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Fall, 1987**\*977 DIVISION OF PROPERTY AT DIVORCE**

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## TABLE OF CONTENTS

	page
I. DIVISION OF THE ESTATE	979
A. Overview	979
B. What is Not Divisible by the Court	982
(1) Separate Property	983
(a) Real Property	983
(b) Personal Property	984
(2) Property Owned by Certain Nonresidents and Foreign Realty	985
(3) State Workers' Compensation	988
(4) Certain Federal Government Benefits	989
(a) Railroad Retirement	989
(b) Social Security Disability Benefits	990

(c) Military Readjustment Benefits	990
(d) Veterans Administration Benefits	990
(e) Fleet Reserve Retainer Pay	991
(f) Federal Worker's Compensation	991
(5) Assets of a Business Entity	992
(a) Corporation	992
(b) Partnership	995
(6) Goodwill Attached to a Professional Practice	997
(a) Sole Proprietorship	997
(b) Professional Association or Corporation	997
(c) Partnership	997
(7) Degrees Earned During Marriage	998
(8) Life Insurance Renewals	998
(9) State-Sponsored Retirement Funds	999
(10) Undistributed Trust and Estate Income	1000
(11) Veterans Land Board Property	1001
(12) Membership in a Voluntary Association	1001

(13) Military Disability Benefits	1002
(14) Ability to Practice a Profession	1002
C. Estate of the Parties: Manner of Division	1003
(1) Partition or Sale of Assets	1003
(2) Sale of Homestead	1003
(3) Setting Aside of Homestead	1005
(4) Appointment of a Receiver	1006
(5) Award of Interest in Going Business	1008
(a) Sole Proprietorship	1008
(b) Partnership	1008
(c) Corporation	1009
(6) Other Monetary Payments	1009
(7) Award Money Judgment	1011
(8) Impose Lien	1013
(9) Create Trust Relationship	1015
(10) Award Attorney's Fees	1017
D. Estate of the Parties: Just and Right Division	1018
(1) Fault in the Breakup of the Marriage	1019

(2) Benefits the Innocent Spouse May Have Derived From the Continu- ation of the Marriage	1019
(3) Disparity of Earning Power, Business Opportunities, Capacities and Abilities	1019
(4) Health of Spouses	1020
(5) Children of the Marriage: Cus- tody and Child Support	1020
(6) Age of the Spouses	1021
(7) Expected Inheritance of the Spouses	1021
(8) Education and Future Employ- ability	1021
(9) Need for Future Support	1022
(10) Separate Estates of the Spouses	1022
(11) Foreign Realty	1022
(12) Credit for Temporary Alimony Paid	1023
(13) Wasting and Concealing Com- munity Assets	1023
(14) Attorney's Fees	1024
(15) Nature of the Property	1025
(16) Debts and Liabilities	1025
(17) Tax Consequences	1025

(18) Reimbursement	1026
E. Estate of the Parties: Not Divided	1026
(1) Reserving Estate Division for the Future	1026
(2) Community Property Not Divided	1027
(3) New Legislation	1027
(4) 'Mother Hubbard' Clauses	1029
F. Estate of the Parties: Debts, Liabilities and Taxes	1031
G. Contractual Alimony	1032
II. CONCLUSION	1033

## \*979 INTRODUCTION

The first step in the division of property is the discovery of the assets and liabilities. Second, the assets must be characterized as separate or community. The third step is the valuation of assets. Fourth, one must determine if any claims for reimbursement may be made on behalf of either of the spouses' separate estates or the community estate. Then, and only then, may the practitioner make an intelligent recommendation to a client or propose to a trial court what division of the assets and liabilities would be 'just and right,' giving due consideration for such things as fault in the breakup of the marriage, the relative economic equities and any claims for reimbursement. Discovery, characterization, valuation and reimbursement are not within the scope of this article. We begin with the final step: division.

### I. DIVISION OF THE ESTATE

#### A. Overview

A district court's power to divide property originates, in part, from [Article V, Section 8 of the Texas Constitution](#), which provides:

District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Consti-

tution or other law on some other court, tribunal, or administrative body. District Court judges shall have the power to issue writs necessary to enforce their jurisdiction. [FN1]

District court jurisdiction in divorce cases is specifically provided in [Section 24.007 of the Texas Government Code](#):

In addition to the jurisdiction conferred by [Article V, Section 8, of the Texas Constitution](#), the district court \*980 has original civil jurisdiction of cases of dissolution of marriage. [FN2]

Some district courts have been established as family district courts:

(a) A family district court has the jurisdiction and power provided for district courts by the constitution and laws of this state. Its jurisdiction is concurrent with that of other district courts in the county in which it is located.

(b) A family district court has primary responsibility for cases involving family law matters. These matters include:

- (1) adoptions;
- (2) birth records;
- (3) divorce and marriage annulment;
- (4) child welfare, custody, support and reciprocal support, dependency, neglect, and delinquency;
- (5) parent and child; and
- (6) husband and wife.

(c) This subchapter does not limit the jurisdiction of other district courts nor relieve them of responsibility for handling cases involving family law matters. [FN3]

A district court, once having acquired jurisdiction over the parties and the subject matter, possesses the power to determine all disputes involved. [FN4]

A jurisdictional conflict may arise if a statutory probate court exercises its concurrent jurisdiction over matters ‘incident to an estate,’ such as in a guardianship proceeding. This is a question of dominant jurisdiction. Where the jurisdiction of a statutory probate court is concurrent with that of a district court, any matter ‘incident to an estate’ ordinarily should be brought in the probate court. However, if a district court acquires jurisdiction over an estate by the filing of a divorce petition before the estate assumes a probate nature and the probate court does not have jurisdiction adequate to grant all requested relief, the probate court should defer to the district \*981 court. [FN5] It is not completely clear what the result would be if the probate court acquired jurisdiction before the divorce court. Both *Williams v. Scanlan* [FN6] and *English v. Gregory* [FN7] indicate clearly that a district court has ‘exclusive’ jurisdiction over divorce matters. In exercising this exclusive jurisdiction, it must be remembered that the issues of property division and divorce are not severable. [FN8]

The legislative mandate relating to the exercise of judicial power is found in the Section 3.63(b) is the ‘quasi-community property’ statute. It requires the court to divide real and personal property, regardless of the situs of the property, acquired by either spouse while domiciled elsewhere, if it would have been community property if at the time of acquisition the spouse had been domiciled in Texas. ‘Elsewhere’ includes Egypt. [FN10]

In *Estate of Hanau v. Hanau*, [FN11] the Texas Supreme Court recently refused to extend the quasi-community property concept to probate matters. As noted by Justice Spears in his concurring opinion, two rules exist for the characterization of the same property:

**\*982** A husband and wife from a common law state could retire to Texas with the majority of their property characterized as the husband's separate marital property. If the wife brought divorce proceedings, the 'separate' marital property would be characterized as quasi-community property under *Cameron* and [Section 3.63 of the Family Code](#). The trial court would then be authorized to divide the marital property between the spouses in a manner that it deemed just and right. Under the majority's decision in this case, the same husband could execute a will devising all the 'separate' marital property to a third party leaving the wife without any means of support after he dies. [\[FN12\]](#)

Whether the property is divisible under 3.63(a) or 3.63(b), the courts must interpret and apply the ambiguous language of the statute—'the estate of the parties,' the 'manner' of division to be employed and what is 'just and right.' Texas marital property has two components: separate and community. Thus, only three types of marital property exist:

- (1) Wife's separate property
- (2) Husband's separate property
- (3) Community property.

#### B. *What is Not Divisible by the Court*

Perhaps the easiest way to define 'the estate of the parties' to be divided by the court is to identify the things it does not include. The exclusions are based generally on four considerations:

1. The United States Constitution and the Texas Constitution prohibit divestiture.
2. Public policy dictates that certain rights and entitlements are inalienable from the person possessing them.
3. Certain rights and entitlements are too speculative, conjectural or intangible to be considered.
4. Certain rights and entitlements are not divisible due to the preemptive effect of state and federal statutes.

#### **\*983** (1) Separate Property

##### (a) Real Property

In *Eggemeyer v. Eggemeyer*, [\[FN13\]](#) Homer Eggemeyer owned an undivided one-third interest in a farm which had been given to him. In its division, the trial court divested Homer of that separate property interest and awarded it to Virginia, his wife. This presented the question of whether a trial court indeed had the power to divest one spouse of separate realty and transfer title to the other spouse by decree of divorce.

Justice Pope, writing for the Supreme Court of Texas, looked first to the intent of the Texas Legislature in its enactment of [Section 3.63 of the Texas Family Code](#). He perceived that intent to be a codification of prior law which had prohibited expressly the divestiture of title to real estate. [\[FN14\]](#) The appellate courts had historically construed the phrase 'estate of the parties' to mean community property only. Thus, the 'estate of the parties,' i.e. community property, is divisible; 'the estate of each spouse,' i.e. separate property, is not. [\[FN15\]](#)

Justice Pope also found constitutional problems with the trial court's decree. First, prior supreme court decisions had held that the definition of separate property stated in [Article XVI, Section 15, of the Texas Constitution](#), was exclusive, and not subject to alteration or enlargement by the legislature. [\[FN16\]](#) To make one spouse's separate property into the separate property of the other spouse, pursuant to [Section 3.63](#), was held an unconstitutional enlargement of that definition. [\[FN17\]](#) The second constitutional problem involved [Article I, Section 19, of the Texas Constitution](#), which prohibits

a deprivation of property 'except by the due course of the law of the land.' 'Substantive due course' was said to require a 'public purpose' or police power justification to allow divestiture of property. [FN18] The Texas Supreme Court found no such purpose or justification: 'Trial courts have a broad latitude in the division of the marital community property, but that discretion does not extend to a \*984 taking of the fee to the separate property of the one and its donation to the other.' [FN19] To divest one spouse of a fee interest in real property and award it to the other lies entirely outside the trial court's discretion. Such a divestiture cannot be harmless error. [FN20] A decree that divests a spouse of separate property is not void and subject to collateral attack. The error is one of a substantive law to be remedied by appeal. [FN21]

#### (b) Personal Property

In *Cameron v. Cameron*, [FN22] the husband earned military retirement pay and acquired United States Savings Bonds during his marriage. During virtually the entire marriage, the Camerons lived in states that did not have a community property system, the so-called common law jurisdictions. In those jurisdictions, the retirement pay and bonds would have been characterized as the husband's non-marital separate property.

The trial court awarded the wife 35% of the retirement pay and 50% of the bonds. The court of civil appeals reversed the trial court's decision, applied the inception of title doctrine and characterized the retirement pay as the husband's separate property since it had accrued while he was residing in common law jurisdictions. Applying the same reasoning, the court held that a fraction of the bonds was the husband's separate property.

The Texas Supreme Court reversed the Court of Civil Appeals. Justice Pope, once again writing for the court as in *Eggemeyer*, judicially adopted [Section 3.63\(b\) of the Texas Family Code](#). The court held that property, wherever situated, acquired by a spouse while domiciled outside of Texas that would have been community property if the spouse had been domiciled in Texas at the time of acquisition, is divisible by the court. Thus, the retirement pay and bonds were subject to division.

After a lengthy discussion of *Eggemeyer* and the related law of other jurisdictions, the court answered the wife's argument that *Eggemeyer* stood only for the narrow rule that separate real property may not be divested: 'We can find no justifiable reason\*985 for treating separate personalty in a different manner than separate realty in divorce proceedings.' [FN23]

Chief Justice Greenhill and Justices McGee, Barrow and Sondock agreed with the [Section 3.63\(b\)](#) aspect of the decision, but strongly disagreed with the court's 'unnecessary' extension of the *Eggemeyer* doctrine to separate personalty. [FN24]

#### (2) Property Owned by Certain Nonresidents and Foreign Realty

The basis of the exercise of *in rem* and *quasi in rem* jurisdiction has traditionally been the presence of the property in the forum state. [FN25] In *Shaffer v. Heitner*, [FN26] however, the United States Supreme Court noted that "judicial jurisdiction over a thing' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing.' [FN27] Based on this premise, the Court held that 'in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.'" [FN28] The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the due process clause [FN29] is the minimum contacts standard elucidated in *International Shoe Co. v. State of Washington*. [FN30]

Prior to the Supreme Court's opinion in *Shaffer*, the traditional view was that a forum state had jurisdiction to determ-

ine ownership interests in property situated within the state irrespective of whether it had personal jurisdiction over a nonresident respondent. [FN31] Does *Shaffer*, with its due process requirements for *in rem* actions, restrict (or expand) the state's power to determine the interest of nonresidents in property located in the forum state? Although *Shaffer* requires minimum contacts for an *in rem* adjudication, the Court observes that 'when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it \*986 would be unusual for the State where the property is located not to have jurisdiction.' [FN32] This language suggests that there would be no question of jurisdiction to partition realty within the state. But what of personalty brought to the forum state by one spouse against the wishes of the other? Arguably, at least, the Court in *Shaffer* meant to stop this jurisdiction-by-seizure. [FN33]

The case of *Texaco, Inc. v. LeFevre* [FN34] may be a warning that attempted property division without *in personam* jurisdiction of the nonresident respondent will not be accorded full faith and credit. In *LeFevre* the husband was subject to an alimony order entered by a New York court that had unquestioned personal jurisdiction of both parties. The husband moved to Texas and sued for divorce. The Texas court granted the divorce and divided property. The location of the property was not stated. The wife brought suit in New York to collect an alimony arrearage and obtained a judgment and order that Texaco, the husband's employer, pay a portion of his salary to her. The husband then obtained a Texas court order, enjoining Texaco from complying with the New York order. Texaco filed an interpleader in federal court in New York.

The federal court found: (1) the New York alimony order was valid, (2) the Texas divorce was void as to the property rights of the parties and (3) the Texas court should be enjoined from enjoining Texaco from complying with the New York garnishment order. [FN35] The Texas district court refused to dissolve the injunction against Texaco, but declined to hold Texaco in contempt. On appeal, the Fifth Circuit held that the Texas court must dissolve the injunction. [FN36] It is not clear whether the federal court was simply restating the doctrine of *Vanderbilt v. Vanderbilt* [FN37] or holding that any Texas orders with respect to property were void without personal jurisdiction of both parties.

If the Texas court does have *in personam* jurisdiction over the spouses, it may divide personal property wherever situated:

Personal property is subject to the law which governs the person of the owner, and the district court, having \*987 acquired jurisdiction of the persons of the owners of the property in question, could apply the law of their domicile, and determine their rights in the property, and sitting as a court of equity which acts upon the person of the parties could, after determining their interest, enforce this decree. [FN38]

A long line of cases has held that a state court lacks jurisdiction to award, partition, or divide foreign realty or to otherwise directly affect title to such property. [FN39] Thus, absent an agreement between the spouses, some of the spouses' estate may remain undivided.

However, a trial court, with *in personam* jurisdiction over both spouses, may do indirectly what it cannot do directly. For example, in a divorce case involving foreign realty, the trial court lacks *in rem* jurisdiction over that portion of the spouses' estate. Nevertheless, the trial court can order one spouse to execute a document of conveyance of that out-of-state property to the other spouse, without expressly dividing it in the decree of divorce. [FN40]

In *In Re Glaze* [FN41] the decree of divorce contained the following language: 'IT IS ORDERED, ADJUDGED AND DECREED that the Respondent shall convey title to the ranch located in Colfax County, New Mexico, to the Petitioner, subject to any indebtedness against such property.' [FN42] The wife complained that the court lacked jurisdiction over the New Mexico realty. The appellate court upheld this circumvention of the jurisdiction problem:

In this case, the trial court did not exceed its jurisdiction. It is apparent from the findings that the trial judge

considered the value of the New Mexico ranch in dividing the property, in accordance with the parties' agreement. By ordering Mrs. Glaze to convey the \*988 New Mexico property to Mr. Glaze the court exercised its equitable power to compel action by a party over whom it had *in personam* jurisdiction. [FN43]

Section 3.63(b) of the Texas Family Code, the quasi-community property statute, expressly attempts to confer jurisdiction on the Texas divorce court over real and personal property wherever situated which was acquired while the spouses were domiciled outside the State of Texas. If a Texas court, acting on that mandate, decreed a division of foreign realty, it is unclear as a matter of federal constitutional law, whether the situs state must give that Texas decree full faith and credit. [FN44]

In the leading Texas case on this question, the supreme court stated that 'as a matter of comity we will enforce the [in personam] equitable decrees of a sister state affecting Texas land so long as enforcement does not contravene an established public policy in the State.' [FN45]

In any case, Section 3.63(b) does not seem to apply to foreign realty acquired by a spouse while domiciled in Texas. Rather, it only applies, as the section states, to foreign real property acquired by a spouse 'while domiciled elsewhere.' One practical alternative for a Texas court is to award the foreign realty to the spouse in whose name it stands and to award the other spouse property over which it does have jurisdiction. [FN46]

### (3) State Workers' Compensation

In *Hicks v. Hicks* [FN47] state workers' compensation benefits, for a period of disability after divorce, received or to be received after divorce, were found to be the worker's separate property, even though the injury and claim may have occurred during marriage. The court held that a division of such benefits constituted an involuntary judicial assignment forbidden by Texas workers' compensation law. [FN48] However, if an injured worker is married at the time of the injury and remains married throughout the period of disability, the workers' compensation is community\*989 property, because such awards are intended to compensate for lost earning capacity. [FN49]

### (4) Certain Federal Government Benefits

The exclusion of some federal government benefits from the 'estate of the parties' is based on public policy and federal preemption. The courts have reviewed the matters presented on a statute-by-statute basis, always looking for the congressional intent behind the enactment.

In *Hisquierdo v. Hisquierdo*, [FN50] a case involving Railroad Retirement Act benefits, the United States Supreme Court established a test to determine the federal preemption question. The Court stated that 'the pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition.' [FN51]

Each case precedent in this area is based on the interpretation of a particular federal statute. These statutes are often amended. When confronted with a case involving a federal government benefit, the practitioner should always check the particular federal statute in question rather than relying solely on case precedent.

#### (a) Railroad Retirement

In *Hisquierdo*, the United States Supreme Court held that a state court in a community property state could not con-

sider the value of railroad retirement benefits in awarding other property to compensate the non-employee spouse for denied benefits. The court concluded that under the supremacy clause [FN52] the express terms of the anti-attachment clause set forth in section 231m [FN53] of the statute preempted state community property laws and that to hold otherwise would frustrate congressional intent and federal policy. [FN54]

In *Eichelberger v. Eichelberger* [FN55] the Texas Supreme Court relied upon *Hisquierdo* in holding that benefits payable under the Railroad Retirement Act and the expectation of ultimately receiving\*990 future benefits under the Act, are not subject to division by a state court as ‘property’ upon divorce. Under the Railroad Retirement Solvency Act of 1983, [FN56] Congress added a subsection to Section 231m which expressly permits characterization of certain components of the benefits as community property. [FN57] However, the basic component of the benefits under Section 231b(a) is still not subject to division. [FN58]

#### (b) Social Security Disability Benefits

In *Richard v. Richard* [FN59] the court relied on the federal preemption rationale of *Hisquierdo* and *Eichelberger* and the anti-attachment clause in the Social Security Act [FN60] in holding that Social Security disability benefits are not community property divisible upon divorce due to federal preemption.

Although, the Texas courts have yet to directly address the question of the divisibility of Social Security retirement benefits, there is no reason to expect a result different from that reached in *Richard*.

#### (c) Military Readjustment Benefits

In *Perez v. Perez* [FN61] the Supreme Court of Texas reviewed the relevant legislative history to determine congressional intent, then held that military readjustment benefits were not community property, but rather were an ‘unearned gratuity’ bestowed upon involuntarily released members of the Army Reserve and therefore not subject to division. ‘(T)o classify these benefits as a gift under Texas property rules comports with stated federal objectives.’ [FN62]

#### (d) Veterans Administration Benefits

In *Ex Parte Johnson* [FN63] the court relied upon *Hisquierdo* and the anti-attachment clause in the federal statute [FN64] in holding that disability compensation from the Veterans Administration is not property divisible upon divorce due to federal preemption.

\*991 In *Ex Parte Burson* [FN65] a decree of divorce divided Air Force disability retirement pay; thereafter, the husband waived that pay in exchange for Veterans Administration disability benefits. The husband was jailed for contempt as a result of his failure to pay, but the supreme court granted a writ of habeas corpus and discharged the husband. The court stated that ‘. . . a divorce decree cannot prohibit Burson from doing that which federal law properly gave him a right to do.’ [FN66]

Preemption extends to any benefits issued under Title 38 of the United States Code. [FN67] This includes National Service Life Insurance policies issued by the Veterans Administration. In *Towne v. Towne*, [FN68] a former serviceman and his wife entered into a property settlement agreement in 1980 whereby ownership of a National Service Life Insurance policy was awarded to the wife. Unbeknownst to the wife, the husband had previously changed the beneficiary from her to his girlfriend. In 1982 the husband died and the wife and girlfriend battled over the proceeds. The court held that

the husband had an absolute right to change the beneficiary designation and that any attempted restriction was void under Title 38. [FN69]

(e) Fleet Reserve Retainer Pay

In *Sprott v. Sprott*, [FN70] the court was presented with the opportunity to distinguish retainer pay from retirement pay, and held that the retainer was not community property and not divisible because it was 'compensation for the demands the government makes upon the serviceman and is not payment for services which were entirely performed in the past.' [FN71]

(f) Federal Worker's Compensation

In *Bonar v. Bonar* [FN72] the El Paso Court of Appeals compared federal worker's benefits to state workers' compensation benefits, [FN73]\*992 and stated that 'the law of this State is clear that worker's compensation benefits received after divorce are not community property, even in those instances where the injury was received during the marriage.' [FN74]

In *Anthony v. Anthony* [FN75] the Austin Court of Appeals distinguished *Hisquierdo v. Hisquierdo* [FN76] and *Ex Parte Johnson* [FN77] by ascertaining a contrary congressional intent from the language of the federal worker's compensation statute. Contrary to *Bonar*, [FN78] the *Anthony* court held that these benefits were community property divisible by the court. The *Anthony* court distinguished federal worker's compensation benefits from state worker's compensation benefits and the contrary holding in *Hicks*: '(S)uch benefits under Texas law are totally unrelated to retirement rights, are not paid in the place of retirement benefits, and are not paid out of a fund created by the wages of the worker.' [FN79]

(5) Assets of a Business Entity

Cases dealing with the assets of a business entity generally fall within the category of properties excluded from the estate of the parties as a result of a conflict with state statutory provisions. [FN80] The legislature created these entities; the courts seem hesitant to disturb them. [FN81]

(a) Corporation

As a general rule, the underlying assets of a corporation are not divisible by the court; only the shares of stock in the corporation, acquired since marriage, may be divided. [FN82] However, when the corporate form has been used as an unfair device to \*993 achieve an inequitable result, the court may disregard the corporate fiction and pierce the corporate veil. [FN83] In a divorce case, disregarding the corporate fiction is used as a device to cause corporate assets acquired since marriage to be included within the community estate. [FN84]

In *Castleberry v. Branscum* [FN85] the Texas Supreme Court enumerated the various bases for disregarding the corporate fiction:

- (1) when the fiction is used as a means of *perpetrating fraud*;
- (2) *where a corporation is organized and operated as a mere tool or business conduit of another corporation*;

- (3) where the corporate fiction is resorted to as a means of evading an existing legal obligation;
- (4) where the corporate fiction is employed to achieve or perpetrate a monopoly;
- (5) where the corporate fiction is used to circumvent a statute; and
- (6) where the corporate fiction is relied upon as a protection of crime or to justify wrong. [FN86]

Justice Spears, writing for the majority, identified a ‘blurred’ distinction between the concept of *alter ego* and the other bases for disregarding the corporate fiction: ‘*Alter ego* is only one of the bases for disregarding the corporate fiction: where a corporation is organized and operated as a mere tool or business conduit of another corporation.’ [FN87] The court found that the theory being asserted by Mr. Castleberry was ‘perpetrating fraud.’ [FN88] The court held that the standard for this particular basis was constructive fraud, that is, whether recognizing the separate corporate existence would bring about an inequitable result. [FN89]

**\*994** Justice Gonzalez filed a dissenting opinion in which Justices Campbell, Wallace and Robertson joined. The dissent strongly disagreed with the liberal standard set forth by the majority:

Under the court's current analysis, the corporate entity may be pierced, as a sham to perpetrate a fraud, any-time recognition of ‘the separate corporate existence would bring about an inequitable result.’ This standard is so broad that it is not a standard. It fails to provide any guidance on the necessary elements to assert a cause of action under this theory. Presumably, a party only needs to assert that it would be unfair or inequitable to recognize the corporate existence; the corporate veil will be pierced whenever the courts do not like the outcome, irrespective of the type of alleged misconduct by the parties. Piercing the corporate existence whenever a party does not receive a ‘complete’ or ‘fair’ recovery is an unworkable approach. [FN90]

The opinion in *Zisblatt v. Zisblatt* [FN91] contains an excellent discourse on disregarding the corporate fiction in a divorce case. Irene Zisblatt attempted to include the assets of Dispo Sales and Service Corporation (Dispo), a corporation owned by Jack Zisblatt prior to marriage, as community assets through a request to the court to disregard the corporate fiction. After more than twelve years of marriage, the Zisblatt's literally owned nothing more than ‘the clothes on their backs.’ [FN92] Dispo owned everything (their home, furniture, etc.) and paid everything (home maintenance and utilities, medical expenses, etc.). Much of the husband's commission income during marriage as a manufacturer's representative had been paid into Dispo. At the time of divorce, Dispo had cash assets in excess of \$500,000. Furthermore, several transactions by the husband, including an inexplicable gift of stock to his sister, indicated deception, if not outright fraud. It appeared to be a textbook case for piercing the corporate veil.

Despite these militating factors, the trial court found that Dispo was not the *alter ego* of the husband and proceeded to divide the relatively meager community estate accordingly. The appellate court reversed and remanded, stating that

**\*995** [T]o uphold the fiction of Dispo as an entity separate from Jack Zisblatt would be a clear and material prejudice to the rights of Irene [wife] and the community estate and an evasion of an existing legal obligation of Jack to devote his time, talent and industry to the community. . . .

. . . .

. . . Dispo was nothing more than a series of accounts into which were deposited the majority of the commissions earned by Jack over the course of the marriage. This is clearly fraud on the rights of the community. [FN93] Therefore, the court held that all of the assets which came into Dispo during the time of the Zisblatts' marriage were community property and divisible. [FN94]

In *Robbins v. Robbins* [FN95] the court, in holding that the *alter ego* theory had not been established, distinguished

*Zisblatt* by stating that ‘ i n *Zisblatt* the errant spouse formed a corporation to specifically defraud the rights of the community estate. Here, Harvey Robbins merely dominated the corporate affairs of Lakeside and worked long hours to insure its success.’ [FN96]

The result in *Zisblatt* demonstrates the utility of the doctrine of disregarding the corporate fiction in cases involving separate property corporations. In the right case, a spouse might want to assert the theory against a community property corporation rather than accept an unsatisfactory valuation of its stock.

#### (b) Partnership

Three sections of the Texas Uniform Partnership Act (the Act) are relevant to the division of property upon divorce. [FN97]

\*996 In sum, the Act allows the court to divide the spouses' partnership interest, vesting a proportionate interest of the asset in each party, or award the entire interest to one of the spouses. However, a spouse not a party to the partnership agreement cannot exceed the status of ‘assignee,’ and will have no right to participate in management. [FN98]

The Act adopts the entity theory of partnership. Thus, the rights of a divorcing spouse of a partner attach only to the partnership interest, not to the assets of the partnership. Specific partnership assets belong to the partnership entity, not to either the separate or community estates of the partners. It is error to divide partnership assets. [FN99]

It seems that the concept of *alter ego*, which to date has been utilized solely with respect to corporations, could be applicable to the partnership entity. The ‘legal fiction’ of a partnership \*997 entity could also be employed by a spouse to achieve an inequitable result. [FN100]

#### (6) Goodwill Attached to a Professional Practice

##### (a) Sole Proprietorship

In *Nail v. Nail* [FN101] the Texas Supreme Court held that the goodwill attached to the medical practice of an ophthalmologist was not part of the estate of the parties, stating: ‘It did not possess value or constitute an asset separate and apart from his person, or from his individual ability to practice his profession.’ [FN102] The court expressly reserved the question of whether goodwill could exist in a professional partnership or corporation. [FN103]

Whether the goodwill of a professional corporation exists apart from the goodwill of an individual is a question for the trier of fact. [FN104]

##### (b) Professional Association or Corporation

The court in *Geesbreght v. Geesbreght* [FN105] answered affirmatively the question reserved in *Nail v. Nail*. [FN106] The court held that the value of John Geesbreght's stock in a physicians' professional corporation was enhanced by the goodwill of the corporation, separate and apart from his person, and that such enhanced value was subject to division. [FN107]

(c) Partnership

In *Finn v. Finn* [FN108] the court established a two-prong test to determine whether goodwill attached to a professional practice is divisible on divorce. ‘First, goodwill must be determined to exist independently of the personal ability of the professional spouse. Second, if such goodwill is found to exist, then it must be determined whether that goodwill has a commercial value in which the community estate is entitled to share.’ [FN109]

\*998 Applying this test, the court found that the restrictions in the husband's partnership agreement deprived him of any legal entitlement to the value of the firm's goodwill. Thus, the estate of the parties to be divided by the trial court did not include the value of the goodwill attributable to the husband's partnership interest. [FN110] Obviously, the terms of a partnership agreement or a buy-sell agreement can be extremely important in determining the second prong of the *Finn* test. [FN111]

(7) Degrees Earned During Marriage *Frausto v. Frausto* [FN112] is the only Texas case addressing the question of the divisibility of degrees earned during marriage. Manuel and Maria Frausto agreed that Manuel would enter medical school. Maria continued to work while Manuel obtained his medical education. During that period, a considerable portion of the marriage-related expenses were paid from the wife's earnings.

The trial court ordered Manuel to pay Maria \$20,000.00 ‘as a part of the division of the estate of the parties and as reimbursement for Petitioner's share of the community expense for [R]espondent's education.’ [FN113] The appellate court reversed and held that Manuel's professional educational degree was not a property right and not divisible upon divorce. The court cited *Nail* as an analogous situation involving an alleged asset (i.e., goodwill) that did not possess value separate and apart from the person. [FN114]

(8) Life Insurance Renewals

In *Vibroch v. Vibrock*, [FN115] Wendell Vibrock sold insurance policies for Fidelity Union during his marriage to Lynda Vibrock. If these policies were renewed, Wendell was to receive renewal commissions “in recognition of continuous full time service and as compensation for services rendered in keeping business \*999 in force.” [FN116] The divorce decree omitted consideration of these commissions; later the wife sought to partition. The court of civil appeals held that to partition the commissions would be ‘to award her a personal judgment which would not be referable to property in existence upon divorce,’ and that this ‘anticipatory right’ was neither ascertainable, vested, nor divisible and subject to forfeiture. [FN117]

In a subsequent *per curiam* ruling, the Texas Supreme Court found no reversible error, but issued the caveat that ‘disposition of this case by this court indicates neither approval nor disapproval of the language contained in the opinion of the court of civil appeals which suggests that these renewal commissions are not community property.’ [FN118]

(9) State-Sponsored Retirement Funds

In *Wilson v. Teacher Retirement System of Texas*, [FN119] a husband ‘assigned’ to his wife in the property settlement agreement, incorporated into the divorce decree, all funds held in the husband's account with the Teacher Retirement System. The Teacher Retirement System did not meet the wife's demand for immediate payment, and litigation ensued.

The *Wilson* court held that the attempted assignment by property settlement agreement was unenforceable due to the

prohibition against attachment and assignment in [Section 3.07 of the Texas Education Code](#) and restated the rule that ‘a contract cannot impair the validity of any law, nor control or limit the provisions of a statute.’ [\[FN120\]](#)

The *Wilson* court also distinguished the prior decisions of *Teacher Retirement System of Texas v. Neill* [\[FN121\]](#) and *Collida v. Collida* [\[FN122\]](#) in which the divisions of funds were judicial, rather than contractual, and were payable to the participant at the time of the decree. The court stated that ‘t he ordered payments in *Neill* and *Collida* did not violate the law; here, rendition of judgment\***1000** ordering the System to pay Ms. Wilson would be contrary to law.’ [\[FN123\]](#)

However, in *Morgan v. Horton*, [\[FN124\]](#) the court held that the Education Code exemption provision [\[FN125\]](#) did not bar division of a teacher's pension plan in a suit for partition brought by an ex-spouse. This suit was brought twenty years after the divorce and although the benefits were ‘unassignable’ under the exemption provision, the court said the ex-spouse was not an ‘assignee.’ [\[FN126\]](#)

The *Wilson* [\[FN127\]](#) and *Morgan* cases can be reconciled to some extent if one accepts the contract—decree distinction suggested in *Wilson*. However, the property settlement agreement in *Wilson* was incorporated into the divorce decree by reference and the decree further declared that Ms. Wilson was ‘awarded all funds held in the account’ [\[FN128\]](#) of Mr. Wilson. Moreover, the *Wilson* court stated that the assignment prohibition applied to divorcing spouses, [\[FN129\]](#) while in *Morgan* the court ‘found one spouse to be neither a creditor nor an assignee of the other when in a divorce proceeding a division of community benefits was sought.’ [\[FN130\]](#)

In *Dyer v. Investors Life Ins. Co. of North America*, [\[FN131\]](#) the Fort Worth Court of Appeals stated that a trial court, in its division, may award an ownership interest in a state retirement plan to the non-employee spouse. However, the non-employee spouse's access to that interest is restricted by the plan's spendthrift provisions. [\[FN132\]](#)

#### (10) Undistributed Trust and Estate Income

The most recent opinion in this area, *In re Marriage of Burns*, [\[FN133\]](#) employs [Section 5.01 of the Texas Family Code](#) as the governing standard. The question is whether undistributed trust or estate income is ‘property . . . acquired by either spouse during marriage.’ [\[FN134\]](#) Undistributed income is property, [\[FN135\]](#)\***1001** but the key is whether it has been acquired, either actually or constructively, by the spouses during marriage. Undistributed, by definition, means that there has been no actual acquisition; if no present or past right of the beneficiary exists to compel distribution, there is no constructive acquisition. In *Burns*, the trustee had absolute discretion to accumulate and distribute. [\[FN136\]](#) Therefore, no acquisition occurred, so no community property existed. [\[FN137\]](#)

#### (11) Veterans Land Board Property

In *Collora v. Navarro* [\[FN138\]](#) the appellate court held that the trial court overstepped its bounds of authority by awarding the wife *legal* title to land in which she had an undivided one-half *equitable* interest, where *legal* title rested in the Veterans Land Board, which was not made a party to suit. At most the court had the power to adjust *equitable* interests in land among parties to the action. [\[FN139\]](#)

#### (12) Membership in a Voluntary Association

In *Cluck v. Cluck* [\[FN140\]](#) the court held that the trial court had no authority to divest one's membership in a voluntary association, such as a country club, and award it to another. The court stated:

[A] voluntary association has the sole right to determine who will be the members. . . .

. . . .

. . . A voluntary association has the power to enact rules governing the admission of members and prescribing certain qualifications for membership; and such rules will be enforced, unless they are against good morals or violate the laws of the State. [FN141]

#### \*1002 (13) Military Disability Benefits

In *McCarty v. McCarty* [FN142] the United States Supreme Court ruled that military nondisability retired pay was not subject to community property division upon divorce. The Court ruled that such a division would violate the supremacy clause of the United States Constitution. [FN143] In response, the United States Congress passed the Uniform Services Former Spouses Protection Act (USFSPA). [FN144] The Act allows state courts to divide the benefits according to the law of their jurisdiction. The USFSPA is retroactive to June 25, 1981, the day before the *McCarty* decision, so that military retirement benefits are made subject to division both before and after June 25, 1981. Retirement benefits left undivided by divorces in the interim period, between *McCarty* and the Act, are also subject to division. [FN145]

The oft-cited Texas Supreme Court case, *Busby v. Busby*, [FN146] held that military disability retirement benefits were community property. In *Patrick v. Patrick* [FN147] the Fort Worth Court of Appeals held that, although the USFSPA abrogated *McCarty*, ‘it expressly exempted from division disability retirement benefits under 10 U.S.C.S., Section 1201, thereby leaving *McCarty* in effect as to those benefits.’ [FN148]

The El Paso Court of Appeals has recently handed down a decision in direct conflict with *Patrick*. [FN149] After analyzing *McCarty* and sections 1408 and 1201, the El Paso Court held that *Busby* was still the law: military disability pay is divisible.

#### (14) Ability to Practice a Profession

In *Ulmer v. Ulmer* [FN150] the decree of divorce contained the following injunction:

IT IS ORDERED AND DECREED that since ULMER JANITORIAL SERVICE, INC. has been awarded to CARRENE T. ULMER as her sole and separate property that RUFUS E. ULMER be and is hereby enjoined \*1003 and restrained from entering into a like business in competition with CARRENE T. ULMER for period of one year, within San Antonio, Bexar County, Texas; and that he will do nothing to take away or diminish the trade, business, or goodwill between the business and its customers. [FN151]

Rufus Ulmer argued that ‘the injunction deprive[d] him of his separate property, i.e., the right to engage in his chosen profession. [FN152] The court of appeals held that ‘an individual's ability to practice his profession does not qualify as property subject to division by decree of the court.’ [FN153]

#### C. Estate of the Parties: Manner of Division

The appellate courts have broadly construed the legislative mandate as to the ‘manner’ in which the trial court may effect the division. Indeed, the trial courts have been rather creative. *Dorfman v. Dorfman* [FN154] contains an excellent statement of the scope of the trial court's mandate concluding that ‘the division may be accomplished by any legal

*device or equitable means*, such as partition that does not compel a divestiture of a party's title to separate real estate, the impress of a lien, or the creation of a trust.' [FN155]

(1) Partition or Sale of Assets

The 'court has the duty to determine if the community property is subject to partition in kind.' [FN156] If so determined, the court shall divide the community property equitably between the parties. If it is not subject to partition in kind, the court can order the property sold. [FN157]

(2) Sale of Homestead

A homestead may be ordered sold and its proceeds divided. [FN158] This technique is not favored when there is a disparity of earning capacity between the spouses and minor children \*1004 are involved. [FN159] Although the trial court may order the homestead sold, it may not order that the proceeds therefrom be applied to general debts. [FN160] Such an order would permit general creditors to look to property previously beyond their reach, and would violate the statutory protection afforded the proceeds from the sale of a homestead. [FN161]

Effective June 15, 1985, the statutory definition of homestead, and the protection it and its proceeds are afforded, was substantially altered. [FN162] The amended property code determines the homestead interest by size, rather than by monetary \*1005 limitation, as was the prior standard. Section 41.002(c) states that the amendment is to be given retroactive application; prior law required the exemption to be determined at the time the homestead was designated. [FN163]

(3) Setting Aside of Homestead

The trial court has the power to award the use of the parties' homestead to either spouse or for the benefit of the children, whether the homestead be separate or community property. [FN164] Despite the broad mandate in *Hedtke v. Hedtke*, [FN165] a court will rarely set aside the homestead to a former spouse without the presence of minor children. However, in *Patt v. Patt*, [FN166] a trial court awarded each party an undivided one-half interest in the community homestead, but further awarded the wife exclusive use and possession for life, subject only to her timely payment of the house note, taxes, insurance, and reasonable maintenance. Even though the homestead was the only significant community asset and there were no minor children, the appellate court did not find the division to be an abuse of discretion. [FN167]

The court may dictate a forfeiture of the former spouse's continued use and occupancy of the homestead upon the occurrence of specified events, such as abandonment of the premises, remarriage or non-payment of the homestead-related expenses. [FN168] In the case of remarriage, ' t his arrangement maintains a stable environment for the child until such time as a similar environmental option is available. . . .' [FN169]

\*1006 (4) Appointment of a Receiver

The Texas Civil Practice and Remedies Code became effective September 1, 1985. The old receivership provisions set forth in articles 2293 to 2319 of *Vernon's Annotated Civil Statutes* were thereby repealed. Chapter 64 of the Code sets forth the new rules for receivership. [FN170]

When the trial court orders a division of the estate of the parties pursuant to a divorce decree, each spouse has an in-

terest in the property. The question becomes, as Section 64.001(b) states, whether the property is ‘in danger of being lost, removed or materially injured.’

Rather than use the receivership provisions of the Civil Practice and Remedies Code, [Section 3.58 of the Texas Family Code](#) may be utilized. [\[FN171\]](#) To support a receivership order, the \*1007 necessity for the preservation of property and protection of the parties must be shown. There is some indication that a lesser degree of danger will justify a court-ordered receivership in divorce cases as compared to other civil cases. [\[FN172\]](#)

In *Readhimer v. Readhimer*, [\[FN173\]](#) an appeal of a judgment appointing a receiver during the pendency of a divorce, the Houston Court of Appeals addressed the implication of some court decisions allowing a receiver when no property loss was indicated:

This Court is aware of cases reciting that, in a divorce case, the court may appoint a receiver without any showing that the property is in danger of being lost, removed, or materially injured. . . . The better rule, however, would require a showing that the parties' property was in danger and that a less harsh remedy was unavailable before a receiver is appointed. It certainly would require some evidence and a record demonstrating the options that the court could or did consider. Failure to make an adequate record has been found to be an abuse of discretion. [\[FN174\]](#)

In two cases decided before the promulgation of the Civil Practice and Remedies Code, *North Side Bank v. Wachendorfer* [\[FN175\]](#) and *Mussina v. Morton*, [\[FN176\]](#) courts appointed a receiver over marital\*1008 property on the application of a spouse, the owner of the property. In both cases, the court of appeals held that, despite [Section 3.58\(c\)\(5\) of the Texas Family Code](#), the express terms of former article 2318 [\[FN177\]](#) limited the power of the divorce court to appoint a receiver over marital property when it was sought by one of the spouses against a third party creditor.

In addition to [Section 64.002 of the Civil Practice Remedies Code](#), a new article 2318 was created by the Legislature and provides:

‘(b) Nothing herein shall prevent:

(2) a spouse in a suit filed under Title 1 or 2, Family Code, from having a receiver appointed over all or part of the marital estate.’

As confusing as it may seem, the result is a new receivership statute that consists of Chapter 64 of the Civil Practice and Remedies Code and a stray, but crucial, provision in the Vernon's statutes. The results in *North Side Bank* and *Mussina* effectively here been overruled.

## (5) Award of Interest in Going Business

### (a) Sole Proprietorship

In *In re Marriage of Trujillo*, [\[FN178\]](#) the trial court awarded the wife an undivided one-third interest in a going business. The court of appeals expressed some reservations, but upheld the division holding that

‘[w]hile the court does not think it is wise to award individual interests in a going business between parties who are already antagonistic, we cannot say that such action is an abuse of discretion.’ [\[FN179\]](#)

(b) Partnership

As explained above, [FN180] a partner's interest in the partnership may be community property, while the partner's right in specific partnership property and the partner's right to participate in the management are not community property. The court in *McKnight v. McKnight* [FN181] implicitly approved the partition of husband's partnership interest as within the discretion of the \*1009 trial court, subject to the limitations of the Texas Uniform Partnership Act.

(c) Corporation

In *Braswell v. Braswell* [FN182] the court awarded the wife one-half of the couple's shares in a closely held corporation which was controlled by the husband. This action caused the wife to fear that the husband would take actions to render her stock less valuable. The court replied that ' t he mere fact stock in a closely held corporation is divided in kind between the husband and wife in such a way that the husband, who is president and general manager of the corporation, might retain the control of the corporation does not, alone, constitute an inequitable division.' [FN183]

(6) Other Monetary Payments

After divorce, monetary payments by one spouse to the other spouse may be required by the trial court if the payments are referable to rights and equities of the parties in property in existence at the time of dissolution of marriage. Such payments will not be regarded as allowance of alimony in violation of public policy, even where there is no cash in the community estate. [FN184]

In *Benedict v. Benedict* [FN185] the trial court made the following order:

In further settlement of the rights of Petitioner in the community and separate property of the parties, the court finds the Petitioner is entitled to have and recover judgment against Respondent in the sum of \*1010 \$400.00 monthly for the remainder of her lifetime or until such time as she may remarry. [FN186]

Not surprisingly, the husband complained that the trial court had ordered permanent alimony. The appellate court found that the trial court undoubtedly intended the \$400 per month to be paid from the husband's trust estate. The court reformed the judgment by adding the following:

The aforesaid monthly payment is ordered to be paid by Respondent Douglas Geddes Benedict of Petitioner Sammy Jane Benedict from the income of the existing trust estate of which said Respondent is beneficiary, and of which on October 9, 1975, the trustee was Mrs. Mary Graham, formerly Mrs. Robert L. Graham, as it is received. [FN187]

If this case was a division of the estate of the parties, one wonders why the order would terminate on wife's remarriage or death. Despite the appellate court's opinion and reformation, the Tax Court agreed with Mr. Benedict and held that the payments in question should be classified as alimony for tax purposes. [FN188]

In *Cordell v. Cordell* [FN189] the trial court ordered a \$5,000 payment not referable to any property that either spouse may have had or claimed at the time of the decree. The appellate court, citing *Benedict*, concluded that the future cash payment was alimony and against Texas public policy. [FN190]

The trial court in *Cohen v. Cohen* [FN191] ordered a husband to pay his wife the following:

Out of cash on hand, \$219,600 to be paid as follows:

(a) \$27,000 in cash within 10 days

(b) \$192,000 due and payable on or before February 1, 1985. Until such sum has been paid, Jay Howard Cohen shall pay to Helene Renee Cohen interest on the remaining unpaid principal balance of said sum at the rate of 10% per annum beginning on February 1, 1975. If the entire sum has not been paid by February 1, 1978, the principal sum outstanding on February 1, of each succeeding year shall be increased or decreased\***1011** [according to the] Implied Price Deflator for Personal Consumption Expenditures (1958=100) published by the Bureau of Economic Analysis of the United States Department of Commerce. [FN192]

The husband complained that the ten percent interest was void because it was in excess of the legal rate, and because conditioning his obligations on the cost-of-living index deprived him of property without due course of law. The court of appeals held that the interest and cost-of-living index were not what they appeared to be, rather they were simply a means to allow the husband to enjoy the use of the money. [FN193]

#### (7) Award Money Judgment

If an estate can be divided equitably by partitioning the assets in kind, that method should be used instead of an award of a money judgment. [FN194] However:

. . . the court may be justified in dividing property in a manner other than 'in kind' when due consideration is given to such matters as the nature and type of particular property involved and the relative conditions, circumstances, capabilities and experience of the parties. [FN195]

Court-ordered money judgments and monetary payments are in the nature of a property division, rather than alimony. Therefore, these court-ordered obligations may be dischargeable in bankruptcy. [FN196]

In *Hanson v. Hanson* [FN197] the court recognized the problems with an award of an unsecured money judgment:

\***1012** It is our opinion that a trial court should provide security for money judgments which are granted to achieve an equitable division of a community estate, unless there is some compelling reason to do otherwise. In this way the party granted the money judgment will be protected from uncertainties such as bankruptcy, concealment, and use of assets, which could work to deprive the party of his share of the community estate. [FN198]

The court also set guidelines for the terms of payment which are sometimes set by the trial court in conjunction with the money judgment award:

A trial court should set the term for payment of the cash judgment for as short a period as possible without imposing a serious hardship on the party responsible to pay the judgment. Application of this standard will minimize two disadvantages of judgments with pay-back terms. First, while a party's judgment is outstanding the party is deprived of the right of control and disposition of his full share of the estate. Second, when a trial court sets an unduly long term for payment, with an award of interest at a fixed rate, the party granted the judgment will usually end up being under or over compensated for the delay in payment due to the fluctuation of interest rates. [FN199]

The court in *Hanson* held that the trial court abused its discretion by failing to provide security for the judgment and in setting an unduly long term for payment. Payment would have extended over six years. However, a trial court's failure to provide security for a money judgment does not automatically constitute an abuse of discretion. [FN200]

The trial court in *Beavers v. Beavers* [FN201] awarded the majority of the community estate to the husband and balanced the award by a \$119,275 money judgment in favor of the wife, payable \$10,000 initially and \$2,000 per month

thereafter. The husband claimed that the terms for payment were unreasonable. The appellate court stated that ‘ We hile we agree that under a money judgment of the character at issue in this case the judgment\***1013** debtor is entitled to reasonable terms, we cannot agree that periodically required payments must never exceed current income.’ [FN202]

A money judgment may also be used as a remedy to compensate a spouse who has failed to receive court-ordered temporary support payments or who has been damaged by the other spouse's squandering of community assets. [FN203] Rather than dividing retirement benefits between the spouses, the trial court may award one spouse all of his benefits and award the other spouse a money judgment in lieu of any interest in the benefits. [FN204]

#### (8) Impose Lien

A judgment lien is created by compliance with state statutes. An equitable lien does not owe its existence to any statute, rather its origin is rooted in the trial court's equitable power. [FN205] In a divorce action, an equitable lien may be placed upon a spouse's real property homestead only to secure the payment of an amount awarded to the other spouse in payment for that other spouse's interest. The resulting lien is akin to a purchase money lien. [FN206]

Historically, trial courts fixed *express* equitable liens upon real property to secure payment of a monetary award. However, \***1014** these liens may be implied. In *McGoodwin v. McGoodwin* [FN207] the trial court approved the McGoodwins' property settlement agreement that awarded the homestead to the husband, who in return agreed to pay the wife ‘\$22,500 as consideration for the conveyance of the wife's 1/2 interest.’ [FN208] The husband continued to live on the homestead, but did not pay the wife as agreed. The wife, claiming an implied vendor's lien, brought suit to foreclose the homestead. The trial court decreed that the property should be sold to satisfy the wife's claim. The husband appealed. Resorting to the law of contracts, the Supreme Court of Texas held that an implied vendor's lien arose in the wife's favor against the undivided one-half interest she had ‘sold.’ The court distinguished the facts from the prior decisions in *Spence v. Spence* [FN209] and *Ealy v. Ealy* [FN210] by reasoning that each case involved court-ordered, *not agreed*, property divisions in which the trial court elected not to create an express lien. [FN211]

In *Stapler v. Stapler*, [FN212] a case that may have far-reaching implications, the Fort Worth Court of Appeals recently broadened the *McGoodwin* implied vendor's lien doctrine. The *Stapler* Court awarded the wife certain real estate and the responsibility for certain debts of the parties, including federal income taxes. The trial court found that the wife's promise to pay the debt was consideration for her receipt of the real estate. Therefore, the husband was entitled to seek and obtain foreclosure of an implied vendor's lien in the real estate upon the subsequent failure of the wife to pay the federal income tax liability. Responding to the wife's argument that the husband's claim was not yet ripe since he had yet to suffer a loss, the court stated:

[The wife] may or may not have been indebted to Lloyd under the terms of the decree's indemnification provision, but she was without question of default in her obligation under the decree to pay the Internal \***1015** Revenue Service debt. Her failure to fulfill that obligation, the assumption of which formed part of the consideration of her receipt of the real estate, authorized the trial court to foreclose the implied vendor's lien in the property. [FN213]

The equitable lien can be imposed on different types of marital property, not just homestead. [FN214] It is proper for a trial court to suspend enforcement of the equitable lien until the owner sells the property. [FN215]

*Jensen v. Jensen* [FN216] provides authority for the proposition that equitable liens may not be placed on separate property. The court stated that ‘if the right to reimbursement is proved, a lien shall not attach to Mr. Jensen's separate property shares. Rather, a money judgment may be awarded.’ [FN217] This ‘no lien’ language has been construed narrowly; that is, limited to situations which involve closely-held stock and the ‘key man concept,’ such as in *Jensen*.

[FN218]

#### (9) Create Trust Relationship

The trial court may appoint either spouse as trustee to safe-guard or receive money, benefits, or other property awarded to the other spouse. Typically a trustee is necessary in the case of retirement benefits where the husband receives the entire benefit payment and is ordered to pay his wife a portion upon receipt. The husband is appointed as trustee of his wife's portion. [FN219] A trial court has the power to hold a trustee/spouse in contempt of court for refusing to obey an order directing him to pay the other spouse funds which he holds as trustee. [FN220]

Often, a trial court impresses a constructive trust in post-judgment situations as an equitable remedy to prevent injustice. The court may impose such a trust where there is a fiduciary or confidential relationship between two parties, and the \*1016 party holding property or money would profit by a wrong or be unjustly enriched if he were allowed to keep the property or money. [FN221] 'A constructive trust is the formula through which the conscience of equity finds expression.' [FN222]

In *Roberts v. Roberts* [FN223] the court employed the constructive trust doctrine in a family law matter. The trial court had ordered that 'the four (4) children from a prior marriage will be sole beneficiaries of all insurance policies presently insuring the life of husband .' [FN224] The husband designated his second wife as beneficiary. After the husband's death, litigation ensued between the second wife and the children. The trial court imposed a constructive trust in favor of the children on the policy proceeds in the possession of the second wife. The appellate court affirmed the propriety of the trust.

An excellent example of the combined use of the court-appointed trustee and post-judgment constructive trust is *Hudspeth v. Stoker*. [FN225] The property settlement agreement, which was incorporated into the divorce decree, stated:

Further the parties covenant and agree to execute any and all necessary legal documents to affect the following insurance benefits provisions and to each continue the payment of premiums on the policies on their respective lives:

(a) Insurance on the life of EDWARD GLENN HUDSPETH with Great American Reserve Life Insurance Company, Policy No. G 6395, in the face amount of \$15,000 shall be made payable to the Plaintiff, *CHRISTINE HUDSPETH as Trustee* for JOEL PATRICK HUDSPETH, TERRILL ANN HUDSPETH and ANN ELIZABETH HUDSPETH, share and share alike, and that the Plaintiff, *CHRISTINE HUDSPETH*, shall be named owner of said Policy in said capacity. [FN226]

The policy referred to in the divorce decree was subsequently terminated and replaced by a group policy which named the decedent's second wife as beneficiary. The trial \*1017 court imposed a constructive trust on \$15,000 of the policy proceeds in favor of his first wife. In affirming, the appellate court stated:

Hudspeth's actions were in direct conflict with his signed agreement and with the decree of the court. By designating a new beneficiary on his group life insurance policy he thwarted the terms of the property settlement agreement incorporated into the divorce decree relating to the life insurance proceeds. Hudspeth's action was a violation of his legal duty under the decree, and the court was justified in imposing a constructive trust upon the proceeds. [FN227]

#### (10) Award Attorney's Fees

In a divorce proceeding, the trial court may award attorney's fees to either party as a part of the 'just and right' division of the community estate. [FN228] The award of a money judgment for attorney's fees is simply one manner of dividing marital property. [FN229] Alternatively, the trial court has the authority to award attorney's fees as costs in any suit affecting the parent-child relationship. [FN230]

Until recently, case law did not distinguish between attorney's fees at trial and attorney's fees on appeal. *Jacobs v. Jacobs* cast some doubt on the validity of the award of appellate attorney's fees. The *Jacobs* court stated that 'a trial court may not penalize a party for taking a successful appeal by taxing him with attorney's fees.' [FN231] Subsequent cases, however, have made it clear that a trial court may unconditionally award attorney's fees on appeal so long as it is clearly a part of the division of the community estate or pursuant to [Section 11.18 of the Family Code](#). [FN232]

**\*1018 D. Estate of the Parties: Just and Right Division**

The court has wide discretion in ordering a division of property. [FN233] The court's division will not be disturbed on appeal unless a clear abuse of discretion is shown. [FN234] 'The primary duty of the trial court in dividing the estate of the parties is to make a division that is fair, just and equitable.' [FN235] The division need not be equal so long as it is equitable and the circumstances justify a disproportionate division. [FN236] The trial court is required to view the case in its entirety in making a division of the estate that is just and right. [FN237]

The case law has accumulated a laundry list of factors that may be considered by the trial court in making its 'just and right' division. Perhaps the most comprehensive recitation of this list comes from *Murff v. Murff*: [FN238]

[T]he trial court may consider such factors as the spouses' capacities and abilities, benefits which the party not at fault would have derived from continuation of the marriage, business opportunities, education, relative physical conditions, relative financial condition and obligations, disparity of ages, size of separate estates, and the nature of the property. We believe that the consideration of such factors by the trial court is proper in making a 'just and right' division of the property. Likewise, the consideration of a disparity in earning capacities or of incomes is proper and need not be limited by 'necessitous' circumstances. [FN239]

The facts of most divorce cases necessarily trigger more than one of the aforementioned factors. Thus, the courts typically make their decisions based on several factors considered together. [FN240] The following discussion will pinpoint, where possible, cases which were decided by a single factor.

**\*1019 (1) Fault in the Breakup of the Marriage**

In dividing the estate of the parties, the court may consider fault in the breakup of the marriage. [FN241] Fault may be considered as a factor in division if a fault ground is pled; however, the division should not be a punishment for the spouse at fault. There is a difference between making a just and right division of property and punishing the errant spouse. [FN242] When a divorce is sought on both fault and no-fault grounds, the court may consider fault in making a property division, but this does not mean the court must consider it. [FN243] It is not clear whether the trial court may consider fault in dividing the property in a no-fault divorce. The better practice is to plead it. [FN244]

In *Hourigan v. Hourigan* [FN245] the appellate court held that the trial court properly considered the wife's abandonment of her husband and child in its division of the estate. The husband had alleged abandonment as one of his grounds for divorce. The trial court must allow reasonable discovery on the issues of fault and adultery in the breakup of the marriage. [FN246]

## (2) Benefits the Innocent Spouse May Have Derived From the Continuation of the Marriage

In making a just and right division of the estate of the parties, the court may consider the benefits which the spouse not at fault would derive from continuing the marriage. [FN247] For example, this concept includes the medical benefits to which a former spouse would have been entitled as a wife of a retired Air Force officer. [FN248]

## (3) Disparity of Earning Power, Business Opportunities, Capacities and Abilities

The court may consider the disparity of earning power between the spouses, as well as their respective business opportunities,\*1020 capacities and abilities. [FN249] In *Bokhoven v. Bokhoven* [FN250] the appellate court, after reviewing the entire record of the trial proceeding, upheld the property division stating that ‘ In this particular instance, the trial court's division of community property could be based solely upon the difference in earning capacities of the parties as set out in the findings of fact.’ [FN251]

## (4) Health of Spouses

The physical condition of each spouse offers an additional factor to be considered in the division of the estate. [FN252] In *Cravens v. Cravens* [FN253] the court of appeals upheld a disproportionate division based on the wife's poor physical condition:

In this case, the Appellee testified concerning injuries she received as the result of an attack upon her by Appellant shortly before their separation. She also testified as to her disability resulting from her injuries, and her present inability to do tasks that she previously could have performed. Based upon such evidence, the trial court could have awarded her a disproportionate share of the property. [FN254]

## (5) Children of the Marriage: Custody and Child Support

Section 3.63 of the Texas Family Code states that the court-ordered division shall have ‘due regard’ for ‘any children of the marriage.’ [FN255] In *Boriack v. Boriack* [FN256] the husband was awarded custody of the couples' child. The wife complained of an unequal division of property; however, the court determined that the fact that Dr. Boriack was awarded custody ‘in itself would justify an unequal division favoring him.’ [FN257]

The case of *Young v. Young* [FN258] presented the question whether the reference to ‘any children’ in Section 3.63 includes\*1021 adult children. At the time of divorce, the Youngs had a thirty-two year old son who contracted multiple sclerosis as an adult. Physically disabled, this son lived with Mrs. Young. Mr. Young contended that ‘any children’ meant minor children. The appellate court construed the statute to include adult children because ‘the only word modifying children in section 3.63 is any.’ [FN259] The amount of child support is another factor which can be considered in the trial court's property division. [FN260]

## (6) Age of the Spouses

In *Roberts v. Roberts* [FN261] the court stated that ‘Edna (wife) at age 63, is more than 20 years older than A.L. (husband). The trial court may well have considered this age discrepancy in awarding the 149.78 acre tract to Edna.’ [FN262] The court of appeals held that there was no abuse of discretion in the award of the real property to the wife. [FN263]

(7) Expected Inheritance of the Spouses

In *Whittenburg v. Whittenburg* [FN264] the trial court referred to the expected inheritance of husband as a factor in making a just and right division of the estate.

(8) Education and Future Employability

In the division of the estate in *McCartney v. McCartney*, [FN265] the court considered that in the division of the estate that: 'the wife's physical disability and her lack of training will likely require her to deplete the estate awarded to her under the decree, while the husband's future earnings will likely increase \*1022 the over-all value of the estate awarded to him. [FN266] Educational background is but another factor to be considered in the division of the estate. [FN267]

(9) Need for Future Support

The court of appeals in *Goren v. Goren* [FN268] held that 'the trial court was justified in considering the parties' respective financial obligations and future earning capacity, and their probable respective needs for support . . . An important factor, if not the most important factor, is the parties' probable respective needs for future support.' [FN269]

The court in *Pickett v. Pickett* [FN270] went further, theorizing that the probable future need for support seems to be the most important factor in determining the court's exercise of its discretion in dividing the community estate of the parties in a divorce.

(10) Separate Estates of the Spouses

The court may properly consider the size of the separate estates of the spouses in its division of the community estate. [FN271]

(11) Foreign Realty

The court may consider the value of foreign realty in making its division. Although the Texas court lacks jurisdiction to determine title to such land, it may consider its existence when dividing the property over which it does have jurisdiction. [FN272]

In *Walker v. Walker* [FN273] the court upheld the consideration of the value of funds used by the husband to purchase land in Florida, a common law jurisdiction, where the wife's community interests were not recognized. The court stated:

[T]he trial court in order to effect a fair, just and equitable division of the whole of the community estate was clothed with the power and authority to take into consideration the value of the community funds so invested in \*1023 the Florida realty in a foreign jurisdiction and to charge the husband with one-half of the value of such funds in the allocation as here to the wife of property, real, personal or mixed, situated within the court's jurisdiction in Texas. [FN274]

In allocating property within its jurisdiction to one spouse the court may consider the property beyond its jurisdiction in possession of the other spouse. [FN275]

#### (12) Credit for Temporary Alimony Paid

In *Edsall v. Edsall* [FN276] the wife was paid \$250 per month temporary alimony and the husband was allowed \$100 per month. The trial court found that the wife had received \$2,200 more than the husband during the pendency of the divorce and charged the wife's interest in the community estate with \$1,100 or one-half of such excess payments received by her. The appellate court held that the trial court's decision was not an abuse of discretion.

In *Schechter v. Schechter*, [FN277] the Dallas Court of Civil Appeals assumed that the trial court has taken into consideration the temporary alimony paid to the wife since it awarded the husband the larger share of the community estate. However, because this case involved a prenuptial agreement which prohibited the wife from seeking temporary alimony, it could be read to mean that the trial court considered the prenuptial's prohibition, rather than temporary alimony in general.

Why should the court consider payment of temporary alimony which is, in the vast majority of cases, simply a division of community income during the pendency of the divorce? Giving credit for payment of temporary alimony is similar to pretending the spouses are already divorced and reimbursing the payor-spouse's separate estate.

#### (13) Wasting and Concealing Community Assets

If gifts to the children by a spouse, without the other spouse's consent, are excessive in relation to the total community estate and are detrimental to the other spouse's primary \*1024 source of post-divorce support, the court can award the injured spouse one-half the amount of the gifts to the children. [FN278]

In *Reaney v. Reaney* [FN279] the husband testified that he went to Puerto Rico with approximately \$53,000. He admitted that he squandered this money—he lost some of it gambling and gave some of it away—and that at the time of trial he did not have any of it. The court held that ‘in the light of the undisputed facts in this case the trial court could not make a fair and just division of the remaining community assets without taking into account, Appellant's (husband's) profligate loss of a large portion of the community estate.’ [FN280]

Considering that a husband, during the pendency of the divorce, wrongfully and willfully converted a substantial amount of community funds to his own personal use, the court was justified in awarding a disproportionate portion of the estate to wife. [FN281] Also, money spent by husband on a girlfriend during the pendency of a divorce would be a factor to be considered by the court in dividing the estate. [FN282] However, bad investments and poor judgment alone, in the absence of fraud, will not justify a disproportionate division of the community estate. [FN283]

Due to the trust relationship between spouses as to the community property controlled by each, the burden of proof is upon the disposing spouse to prove the fairness of the disposition of community assets. [FN284] If the trial court finds that a spouse has concealed community property, it may award that property to that spouse as his share of the community estate. [FN285]

#### (14) Attorney's Fees

The award of attorney's fees is another factor to be considered in making an equitable division of the estate in a divorce. [FN286]\*1025 A decree that one party is to pay the other's attorney's fee in effect awards the paying party less of the estate. This is but one factor to be considered in making an equitable division of the estate. [FN287]

(15) Nature of the Property

Among the many factors considered for equitable division, the court should not overlook the nature of the estate property itself. In *Waggener v. Waggener* [FN288] and *Thomas v. Thomas* [FN289] the court recites this factor as part of a pre-*Murff* laundry list. [FN290]

The cases citing this factor do not give clear examples of what is meant by nature of the property; rather, the courts merely recite it as part of the *Murff* laundry list of factors. Nature of the property may be synonymous with size of the community estate or sizes of the spouses' respective separate estates. Nature of the property could also refer to primary assets which are not readily partitionable, such as stock in a closely held corporation controlled by one spouse or a partnership interest controlled by one spouse. [FN291]

(16) Debts and Liabilities

Imposition of liability for the discharge of an obligation is yet another factor to be considered in the division. Failure to do so may be error. [FN292]

(17) Tax Consequences

Although the court has no power to relieve either spouse of personal liability to the taxing authority, the court may take tax \*1026 liability into consideration and may require one party to assume the other party's liability for taxes or require reimbursement for taxes paid. [FN293] In *McCartney v. McCartney* [FN294] the court stated:

The trial court was not required to afford any greater weight to the issue of tax liability than to the other factors bearing upon the fair and just division of the community properties. However, the trial court should have taken into consideration the issue of tax liability, as with other pertinent factors affecting the justness of its decree. [FN295]

(18) Reimbursement

Rather than ordering an immediate payment or money judgment, the trial court may adjust the division of the estate to compensate the spouse entitled to reimbursement. [FN296]

*E. Estate of the Parties: Not Divided*

(1) Reserving Estate Division for the Future

The issues of property division and divorce are not severable. [FN297] If the disposition of community property and debts is left for future agreement of the parties, the decree based upon the agreement is not a final judgment. [FN298] The court cannot divide a divorce case into segments and enter separate, appealable judgments for each piece. [FN299] But it is permissible for the court to effect a present partition of community property into undivided interests with agreement for future sale. The failure to impose a time limitation will result in the allowance of a reasonable time for such sale. [FN300]

### \*1027 (2) Community Property Not Divided

A decree of divorce is res judicata as to property awarded, but the decree is binding only to the extent the property is brought within the scope of its adjudication. [FN301] Where the property settlement agreement and subsequent decree of divorce fail to divide all the community property, the former spouses become tenants in common of that undivided property. [FN302] In this event either party may subsequently demand the partition of the property not divided previously. [FN303] A bill of review is not required to divide such assets. [FN304]

The rule authorizing a subsequent suit for partition to dispose of community property rights not adjudicated in the divorce judgment is not applicable to debts or tax liabilities. [FN305] Once the decree becomes final, the parties' respective liabilities are determined according to applicable law. [FN306]

### (3) New Legislation

Effective November 1, 1987, the case law rules developed for the partition of undivided community property were substantially revised by the addition of three new sections to the Texas \*1028 Family Code. [FN307] The legislation applies only to decrees rendered on or after the effective date. [FN308]

\*1029 Case law, as described above, [FN309] may reward a spouse who conceals property since it allows the wrongdoer to retain one-half of the concealed property. This scenario may work to the detriment of the innocent spouse if the trial court would have been inclined to award that innocent spouse a disproportionate share of the community property. Under new section 3.91(a), if the court had jurisdiction at the time the decree was rendered, it retains the ability to make a 'just and right' division. [FN310]

Often, two forums have jurisdiction to grant a divorce, but neither has jurisdiction over all of the property. Thus, some of the property remains undivided. Section 3.92 gives the Texas courts the ability to divide that property if it subsequently acquires jurisdiction. [FN311]

### (4) 'Mother Hubbard' Clauses

Sometimes the estate of the parties is divided unintentionally. This happens through the so-called 'Mother Hubbard' or residuary clause, a provision in a decree that purports to encompass those things not specified in the decree, but included in the community estate. Each case turns upon the particular language of the residuary clause and the type of property involved. For example, a provision in a decree of divorce awarding a party 'all personal property in the possession' has been held to include insurance policies. [FN312]

In *Jacobs v. Cude* [FN313] the divorce decree contained the following provision: 'Defendant, Ira Gordon Cude, will receive all community property not mentioned above.' [FN314] The court held that retirement benefits were included by inference in that provision. [FN315]

In another case, the property settlement agreement, provided for the husband to receive 'all personal effects and household contents and furniture in his possession' and the wife to receive '. . . all other community property of the parties not expressly herein given to the husband.' [FN316] The court \*1030 found that insurance policies are not 'personal effects,' but instead are 'community property' and as such went to the wife under the residuary clause above. [FN317]

A divorce decree can adjudicate ownership of retirement benefits by the use of a residuary clause. [FN318]

In *Miller v. Miller*, [FN319] Howard Miller contended that the stock owned jointly with his wife was disposed of by the residuary clause in the property settlement agreement. The Dallas Court of Appeals stated the appropriate analysis for such situations:

An agreed judgment must be interpreted as if it were a contract between the parties, and the interpretation of the judgment is governed by the laws relating to contracts (citations omitted). In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument (citation omitted). If the intention expressed on the face of the contract is doubtful, resort may be had to parol evidence of the situation and the surroundings of the parties to resolve the doubt. Similarly, resolution of an ambiguity in an agreed judgment turns upon the intentions of the parties as disclosed by the provisions of the judgment and the surrounding circumstances, which may be clarified through the admission of extrinsic evidence. [FN320]

After reviewing the judgment's language and giving due consideration to both spouses' trial testimony that they did not intend that the decree should include the stock, the court upheld the trial court's finding that the stock was held by the Millers as tenants in common. [FN321]

#### \*1031 F. *Estate of the Parties: Debts, Liabilities, and Taxes*

The 'estate of the parties' to be divided by the court invariably includes not only assets, but also debts and liabilities. The power to divide includes the power to order one of the parties to pay such debts or liabilities. [FN322] If the court is to order a 'just and right' division of the estate, it should allocate the debts and liabilities in conjunction with the division of assets. [FN323] In allocating the spouses' debts and liabilities, the court must consider the rights of the spouses' creditors. The divorce decree cannot alter the contractual obligations between the spouses and their creditors. [FN324]

Furthermore, the trial court does not have the power to diminish or limit the power of creditors, either secured or unsecured, to proceed against either spouse for payment of debts incurred prior to the granting of the divorce. It only has the authority, as between the spouses only, to determine liability to third party creditors. [FN325]

Although the court lacks the power to relieve either spouse of personal liability to a taxing authority, it may be error for a trial court not to consider probable tax liability in making its division of the estate. The court has the power to require one spouse to assume the other's liability for taxes or require reimbursement for taxes paid. [FN326]

Although not directly applicable, some of the same principles and concepts used to characterize marital assets should govern the division of marital debts and liabilities. For example, debts \*1032 incurred or contracted by a spouse prior to marriage should be that spouse's 'separate debts.' Those debts incurred or contracted after marriage should be presumptively 'community debts.' The labels 'separate debt' and 'community debt' would at best be convenient labels and should not operate automatically to place personal liability on a non-contracting spouse.

The label 'community debt' has been overworked by the courts. The designation of a debt as community means nothing more than that some community property is liable for its satisfaction. Those cases referring to 'community debt' or 'joint liability' are the so-called 'creditor's cases' and have little to do with the 'just and right' division of the estate. Most of these creditor's cases are post-divorce situations. The creditor has sued one or both former spouses on a debt incurred during marriage and the court is trying to determine who is liable and which property is subject to execution. [FN327]

#### G. *Contractual Alimony*

Payments imposed by a divorce decree on one spouse as a personal obligation for the support of the other spouse contravene the public policy of the state. [FN328] However, the Texas Legislature has provided for agreements of spousal maintenance in Section 3.631 of the Family Code. [FN329] This statute also provides that if the court approves an agreement, it may set forth the agreement in full or incorporate it by reference in the decree of divorce. [FN330]

Although the trial cannot order contractual alimony to be paid, it may approve a separate contractual agreement which binds one spouse to pay alimony to the other spouse, and incorporate the agreement by reference into the divorce decree. [FN331] An agreement to pay alimony has whatever legal force \*1033 the law of contracts will provide. [FN332] It is not enforceable by contempt. [FN333]

### III. CONCLUSION

Division of property at divorce is a multi-phase task, with division itself being only a final step. This article has demonstrated that division, too, has many sub-issues that must be resolved by the family law practitioner.

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[FN1] TEX. CONST. art. V, § 8.

[FN2] TEX. GOV'T CODE ANN. § 24.007 (Vernon 1987).

[FN3] TEX. GOV'T CODE ANN. § 24.007 (Vernon 1987).

[FN4] *Russell v. Russell*, 199 S.W.2d 858 (Tex. Civ. App.—Fort Worth 1947, no writ); *Naumann v. Naumann*, 408 S.W.2d 347 (Tex. Civ. App.—Austin 1966, no writ).

[FN5] *Williams v. Scanlan*, 714 S.W.2d 38 (Tex. App.—Houston [14th Dist.] 1986, no writ) (temporary guardianship of a spouse's estate); *English v. Gregory*, 714 S.W.2d 443 (Tex. App.—Houston [14th Dist.] 1986, no writ) (guardianship of a spouse's estate).

[FN6] *Williams*, 714 S.W.2d at 40.

[FN7] *English*, 714 S.W.2d at 446.

[FN8] See *infra* text accompanying notes 300-03.

[FN10] *Ismail v. Ismail*, 702 S.W.2d 216 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). For limitations on the statute's attempt to confer jurisdiction over property 'wherever situated,' see *infra* notes 25-46 and accompanying text.

[FN11] 730 S.W.2d 663 (Tex. 1987).

[FN12] *Id.* at 667.

[FN13] 554 S.W.2d 137 (Tex. 1977).

[FN14] *Eggemeyer*, 554 S.W.2d at 139.

[FN15] *Eggemeyer*, 554 S.W.2d at 139 (citing *Reardon v. Reardon*, 359 S.W.2d 329 (Tex. 1962); *Hailey v. Hailey*, 160 Tex. 372, 331 S.W.2d 299 (1960); *Mansfield v. Mansfield*, 308 S.W.2d 80 (Tex. Civ. App.—El Paso 1958, writ dismissed)).

[FN16] *Arnold v. Leonard*, 114 Tex. 535, 273 S.W.2d 799 (1925); *Graham v. Franco*, 488 S.W.2d 390, 392 (Tex. 1972).

[FN17] *Eggemeyer*, 554 S.W.2d 137.

[FN18] *Id.* at 140.

[FN19] *Id.* at 142.

[FN20] *Whorrall v. Whorrall*, 691 S.W.2d 32 (Tex. App.—Austin 1985, writ dismissed).

[FN21] *Putegnat v. Putegnat*, 706 S.W.2d 702 (Tex. App.—Corpus Christi 1986, no writ).

[FN22] 641 S.W.2d 210 (Tex. 1982).

[FN23] *Id.* at 220.

[FN24] *Cameron*, 641 S.W.2d at 223.

[FN25] *Hanson v. Denckla*, 357 U.S. 235 (1958); *Harris v. Balk*, 198 U.S. 215 (1905).

[FN26] 433 U.S. 186 (1977).

[FN27] *Id.* at 207 (quoting Restatement (Second) of Conflict of Laws § 56 (1971)).

[FN28] *Id.*

[FN29] U.S. CONST. amend. XIV, § 1.

[FN30] 326 U.S. 310 (1945).

[FN31] See *Risch v. Risch*, 395 S.W.2d 709 (Tex. Civ. App.—Houston 1965, writ dismissed); *Fox v. Fox*, 559 S.W.2d 407 (Tex. Civ. App.—Austin 1977, no writ); *Simons v. Miami Beach First Nat'l Bank*, 381 U.S. 81 (1965).

[FN32] *Shaffer*, 433 U.S. at 207.

[FN33] See *Shaffer v. Heitner*, 433 U.S. 186, 207-208 n.25 (citing Note, *The Power of a State to Affect Title in a Chattel Atypically Removed to It*, 47 COLUM. L. REV. 767 (1947)).

[FN34] 610 S.W.2d 173 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

[FN35] *Id.* at 175.

[FN36] *Id.*

[FN37] 354 U.S. 416 (1957) (holding that divorce decree did not terminate a wife's right to seek a future order of support in a state to which she migrated after separation).

[FN38] *Moor v. Moor*, 63 S.W. 347, 351 (Tex. Civ. App. 1901, writ ref'd).

[FN39] *Fall v. Eastin*, 215 U.S. 1, 8 (1909); *Kramer v. Kramer*, 668 S.W.2d 457, 459 (Tex. App.—El Paso 1984, no writ); *Brock v. Brock*, 586 S.W.2d 927, 930 (Tex. Civ. App.—El Paso 1979, no writ); *Fox v. Fox*, 559 S.W.2d 407, 410 (Tex. Civ. App.—Austin 1977, no writ); *Kaherl v. Kaherl*, 357 S.W.2d 622, 624 (Tex. Civ. App.—Dallas 1962, no writ).

[FN40] *McElreath v. McElreath*, 162 Tex. 190, 345 S.W.2d 722 (1961). *In Re Read*, 634 S.W.2d 343 (Tex. App.—Amarillo 1982, writ dismissed); *Brown v. Brown*, 590 S.W.2d 808 (Tex. Civ. App.—Eastland 1979, writ dismissed by agr.) (California property). *See also Miller v. Miller*, 715 S.W.2d 786 (Tex. App.—Austin 1986, writ ref'd n.r.e.) (a complete exploration of this principle back to its roots).

[FN41] 605 S.W.2d 721 (Tex. Civ. App.—Amarillo 1980, no writ).

[FN42] *Id.* at 724.

[FN43] *Id.*

[FN44] *Fall v. Eastin*, 215 U.S. 1 (1909).

[FN45] *McElreath*, 345 S.W.2d at 733.

[FN46] *See Ismail v. Ismail*, 702 S.W.2d 216, 222 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Risch v. Risch*, 395 S.W.2d 709 (Tex. Civ. App.—Houston 1965, writ dismissed), *cert. denied*, 386 U.S. 10 (1967).

[FN47] 546 S.W.2d 71 (Tex. Civ. App.—Dallas 1976, no writ).

[FN48] *See TEX. REV. CIV. STAT. ANN.* art. 8306 § 3(b) (Vernon 1983).

[FN49] *Few v. Charter Oak Fire Ins. Co.*, 463 S.W.2d 424 (Tex. 1971).

[FN50] 439 U.S. 572 (1979).

[FN51] *Id.* at 583.

[FN52] U.S. CONST. art. VI, cl. 2.

[FN53] 45 U.S.C. § 231m (1982).

[FN54] *Hisquierdo*, 439 U.S. at 585.

[FN55] 582 S.W.2d 395 (Tex. 1979).

[FN56] Pub. L. No. 98-76, § 419(a), 97 Stat. 438.

[FN57] 45 U.S.C.A. § 231m(b)(2) (West Supp. 1986).

[FN58] *Kamel v. Kamel*, 721 S.W.2d 450 (Tex. App.—Tyler 1986, no writ).

[FN59] 659 S.W.2d 746 (Tex. App.—Tyler 1983, no writ).

[FN60] *See* 42 U.S.C.A. § 407(a) (West Supp. I 1983).

[FN61] 587 S.W.2d 671 (Tex. 1979).

[FN62] *Id.* at 673.

[FN63] 591 S.W.2d 453 (Tex. 1979).

[FN64] 38 U.S.C.A. § 3101(a) (West Supp. 1987).

[FN65] 615 S.W.2d 192 (Tex. 1981).

[FN66] *Id.* at 196; *See also* *Kamel*, 721 S.W.2d 450; *Ulmer v. Ulmer*, 717 S.W.2d 665 (Tex. App.—Texarkana 1986, no writ); *Conroy v. Conroy*, 706 S.W.2d 745, (Tex. App.—El Paso 1986, no writ); *Schuster v. Schuster*, 690 S.W.2d 644 (Tex. App.—Austin 1985, no writ) (V.A. benefits not community property); and *Ex Parte Pummill*, 606 S.W.2d 707 (Tex. Civ. App.—Ft. Worth 1980, no writ).

[FN67] *See* 38 U.S.C.A. §§ 701-726 (West 1979 and Supp. 1987).

[FN68] 707 S.W.2d 745 (Tex. App.—Fort Worth 1986 no writ).

[FN69] *Id.* at 749.

[FN70] 576 S.W.2d 653 (Tex. Civ. App.—Beaumont 1978, writ *dism'd w.o.j.*).

[FN71] *Id.* at 655.

[FN72] 614 S.W.2d 472 (Tex. Civ. App.—El Paso 1981, writ *ref'd n.r.e.*).

[FN73] *Id.* at 473. Federal worker's compensation is provided by 5 U.S.C.A. §§ 8101-93 (West Supp. 1987).

[FN74] *Bonar*, 614 S.W.2d at 473.

[FN75] 624 S.W.2d 388 (Tex. App.—Austin 1981, writ *dism'd w.o.j.*).

[FN76] 439 U.S. 572 (1979).

[FN77] 591 S.W.2d 453 (Tex. 1979).

[FN78] *Bonar*, 614 S.W.2d 473 (Tex. Civ. App.—El Paso 1981, writ *ref'd n.r.e.*).

[FN79] *Anthony*, 624 S.W.2d at 391. However, Texas courts traditionally have held civil service disability and retirement benefits to be community property subject to division. *See* *Boniface v. Boniface*, 656 S.W.2d 131 (Tex. App.—Austin 1983, no writ); *Bonar v. Bonar*, 614 S.W.2d 472 (Tex. Civ. App.—El Paso 1981, writ *ref'd n.r.e.*); *In Re Marriage of Butler*, 543 S.W.2d 147 (Tex. Civ. App.—Texarkana 1976, writ *dism'd*).

[FN80] *See, e.g.,* *McKnight v. McKnight*, 543 S.W.2d 863 (Tex. 1976).

[FN81] *Id.*

[FN82] *Humphrey v. Humphrey*, 593 S.W.2d 824 (Tex. Civ. App.—Houston (Tex. Civ. App.—Houston [14th Dist.] 1980, dis'd w.o.j.).

[FN83] *Castleberry v. Branscum*, 721 S.W.2d 270 (Tex. 1986).

[FN84] *Humphrey*, 593 S.W.2d at 824; (husband's separate property wholly-owned corporation; no evidence of *alter ego* found); *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982) (no *alter ego*); *Duke v. Duke*, 605 S.W.2d 408 (Tex. Civ. App.—El Paso 1980, writ dis'm'd) (no *alter ego*); *Goetz v. Goetz*, 567 S.W.2d 892 (Tex. Civ. App.—Dallas 1978, no writ) (no *alter ego*); *But see Dillingham v. Dillingham*, 434 S.W.2d 459 (Tex. Civ. App.—Ft. Worth 1968, writ dis'm'd) (husband's separate property corporation found to be *alter ego*, separate and community commingled; *all* assets held to be divisible).

[FN85] 721 S.W.2d 270 (Tex. 1986).

[FN86] *Id.* at 272 (quoting *Pac. Am. Gasoline Co. of Texas v. Miller*, 76 S.W.2d 833 (Tex. Civ. App.—Amarillo 1934, writ ref'd) (emphasis added).)

[FN87] *Id.* at 272.

[FN88] *Id.*

[FN89] *Id.* at 273.

[FN90] *Id.* at 277.

[FN91] 693 S.W.2d 944 (Tex. App.—Ft. Worth 1985, no writ).

[FN92] *Id.* at 947.

[FN93] *Id.* at 955-58.

[FN94] *Id.* at 955.

[FN95] 727 S.W.2d 743 (Tex. App.—Eastland 1987, no writ).

[FN96] *Id.* at 747.

[FN97] § 27. *Assignment of Partner's Interest.*

Sec. 27. (1) *A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs; it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled and, for any proper purpose, to require reasonable information or account of partnership transactions and to make reasonable inspection of the partnership books.*

(2) *In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest.*

§ 28-A. *Extent of Community Property Rights of a Partner's Spouse.*

Sec. 28-A. (1) A partner's rights in specific partnership property are not community property.

(2) A partner's interest in the partnership may be community property.

(3) A partner's right to participate in the management is not community property.

§ 28-B. *Effect of Death or Divorce on Interest in the Partnership.*

Sec. 28-B. (1) (A) *On the divorce of a partner*, the partner's spouse shall, to the extent of such spouse's interest in the partnership, be regarded for purposes of this Act as *an assignee* and purchaser of such interest from such partner.

(B) On the death of a partner, such partner's surviving spouse (if any) and such partner's heirs, legatees or personal representative, shall to the extent of their respective interests in the partnership, be regarded for purposes of this Act as assignees and purchasers of such interests from such partner.

(C) On the death of a partner's spouse, such spouse's heirs, legatees or personal representative, shall to the extent of their respective interests in the partnership, be regarded for purposes of this Act as assignees and purchasers of such interests from such partner.

(2) A partnership is not dissolved by the death of a partner's spouse unless the agreement between the partners provides otherwise.

(3) Nothing in this Act shall impair any agreement for the purchase or sale of an interest in a partnership at the death of the owner thereof or at any other time.

TEX. REV. CIV. STAT. ANN. art. 6132b, §§ 27, 28-A, 28-B (Vernon 1970) (emphasis added).

[FN98] *Mundy v. Mundy*, 653 S.W.2d 954 (Tex. App.—Dallas 1983, no writ); *McKean v. Thompson*, 555 S.W.2d 136 (Tex. Civ. App.—Dallas 1977, no writ).

[FN99] *Jones v. Jones*, 699 S.W.2d 583, 586 (Tex. App.—Texarkana, 1985, no writ); *York v. York*, 678 S.W.2d 110 (Tex. App.—El Paso 1984, writ ref'd n.r.e.); *Roach v. Roach*, 672 S.W.2d 524 (Tex. App.—Amarillo 1984, no writ); *Smoot v. Smoot*, 568 S.W.2d 177 (Tex. Civ. App.—Dallas 1978, no writ); *McKnight v. McKnight*, 535 S.W.2d 658 (Tex. Civ. App.—El Paso) *rev'd on other grounds*, 543 S.W.2d 863 (Tex. 1976).

[FN100] *See supra* text accompanying notes 82-96.

[FN101] 486 S.W.2d 761 (Tex. 1972).

[FN102] *Id.* at 764.

[FN103] *Id.*

[FN104] *Simpson v. Simpson*, 679 S.W.2d 39 (Tex. App.—Dallas 1984, no writ).

[FN105] 570 S.W.2d 427 (Tex. Civ. App.—Ft. Worth 1978, writ *dism'd*).

[FN106] 486 S.W.2d 761 (Tex. 1972).

[FN107] *Geesbreght*, 486 S.W.2d at 436.

[FN108] 658 S.W.2d 735 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

[FN109] *Id.* at 741.

[FN110] *Id.*

[FN111] *See also* *Rathmell v. Morrison*, 732 S.W.2d 6 (Tex. App.—Houston [14th Dist.] 1987, no writ); *Stephens v. Stephens*, 625 S.W.2d 428 (Tex. App.—Ft. Worth 1981, no writ); *Austin v. Austin*, 619 S.W.2d 290 (Tex. App.—Austin 1981, no writ).

[FN112] 611 S.W.2d 656 (Tex. Civ. App.—San Antonio 1981, writ dism'd).

[FN113] *Id.* at 657.

[FN114] *Id.* at 659 (citing *Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972)).

[FN115] 549 S.W.2d 775 (Tex. Civ. App.—Ft. Worth) *writ ref'd n.r.e. per curiam*, 561 S.W.2d 776 (Tex. 1977).

[FN116] *Id.* at 777 (quoting husband's employment contract).

[FN117] *Id.* at 778.

[FN118] 561 S.W.2d 776 (Tex. 1977). *See also* *Bray v. Bray*, 576 S.W.2d 664 (Tex. Civ. App.—Beaumont 1978, no writ).

[FN119] 617 S.W.2d 329 (Tex. Civ. App.—Amarillo 1981, no writ).

[FN120] *Wilson*, 617 S.W.2d at 332 (citing *Gorman v. Gause*, 56 S.W.2d 855, 858 (Tex. Comm'n App. 1933, jdgmt. adopted)).

[FN121] 563 S.W.2d 873 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.).

[FN122] 546 S.W.2d 708 (Tex. Civ. App.—Beaumont 1977, writ dism'd) (involving Fireman's Relief and Retirement Fund).

[FN123] *Wilson*, 617 S.W.2d at 332.

[FN124] 675 S.W.2d 602 (Tex. App.—Dallas 1984, no writ).

[FN125] *See* TEX. REV. CIV. STAT. ANN. title 110B, § 31.005.

[FN126] *Morgan*, 675 S.W.2d at 604.

[FN127] 617 S.W.2d at 329.

[FN128] *Id.* at 330.

[FN129] *Id.* at 331.

[FN130] 675 S.W.2d at 604.

[FN131] 728 S.W.2d 478 (Tex. App.—Ft. Worth 1987, no writ).

[FN132] *Id.* at 479.

[FN133] 573 S.W.2d 555 (Tex. Civ. App.—Texarkana 1978, writ dismiss'd).

[FN134] TEX. FAM. CODE ANN. § 5.01 (Vernon 1975).

[FN135] *Burns*, 573 S.W.2d at 557.

[FN136] *Id.*

[FN137] *Id.* See also *In Re Marriage of Long*, 542 S.W.2d 712 (Tex. Civ. App.—Texarkana 1976, no writ) (constructive acquisition); *Currie v. Currie*, 518 S.W.2d 386 (Tex. Civ. App.—San Antonio 1974, writ dismiss'd) (no acquisition); *Buckler v. Buckler*, 424 S.W.2d 514 (Tex. Civ. App.—Ft. Worth 1967, writ dismiss'd) (no acquisition).

[FN138] 574 S.W.2d 65 (Tex. 1978).

[FN139] *Id.* at 70.

[FN140] 647 S.W.2d 338 (Tex. App.—San Antonio 1982, writ dismiss'd).

[FN141] *Cluck*, 647 S.W.2d at 342 (quoting *Cline v. Insurance Exchange of Houston*, 140 Tex. 175, 166 S.W.2d 677, 680 (1942)).

[FN142] 453 U.S. 210 (1981).

[FN143] U.S. CONST. art. 6, cl. 2.

[FN144] 10 U.S.C. § 1408 (1982).

[FN145] *Harrell v. Harrell*, 684 S.W.2d 118, 121 (Tex. App.—Corpus Christi 1984, no writ) (quoting S. REP. NO. 502, 97th Cong. 2d Sess., reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 1555, 1596).

[FN146] 457 S.W.2d 551 (Tex. 1970).

[FN147] 693 S.W.2d 52 (Tex. App.—Fort Worth 1985, writ refused n.r.e.).

[FN148] *Id.* at 54.

[FN149] *Conroy v. Conroy*, 706 S.W.2d 745 (Tex. App.—El Paso 1986, no writ).

[FN150] 717 S.W.2d 665 (Tex. App.—Texarkana 1986, no writ).

[FN151] *Id.* at 666-67.

[FN152] *Id.* at 667.

[FN153] *Id.* (citing *Nail v. Nail*, 486 S.W.2d 761 (Tex. 1972)).

[FN154] 457 S.W.2d 417 (Tex. Civ. App.—Texarkana 1970, no writ).

[FN155] *Id.* at 421 (emphasis added).

[FN156] *Hailey v. Hailey*, 160 Tex. 372, 331 S.W.2d 299, 303 (1960).

[FN157] *Braswell v. Braswell*, 476 S.W.2d 444 (Tex. Civ. App.—Waco 1972, writ *dism'd*); *Hailey v. Hailey*, 160 Tex. 372, 331 S.W.2d 299 (1960); *Ellis v. Ellis*, 225 S.W.2d 216 (Tex. Civ. App.—San Antonio 1949, no writ).

[FN158] *Brock v. Brock*, 586 S.W.2d 927 (Tex. Civ. App.—El Paso 1979, no writ).

[FN159] *Maben v. Maben*, 574 S.W.2d 229, 232 (Tex. Civ. App.—Ft. Worth 1978, no writ).

[FN160] *Franks v. Franks*, 138 S.W. 1110 (Tex. Civ. App.—Austin 1911, writ *ref'd*).

[FN161] *Harrington v. Schuble*, 608 S.W.2d 253 (Tex. Civ. App.—Houston [14th Dist.] 1980 no writ) (receiver sale of homestead); *Foster v. Foster*, 583 S.W.2d 868 (Tex. Civ. App.—Tyler 1979, no writ) (homestead proceeds ordered applied to debts, but Mrs. Foster fails to preserve the point by filing supersedeas bond); *Delaney v. Delaney*, 562 S.W.2d 494 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ *dism'd*); *Posten v. Posten*, 572 S.W.2d 800 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ) (fees of guardian ad litem cannot be taxed against homestead proceeds).

[FN162] The Property Code now provides:

§ 41.001. Interests in Land Exempt From Seizure.

(a) A homestead and one or more lots used for a place of burial of the dead are exempt from seizure for the claims of creditors except for encumbrances properly fixed on homestead property.

(b) Encumbrances may be properly fixed on homestead property for:

- (1) purchase money;
- (2) taxes on the property; or
- (3) work and material used in constructing improvements on the property if contracted for in writing before the material is furnished or the labor is performed and in a manner required for the conveyance of a homestead, with joinder of both spouses if the homestead claimant is married.

(c) The homestead claimant's proceeds of a sale of a homestead are not subject to seizure for a creditor's claim for six months after the date of sale.

§ 41.002. Definition of Homestead.

(a) If used for the purposes of an urban home or as a place to exercise a calling or business in the same urban area, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than one acre of land which may be in one or more lots, together with any improvements thereon.

(b) If used for the purposes of a rural home, the homestead shall consist of:

- (1) for a family, not more than 200 acres, which may be in one or more parcels, with the improvements thereon; or
- (2) for a single, adult person, not otherwise entitled to a homestead, not more than 100 acres, which may be in one or more parcels, with the improvements thereon.

(c) The definition of a homestead as provided in this section applies to all homesteads in this state whenever created. (132)

TEX. PROP. CODE ANN. §§ 41.001-.002 (Vernon 1987).

[FN163] See *Cameron v. Beghard*, 85 Tex. 610, 22 S.W. 1033 (1893).

[FN164] *Hedtke v. Hedtke*, 112 Tex. 404, 248 S.W. 21 (1923). See also *Vallareal v. Laredo National Bank*, 677 S.W.2d 600 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.); *Girard v. Girard*, 521 S.W.2d 714 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ) (separate property homestead of one spouse set aside for use and occupancy of other spouse and child until child reaches eighteen years of age); *Bakken v. Bakken*, 503 S.W.2d 315 (Tex. Civ. App.—Dallas 1973, no writ) (community homestead set aside for use and benefit of wife and minor children).

[FN165] 112 Tex. 404, 248 S.W. 21 (1923).

[FN166] 689 S.W.2d 505 (Tex. App.—Houston [1st Dist.] 1985, no writ).

[FN167] *Id.*

[FN168] *Smith v. Rabago*, 672 S.W.2d 38, 40 (Tex. App.—Houston [14th Dist.] 1984, no writ).

[FN169] *Id.* See also *Maisel v. Maisel*, 312 S.W.2d 679 (Tex. Civ. App.—Houston 1958, no writ).

[FN170] § 64.001 Availability of Remedy

(a) A court of competent jurisdiction may appoint a receiver:

- (1) in an action by a vendor to vacate a fraudulent purchase of property;
- (2) in an action by a creditor to subject any property or fund to his claim;
- (3) in an action between partners or *others jointly owning or interested in any property* or fund;
- (4) in an action by a mortgagee for the foreclosure of the mortgage and sale of the mortgaged property;
- (5) for a corporation that is insolvent, is in imminent danger of insolvency, has been dissolved, or has forfeited its corporate rights; or
- (6) in any other case in which a receiver may be appointed under the rules of equity.

(b) Under Subsection (a)(1), (2), or (3), the receiver may be appointed on the application of the plaintiff in the action or another party. The party must have a probable *interest in* or right to *the property* or fund, and the property or fund must be *in danger of being lost, removed, or materially injured*.

(c) Under Subsection (a)(4), the court may appoint a receiver only if:

- (1) it appears that the mortgaged property is in danger of being lost, removed, or materially injured; or
- (2) the condition of the mortgage has not been performed and the property is probably insufficient to discharge the mortgage debt.

§ 64.002 Persons Not Entitled to Appointment

(a) A court may not appoint a receiver for a corporation, partnership, or *individual on the petition of the same* corporation, partnership, or *individual*.

(b) A court may appoint a receiver for a corporation on the petition of one or more stockholders of the corporation.

(c) This section does not prohibit appointment of a receiver for a partnership in an action arising between partners.

TEX. CIV. PRAC. & REM. CODE ANN. §§ 64.001-.002 (Vernon 1986) (emphasis added).

[FN171] § 3.58. Temporary Orders Before Judgment or During Pendency of Appeal.

(c) After a petition for divorce or annulment or to declare a marriage void is filed, the court, on the motion of any party or on the court's own motion, may make any appropriate order, including the granting of a temporary injunction, after notice and hearing, *for the preservation of the property and protection of the parties* as deemed *necessary and equitable*, including but not limited to an order directed to one or both parties:

....

(5) appointing a receiver *for the preservation and protection of the property of the parties*;

....

(g) An order issued under this section, except an order appointing a receiver, is not subject to interlocutory appeal.

(h) Within 30 days after the date that an appeal is perfected, on the motion of any party or on the court's own motion, after notice and hearing, the court may make any order necessary *for the preservation of the property and for the protection of the parties* during the pendency of the appeal as the court may deem *necessary and equitable*. In addition to other matters, an order may:

....

(3) appoint a receiver *for the preservation and protection of the property of the parties*.

TEX. FAM. CODE ANN. § 3.58 (Vernon Supp. 1988) (emphasis added).

[FN172] *Sparr v. Sparr*, 596 S.W.2d 164 (Tex. Civ. App.—Texarkana 1980, no writ).

[FN173] 728 S.W.2d 872 (Tex. App.—Houston [14th Dist.] 1987, no writ).

[FN174] *Id.* at 873.

[FN175] 585 S.W.2d 789 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

[FN176] 657 S.W.2d 871 (Tex. App.—Houston [1st Dist.] 1983, no writ).

[FN177] Now codified at TEX. CIV. PRAC. REM CODE § 64.002 (Vernon 1986).

[FN178] 580 S.W.2d 873 (Tex. Civ. App.—Texarkana 1979, no writ).

[FN179] *Id.* at 875.

[FN180] *See infra* text accompanying notes 98-99.

[FN181] 543 S.W.2d 863 (Tex. 1976).

[FN182] 476 S.W.2d 444 (Tex. Civ. App.—Waco 1972, writ *dism'd*).

[FN183] *Id.* at 448.

[FN184] *Pierce v. Pierce*, 667 S.W.2d 921 (Tex. App.—Fort Worth 1984, no writ) (husband ordered to execute \$100,000 promissory note payable to wife; held proper); *Beavers v. Beavrs*, 651 S.W.2d 52 (Tex. App.—Dallas 1983, no writ) (wife awarded \$119,270 'money recover' against husband secured by equitable liens with execution suspended pending payment of monthly installments); *Thomas v. Thomas*, 603 S.W.2d 356 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (husband ordered to pay wife \$10,000 cash plus \$500 each month for one year; held proper); *Kidd v. Kidd*, 584

S.W.2d 552 (Tex. Div. App.—Austin 1979, no writ) (husband ordered to execute \$30,000 promissory note payable to wife; held proper); *Garrett v. Garrett*, 534 S.W.2d 381 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ) (husband ordered to pay wife \$24,000, \$200 per month, for ten years; held proper); *Womble v. Womble*, 502 S.W.2d 886 (Tex. Civ. App.—Fort Worth 1973, no writ) (husband ordered to execute a \$7,000 promissory note payable to wife; held proper).

[FN185] 542 S.W.2d 692 (Tex. Civ. App.—Fort Worth 1976, writ *dism'd*).

[FN186] *Id.* at 699.

[FN187] *Id.* at 700.

[FN188] *Benedict v. Commissioner*, 82 T.C. 44 (1984).

[FN189] 592 S.W.2d 84 (Tex. Civ. App.—Texarkana 1979, no writ).

[FN190] *Id.* at 86.

[FN191] 632 S.W.2d 172 (Tex. App.—Waco 1982, writ *ref'd n.r.e.*).

[FN192] *Id.* at 173.

[FN193] *Id.* at 173.

[FN194] *See generally* *In re Marriage of Jackson*, 506 S.W.2d 261, 264-66 (Tex. Civ. App.—Amarillo 1974, writ *dism'd*) for a discussion of this view.

[FN195] *In Re Marriage of Jackson*, 506 S.W.2d 261, 266 (Tex. Civ. App.—Amarillo 1974, writ *dism'd*); *See, e.g.*, *Murff v. Murff*, 615 S.W.2d 696 (Tex. 1981) (wife awarded \$7,500 judgment against husband; held proper); *Barcelo v. Barcelo*, 603 S.W.2d 276 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ *dism'd*) (wife awarded \$3,000 judgment against husband; held proper); *Musick v. Musick*, 590 S.W.2d 582 (Tex. Civ. App.—Tyler 1979, no writ) (wife awarded \$13,000 judgment against husband; held improper); *Price v. Price*, 591 S.W.2d 601 (Tex. Civ. App.—Tyler 1979, no writ) (wife awarded \$4,000 judgment against husband; held proper).

[FN196] *See, Harbour v. Harbour*, 590 S.W.2d 828 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ *ref'd n.r.e.*), *cert. den.* 101 S. Ct. 106 (1979) (wife awarded \$25,000 judgment against husband which was discharged in bankruptcy court).

[FN197] 672 S.W.2d 274 (Tex. App.—Houston [14th Dist.] 1984, writ *dism'd*).

[FN198] *Id.* at 279.

[FN199] *Id.*

[FN200] *Wren v. Wren*, 702 S.W.2d 250 (Tex. App.—Houston [1st Dist.] 1985, writ *dism'd*).

[FN201] 675 S.W.2d 296 (Tex. App.—Dallas 1984, no writ).

[FN202] *Id.* at 299.

[FN203] *Jones v. Jones*, 699 S.W.2d 583, 585 (Tex. App.—Texarkana 1985, no writ).

[FN204] *May v. May*, 716 S.W.2d 705 (Tex. App.—Corpus Christi 1986, no writ).

[FN205] *Day v. Day*, 610 S.W.2d 195 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.) (wife awarded money judgment expressly secured by lien on homestead).

[FN206] *Smith v. Smith*, 715 S.W.2d 154 (Tex. App.—Texarkana 1986, no writ) (wife awarded promissory note secured by equitable lien on husband's separate real property; held proper to secure reimbursement for community improvements, however deed of trust cannot be required); *Wren v. Wren*, 702 S.W.2d 250 (Tex. App.—Houston [1st Dist.] 1985, writ *dism'd*) (husband's \$60,000 money judgment against wife not secured by homestead; not error because not compensation for homestead interest); *Cook v. Cook*, 665 S.W.2d 161 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.) (wife awarded judgment secured by equitable lien on husband's separate real property; held proper to secure reimbursement for community improvements and mortgage payments); *Lettieri v. Lettieri*, 654 S.W.2d 554 (Tex. App.—Ft. Worth 1983, writ *dism'd*) (wife's \$210,000 award secured by lien on homestead); *see also Wierzchula v. Wierzchula*, 623 S.W.2d 730 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ) (wife awarded money judgment, but trial court refused to secure with lien; not error because judgment not referable to homestead); *Buchan v. Buchan*, 592 S.W.2d 367 (Tex. Civ. App.—Tyler 1980, writ *dism'd*) (husband awarded money judgment for the value of his leasehold interest in wife's separate property homestead secured by equitable lien thereon; held permissible); *But see Duke v. Duke*, 605 S.W.2d 408 (Tex. Civ. App.—El Paso 1980, writ *dism'd*) (*Eggemeyer* violated by the trial court ordering that husband execute a deed of trust on his separate realty).

[FN207] 671 S.W.2d 880 (Tex. 1984).

[FN208] *Id.* at 881.

[FN209] 455 S.W.2d 365 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.) (husband awarded homestead, wife awarded money judgment 'to equalize;'; held that homestead exempt from forced sale).

[FN210] 616 S.W.2d 420 (Tex. Civ. App.—Texarkana 1981, writ *dism'd*) (husband awarded homestead and ordered to pay wife money without lien; held that homestead exempt from forced sale).

[FN211] *See also Colquette v. Forbes*, 680 S.W.2d 536 (Tex. App.—Austin 1984, no writ).

[FN212] 720 S.W.2d 271 (Tex. App.—Fort Worth 1986, no writ).

[FN213] *Id.* at 272-73.

[FN214] *See Faulkner v. Faulkner*, 582 S.W.2d 639 (Tex. Civ. App.—Dallas 1979, no writ) (wife's judgment secured by husband's stock).

[FN215] *Middlesworth v. Middlesworth*, 380 S.W.2d 790 (Tex. Civ. App.—Ft. Worth 1964, no writ).

[FN216] 665 S.W.2d 107 (Tex. 1984).

[FN217] *Id.* at 110.

[FN218] *Smith v. Smith*, 715 S.W.2d 154 (Tex. App.—Texarkana 1986, no writ).

[FN219] *Ex Parte Gorena*, 595 S.W.2d 841 (Tex. 1979).

[FN220] *Ex Parte Hovermale*, 636 S.W.2d 828 (Tex. App.—San Antonio 1982, no writ) (husband was trustee for benefit of wife's portion of the retirement benefits).

[FN221] *Omohundro v. Matthews*, 161 Tex. 367, 341 S.W.2d 401 (1960); *see also*, *Lowther v. Lowther*, 578 S.W.2d 560 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

[FN222] *Andrews v. Andrews*, 677 S.W.2d 171, 173 (Tex. App.—Austin 1984, no writ) (constructive trust imposed in favor of wife regarding joint purchase of residence prior to marriage taken in husband's name only).

[FN223] 560 S.W.2d 438 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.).

[FN224] *Id.* at 438.

[FN225] 644 S.W.2d 92 (Tex. App.—San Antonio 1982, writ ref'd).

[FN226] *Id.* at 93-94.

[FN227] *Id.* at 96. *See also* TEX. FAM. CODE ANN. § 3.75 (Vernon 1975) (codifies the imposition of constructive trusts in certain post-divorce enforcement actions).

[FN228] *Carle v. Carle*, 149 Tex. 469, 234 S.W.2d 1002 (1950); *Murff v. Murff*, 615 S.W.2d 696 (Tex. 1981).

[FN229] *Simpson v. Simpson*, 727 S.W.2d 662 (Tex. App.—Dallas 1987, no writ).

[FN230] TEX. FAM. CODE ANN. § 11.18 (Vernon Supp. 1987). *See Rodriguez v. Rodriguez*, 616 S.W.2d 383, 384 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

[FN231] 669 S.W.2d 759 (Tex. App.—Houston [14th Dist.] 1984), *rev'd on other grounds*, 687 S.W.2d 731 (Tex. 1985).

[FN232] *Matthews v. Matthews*, 725 S.W.2d 275 (Tex. App.—Houston [1st Dist.] 1986, no writ); *Abrams v. Abrams*, 713 S.W.2d 195 (Tex. App.—Corpus Christi 1986, no writ).

[FN233] *Bell v. Bell*, 513 S.W.2d 20, 22 (Tex. 1974); *see also Hedtke v. Hedtke*, 112 Tex. 404, 411, 248 S.W. 21, 23 (1923).

[FN234] *Bell*, 513 S.W.2d at 22.

[FN235] *Cooper v. Cooper*, 513 S.W.2d 229, 233 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

[FN236] *Thomas v. Thomas*, 525 S.W.2d 200, 202 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

[FN237] *Smallwood v. Smallwood*, 548 S.W.2d 796 (Tex. Civ. App.—Waco 1977, no writ).

[FN238] 615 S.W.2d 696 (Tex. 1981).

[FN239] *Id.* at 699.

[FN240] *See Simpson v. Simpson*, 727 S.W.2d 662 (Tex. App.—Dallas 1987, no writ).

[FN241] *Hooper v. Hooper*, 403 S.W.2d 215, 217 (Tex. Civ. App.—Amarillo 1966, writ dismiss'd).

[FN242] *Young v. Young*, 609 S.W.2d 758, 762 (Tex. 1980).

[FN243] *Murff*, 615 S.W.2d at 698.

[FN244] *Bray v. Bray*, 618 S.W.2d 93, 95 (Tex. Civ. App.—Corpus Christi 1981, writ dismiss'd).

[FN245] 635 S.W.2d 556, 558 (Tex. App.—El Paso 1981, no writ).

[FN246] *See Velasco v. Velasco*, 700 S.W.2d 729 (Tex. App.—San Antonio 1985, no writ).

[FN247] *Hedtke v. Hedtke*, 112 Tex. 404, 248 S.W.21 (1923).

[FN248] *Hopkins v. Hopkins*, 540 S.W.2d 783, 787 (Tex. Civ. App.—Corpus Christi 1976, no writ).

[FN249] *Cravens v. Cravens*, 533 S.W.2d 372 (Tex. Civ. App.—El Paso 1975, no writ); *In re Marriage of McCurdy*, 489 S.W.2d 712 (Tex. Civ. App.—Amarillo 1973, writ dismiss'd).

[FN250] 559 S.W.2d 142 (Tex. Civ. App.—Tyler 1977, no writ).

[FN251] *Id.* at 144.

[FN252] *Hahne v. Hahne*, 663 S.W.2d 77 (Tex. App.—Houston [14th Dist.] 1984, no writ).

[FN253] 533 S.W.2d 372, 376 (Tex. Civ. App.—El Paso 1975, no writ).

[FN254] *Id.* at 376.

[FN255] TEX. FAM. CODE ANN. § 3.63 (Vernon 1975).

[FN256] 541 S.W.2d 237 (Tex. Civ. App.—Corpus Christi 1976, writ dismiss'd).

[FN257] *Id.* at 243 (emphasis added).

[FN258] 609 S.W.2d 758 (Tex. 1980).

[FN259] *Id.* at 760 (Emphasis added.); *see also Hourigan v. Hourigan*, 635 S.W.2d 556 (Tex. App.—El Paso 1981, no writ); *McKnight v. McKnight*, 535 S.W.2d 658 (Tex. Civ. App.—El Paso) (where the court held that it was an abuse of discretion to leave husband without sufficient liquid assets to take over the responsibilities assigned to him in fact and by divorce decree; namely the care of two adult children and custody of three minor children.), *rev'd on other grounds*, 543 S.W.2d 863 (Tex. 1976); *Horlock v. Horlock*, 533 S.W.2d 52, 61 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dismiss'd); *Liddell v. Liddell*, 29 S.W.2d 868, 871 (Tex. Civ. App.—San Antonio 1930, no writ).

[FN260] *Abrams v. Abrams*, 713 S.W.2d 195, 198 (Tex. App.—Corpus Christi 1986, no writ).

[FN261] 535 S.W.2d 373 (Tex. Civ. App.—Tyler 1976, no writ).

[FN262] *Id.* at 374.

[FN263] *Id.*

[FN264] 523 S.W.2d 797 (Tex. Civ. App.—Austin 1975, no writ).

[FN265] 548 S.W.2d 435 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

[FN266] *Id.* at 439.

[FN267] *Cooper v. Cooper*, 513 S.W.2d 229 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

[FN268] 531 S.W.2d 897 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ *dism'd*).

[FN269] *Id.* at 899-900.

[FN270] 401 S.W.2d 846 (Tex. Civ. App.—Tyler 1966, no writ).

[FN271] *Murff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981).

[FN272] *See supra* text accompanying notes 25-46.

[FN273] 231 S.W.2d 905 (Tex. Civ. App.—Texarkana 1950, no writ).

[FN274] *Id.* at 906.

[FN275] *Risch v. Risch*, 395 S.W.2d 709 (Tex. Civ. App.—Houston 1965), *cert. denied* 386 U.S. 10 (1965). *See also* *Ismail v. Ismail*, 702 S.W.2d 216 (Tex. App.—Houston [1st Dist.] 1985, writ *ref'd n.r.e.*).

[FN276] 240 S.W.2d 424 (Tex. Civ. App.—Eastland 1951, no writ).

[FN277] 579 S.W.2d 502 (Tex. Civ. App.—Dallas 1978, no writ).

[FN278] *In re Marriage of McCurdy*, 489 S.W.2d 712 (Tex. Civ. App.—Amarillo 1973, writ *dism'd*) (33% of estate awarded as gifts).

[FN279] 505 S.W.2d 338 (Tex. Civ. App.—Dallas 1974, no writ).

[FN280] *Id.* at 340.

[FN281] *Grothe v. Grothe*, 590 S.W.2d 238 (Tex. Civ. App.—Austin 1979, no writ).

[FN282] *Simpson v. Simpson*, 679 S.W.2d 39 (Tex. App.—Dallas 1984, no writ); *Leal v. Leal*, 628 S.W.2d 168 (Tex. App.—San Antonio 1982, no writ).

[FN283] *Andrews v. Andrews*, 677 S.W.2d 171 (Tex. App.—Austin 1984, no writ).

[FN284] *Morrison v. Mirrison*, 713 S.W.2d 377 (Tex. App.—Dallas 1986, writ *dism'd*).

[FN285] *Arrington v. Arrington*, 613 S.W.2d 565 (Tex. Civ. App.—Forth Worth 1981, no writ); *Rafidi v. Rafidi*, 718 S.W.2d 43 (Tex. App.—Dallas 1986, no writ).

[FN286] *Thomas v. Thomas*, 525 S.W.2d 200, 201 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

[FN287] *Carle v. Carle*, 234 S.W.2d 1002, 1005 (Tex. 1950). *See also* *Haggard v. Haggard*, 550 S.W.2d 374, 378 (Tex. Civ. App.—Dallas 1977, no writ); *Fortenberry v. Fortenberry*, 545 S.W.2d 40 (Tex. Civ. App.—Waco 1976, no writ).

[FN288] 460 S.W.2d 251 (Tex. Civ. App.—Dallas 1970, no writ).

[FN289] 525 S.W.2d 200 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

[FN290] *See supra* text accompanying note 239.

[FN291] *See* *Jones v. Jones*, 699 S.W.2d 583, 585 (Tex. App.—Texarkana 1985, no writ).

[FN292] *Benedict v. Benedict*, 542 S.W.2d 692 (Tex. Civ. App.—Ft. Worth 1976, writ *dism'd*) (tax liability); *McKnight v. McKnight*, 535 S.W.2d 658 (Tex. Civ. App.—El Paso), *rev'd on other grounds*, 543 S.W.2d 863 (Tex. 1976); *Cole v. Cole*, 532 S.W.2d 102 (Tex. Civ. App.—Dallas 1975, no writ) (substantial liabilities left with wife justifies disproportionate division in her favor); *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ *dism'd*) (community estate's debt structure considered in detail by trial court).

[FN293] *Able v. Able*, 725 S.W.2d 778 (Tex. App.—Houston [14th Dist.] 1987, no writ); *Cole v. Cole*, 532 S.W.2d 102 (Tex. Civ. App.—Dallas 1975, no writ).

[FN294] 548 S.W.2d 435, 439 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

[FN295] *Id.* at 439. *See also* *Benedict v. Benedict*, 542 S.W.2d 692 (Tex. Civ. App.—Ft. Worth 1976, writ *dism'd*).

[FN296] *Morrison v. Morrison*, 713 S.W.2d 377 (Tex. App.—Dallas 1986, no writ); *Jones v. Jones*, 699 S.W.2d 583, 586 (Tex. App.—Texarkana 1985, no writ).

[FN297] *Adam v. Stewart*, 552 S.W.2d 536 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ); *Garrison v. Mead*, 553 S.W.2d 25 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

[FN298] *Hottell v. Hottell*, 454 S.W.2d 880 (Tex. Civ. App.—San Antonio 1970, no writ).

[FN299] *Marriage of Knighton*, 685 S.W.2d 719 (Tex. App.—Amarillo 1984, no writ).

[FN300] *Dauray v. Gaylord*, 402 S.W.2d 948 (Tex. Civ. App.—Dallas 1966, writ *ref'd n.r.e.*).

[FN301] *Keller, v. Keller*, 135 Tex. 260, 141 S.W.2d 308 (1940).

[FN302] *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970); *Ex Parte Williams*, 330 S.W.2d 605 (Tex. 1960).

[FN303] *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970); *Thompson v. Thompson*, 500 S.W.2d 203 (Tex. Civ. App.—Dallas 1973, no writ).

[FN304] *Harrell v. Harrell*, 692 S.W.2d 876 (Tex. 1985).

[FN305] *McCartney v. McCartney*, 548 S.W.2d 435 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ); *Allen v. Allen*, 363 S.W.2d 312 (Tex. Civ. app.—Houston 1962, no writ).

[FN306] *McCartney*, 548 S.W.2d at 439.

[FN307] § 3.90 Procedure for Division of Certain Property Not Divided on Divorce or Annulment

(a) Property not divided or awarded to a spouse in a final decree of divorce or annulment may be divided in a suit under this subchapter. Except as otherwise provided by this subchapter, the suit is governed by the Texas Rules of Civil Procedure applicable to the filing of an original lawsuit.

(b) The suit may be brought by either former spouse.

(c) The suit must be filed before two years after the date on which a former spouse unequivocally repudiates the existence of the ownership interest of and communicates that repudiation to the other spouse. The two-year limitations period is tolled for the period of time that a court of this state does not have jurisdiction over the former spouses or over the property.

§ 3.91 Division of Undivided Assets: Prior Court Had Jurisdiction to Divide Property But Failed to Do So:

(a) If a final decree of divorce or annulment rendered by a Texas court failed to dispose of property subject to division under [Section 3.63](#) of this Code even though the court had jurisdiction over the spouses or over the property, the court shall divide the property in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.

(b) If a final decree of divorce or annulment rendered by a court in another state failed to dispose of property subject to division under the law of that state even though the court had jurisdiction to do so, the court of this state shall apply the law of the other state regarding undivided property as required by [Article IV, Section 1, United States Constitution](#) (the full faith and credit clause), and enabling federal statutes.

§ 3.92 Division of Undivided Assets: Prior Court Lacked Jurisdiction to Divide Property:

(a) If a final decree of divorce or annulment rendered by a Texas court failed to dispose of property subject to division under [Section 3.63](#) of this Code because the court lacked jurisdiction over a spouse or the property, that court may, if it subsequently acquires the requisite jurisdiction, divide the property in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.

(b) If a final decree of divorce or annulment rendered by a court in another state failed to dispose of property subject to division under the law of that state because the court lacked jurisdiction over a spouse or the property, a court of this state may, if it subsequently acquires the requisite jurisdiction, divide the property in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.

§ 3.93 Attorney's Fees:

In any proceeding to partition or to divide property as provided by this subchapter, the court may award reasonable attorney's fees and order that they be paid directly to the attorney, who may enforce the order in the attorney's own name by any means available for the enforcement of a judgment for debt.

[TEX. FAM. CODE ANN. 3.90-.93](#) (Vernon Supp. 1987).

[FN308] Tindall and Sampson, *Commentary on H.B. 168*, Advanced Family Law Course, State Bar of Texas, August 1987.

[FN309] *See supra* text accompanying notes 278-85.

[FN310] Tindall & Sampson, Advanced Family Law Course, State Bar of Texas, August 1987.

[FN311] *Id.*

[FN312] *Carter v. Massey*, 668 S.W.2d 450 (Tex. App.—Dallas 1984, no writ).

[FN313] 641 S.W.2d 258 (Tex. App.—Houston [14th Dist.] 1982, no writ).

[FN314] *Id.* at 259.

[FN315] *Id.* at 260.

[FN316] *Teaff v. Ritchey*, 622 S.W.2d 589, 591 (Tex. App.—Amarillo 1981, no writ).

[FN317] *Id.* at 592.

[FN318] *Bloom v. Bloom*, 604 S.W.2d 393, 394 (Tex. Civ. App.—Tyler 1980, no writ). *See also* *Dunn v. Dunn*, 703 S.W.2d 317 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) (retirement benefits: not divided); *Carreon v. Morales*, 698 S.W.2d 241 (Tex. App.—El Paso 1985, no writ) (retirement benefits: divided); *Forsman v. Forsman*, 694 S.W.2d 112 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) (retirement benefits: not divided); *Yeo v. Yeo*, 581 S.W.2d 734 (Tex. Civ. App.—San Antonio 1979, no writ) (retirement benefits: not divided); *Dessommes v. Dessommes*, 505 S.W.2d 673 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.) (retirement benefits: not divided); *Simmons v. Simmons*, 272 S.W.2d 913 (Tex. Civ. App.—Ft. Worth 1954, no writ) (life insurance proceeds: not divided).

[FN319] 700 S.W.2d 941 (Tex. App.—Dallas 1985, no writ).

[FN320] *Id.* at 951.

[FN321] *Id.*

[FN322] *Taylor v. Taylor*, 680 S.W.2d 645 (Tex. App.—Beaumont 1984, writ ref'd n.r.e.); *Janik v. Janik*, 634 S.W.2d 323, 325 (Tex. App.—Houston [14th Dist.] 1982, no writ).

[FN323] *See, e.g.*, *Finn v. Finn*, 658 S.W.2d 735, 748 (Tex. App.—Dallas 1983, writ ref'd n.r.e.); *Goren v. Goren*, 531 S.W.2d 897, 899 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ dismissed w.o.j.); *Horlock v. Horlock*, 533 S.W.2d 52, 58 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dismissed w.o.j.); *Harrington v. Harrington*, 451 S.W.2d 797 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ); *Hayes v. Hayes*, 378 S.W.2d 375 (Tex. Civ. App.—Corpus Christi 1964, writ dismissed w.o.j.).

[FN324] *Broadway Drug Store, Inc. v. Towbridge*, 435 S.W.2d 268, 269-70 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ).

[FN325] *Glasscock v. Citizens Nat'l Bank*, 553 S.W.2d 411 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.); *Walker v. Walker*, 527 S.W.2d 200, 203 (Tex. Civ. App.—Fort Worth 1975, no writ); *Dorfman v. Dorfman*, 475 S.W.2d 423 (Tex. Civ. App.—Texarkana 1970, no writ).

[FN326] *McCartney v. McCartney*, 548 S.W.2d 435 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); *Trevino v. Trevino*, 555 S.W.2d 792 (Tex. Civ. App.—Corpus Christi 1977, no writ); *Benedict v. Benedict*, 542 S.W.2d 692 (Tex. Civ. App.—Fort Worth 1976, writ dismissed w.o.j.); *Gaulding v. Gaulding*, 256 S.W.2d 684, 688 (Tex. Civ. App.—Dallas 1953, no writ).

[FN327] *Latimer v. City Nat'l Bank*, 715 S.W.2d 825 (Tex. App.—Eastland 1986, no writ); *Inwood Nat'l Bank v. Hoppe*, 596 S.W.2d 183 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.).

[FN328] *Francis v. Francis*, 412 S.W.2d 29, 32 (Tex. 1967).

[FN329] TEX. FAM. CODE ANN. § 3.631(a) (Vernon Supp. 1987).

[FN330] TEX. FAM. CODE ANN. § 3.631(c) (Vernon Supp. 1987).

[FN331] *Klise v. Klise*, 678 S.W.2d 545, 548 (Tex. App.—Houston [14th Dist.] 1984, no writ).

[FN332] *Francis*, 412 S.W.2d at 33. *See* 15 Dorsaneo, TEXAS LITIGATION GUIDE, Ch. 363 for a thorough treatment of the availability of contractual defense in a suit to enforce contractual alimony.

[FN333] *Powers v. Powers*, 714 S.W.2d 384 (Tex. App.—Corpus Christi 1986, no writ).

39 Baylor L. Rev. 977

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