment.

Id. at 58.

Thus, even if tracing fails, a spouse may be able to recover his/her original separate property stake, even though s/he cannot definitively show the specific assets that contain that separate property wealth.

XVI. ROBINSON/GAMMILL RELIABILITY STANDARDS. Trial courts are said to have a gatekeeping function with regard to expert testimony. The leading cases in Texas are the *Robinson* case and the *Gammill* case.

E.I. du Pont de Nemours v. Robinson, 923 S.W.2d 549 (Tex. 1995), was a damage suit for products liability, breach of warranty, and violations of the Texas Deceptive Trade Practices-Consumer Protection Act. *Id.* at 551. The plaintiff's expert held a Ph.D. in horticulture, plant ecology and agronomy, and testified as to the causation of injury to the plaintiff's pecan trees. *Id.* at 551. According to the Supreme Court, the case required them to determine "the appropriate standard for the admission of *scientific* expert testimony." [Emphasis added] *Id.* at 554. The Supreme Court held that the expert's testimony was not grounded upon careful *scientific* methods and procedures, not derived by *scientific* methods, not based on *scientifically* valid reasoning and methodology, etc. The Supreme Court said: "In order to constitute *scientific* knowledge which will assist the trier of fact, the proposed expert testimony must be relevant and reliable." [Emphasis added] *Id.* at 556. The Supreme Court held that the witness's opinion regarding the causation of injury to the plaintiff's crops was inadmissible.

Gammill v. Jack Williams Chevrolet, 972 S.W.2d 713 (Tex. 1998), was a products liability, misrepresentation, and negligence action against the manufacturer and dealer of a motor vehicle involved in a one-vehicle accident that resulted in a passenger's death. The plaintiffs offered two experts, Lowry and Huston. Lowry was a licensed professional engineer with bachelor and master degrees in mechanical engineering, whose work involved design of jet airplanes and missiles. *Id.* at 717. Lowry offered to testify that a malfunction in the car held the accelerator pedal in place and caused the accident, and that the seat belt restraining the plaintiffs' daughter had malfunctioned, causing the daughter's death. The Supreme Court held that Lowry's background in fighter planes and missiles did not qualify him to testify to alleged defects in an automobile's accelerator or restraint system. *Id.* at 719. Huston was a licensed professional engineer with B.S., M.S. and Ph.D. degrees in mechanical engineering who had conducted extensive research into vehicle occupant restraint systems. *Id.* at 716. The Supreme Court held that Huston was well-qualified to testify about seat-belt defects. The Court held, however that Huston did not detail with sufficient specificity why the abrasions on the child's body and markings on her shirt indicated that she was wearing the seatbelt at the time of the wreck, and whether the shirt fibers in the seatbelt webbing were from the child's shirt. *Id.* at 727.

Robinson listed factors for the trial court to consider in determining the admissibility of *scientific* evidence: (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses which have been made of the theory or technique. *Robinson*, 923 S.W.2d at 557. It is evident that none of these listed criteria very readily apply to marital property tracing, which is not a scientific endeavor.

In *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998), the Texas Supreme Court suggested a way to approach the work of non-scientific experts. In *Gammill* the Court said:

> The court should ensure that the opinion comports with applicable professional standards outside the courtroom and that it "will have a reliable basis in the knowledge and experience of [the] discipline."

If, in fact, *Gamill*-like analysis applies to marital property tracing, then what are the "applicable professional standards outside the courtroom"? How can you determine whether an opinion of character of property has a "reliable basis in the knowledge and experience of [the] discipline"?

There are no Texas cases applying the *E.I. du Pont de Nemours v. Robinson* standard or even the *Gammill* standard to marital property tracing cases. Some might argue that separate property tracing is not science, or engineering, and it is not subject to scientific or engineering principles. The argument goes that, mechanical errors aside, unlike the laws of physics and chemistry, there are no universal standards by which you can measure a tracing approach, to say that it is “right” or “wrong.” A review of Texas appellate opinions reflects that there are many different ways of tracing separate property, and no one method has been declared absolutely right and applicable in all circumstances.

XVII. ESTIMATING GROWTH OF CAPITAL. If you have a case where separate property wealth was invested, but conventional tracing is not possible due to lack or records or lack of funds to pay for the tracing effort, one way to achieve "rough justice" would be to allocate to the separate estate a reasonable rate of return on invested separate property wealth. There is no Texas case law approving this approach, but it makes some sense. A reasonable rate of return could be approximated by comparison to a government bond, or a corporate bond. It could be approximated by assuming an investment in a broad-based mix of equities, like the Standard and Poor's 500. Or an accountant could look at the actual mix of investments over the length of the marriage and estimate a blended rate of return based on that mix. All other increase in wealth would be attributed to community effort or community earnings.

No case law has endorsed this approach. However, most divorce cases are settled in mediation, and many are settled in collaborative law. If the parties can reach a compromise based on such a calculation, they could in some circumstances reach a satisfactory result and avoid incurring substantial accounting and legal fees that would otherwise have to be spent grinding through the twists and turns of Texas marital property law.

XVIII. THE 10,000 FOOT VIEW. The mechanistic view that has taken hold in recent tracing practices is, in some respects, an elevation of rules over the policies that initially gave rise to those rules. Perhaps we need to return some flexibility to our approach to tracing. If you know that the separate wealth is “in there somewhere,” what higher purpose is served by saying that, if you cannot show precisely where that separate property wealth resides, you must forfeit it all to the community estate? The Supreme Court’s view of mutation in *Schmidt v. Huppman*, that the date-of-marriage beginning inventory and equipment “was in there somewhere” (my words, not theirs) and had mutated but was still separate wealth, is akin to *Barrington* and *Blumer v Kallison*, which recognized the capital of the business as mutated separate property once all profits had been removed, and to *Duncan v. U.S.*, which says that the community property presumption was never intended to allow the community estate to grow larger than itself at the expense of the separate wealth, just because the separate wealth has mutated in form and the specifics of the mutations have been lost to time and chance.

XIX. HYPOTHETICALS.

1. Renewing CDs. Husband invests $10,000 of cash in a certificate of deposit before marriage. During the marriage, he rolls the CD over a number of times. The original CD is lost and the oldest expired CD he can find is dated during marriage. Available records show a pattern of husband rolling this CD each time it matures. At the time of divorce, the CD is in husband's name alone. Husband has only his testimony to prove that the original CD predated marriage. Is that clear and convincing evidence? Is it sufficient to reverse a funding of community property? Is that evidence sufficient to sustain on appeal a finding of separate property? What if Schedule B of his tax returns show interest income from that bank every year, dating back to before marriage? On the date of divorce, the CD is worth $17,288. How much of the CD is separate property?

2. Schedule B. Wife owns 375 shares of GM. Wife's stock brokerage records from early in the marriage have been lost. However, Schedule B on each of her tax returns shows dividends from GM stock dating back to before marriage. Historical financial information on the internet shows a dividend rate that consistently matches the reported dividend income each year to 375 shares of GM stock. Is this clear and convincing evidence that the shares are Wife's separate property? Would you grant Wife a summary judgment on this proof? If the trial court found community property, and you were on the court of appeals, would you vote to reverse and remand? Reverse and render?

3. Schedule D. Husband's stock brokerage records from early in the marriage have been lost. However, Schedule D of his tax return from the year in question shows that he sold 1,000 shares of Microsoft stock, and reflects an acquisition date prior to marriage. Is this clear and convincing evidence that the Microsoft stock was separate property? Would you grant Husband a summary judgment? If the trial court found community property, would you reverse and remand? Reverse and render?

4. Sale of Partial Block 1. Husband owned 500 shares of Ford Motor Co. stock prior to marriage. During marriage he buys 500 more shares of Ford stock, using community funds. Later he sells 500 shares of Ford Stock. What is the character of the shares sold? What effect if Husband testifies that he intended to sell the separate property stock?

5. Sale of Partial Block 2. Same as #4, except Schedule D in the year of sale reflects that the shares sold had an acquisition date during marriage. What is the character of the shares sold? Would you grant Wife a summary judgment that the shares sold were community property?

6. Sale of Partial Block 3. Same as #4, except the tax return from the year of sale is lost. The current brokerage account statement reflects an unrealized capital gain on the unsold shares consistent with a share purchase price higher than any price achieved prior to marriage. In other words, the brokerage statement reflects that the shares with a lower tax basis were liquidated. Are the remaining 500 shares separate or community property? Would you grant Husband a summary judgment that the remaining shares are community property?

7. Promissory Note 1. Husband signs a promissory note and borrows $25,000, fully-funded before marriage. What is the character of the debt and the loan proceeds?

8. Promissory Note 2. Husband signs a $25,000 promissory note right before marriage, but the note is actually funded two days into the marriage. What is the character of the debt and loan proceeds?

9. Revolving Line of Credit 1. Husband signs a $100,000 line-of-credit (LOC) prior to marriage. The balance is $30,000 on the date of marriage. During marriage Husband draws another $30,000 on the LOC. What categories of property are subject to collection of the debt? What is the character of the entire debt and of the $30,000 in proceeds drawn down during marriage?

10. Revolving Line of Credit 2. Same as #9, but Husband pays $30,000 on the $60,000 LOC balance. Is the $30,000 in unpaid debt separate debt or community debt, or a combination of each? Does that depend on whether separate or community funds were used to pay the debt?

11. Revolving Line of Credit 3. Same as #10, but the $30,000 payment is made from an account that contains $100,000, half of which is Husband's separate property and half of which is community property. Was the $30,000 payment made with separate funds, or community funds, or some combination of both? What if husband testifies he intended to use separate funds to pay separate debt and community funds to pay community debt?

12. Investment 1. Wife receives a $30,000 gift from her mother, which she places in a checking account containing $10,000 of community funds. Three days later, with no intervening transactions, wife uses money from the account to buy a $30,000 CD. Wife testifies that she intended to invest only her separate property in the CD. Is the CD entirely separate property, or partly separate property and partly community property? If partly, what part separate and what part community? Would you grant a summary judgment?

13. Investment 2. Same as #12, except Wife leaves her gift funds in the account for 4 months, during which time many deposits and many withdrawals are made. The account dropped as low as $20,000, but was up to $40,000 when the $30,000 CD was purchased. What part of the CD is separate property? What if Wife testifies she intended to invest her separate property? What if Wife produces a letter that she wrote her mother at the time the CD was purchased, saying that she was using the gift money to buy a CD?

14. Reimbursement. A joint bank account contains $5,000 of Husband's separate property funds and $5,000 of community property funds. Husband writes a check to pay his pre-marital debt. Were separate funds or community funds used to pay the debt? What if Wife writes the check? Does if affect the answer if Wife is making a reimbursement claim in favor of the community estate?

15. Overdraft 1. Husband's check register shows a zero balance in his separate property checking account. The Husband issues a "hot" check to make a payment on Husband's pre-marital debt. The bank statement for that month is missing. Has a claim for community property reimbursement been proven? What if the bank statement is found, and it shows that the bank account balance never actually went below zero balance?

16. Overdraft 2. Wife decides to buy FNMA stock, and writes a check for $30,000 for that purpose. At the time the account contains only $15,000, all community property. Wife directs her secretary to transfer $30,000 of Wife's separate property funds into the account the same day to cover the purchase, but due to an oversight the transfer is not made in time to avoid a $15,000 overdraft. When the mistake is discovered, the overdraft is covered with the deposit of $30,000 of Wife's separate property funds. What is the character of the FNMA stock? Is the proof conclusive, or is character a question of fact?

17. Gift 1. Some years ago, Husband deposited $50,000 in an account in his name alone. Husband testifies that the money was a gift from his father. Wife contends that the $50,000 was Husband's gambling winnings. Is Husband's separate property proof clear and convincing? Is it conclusive? What if Wife testifies that the gift was to her and Husband jointly? What if the $50,000 was deposited in a joint account of Husband and Wife?

18. Gift 2. Same as #17, except the $50,000 was from Husband's grandmother instead of his father. Does that make a difference? What if it was from his godfather?

19. Gift 3. Wife received an expensive pearl necklace from a friend, an elderly lady, now deceased. Wife testifies it was a gift. Is that clear and convincing evidence? If Husband doesn't swear to the contrary, would you grant Wife's summary judgment? What if Wife produces an enclosure letter from the lady indicating that the necklace was a gift. Is the letter admissible? Can a forensic CPA rely on the letter as a basis for an opinion?

20. Deed Recital. Husband introduces into evidence a warranty deed to real estate, which recites that the consideration for the property was paid out of Husband's separate estate. Husband files a motion for summary judgment. Wife does not file a response. Do you grant the motion? What if Wife's summary judgment proof shows that the check for the down payment came from a joint account? What if Wife also shows that some community property had been deposited into that account during marriage? What if Wife introduces account records and tracing sheets that show that community funds were in the account at the time the down payment check was written? Would it make a difference if the bank account records showed that, although there were community funds in the account, Husband had sufficient separate property funds in the account to cover the amount of the check?

21. Line-Item-Tracing 1. The spouses maintain a joint account. The account had $2,500 in Wife's separate property funds, $5,000.00 in community property funds. Husband wrote a $1,000 check. What is the character of funds in the check? Any difference if Wife wrote the $1,000 check? What if the account requires two signatures and both Husband and Wife sign the check? What if the check is lost and you can't determine who wrote the check?

22. Line-Item-Tracing 2. The spouses maintain a joint account. The account has $5,000 in Wife's separate property and $5,000 in Husband's separate property funds. Husband writes a $1,000 check. What is the character of the funds in the check? What if Wife writes the check? What if the check is lost and you can't determine from the bank statement who wrote the check?

23. Line-Item-Tracing 3. The forensic accountant wants to trace an account, but the bank records are lost. However, an electronic ledger exists in Quickbooks, showing deposits, withdrawals, and descriptions. Assume Husband made all the entries in the electronic ledger. Is the Quickbooks ledger hearsay? Is it a summary under TRE 1006? Is there a valid best evidence objection? Can a line-item-tracing be based on the Quickbooks ledger? Does it matter whether the tracing is done by a spouse vs. done by an expert witness?

24. Distribution of Profits 1. Husband owned a Mexican food restaurant (sole proprietorship) prior to marriage. The restaurant always breaks even–no profit. The husband gives wife $5,000 per month in cash to buy groceries. The spouses pay cash for everything. On the date of divorce, what is the character of the business, its equipment, inventory, etc.?

25. Distribution of Profits 2. Same as # 24, except that the business assets (without goodwill) were worth $55,000 on the date of marriage, $125,000 at the time of divorce. What options does the Court have?

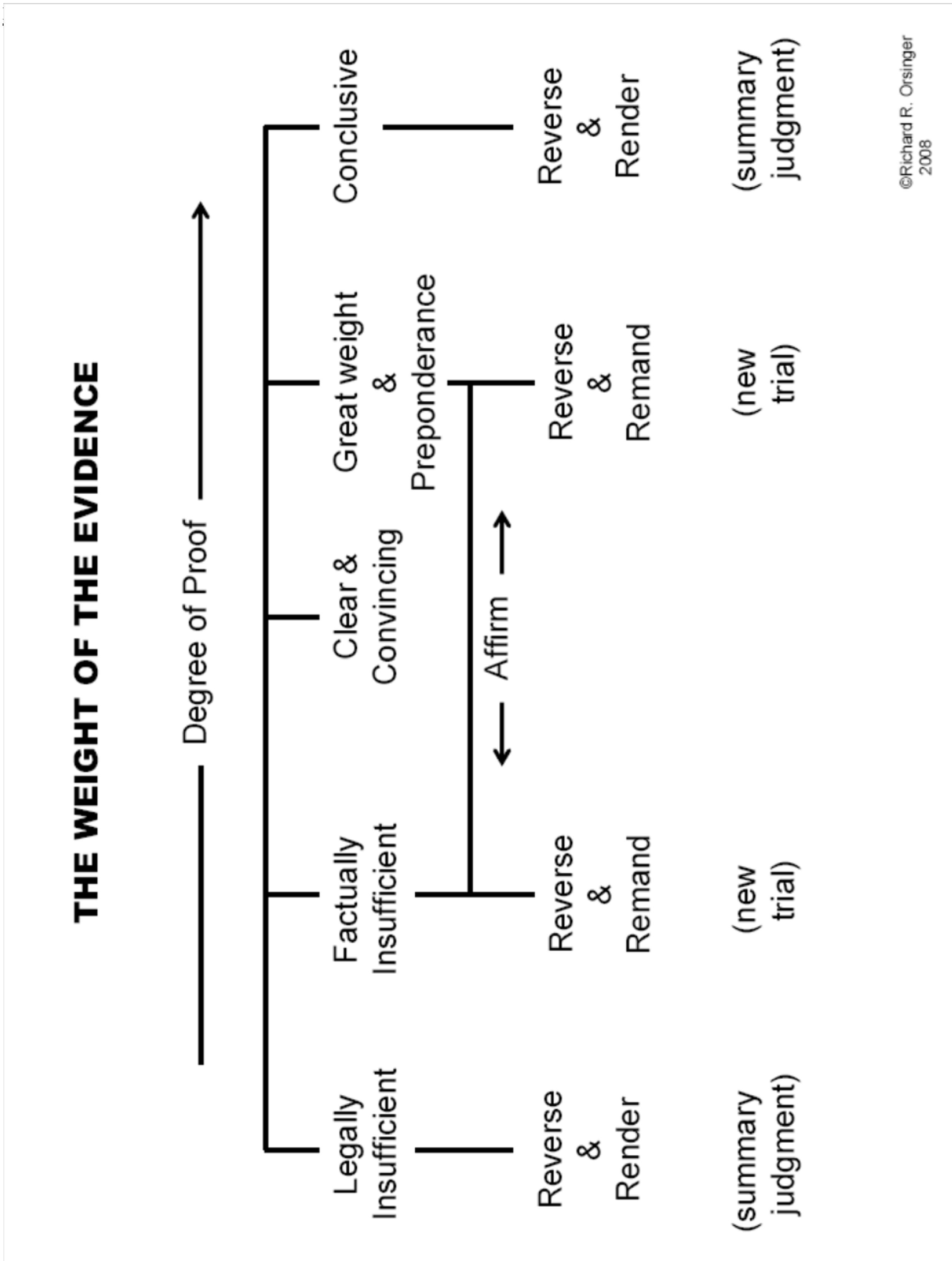
26. Living Expenses. In years one and two of marriage, records reflect that family living expenses matched net after-tax community income. The records from year three were lost. However, in year three several lucrative investments were made. The only sources for the funds to make these investments were either community income or one spouse's separate wealth. Should you assume that living expenses were paid with community income, leaving only separate property to make the investments? Or, due to the lack of records should you say that the investments are community property because there are no records to prove that separate property funds were used to make the investments?

27. Maximum Community Available for Investment. During the first five years of marriage, tax returns establish community income which was reported as taxable income. The tax returns also establish the withholding on that income and the amount of quarterly estimates paid to the IRS. No account records or ledgers are available to do a line-item tracing. Investments made during those five years exceed the total community income, net after tax. Separate property wealth was available to make the investments. Can the attribution of investments to the community be capped at the total community property income during those five years?

28. Possession of the Records. When the parties separated, Husband moved out of the house. He says that he left all the parties' financial records in the home. Husband needs those records to trace some separate property transactions. Wife says there are no financial records at the house. Husband claims Wife spoliated his financial records. Wife denies it. Is the normal burden of proof altered by these facts?

29. *Daubert/Robinson*. Is an expert witness's tracing methodology subject to a Daubert/Robinson challenge?

30. Contractually-Modified Burden of Proof. Can the parties, in a premarital agreement, eliminate the presumption of community in TFC § 3.003(a)? Can the parties reduce the burden of persuasion in TFC § 3.003(b) to a preponderance of the evidence?


THE WEIGHT OF THE EVIDENCE
Degree of Proof
Legally Insufficient
Factually Insufficient
Clear & Convincing
Great weight & Preponderance
Conclusive
Affirm
Reverse & Render
(summary judgment)
Reverse & Remand
(new trial)
Reverse & Remand
(new trial)
Reverse & Render
(summary judgment)
©Richard R. Orsinger 2008