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# FAMILY LAW

by

Joseph W. McKnight\*

**E**XCEPT for (1) provisions with respect to the elderly which have not yet been formulated, (2) existing rules with respect to both the young and old which might be shifted from the Probate Code to the Family Code, and (3) repairs which must be made from time to time due to a variety of oversights, the Texas Family Code became effective as a coherent whole on January 1, 1974, and began to receive authoritative interpretation from the courts. The most significant developments were directed to provisions originally enacted in 1967 with respect to matrimonial property.

At the national level two pieces of legislation with great potential impact on family law were enacted: the Pension Reform Act of 1974 and the Social Service Amendments of 1974.

## I. SPOUSES

### A. Status

The condition of marriage and its consequences came before the courts in several unusual but interrelated circumstances. In one instance<sup>1</sup> the state policy favoring marriage was utilized to support the conclusion that a school district's regulations prohibiting married high school students from participating in extra-curricular activities is unconstitutional as violating the doctrine of equal protection.<sup>2</sup> In another,<sup>3</sup> involving the validity of a Bhuddist marriage entered into in Singapore, the court provided an authoritative definition of the quantum of proof necessary to rebut the presumption of validity of a subsequent marriage in favor of a former one.<sup>4</sup> The court also provided

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1. *Bell v. Lone Oak School Dist.*, 507 S.W.2d 636 (Tex. Civ. App.—Texarkana 1974), *error granted*, 515 S.W.2d 252 (Tex. 1974). The court stated that “[i]t is the public policy of this state to encourage marriage rather than living together unmarried.” 507 S.W.2d at 638. The court recognized that its decision was in direct opposition to another case, *Kissick v. Garland Ind. School Dist.*, 330 S.W.2d 708 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.), which had held, on similar facts, that it was not unreasonable to bar married students from participating in athletics and other extracurricular activities. 507 S.W.2d at 638. The reasoning in *Bell* is clearly preferable.

2. Without any reference to local policy favoring one marriage over the other, a federal court sitting in Pennsylvania found proof of a first marriage without proof of its dissolution conclusive over a second ceremonial marriage for the purposes of awarding social security benefits to the “widow” of the deceased wage earner. *Visconti v. Secretary of H.E.W.*, 374 F. Supp. 1272 (W.D. Pa. 1974), a case in many respects reminiscent of *Caruso v. Lucius*, 448 S.W.2d 711 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.).

3. *Davis v. Davis*, 521 S.W.2d 603 (Tex. 1975), discussed *infra* notes 206-08 in another context.

4. Relying on *Caruso v. Lucius*, 448 S.W.2d 711 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.), the court also held that in order to rebut the presumption of the validity of a later marriage the contestant need only show that the prior marriage was not dissolved in those jurisdictions where the other spouse might reasonably have been expected to achieve dissolution.

an equally authoritative reanalysis of putative marriage. The supreme court held that a putative marriage exists as a matter of law until the spouse asserting it has certain knowledge of an impediment to the marriage and, hence, is no longer a putative spouse in good faith. The result was to restore to the putative subsequent wife what she had lost by the proof of validity of an existing prior marriage of her husband.<sup>5</sup>

Though informal marriages are far more frequently asserted than proved,<sup>6</sup> their status and the function of the declaration provided by statute to implement proof continues to be misunderstood.<sup>7</sup> It was inquired of the Attorney General of Texas whether a couple ceremonially married might file a declaration of an earlier informal marriage in order to substantiate its prior existence.<sup>8</sup> Though no opinion was rendered in response to the inquiry, there would not seem to be any reason why such a declaration might not be recorded for the purpose intended. With respect to procuring a license as a prerequisite to entering into a ceremonial marriage, the attorney general expressed the view that a judicial waiver of factual information (previously authorized by statute) is no longer allowed,<sup>9</sup> though the district court may waive age requirements for procuring a marriage license when good cause is shown.<sup>10</sup>

The attorney general was also called upon to clarify one of the problems of public identification: a person's choice of name and the consequences of marriage on the identification of spouses by name. A preoccupation with formalism and convention tends to prejudge the concept of "legal name" in the public mind. For purposes of recordation, notice, and the issuance of various types of identification devices, public agencies are, nonetheless, in

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5. Though no appeal was taken with respect to the ultimate division of the property of the intestate husband, the result was that the surviving widow took the wife's share of the community and the husband's share was divided between the putative wife and the husband's descendants. In *Caruso v. Lucius*, 448 S.W.2d 711 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.), the putative wife took the wife's share of the community and the husband's half was divided between the widow and the heirs of the husband. See McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 44-45 (1971). Both cases are in agreement in rejecting the line of authority which had required that in order to share in the profits of the putative marriage, the putative spouse should prove participation in acquisition of property which vested during that marriage. *Id.* See also McKnight, *Commentary to the Texas Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 310, 340 (1974).

6. See, e.g., *Peters v. Weinberger*, 377 F. Supp. 294 (M.D. Fla. 1974); *Archie v. State*, 511 S.W.2d 942 (Tex. Crim. App. 1974). But see *Old Republic Ins. Co. v. Christian*, 389 F. Supp. 335 (E.D. Tenn. 1975).

7. See TEX. FAM. CODE ANN. §§ 1.91-95 (1975).

8. TEX. ATT'Y GEN. OP. NO. H-540 (1974). The file was closed without rendering an opinion. (Nov. 1974). For a brief, general treatment of informal marriage and related institutions see Valeri, *Informal Marriages and Other Curative Devices*, 17 HOW. L.J. 558 (1972).

9. TEX. ATT'Y GEN. OP. NO. H-503 (1974). Ch. 888, §§ 1, 1.05 [1969] Tex. Laws 2707, 2711 allowed judicial waiver of "any information pertaining to an applicant, other than the applicant's name, . . . for good cause shown . . ."

In TEX. ATT'Y GEN. OP. NO. H-581 (1975) the opinion was expressed that the county clerk may issue a marriage license to a person within the thirty days following his or her divorce for a marriage to be entered into after that time. Cf. TEX. ATT'Y GEN. OP. NO. M-604 (1970). See McKnight, *Commentary to the Texas Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 286 (1974).

10. TEX. ATT'Y GEN. OP. NO. H-216 (1974).

need of guidance. In answer to an inquiry<sup>11</sup> concerning the right of a married woman to use a name other than that of her husband for purposes of public identification, record, and dealings, the attorney general stated that at marriage a wife may choose to take the name of her husband or continue to use her former name.<sup>12</sup>

No case has yet reached an appellate Texas court with respect to the spousal rights of the husband to consent to or interfere with a wife's medical treatment concerning termination of pregnancy and related matters, though the cases beginning to appear elsewhere tend to deny the husband's rights in these matters.<sup>13</sup> The courts, however, have dealt with some of the problems of status arising after marital dissolution. In one instance<sup>14</sup> the difficulties of claiming and proving liability for necessities supplied during marriage were exemplified. In another, though by way of obiter dictum, the Supreme Court of Texas clearly indicated that Texas wives and Texas widows may successfully bring suit for loss of consortium,<sup>15</sup> a conclusion that other jurisdictions have already reached.<sup>16</sup> The bar of interspousal immunity is still maintained with respect to a cause of action that may be brought by one former spouse against the other.<sup>17</sup>

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11. TEX. ATT'Y GEN. RQ-420 (1973), from the Human Resources Committee of the House of Representatives.

12. TEX. ATT'Y GEN. OP. NO. H-432 (1974). The opinion does not consider the possibility of choice of name unassociated with birth or marriage. Nor does it address the possibility of a person's using one name for social purposes and another in business or professional callings. See Comment, *An Overview of the Equal Rights Amendment in Texas*, 11 HOUS. L. REV. 136, 156 (1973). See also Petition of Hauptly, 312 N.E.2d 857 (Ind. 1974), with respect to the right of a married woman to formal name change under TEX. FAM. CODE ANN. § 32.21 (1975). See Annot., 62 A.L.R.3d 1097 (1975).

13. See, e.g., *Coe v. Gerstein*, 376 F. Supp. 695 (S.D. Fla. 1974); *Doe v. Doe*, 314 N.E.2d 128 (Mass. 1974); *Murray v. Vandevander*, 522 P.2d 302 (Okla. Ct. App. 1974).

For the status of the Texas abortion law see TEX. ATT'Y GEN. OP. NO. H-369 (1974). See also *Geduldeg v. Aiello*, 417 U.S. 484 (1974); Comment, *Exclusion of Pregnancy from Coverage of Disability Benefits Does Not Violate Equal Protection*, 12 HOUS. L. REV. 488 (1975); Comment, *Barefoot and Pregnant—Still: Equal Protection for Women in Light of Geduldeg v. Aiello*, 16 SO. TEX. L. REV. 211 (1975). But cf. TEX. ATT'Y GEN. OP. NO. H-251 (1974).

14. *Lutz v. Lutz*, 508 S.W.2d 955 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

15. *Felsenthal v. McMillan*, 493 S.W.2d 729 (Tex. 1973) noted in *McKnight, Family Law, Annual Survey of Texas Law*, 28 SW. L.J. 66, 66-67 (1974).

16. See *Duncan v. General Motors Corp.*, 499 F.2d 835 (10th Cir. 1974); *Gonzalez v. Fireman's Fund Ins. Co.*, 385 F. Supp. 140 (D.P.R. 1974); *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974); *Tribble v. Gregory*, 288 So. 2d 13 (Miss. 1974). But it was pointed out in *Greenhurst v. Bethlehem Steel Corp.*, 380 F. Supp. 638 (N.D. Ind. 1974), that recovery for loss of consortium is not available under the Federal Employers Liability Act. But, like Texas, other states generally adhere to the rule that a married woman cannot sue her husband for personal injury caused by his tort prior to marriage. See, e.g., *DiGirolamo v. Apanavage*, 454 Pa. 557, 312 A.2d 382 (1974). Interestingly, the court held that the claim was not the wife's "separate property" within the Pennsylvania Interspousal Immunity Statute, though it would unquestionably be a wife's separate property under TEX. FAM. CODE ANN. § 5.01 (1975) and TEX. CONST. art. XVI, § 15.

Though it maintains the rule that merely negligent infliction of mental anguish does not give rise to a cause of action, the Supreme Court of Washington held that damages for emotional distress may be recovered by an immediate family member when the defendant's conduct is "outrageous and extreme." *Grimsby v. Samson*, 85 Wash. 2d 52, 530 P.2d 291 (1975).

17. *Latiolais v. Latiolais*, 361 S.W.2d 252 (Tex. Civ. App.—Beaumont 1962, writ ref'd n.r.e.). See also *Burns v. Burns*, 111 Ariz. 178, 526 P.2d 717 (1974), where the

The increasing national divorce rate and the ever-increasing number of all types of family law cases in the Texas courts suggest that the unfinished business of providing a properly integrated and coherent statewide family court plan is well past due. Past efforts to bring all special domestic relations and juvenile courts into the state system as fully fledged district courts<sup>18</sup> produced a broadened jurisdiction for those separately created courts in several large urban areas.<sup>19</sup> These efforts have not succeeded, however, in bringing within the state system as regular district judges all of those judges who should be elected in the manner of district judges, paid by the state, and entitled to the pension benefits of the state system. Nor has uniformity been achieved with regard to the powers of those separately created courts which are operated wholly or in part at local expense.<sup>20</sup> These incredibly overworked courts are in desperate need of attention, but the problem cannot be solved by the appointment of special masters to assist them.<sup>21</sup>

Though strides have been made in institutionalizing the suggestion of counseling,<sup>22</sup> it seems to be generally agreed that the 1973 amendment to section 3.54 of the Family Code, providing that it is the responsibility of the petitioner's attorney to provide a printed notice concerning the availability of counseling, has been overburdensome and serves little useful purpose. The State Bar of Texas has recommended repeal of subsections (a) and (b) of section 3.54.<sup>23</sup> Though the language of the present statute seems mandatory, a failure in compliance does not negate jurisdiction to dissolve a marriage.<sup>24</sup> While the notice provisions with respect to availability of counseling are regarded as superfluous, it is widely agreed that the 1973 amendments clarifying the privilege of the counselor's report are a sound addition to the Family Code.<sup>25</sup>

The United State Supreme Court has concluded that a state's durational

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court concluded that though divorce abrogates the doctrine of interspousal immunity insofar as intentional torts are concerned, the immunity should survive in cases involving negligence. Otherwise spouses might be encouraged to obtain divorces on no-fault grounds for the purpose of suit only.

18. See Raggio, *Family District Courts*, 29 TEX. B.J. 1007 (1966).

19. See ch. 565, § 1, [1967] Tex. Laws 1242.

20. See, e.g., TEX. ATT'Y GEN. OP. No. H-331 (1974) dealing with the limits of jurisdiction of domestic relations court in Wharton County. See also TEX. ATT'Y GEN. OP. No. H-300 (1974).

21. See TEX. ATT'Y GEN. OP. No. H-609 (1975).

22. See TEX. FAM. CODE ANN. § 3.54 (1975), enacted in 1968 and substantially amended in 1973.

23. See Adams, *Proposed Revisions of the Family Code*, 37 TEX. B.J. 1159 (1974).

24. Ramirez v. Ramirez, No. 15357 (Tex. Civ. App.—San Antonio, Dec. 4, 1974, no writ). It was also concluded that a husband's showing that divorce had been contemplated for over twelve years and that reconciliation was impossible justified the court's refusal to order counseling. Philp v. Philp, 516 S.W.2d 294 (Tex. Civ. App.—Waco 1974, no writ).

25. In TEX. ATT'Y GEN. OP. No. H-478 (1974) it was concluded that the counselor's report was privileged and, absent effective waiver, should not be made available to a federal agency.

In Simpson v. Simpson, 490 F.2d 803 (5th Cir.), cert. denied, 419 U.S. 897 (1974), the court refused a writ of certiorari to the Court of Appeals for the Fifth Circuit which had approved the admission in evidence of conversations procured by the husband in a divorce proceeding by means of a telephone tap of his wife's conversations.

In Smith v. Armstrong, 383 F. Supp. 365 (N.D. Tex. 1974), the court concluded that it had jurisdiction under the Civil Rights Act, 42 U.S.C. § 1985(3) (1974), to consider the plaintiff's cause of action pertaining to conspiracy to interfere with civil rights by way of, *inter alia*, coercing divorce.

domicile requirement of one year for purposes of divorce is a reasonable requirement within the United States Constitution.<sup>26</sup> Subsequently, a three-judge federal district court sitting in New York upheld the constitutionality of a New York statute which required that a petitioner married outside the state maintain two years of residence prior to commencing divorce proceedings in New York.<sup>27</sup> The Texas Family Code<sup>28</sup> provides that a non-resident spouse may petition for divorce in Texas if the other spouse has been domiciled in Texas for six months. In *LeFebvre v. LeFebvre*<sup>29</sup> Texas's ninety days' county residence requirement<sup>30</sup> was held immune from constitutional attack.<sup>31</sup>

An obiter dictum in *In re Jackson*<sup>32</sup> may encourage the belief that the legislature intended to allow the granting of divorce on default of appearance in spite of the provisions of section 3.53 of the Family Code which had been thought adequate to deter this conclusion.<sup>33</sup> On the other hand, as the result of *Dugie v. Dugie*,<sup>34</sup> many practitioners have begun to prepare statements of fact in all divorce cases in which one of the parties has failed to appear. In *Dugie* the husband made no appearance at the trial but appealed from the decree of divorce. Since there was no statement of facts (to which the appellant was entitled) and the court did not treat the husband's failure to appear as a waiver of the presence of a court reporter, the appellate court held that the husband was entitled to a new trial so that a record could be made.<sup>35</sup>

26. *Sosna v. Iowa*, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975).

27. *Mendez v. Heller*, 380 F. Supp. 985 (E.D.N.Y. 1974). See also *Mon Chi Heung Au v. Lum*, 512 F.2d 430 (9th Cir. 1975).

28. TEX. FAM. CODE ANN. § 3.24 (1975).

29. 510 S.W.2d 29 (Tex. Civ. App.—Beaumont 1974, no writ).

30. TEX. FAM. CODE ANN. § 3.20 (1975).

31. In a concurring opinion, Keith, J., expressed the view that the question had become moot prior to filing of the brief. 510 S.W.2d 29, 31 (Tex. Civ. App.—Beaumont 1974, no writ). For an earlier discussion of the county residence requirements see McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 69 (1974). In *In re Gilman*, 507 S.W.2d 610 (Tex. Civ. App.—Amarillo 1974, writ dismissed), the court once again held that a failure to honor the sixty days waiting period between filing of a divorce petition and judgment is not jurisdictional.

32. 506 S.W.2d 261, 269 (Tex. Civ. App.—Amarillo 1974, writ dismissed). See also *Leonard v. Leonard*, 512 S.W.2d 771, 776 (Tex. Civ. App.—Corpus Christi 1974, writ dismissed).

33. In *Friedman v. Friedman*, 233 Ga. 254, 210 So. 2d 754 (1974), the court held that a divorce might be granted without any evidentiary hearing whatever when both parties allege the marriage had been "irretrievably broken" since there was no fact issue then remaining for adjudication and neither party could complain of a judgment he or she had sought. Though it has been suggested that both spouses might be petitioners in a Texas proceeding utilizing no-fault grounds, McKnight, *Commentary to the Texas Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 328 (1974), the Texas Family Code nowhere specifically provides for joint petitioners. Observations there made with respect to *Cusack v. Cusack*, 491 S.W.2d 714 (Tex. Civ. App.—Corpus Christi 1974, writ dismissed) may fuel this misinterpretation. There it was said that "as a no-fault ground for divorce, insupportability is not subject to any defenses in the nature of affirmative defenses, for example, adultery, recrimination, connivance, collusion and condonation." 5 TEX. TECH L. REV. at 328. That statement was not meant to suggest that a respondent's denial of a petitioner's grounds for divorce be construed as a "defense" to which the ground of insupportability is not susceptible. Such a position would constitute denial of due process.

34. 511 S.W.2d 623 (Tex. Civ. App.—San Antonio 1974, no writ).

35. Cf. *Brown v. Brown*, 520 S.W.2d 571 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

With respect to temporary orders the court held in *Ex parte Thompson*<sup>36</sup> that an order for temporary alimony is effective only to the date of the judgment appealed from and that a further order must be obtained for support pending appeal. Unless a pre-judgment alimony order expressly requires the continuation of payments after judgment and until further proceedings are concluded, a further order after judgment (or on granting a new trial) is necessary in order that the party charged with support may be specifically apprised of a continuing obligation. An order granting a new trial does not automatically continue temporary alimony or make it applicable retroactively to the period after the entry of a divorce decree. In *Dickson v. Dickson*<sup>37</sup> the trial court had entered a temporary order under section 3.58 of the Family Code dividing the management of two farms between the spouses. An appeal was taken from the order though no injunctive relief had been sought by either party. The Austin court of civil appeals held that the order was not subject to appeal under article 4662<sup>38</sup> which authorizes appeals from orders granting temporary injunctions. On the other hand, in *Spiller v. Sherill*<sup>39</sup> the trial court granted a divorce and entered an agreed interlocutory decree imposing a trust on particular property, and gave the wife its exclusive use pending final judgment. Subsequently, the court entered its final judgment dissolving the trust and awarding the property to the husband. The wife perfected her appeal and filed her supersedeas bond. She then sought a writ of prohibition to maintain the state of affairs under the interlocutory decree. The writ was granted. It was concluded that there was a final appealable judgment, and by filing the supersedeas bond, execution on the judgment was stayed.<sup>40</sup>

When the husband filed his petition for divorce in *Deen v. Kirk*,<sup>41</sup> he also filed the wife's waiver of citation executed the day before suit was filed, and

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36. 510 S.W.2d 165 (Tex. Civ. App.—Dallas 1974, no writ).

37. 516 S.W.2d 28 (Tex. Civ. App.—Austin 1974, no writ).

38. TEX. REV. CIV. STAT. ANN. art. 4662 (1940).

39. 518 S.W.2d 268 (Tex. Civ. App.—San Antonio 1974, no writ).

40. In *Thompson v. Gibbs*, 504 S.W.2d 630 (Tex. Civ. App.—Dallas 1974), a writ of mandamus was sought and conditionally granted to order the trial judge to proceed to trial in a suit for divorce which he had removed from his docket. A decree of divorce was entered on June 15 and ten days later the wife filed a motion for new trial which was timely amended on July 16. On August 13 the parties entered into an agreement to extend the time of hearing until September 6, when the judge set aside the decree of June 15 and granted a new trial. More than two months later the judge entered an order setting aside his order of September 6 and removing the case from the docket on the ground that the granting of a motion for new trial on September 6 was rendered after the motion had been overruled by operation of law as made more than 30 days after the original decree. The parties did not dispute that their agreement had been ineffective to extend the time for decision of the amended motion for retrial and that the amended motion was overruled by operation of law 45 days after it had been filed and all of these events occurred prior to the hearing on September 6. The wife contended, however, that the trial court was vested with authority for a period of 30 days following the overruling of the motion for new trial to change the decree so that the order of September 6 was valid and effective and, hence, the court's subsequent striking of its order of September 6 was ineffective. The Dallas court of civil appeals agreed with the petitioner's contention that the ultimate order should be disregarded and that the cause should be regarded as pending before the trial court.

Thereafter, the Supreme Court of Texas overruled the motion to file a petition for a writ of mandamus. *Thompson v. Gibbs*, 17 Tex. Sup. Ct. J. 226 (1974).

41. 508 S.W.2d 70 (Tex. 1974).

it was, therefore, ineffective under article 2224.<sup>42</sup> The suit went to judgment without personal service of the wife. The wife then brought a bill of review as a separate suit to set aside the divorce decree. More than thirty days after rendition of the judgment, the trial court set aside the judgment in the first suit, presumably as void on the record. The husband then moved for dismissal of the second suit on the ground of mootness since the judgment in the first suit had been set aside. The husband's motion was granted. While the wife's appeal of the court's order was pending, she brought an original mandamus proceeding in the Texas Supreme Court to expunge the order which purported to set aside the original judgment. The relief sought by the wife was, in effect, granted.<sup>43</sup> Her appeal thereafter succeeded on her suit for a bill of review.<sup>44</sup> In another case for a bill of review the members of the appellate court took very different views of the pleadings, the record, the applicable law, and its application.<sup>45</sup> The ex-wife had been the petitioner for the divorce entered upon an agreed judgment. She brought a bill of review to set aside all matters relating to child custody and division of property, but not the divorce itself. Her contention was that her participation in the proceeding by way of an agreed judgment had been procured by the husband's fraudulent misrepresentations. A majority of the appellate court was of the opinion that the wife's bill of review should have been granted. The dissenting judge discerned fraud and negligence on her part.<sup>46</sup> No point was made with respect to the extent that the wife acted on the advice of counsel during her negotiations with her husband.

*Law v. Law*<sup>47</sup> was an appeal by the ex-wife from a judgment for divorce in a proceeding which she initiated, but the appeal was only with respect to the division of property. The parties had agreed to an equal division of a community interest in a particular piece of property, but the judgment had mistakenly awarded it solely to the wife. The husband moved to correct the judgment.<sup>48</sup> Within thirty days of entry of the judgment, the court entered an amended judgment that changed the division of property.<sup>49</sup> The wife's attorney was advised of the hearing of the husband's motion to amend, but the wife's counsel did not appear. The appellate court rejected the wife's

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42. TEX. REV. CIV. STAT. ANN. art. 2224 (1971).

43. The relief was granted conditionally if the trial judge should fail to set aside his order.

44. *Deen v. Deen*, 511 S.W.2d 612 (Tex. Civ. App.—Fort Worth 1974, no writ).

45. *McFarland v. Reynolds*, 513 S.W.2d 620 (Tex. Civ. App.—Corpus Christi 1974, no writ).

46. 513 S.W.2d at 628. See also *Boley v. Boley*, 506 S.W.2d 934 (Tex. Civ. App.—Fort Worth 1974, no writ).

47. 517 S.W.2d 379 (Tex. Civ. App.—Austin 1974, no writ).

48. A somewhat similar situation was presented in *Holway v. Holway*, 506 S.W.2d 643 (Tex. Civ. App.—El Paso 1974, no writ), where a judgment was entered *nunc pro tunc* to correct a clerical error six years after the original entry of judgment. The issue there was whether the later judgment was fully supported by the judge's handwritten entry on his docket sheet.

49. But if a spouse against whom an amended judgment is sought to be entered would have been entitled to plead the Soldiers' and Sailors' Civil Relief Act by virtue of intervening military orders, the court would err in entering an amended judgment. *Becknell v. D'Angelo*, 506 S.W.2d 688 (Tex. Civ. App.—Fort Worth 1974, no writ).

assertion of lack of proper notice of the hearing under rules 316 and 317.<sup>50</sup> The wife also alleged irregularities in a previous divorce of the spouses after which they had remarried.<sup>51</sup> In so doing she sought to reopen the property settlement confirmed by the earlier decree. The wife asserted that the judgment merely stated that the marriage was dissolved and was irregular in that it did not state for and against whom it was rendered in compliance with rule 306.<sup>52</sup> But it was clear from the record that the wife was the moving party in the suit. The court leaves the implication that a simple declaration of dissolution is in proper compliance with the Family Code when no-fault grounds are relied on.<sup>53</sup>

*Mitchim v. Mitchim*<sup>54</sup> is a landmark of domestic relations in the conflict of laws. Arizona had been the marital domicile of the spouses for about five years before the husband moved to Texas. A year later the wife commenced divorce proceedings in Arizona, which had adopted a long-arm statute with the purpose of giving residents of that state "the maximum privileges permitted by the Constitution of the United States."<sup>55</sup> The husband was cited in Texas as provided in the statute for extraterritorial service. Without any further showing of personal jurisdiction, the Arizona court granted the wife a divorce and awarded her an order for alimony, costs, and attorney's fees. The husband sought a declaration of a Texas court that the order for alimony, costs, and attorney's fees was void. Recognizing "that judgments for future payments of alimony and judgments otherwise subject to modification have 'no constitutional claim to a more conclusive or final effect' in another state than they have in the state where rendered,"<sup>56</sup> the Texas Supreme Court held that the Arizona decree for delinquent alimony payments would be worthy of full faith and credit, and that the Texas trial court erred in adjudicating the Arizona decree as void. A Texas court is bound by Arizona's construction of her long-arm statute. If other states which have not done so enact long-arm statutes similar to Arizona's, and if those statutes are elsewhere given the effect that Texas gives to the Arizona statute, many of the difficulties we now attempt to solve so haltingly and inadequately by recourse to the reciprocal child support acts will be soluble by simpler means, made easier still by a widespread enactment of the Uniform Enforcement of Foreign Judgments Act.

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50. TEX. R. CIV. P. 316, 317, 329b. For other suggestions of professional misconduct see *Leonard v. Leonard*, 512 S.W.2d 771 (Tex. Civ. App.—Corpus Christi 1974, writ dismissed); *Blancas v. Blancas*, 495 S.W.2d 597 (Tex. Civ. App.—Texarkana 1973, no writ). See also McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 70 (1974).

51. In *Smith v. Smith*, 519 S.W.2d 152 (Tex. Civ. App.—Dallas 1974, writ refused), the court held that a divorce of the spouses followed by their remarriage does not invoke TEX. PROB. CODE ANN. § 69 (1956) which causes testamentary provisions for a divorced spouse to become ineffective.

52. TEX. R. CIV. P. 306.

53. See also *Blancas v. Blancas*, 495 S.W.2d 597 (Tex. Civ. App.—Texarkana 1973, no writ).

54. 518 S.W.2d 362 (Tex. 1975).

55. *Id.* at 365, citing *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732 (1966).

56. *Id.* at 366, citing *Halvey v. Halvey*, 330 U.S. 610 (1946).

### B. Characterization of Marital Property

The basic rules of characterization are simply stated: (1) property acquired before marriage or representing an element of the person or personality of a spouse brought into marriage is separate property; (2) property acquired during marriage is presumed to be community property, but this presumption may be disproved by showing (a) acquisition by gift or inheritance, or (b) mutation of separate property demonstrated by tracing.<sup>57</sup> However, these simple rules are not always easy of application.

Section 5.01 of the Family Code<sup>58</sup> enunciates the rule that recovery for personal injury if it is not measured by loss of earning power is separate property. Once that proposition was accepted as constitutional,<sup>59</sup> various peripheral points related to it have come before the courts for resolution. In *Wilkinson v. Stevison*<sup>60</sup> the Supreme Court of Texas concluded that a husband's contributory negligence bars a wife's recovery for separate property injuries if he is acting as her agent in the venture in which she is injured, a proposition so obvious as not to merit discussion even though the supreme court's attention was required to apply the rule to particular facts.<sup>61</sup> But characterization of a percentage of military retirement benefits as "disability payments" does not alter their essential community character as retirement benefits.<sup>62</sup> An unvested interest in military pension benefits of whatever nature is not capable of characterization as matrimonial property, however.<sup>63</sup>

Characterization is most easily demonstrated by the application of presumptions and by tracing. If, for example, part of a tract of land is brought into marriage and the rest is acquired during marriage, the latter part is presumed to be community.<sup>64</sup> But if property bought during marriage is shown

57. For a collection of cases see Comment, *The Commingling of Separate and Community Funds: The Requirement of Tracing in Texas*, 6 ST. MARY'S L.J. 234 (1974).

58. TEX. FAM. CODE ANN. § 5.01 (1975).

59. *Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972), discussed in McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 27-29 (1973); Smith, *Family Law, Annual Survey of Texas Law*, 27 Sw. L.J. 45, 53-55 (1973). See also McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 71-72 (1974); Comment, *Reclassification of Tort Recoveries by Spouses—Possible Effect of Graham v. Franco*, 4 TEX. TECH L. REV. 359 (1973).

60. 514 S.W.2d 895 (Tex. 1974).

61. The facts of *Sutherland v. Auch Inter-Burrough Transit Co.*, 366 F. Supp. 127 (E.D. Pa. 1973), suggest some further questions as yet unresolved by Texas appellate courts. That was a case in which pain and suffering affected earning power.

62. *Marshall v. Marshall*, 511 S.W.2d 72 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ); cf. *Ramsey v. Ramsey*, 474 S.W.2d 939 (Tex. Civ. App.—Eastland 1971, writ dismissed), discussed in McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 31 (1973). See also *Busby v. Busby*, 457 S.W.2d 551, 554 (Tex. 1970).

63. *Lumpkins v. Lumpkins*, 519 S.W.2d 491 (Tex. Civ. App.—Austin 1975, no writ). See also Note, *Rice Acreage Allotment*, 26 BAYLOR L. REV. 376 (1974).

The Pension Reform Act of 1974 may have considerable impact on the characterization of property interests in employee retirement plans through its provision that its terms supersede any and all state law insofar as it may now or hereafter relate to an employee benefit plan therein described. Federal government and church plans are, however, excluded from the operation of the act. See Ray, *Trusts and Pensions (including effects of the Pension Reform Act of 1974)*, in TEXAS FAMILY LAW & COMMUNITY PROPERTY 183 (J. McKnight ed. 1975).

64. *Cockerham v. Cockerham*, 514 S.W.2d 150 (Tex. Civ. App.—Waco 1974, writ granted).

as purchased with the proceeds of an inheritance, the presumption in favor of acquisition in favor of the community is rebutted.<sup>65</sup> In *Babb v. McGee*<sup>66</sup> the dispute centered upon characterization of property conveyed by a husband to his wife for "\$10.00 and love and affections." The recital of the small dollar amount would not in itself negate a showing of intended gift by the husband to the wife, but other recitals indicating a transfer wholly or preponderantly for valuable consideration may lead to that implication.<sup>67</sup>

Characterizing a credit purchase is in a sense a matter of tracing: the property acquired and the liability incurred are characterized by the nature of the terms of credit on which the transaction is based. A recent example of this principle is *Ray v. United States*.<sup>68</sup> There it was clear that the agreement between lender and borrower provided that the loan should be repaid from the separate property of the borrowing spouse. The proceeds of the loan were used to purchase United States treasury bonds which the estate of the deceased spouse redeemed at face value in payment of estate taxes. In an action for refund of estate taxes the United States questioned the propriety of redemption of the bonds. The court concluded that the bond redemption was indeed proper as the bonds were the separate estate of the deceased spouse, not the community estate of both spouses.<sup>69</sup>

*Currie v. Currie*<sup>70</sup> dealt with the character of income from two trusts of which a spouse was beneficiary. In one the net income of the trust was to become part of the corpus subject to the full discretion of the trustee to determine what constituted the net income. The trustee was also empowered to pay estate taxes on the estate of the settlor from the income and corpus of the trust, as well as current expenses of the trust. The trustee had done so, and the principal argument advanced by the beneficiary's spouse was that their community estate was entitled to reimbursement for those funds expended. The court held that those payments were made before any interest would accrue to the beneficiary and, hence, there was no community interest in them. In the other trust the spouse was beneficiary of one-third of the corpus of the trust to be distributed on the death of the spouse's mother, to whom the net income of the trust was to be paid in the trustee's discretion

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65. *Cowart v. Cowart*, 515 S.W.2d 359 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.).

66. 507 S.W.2d 821 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).

67. See, e.g., *Scaling v. Beggs*, 334 S.W.2d 209 (Tex. Civ. App.—San Antonio 1960, writ ref'd n.r.e.), where the deed recited "in consideration of Ten Dollars and other valuable considerations."

Though Texas law may not always lend itself to easy application in complicated fact situations, the precision of our constitutional and statutory definitions nevertheless precludes uncertainty of titles and what may be regarded as characterization of separate or community property merely by post facto imagination of a spouse or whim of the courts. See, e.g., *Kroloff v. United States*, 487 F.2d 334 (9th Cir. 1973). See also *Bingaman, The Effects of an Equal Rights Amendment on the New Mexico System of Community Property: Problems of Characterization, Management and Control*, 3 NEW MEXICO L. REV. 11 (1973).

68. 385 F. Supp. 372 (S.D. Tex. 1974).

69. For an analysis of statutory law with respect to post mortem liability, see *Hudspeth, Texas Marital Property Laws as They Relate to Estate Administration*, 36 TEX. B.J. 293 (1973).

70. 518 S.W.2d 386 (Tex. Civ. App.—San Antonio 1974, writ disp'd).

during her lifetime. Any undistributed net income was to be added to the corpus. The court held that accumulated net income was not community property of the "contingent" remainderman. But as a general rule, the right of this beneficiary would be said to be vested subject to divestiture for failure to survive the life tenant.

It has long been disputed whether a partition agreement by which the community property is divided between the spouses as shares of separate property can properly cover after-acquired income which, absent the agreement, would have been community property during the marriage. Such partitions are frequently in terms of separation agreements, though they need not be made in that context.<sup>71</sup> With the decision in *Amarillo National Bank v. Liston*<sup>72</sup> authorities were equally divided: two decisions of courts of civil appeals favoring prospective partition and two opposing. *Jernigan v. Scott*<sup>73</sup> gives the proponents of prospective partition the edge.<sup>74</sup> Substantially the same issue must be dealt with in considering the validity of provisions in a marriage contract which has the objective of dealing with earnings acquired during marriage.<sup>75</sup>

### C. Division on Divorce

In *Francis v. Francis*<sup>76</sup> the Texas Supreme Court held that a contractual property settlement enforceable as such, though "approved" by the trial court and incorporated in the divorce decree, does *not* constitute an award of permanent alimony. For reasons unaccountable, but perhaps explainable by slowness of legal communications or simply by hope, the issue there settled continues to be litigated on appeal.<sup>77</sup> In *Mahrer v. Mahrer*<sup>78</sup> a broad inter-

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71. See, e.g., *Strickland v. Wester*, 131 Tex. 23, 112 S.W.2d 1047 (1938); *Cauble v. Beaver-Electra Ref. Co.*, 115 Tex. 1, 274 S.W. 120 (1925).

72. 464 S.W.2d 395 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.), discussed in McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 25 Sw. L.J. 31, 32 (1971), where other related cases are cited.

73. 518 S.W.2d 278 (Tex. Civ. App.—San Antonio 1974, error ref'd n.r.e.).

74. *Cortez v. Corsi*, 513 S.W.2d 648 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.), also deals peripherally with the consequences of a property settlement agreement. See also *Costello v. Costello*, 379 F. Supp. 630 (D. Wyo. 1974).

75. Since parties to antenuptial agreements may move from state to state, it is advisable to consider the law of prospective domicile in drawing them. A useful addition to the literature on this subject is Winston, *Antenuptial Agreements—What the Law Now Says*, 62 ILL. B.J. 604 (1974).

In a later chapter of the *Rosensteil* dispute, *Rosensteil v. Rosensteil*, 368 F. Supp. 61 (S.D.N.Y. 1973), a sequel to *Rosensteil v. Rosensteil*, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965), cert. denied, 384 U.S. 971 (1966), in which New York finally came around to approving foreign bilateral divorces, it was asserted that an antenuptial agreement between prospective spouses by which the woman gave up all interest in the husband's estate on termination of the marriage by divorce was not binding on her following an *ex parte* foreign divorce proceeding by the husband in a new jurisdiction of domicile. The court held that the agreement was fully binding on the ex-wife and her contentions with respect to misunderstanding some of its provisions were cured by her representation by counsel in its formulation.

76. 412 S.W.2d 29 (Tex. 1967).

77. See *Tinsley v. Tinsley*, 512 S.W.2d 74 (Tex. Civ. App.—Waco 1974, no writ); *Shaw v. Shaw*, 483 S.W.2d 825 (Tex. Civ. App.—San Antonio 1972, no writ). Nor is *Francis* fully understood by the judiciary. See *Strader v. Strader*, 517 S.W.2d 905 (Tex. Civ. App.—Waco 1974, no writ). See also *In re Jackson*, 506 S.W.2d 261 (Tex. Civ. App.—Amarillo 1974, writ dismissed).

78. 510 S.W.2d 402 (Tex. Civ. App.—Dallas 1974, no writ).

pretation of consideration supporting such a contract was again made.<sup>79</sup> Nor is an award of a money judgment to one of the spouses to equalize the division of property on divorce a decree for permanent alimony.<sup>80</sup> Even if the parties in their property settlement agreement describe the payments as "alimony" so that the husband may claim them as tax deductions, payments ordered by the decree in furtherance of the contract do not constitute forbidden permanent alimony.<sup>81</sup>

In the same sense that an interest in a pension fund, or any other interest *not vested* during marriage, cannot be a community property interest subject to division on divorce,<sup>82</sup> the court concluded in *In re Rister*<sup>83</sup> that a vested pension right subject to increase in *amount* based on the employee-spouse's continued employment after divorce does not allow the divorce court to consider the interest as worth more than its accrued value at the date of divorce. If rights in a pension plan are vested from the moment of employment, as the court suggested they might have been in the pension plan considered in *Rister*, some of the difficult problems of division on divorce or post-divorce divisions of assets undivided in the divorce decree, as in *Dessommes v. Dessommes*,<sup>84</sup> are not presented for resolution. A thorough understanding of the Pension Reform Act of 1974 may also cause some problems of pension division on divorce to disappear.<sup>85</sup>

The general rule of property division on divorce in Texas is that of equity—as "the court deems just and right."<sup>86</sup> The court arrives at this conclusion

79. For further discussion of this point, see McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 37 (1973).

80. *In re Jackson*, 506 S.W.2d 261 (Tex. Civ. App.—Amarillo 1974, writ *dism'd*). As to enforcement of such lump sum or periodic payments, see *Forney v. Jorrie*, 511 S.W.2d 379, 383 (Tex. Civ. App.—San Antonio 1974, writ *ref'd n.r.e.*).

81. *Nordstrom v. Nordstrom*, 515 S.W.2d 14 (Tex. Civ. App.—Waco 1974, writ *ref'd n.r.e.*). For another situation in which tax considerations were involved in the interpretation of a property settlement agreement, see *Motheral v. Motheral*, 514 S.W.2d 475 (Tex. Civ. App.—Corpus Christi 1974, writ *ref'd n.r.e.*). For a somewhat polemical appeal for statutory authorization of permanent alimony for ex-wives, see *Turley, A Wife's Right to Support Payments in Texas*, 16 So. TEX. L.J. 1 (1974). At its February 1975 meeting the Board of Directors of the State Bar of Texas rejected a proposal that the bar sponsor legislation providing for post-divorce alimony of limited duration as a "readjustment allowance" but *approved* the entering wedge to the same end, a proposal for a disability allowance for a divorced spouse.

82. *Lumpkins v. Lumpkins*, 519 S.W.2d 491 (Tex. Civ. App.—Austin 1975, no writ); *Davis v. Davis*, 495 S.W.2d 607 (Tex. Civ. App.—Dallas 1973, writ *dism'd*), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 73 (1974). See also Comment, *Retirement Benefits and the Right of Reimbursement*, 11 HOUS. L. REV. 960 (1974).

83. 512 S.W.2d 72 (Tex. Civ. App.—Amarillo 1974, no writ).

84. 505 S.W.2d 673 (Tex. Civ. App.—Dallas 1973, writ *ref'd n.r.e.*), *discussed in* McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 72-73 (1974). See also Rudberg, *Enforcing Divorce Judgments and Property Settlement Agreements in Texas*, 5 TEX. TECH L. REV. 645, 649 (1974).

85. See Ray, *supra* note 63. Federal and religious pension plans are, however, excluded from the operation of that act.

86. TEX. FAM. CODE ANN. § 3.63 (1975). The section concludes with the words "having due regard for the rights of each party and any children of the marriage." The reference to the rights of children is an anachronism, perhaps the last vestige of the forced heirship statute, An Act Concerning Wills §§ 13-15, [1840] Tex. Laws 167, 170, 2 H. GAMMEL, LAWS OF TEXAS 341, 344 (1898), repealed in 1856, but in effect when Texas's first divorce law was enacted, An Act Concerning Divorce and Alimony § 4, [1841] Tex. Laws 20, 2 H. GAMMEL, LAWS OF TEXAS 483, 484 (1898), as a part of which the original version of § 3.63 was enacted. At that time, therefore, children had rights in the property of their parents which could not be divested by marriage contracts

by proper exercise of its discretion,<sup>87</sup> and a jury verdict on division of property is purely advisory.<sup>88</sup> There is no requirement that property be divided equally, or in kind, though an equitable division may be achieved by awarding particular properties to one spouse and property of a different quality to the other,<sup>89</sup> or by requiring one spouse to execute a note in favor of the other to achieve a balanced division if one spouse is given all or substantially all of the property in esse,<sup>90</sup> or all of a particular type of property,<sup>91</sup> or by granting a money award secured by a lien on particular property awarded to the other spouse,<sup>92</sup> or by ordering periodic payments for the same purpose.<sup>93</sup>

In approaching the problem of property division on divorce, the court will commonly make a finding as to the character of particular property as either separate or community estate. If a mistake is made in the characterization, but the division is nonetheless equitable, the courts have treated the mistake as harmless.<sup>94</sup> If the issue is merely one of the trial court's exercise of discretion, the division will not be disturbed on appeal unless it is shown that the court abused its discretion by making a manifestly unfair division.<sup>95</sup>

There is still some dispute with respect to the meaning, apart from the wisdom,<sup>96</sup> of section 3.63 of the Family Code. But in *Wilkerson v. Wilkerson*<sup>97</sup> the court made a clear holding that title to separate realty might be divested in making an equitable division on divorce. In *Bell v. Bell*<sup>98</sup> the Beaumont court of civil appeals had held that in making a division on divorce the court must take into consideration separate corporate interests as well as community property. The appellate court seems to have concluded that the trial

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or disinheritance without cause, but today children have no such rights but merely a right of support under title 2 of the Family Code. See McKnight, *Commentary on the Texas Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 340 (1974).

87. *Wetzel v. Wetzel*, 514 S.W.2d 283 (Tex. Civ. App.—San Antonio 1974, no writ).

88. *Cockerham v. Cockerham*, 514 S.W.2d 150 (Tex. Civ. App.—Waco 1974, writ granted), though the court's conclusion that a jury finding of fact with respect to disposal of marital property as also purely advisory seems erroneous.

89. See *Mercer v. Mercer*, 503 S.W.2d 395 (Tex. Civ. App.—Corpus Christi 1973, no writ).

90. *Womble v. Womble*, 502 S.W.2d 886 (Tex. Civ. App.—Fort Worth 1973, no writ).

91. *Elrod v. Elrod*, 517 S.W.2d 669 (Tex. Civ. App.—Corpus Christi 1974, no writ).

92. *In re Jackson*, 506 S.W.2d 261 (Tex. Civ. App.—Amarillo 1974, writ dismissed).

93. *Forney v. Jorrie*, 511 S.W.2d 379 (Tex. Civ. App.—San Antonio 1974, writ refused n.r.e.). But acceleration of payments on breach was not there considered because not supported by proper pleadings. For another instance of inadequate pleadings to support a division on divorce, see *Townsend v. Townsend*, 511 S.W.2d 424 (Tex. Civ. App.—Amarillo 1974, no writ).

94. *Law v. Law*, 517 S.W.2d 379, 383 (Tex. Civ. App.—Austin 1974, writ dismissed); *Wilkerson v. Wilkerson*, 515 S.W.2d 52 (Tex. Civ. App.—Tyler 1974, no writ); *Gaulding v. Gaulding*, 503 S.W.2d 617 (Tex. Civ. App.—Eastland 1973, no writ).

95. *Bell v. Bell*, 513 S.W.2d 20 (Tex. 1974); *Elrod v. Elrod*, 517 S.W.2d 669 (Tex. Civ. App.—Corpus Christi 1974, no writ); *Cunningham v. Cunningham*, 515 S.W.2d 345 (Tex. Civ. App.—Corpus Christi 1974, no writ); *Hensley v. Hensley*, 496 S.W.2d 929 (Tex. Civ. App.—El Paso 1973, no writ). If the last case stands for any other proposition, it is difficult to discern.

96. At the 1975 regular session of the Texas Legislature, the House of Representatives passed H.R. 454 to prohibit divestiture of title to separate realty by a divorce court.

97. 515 S.W.2d 52, 55-57 (Tex. Civ. App.—Tyler 1974, no writ). For an earlier discussion of the point see McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 38-39 (1973). See also McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 75 nn. 64-65 (1974).

98. 504 S.W.2d 610 (Tex. Civ. App.—Beaumont 1974).

court failed to consider the separate corporate interests, thus it reversed and remanded for further proceedings, but without any direction as to how division should be made. The court merely commented that in the interest of equity it should make no difference whether the wealth accumulated through the activity of one spouse was earned by doing business as an individual proprietorship or through a corporation.<sup>99</sup> In reversing the conclusion of the court of civil appeals and affirming the judgment of the trial court, the Supreme Court of Texas merely concluded that the trial court *had* considered all the business interests of the parties in making its division.<sup>100</sup>

In *Cooper v. Cooper*<sup>101</sup> the court had before it a case involving a considerable amount of community property as well as substantial separate estates belonging to each of the spouses. Though the differences in earning capacity and business opportunities of the spouses justified an unequal division of the community estate, there were no circumstances<sup>102</sup> requiring "an apportionment of the husband's separate property to the wife in order to effect a fair and just division of the estates of the parties. . . . The separate property of one spouse should not be awarded to the other merely to equalize their comparative wealth."<sup>103</sup> The court ordered remission of items of the husband's separate property awarded the wife and on compliance affirmed the rest of the trial court's award.

No appellate court has yet considered whether a distinction should be drawn between fault and no-fault divorces with respect to taking fault into consideration in making a division of property.<sup>104</sup> In making a property division in both instances the courts frequently recite the old litany of factors, including fault, to be considered in making a discretionary property division.<sup>105</sup> It is submitted that courts should not automatically apply factors of fault in dividing property in a divorce based on no-fault grounds.<sup>106</sup>

Fixing an attorney's fee is closely related to a division of property though the underlying reason for doing so may be juridically unrelated. Liability for the attorney's fee of the petitioning or responding wife in a matrimonial cause has long fallen on the husband and any property over which he has control has been regarded as subject to its satisfaction. Hence, responsibility for payment of the fee rests not only on the community subject to his charge but on his present and future separate estate. In Family Code terms liability for the fee is, therefore, rooted in the duty of support the husband owes to

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99. *Id.* at 611.

100. *Bell v. Bell*, 513 S.W.2d 20 (Tex. 1974).

101. 513 S.W.2d 229 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

102. As when one party is without means of support or has children to support, as pointed out in *Fuhrman v. Fuhrman*, 302 S.W.2d 205 (Tex. Civ. App.—El Paso 1957, writ *dism'd*).

103. *Id.* at 234.

104. The question was posed in *McKnight & Raggio, Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 42-43 (1972).

105. See *Cooper v. Cooper*, 513 S.W.2d 229, 233, 234 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

106. See the series of comments culminating in *Sassower, No-Fault Divorce and Women's Property Rights: A Rebuttal*, 45 N.Y.S.B.J. 485 (1973). See also *McKnight, Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 36-37 (1973).

the wife.<sup>107</sup> The reason for this result is found in classifying the wife's attorney's fee as a necessary of the marriage. But the principle that the responsibility for providing necessities produces personal liability of the husband as well as a community one<sup>108</sup> was established when the husband had control of the whole community as well as both separate estates. In that context the principle that the wife constituted the husband's agent of necessity for procuring necessities was reasonable.<sup>109</sup> The husband's liability for necessities was a corollary to the common law rule that a married woman did not have an independent contractual capacity or property subject to her control. In order to carry out her function as manager of the household, it was necessary that a married woman should be able to pledge the husband's credit for those things which were required. Now, however, in a changed statutory environment with respect to community management, the courts' blind adherence to the necessities rule is not appropriate, especially when it operates for the benefit of a moneyed petitioner in a no-fault situation where the respondent spouse opposes the divorce. The no-fault concept allows each spouse to dissolve the marriage without any meaningful restraint by the other. In that instance it would be appropriate to require a petitioning spouse to pay for legal assistance in achieving the unilateral objectives desired.

In *Cooper v. Cooper*<sup>110</sup> both parties had substantial separate estates and there was also a substantial community estate. The court concluded that there was no justification for charging the wife's attorney's fees against the husband's estate. "In dividing the community property, particularly in 'no-fault' cases, the trial court should also consider the fact that the husband will be liable for [his own] attorney's fees."<sup>111</sup> If, however, the wife's attorney's fees, incurred in the divorce proceeding, are properly viewed as necessities, and the community estate is to be equally divided, it would seem appropriate that both spouses' attorneys' fees be paid from the community estate as a cost of winding up the marriage before the residue of the community is divided. But the courts have customarily looked upon the wife's attorney's fees as an independent element of equitable division of the estate of the parties with the result that the husband is ordered to pay the fees, or they are ordered to be paid from that part of the community property which would otherwise be distributed to him.

The attorney's fee awarded to one spouse against the other must be reasonable.<sup>112</sup> Reasonableness of an attorney's fee is a question of fact and evi-

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107. TEX. FAM. CODE ANN. § 4.02 (1975).

108. *In re Jackson*, 506 S.W.2d 261 (Tex. Civ. App.—Amarillo 1974, writ dismissed).

109. In its current context, however, the result is that the wife is given *several* management of that community property over which the husband has sole management for the purpose of procuring necessities, including the cost of professional representation in a divorce proceeding.

110. 513 S.W.2d 229 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

111. *Id.* at 235.

112. Since necessities provided to a married woman used to be treated as contracted for by her as her husband's agent of necessity, the wife's attorney's fee was fixed in a *reasonable* amount in order to protect the principal from any imposition that may have been perpetrated on his agent. The judicial determination of a *reasonable* amount under *present* law, however, seems to be for the purpose of making an equitable division of the marital property.

dence must be introduced to support the finding. It is not appropriate for the court merely to take judicial notice of minimum fee schedules, or the judge's personal experience in such matters, without hearing some evidence to support the finding.<sup>113</sup> Fees for appraisers, actuaries, accountants, and other expert witnesses called by the wife are aspects of her attorney's fee.<sup>114</sup>

The Ethics Committee of the State Bar of Texas has expressed the opinion<sup>115</sup> that it is improper for a lawyer to secure a judgment for legal fees against his client in the same suit as that in which he is representing that client.<sup>116</sup> The opinion points up the appropriateness of an attorney's reaching an early understanding with his client with respect to fees, and a full disclosure of these arrangements will facilitate the court's fixing of fees. For the purpose of fee disputes the courts have sometimes treated<sup>117</sup> an attorney for a client-spouse as a party to the client's suit against the other spouse in a domestic matter without any formal designation of the attorney as a party to the suit. *Masters v. Stair*,<sup>118</sup> the most recent case on the subject, twice reached the San Antonio court of civil appeals. The attorney had been employed by the wife, who promised to pay him a reasonable fee for representing her in a divorce proceeding though no understanding was reached as to a precise amount. The trial court found that a reasonable fee for representation of the wife was \$4,800 but awarded the attorney a judgment of \$2,500 against the husband for his fee. The ex-husband paid that amount. In his subsequent suit against his former client for the rest of the fee the trial court concluded that the divorce judgment was a bar to the attorney's recovery. But the attorney seemed to have argued that he was not a party to the suit for divorce. Though questioning the ethical propriety of some of the consequences of doing so, the appellate court seemed willing to treat the attorney as a party, but was unable to resolve the dispute on the basis of the record before it.<sup>119</sup> On further appeal after a new trial at which all the foregoing facts were found, the appellate court held that the attorney was properly entitled to recover the difference between the amount found as a reasonable fee and the amount already paid by the husband under the judicial order.<sup>120</sup> In

113. *Huntley v. Huntley*, 512 S.W.2d 767 (Tex. Civ. App.—Austin 1974, no writ). In *Reaney v. Reaney*, 505 S.W.2d 338 (Tex. Civ. App.—Dallas 1974, no writ), there was presumably evidence in the record sustaining the value of the attorney's time and services. See also *Ramirez v. Ramirez*, No. 15357 (Tex. Civ. App.—San Antonio, Dec. 4, 1974, no writ). For a general discussion, see Annot., 59 A.L.R.3d 152 (1974).

114. *Currie v. Currie*, 518 S.W.2d 386 (Tex. Civ. App.—San Antonio 1974, writ dismissed). For a receiver's fee and salary, see *Huntley v. Huntley*, 512 S.W.2d 767 (Tex. Civ. App.—Austin 1974, no writ).

115. TEX. ETHICS COMM. OP. No. 374, 37 TEX. B.J. 1085 (1974).

116. For a general discussion of other matters in the attorney-client relationship, see D. GRANT, AVOIDING UNINTENTIONAL GRIEVANCES (1974), reprinted in part in 37 TEX. B.J. 959, 1081, 1175 (1974); 38 TEX. B.J. 55, 155 (1975).

117. See *Mullinax, Wells, Mauzy & Collins v. Dawson*, 478 S.W.2d 121 (Tex. Civ. App.—Dallas 1972, writ refused n.r.e.); cf. *Carter v. Leiter*, 476 S.W.2d 461 (Tex. Civ. App.—Dallas 1972, writ refused n.r.e.), where the attorneys intervened as parties. Both cases are discussed in McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 40 (1973).

118. 505 S.W.2d 702 (Tex. Civ. App.—San Antonio), *rev'd and remanded*, 518 S.W.2d 439 (Tex. Civ. App.—San Antonio 1974, no writ).

119. 505 S.W.2d 702 (Tex. Civ. App.—San Antonio 1974).

120. 518 S.W.2d 439 (Tex. Civ. App.—San Antonio 1974, no writ).

*Myers v. Myers*<sup>121</sup> the wife executed a release to her ex-husband purporting to discharge his obligation to pay her attorney's fees as required by court order. After the husband's unsuccessful appeal of the cause, the trial judge ordered the clerk to pay the wife's attorney's fees out of the husband's cash deposit as a supersedeas bond. The husband's appeal of this interlocutory order was unsuccessful.<sup>122</sup>

Special care must always be taken in drawing a divorce decree so that the understanding of the parties' intentions are fully and unambiguously expressed to insure that enforcement can be effectively achieved either by contempt or for a money judgment. Particular care should be taken in spelling out responsibility for discharging tax liabilities of former spouses. A recital that one spouse must pay "community debts" will not necessarily cover tax liabilities of both spouses during the last year of marriage.<sup>123</sup> Nor should it be anticipated that a dispute arising from a property settlement agreement by which each spouse undertakes responsibility for his or her income taxes can be resolved by a suit for injunctive relief brought by one spouse against the federal taxing authorities.<sup>124</sup> The draftsman of a divorce decree should also anticipate the discharge of some liability for a former spouse by a third person.<sup>125</sup> The tax consequences of buy-out agreements between the spouses de hors the decree must also be carefully weighed. A tax court has recently held, for example,<sup>126</sup> that an agreement between spouses by which the husband would borrow money to buy out the wife's interest in the community home would cause her to realize a long-term capital gain on the transaction.

The prospect of need for enforcement by contempt proceedings should always be envisioned in drafting the decree. The court's order must be stated in clear and specific terms before a party can be found in contempt for its violation.<sup>127</sup> In *Marshall v. Marshall*<sup>128</sup> the divorce court properly constituted an ex-husband a constructive trustee of a percentage of his military retirement payments "as, and when received" and ordered him to pay those amounts to the ex-wife.<sup>129</sup> This has been a popular device to cope with the difficulties in dividing federal retirement benefits with respect to which the

121. 515 S.W.2d 334 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ *dism'd*). An earlier aspect of this dispute is noted in McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 77 (1974).

122. The husband's petition for mandamus was not properly filed. For that and other reasons, the writ of mandamus was denied.

123. *Brooks v. Brooks*, 515 S.W.2d 730 (Tex. Civ. App.—Eastland 1974, writ *ref'd n.r.e.*).

124. *Lange v. Phinney*, 507 F.2d 1000 (5th Cir. 1975).

125. See *Forney v. Jorrie*, 511 S.W.2d 379 (Tex. Civ. App.—San Antonio 1974, writ *ref'd n.r.e.*), where the wife's second husband discharged liabilities of both former spouses.

126. *Jean L. May*, 33 CCH Tax Ct. Mem. 256 (1974).

127. See *Ex parte Filemyr*, 509 S.W.2d 731 (Tex. Civ. App.—Austin 1974, no writ). See also *Ex parte Thompson*, 510 S.W.2d 165 (Tex. Civ. App.—Dallas 1974, no writ). An order to pay interest on late payments to the ex-wife's accruing share of property is not enforceable by contempt. *Ex parte Sutherland*, 515 S.W.2d 137 (Tex. Civ. App.—Texarkana 1974, writ *dism'd*).

128. 511 S.W.2d 72 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

129. *Id.* at 75. An unappealed order with respect to characterization and division of retirement pay cannot be attacked by a writ of habeas corpus. *Ex parte Sutherland*, 515 S.W.2d 137 (Tex. Civ. App.—Texarkana 1974, writ *dism'd*).

United States has been uncooperative.<sup>130</sup> Short of recourse to the federal courts by the *state*, which may be achieved by administrative intercession of the federal Department of Health, Education and Welfare, the recently enacted Social Service Amendments of 1974 do not offer Texas more than federal assistance to *find* former spouses who are delinquent in compliance with court orders. Garnishment of wages from federal sources does not seem available because that remedy is dependent on its availability under state law.<sup>131</sup>

Dissatisfaction with division on divorce can be approached in a variety of ways: (1) an appeal from the order of the trial court alleging an error of law or abuse of discretion,<sup>132</sup> (2) a bill of review alleging fraud, as for secreting assets at the time of divorce,<sup>133</sup> or (3) a suit for partition of community assets undivided by the court.<sup>134</sup> If the property in question is held by a third person, further problems of proof, joinder, and venue are presented.<sup>135</sup> In *Estabrook v. Wise*<sup>136</sup> foreign realty acquired during marriage was alleged to have been secreted at the time of divorce. On discovery of these interests subsequent to divorce, the ex-wife brought an in personam suit against the ex-husband to convey a one-half interest in the properties. Though a Texas divorce court may consider realty acquired in other jurisdictions in making an equitable division of the property of the marriage,<sup>137</sup> the Tyler court of civil appeals disagreed with respect to whether the thrust of this suit was in personam or in rem. The majority of the court was of the former and far sounder view. In *Mitchim v. Mitchim*<sup>138</sup> a foreign court, asserting jurisdiction of the parties by virtue of its long-arm statute, dissolved the marriage

130. See McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 26 Sw. L.J. 31, 33 n.20 (1972); McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 45-46 (1969).

131. Social Services Amendments of 1974, P.L. No. 93-647, § 459 (Jan. 4, 1975), do not appear to offer any assistance in Texas to ex-spouses of federal pensioners.

132. See, e.g., *Currie v. Currie*, 518 S.W.2d 386 (Tex. Civ. App.—San Antonio 1974, writ *dism'd*). But an attorney's inattention to the client's affairs is not ordinarily a ground for appeal. *Law v. Law*, 517 S.W.2d 379 (Tex. Civ. App.—Austin 1974, writ *dism'd*); *Leonard v. Leonard*, 512 S.W.2d 771 (Tex. Civ. App.—Corpus Christi 1974, writ *dism'd*). See also *Blancas v. Blancas*, 495 S.W.2d 597 (Tex. Civ. App.—Texarkana 1973, no writ), a proceeding by way of writ of error.

But a writ of habeas corpus for release from confinement for contempt is not an appropriate remedy to attack an order directing the ex-husband to deliver half of his subsequent naval pay to his ex-wife as a means of implementing division of community property. *Ex parte Sutherland*, 515 S.W.2d 137 (Tex. Civ. App.—Texarkana 1974, writ *dism'd*).

133. See, e.g., *Raney v. Mack*, 504 S.W.2d 527 (Tex. Civ. App.—Texarkana 1973, no writ). Inattention of one's attorney is not generally a ground for bill of review. See McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 70 (1974).

134. See, e.g., *Thompson v. Thompson*, 500 S.W.2d 203 (Tex. Civ. App.—Dallas 1973, no writ); *Martinez v. Tavera*, 503 S.W.2d 818 (Tex. Civ. App.—Eastland 1973, writ *ref'd n.r.e.*).

135. See, e.g., *Isenberg v. Isenberg*, 510 S.W.2d 364 (Tex. Civ. App.—San Antonio 1974, no writ); *Boley v. Boley*, 506 S.W.2d 934 (Tex. Civ. App.—Fort Worth 1974, no writ). See also McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 40 (1973).

136. 506 S.W.2d 248 (Tex. Civ. App.—Tyler 1974, writ granted, but *dism'd ab initio* as moot).

137. See *Walker v. Walker*, 231 S.W.2d 905 (Tex. Civ. App.—Texarkana 1950, no writ).

138. 509 S.W.2d 720 (Tex. Civ. App.—Austin), *rev'd on other grounds*, 518 S.W.2d 362 (Tex. 1974).

of the spouses but did not purport to divide military retirement benefits of the husband. In the husband's Texas action for a declaration of invalidity of the foreign decree, the wife asserted entitlement to one-half the retirement benefits. Disregarding the principle of vesting laid down in *Busby v. Busby*,<sup>139</sup> and relying instead on *Dessommes v. Dessommes*,<sup>140</sup> the court made a division by defining community interest on the basis of benefits accrued while the spouses resided in community property states. No further appeal was taken on this point.<sup>141</sup> In *Wilson v. Wilson*<sup>142</sup> retirement benefits undivided by a divorce court were again considered. The ex-wife sought a partition. The trial court made a fractional award of less than half for the wife, reflecting apparently the ratio of months of marriage to months of service. The husband appealed on the ground of an oral understanding at the time of divorce that he would receive the whole of the retirement pay. The appellate court held that the husband had failed to show the agreement on which he relied and that he could not complain of the award he had received, presumably, in light of the fact that the award did not measure up to the standard of *Busby* and was thus in his favor.<sup>143</sup>

#### D. Management of Marital Property

The most significant area of judicial activity was that of management of matrimonial property. In one year's time the courts have considered a variety of disputes involving the interpretation of the principal management pro-

139. 457 S.W.2d 551 (Tex. 1970).

140. 505 S.W.2d 673 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.), discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 72-73 (1974).

141. The right to retirement benefits vested while the couple were living in California. Without any discussion of California law, the court assumed that Texas law, i.e., *Busby*, was applicable, but as modified by *Dessommes*. The dissenting judge interpreted *Busby* as holding that when the husband's retirement benefits vest in a community property state, the wife becomes "entitled to her portion of that part of the interest in the retirement plan which was earned while the parties were man and wife." 509 S.W.2d at 726. See also the dissent in *Lumpkins v. Lumpkins*, 519 S.W.2d 491, 494-95 (Tex. Civ. App.—Austin 1975, no writ).

In relation to the characterization question several factors have a bearing on the division of property: (1) finding and characterizing matrimonial property to divide, (2) considering other "interests" and surrounding facts in the division of that property, and (3) considering the nature of the property interest in allocating it wholly to one spouse in spite of its community character or its character as separate property of the other spouse. An excess of zeal in finding property to divide unduly strains the rules of characterization as is illustrated by *Miser v. Miser*, 475 S.W.2d 597 (Tex. Civ. App.—Dallas 1971, writ dismissed), discussed in McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 30-31 (1973), and the approach of the dissenting judge in *Lumpkins*. See Comment, *The Identification and Division of Intangible Community Property: Slicing the Invisible Pie*, 6 U. CAL. DAVIS L. REV. 26 (1973). If there is property to divide, the court may perhaps consider other interests, perhaps even unvested interests, in making the division. But even if an interest may be properly characterized as community property, the court need not divide it between the spouses. Doubts surrounding its ultimate realization may very well prompt the court to deny a division when a community interest might not ever be realized. This approach would avoid contrary strains on characterization principles as are apparent in *Currie v. Currie*, 518 S.W.2d 386 (Tex. Civ. App.—San Antonio 1974, writ dismissed).

142. 507 S.W.2d 916 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

143. The husband also asserted that some years of marriage were spent in non-community property states, but evidence of the law of those states was not offered at the trial, and hence it was presumed to be the same as that of Texas.

vision of the Code,<sup>144</sup> and its interrelationship with the principal liability provision<sup>145</sup> and the provision for protection of third persons.<sup>146</sup> In the two most significant cases the question of the necessity of having both spouses before the court arose in the context of whether or not the court could render a judgment binding the non-party spouse with respect to transactions involving community property. The consideration determinative of these cases is the capacity of a spouse to manage matrimonial property in particular instances. In *Cooper v. Texas Gulf Industries*<sup>147</sup> the spouses acting together bought realty (partly with cash and partly on credit, but there was no evidence of the source of the cash) and the conveyance was made to both of them. Seeking rescission of the transaction, the husband alone brought suit against the grantor in 1970. That suit was dismissed with prejudice against the husband. In 1971 suit for similar relief was brought by the husband and wife jointly. The grantor sought summary judgment on the basis of *res judicata*. The spouses argued that the wife was an indispensable party to the prior suit and the judgment was, therefore, void. The court reached the important conclusion that rule 39,<sup>148</sup> as amended effective January 1, 1971, had radically changed the earlier doctrine of joinder of parties. Under the new rule it will "be rare indeed if there were a person whose presence was so indispensable in the sense that his absence deprives the court of jurisdiction to adjudicate between the parties already joined."<sup>149</sup> When two or more persons, therefore, have a mutual interest in the outcome of a judicial dispute, suit against one of them does not necessitate the joinder of others whose interests may be subject to later disposition. In reaching this conclusion with respect to the matrimonial property involved, the court considered the consequences to the wife's interest in the property in issue and her management powers with respect to it. On the basis of the record (but without any analysis of it) the court concluded that the property in issue was subject to the joint management of the spouses.<sup>150</sup> The court also concluded that the whole property was subject to joint management by characterization of the purchase transaction as one achieved by the spouses *acting together*, a conclusion that would put the purchase transaction within sections 5.22(b) or (c).<sup>151</sup> But though the court does not anywhere say so clearly, it seems that section 5.22(c) is assumed to be applicable.<sup>152</sup> Since there was no evidence of an agreement

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144. TEX. FAM. CODE ANN. § 5.22 (1975).

145. *Id.* § 5.61.

146. *Id.* § 5.24.

147. 513 S.W.2d 200 (Tex. 1974), *noted in* 52 TEXAS L. REV. 1410 (1974); 6 ST. MARY'S L.J. 93 (1975).

148. TEX. R. CIV. P. 39.

149. 513 S.W.2d at 204.

150. Without evidence as to its source, the cash portion of the purchase price was apparently presumed to be community property under TEX. FAM. CODE ANN. § 5.02 (1975). There is no specific presumption spelled out in the Code with respect to the management of community property the source of which is unknown but the court may have found an intimation of a rule for joint management in *id.* § 5.22(c).

151. *Id.* §§ 5.22(b), (c).

152. The background of § 5.22 is best seen by examining art. 4621, from which it was drawn. Ch. 309, § 1, art. 4621, [1967] Texas Laws 735, 738. Subsection (c) re-codified the fourth independent clause of that article which was added as a sort of residuary clause to catch any situation (though the draftsmen could not think of one to which it was necessarily specifically applicable) not covered by the three clauses which

between the spouses that one or the other could represent both in this matter of joint management, the court concluded that the wife's failure to participate in the first suit did not foreclose her interest in the second suit and that the dismissal of that suit against the husband would not affect her. In *Dulak v. Dulak*,<sup>153</sup> decided the same day as *Cooper*, the court reiterated the management point in a different context. In *Dulak* the husband and wife had jointly purchased realty, which was conveyed to the spouses jointly, in return for which they gave a joint note. The husband later procured the release of the note from the seller, and suit was brought against him alone to cancel this release as procured by his undue influence. The husband urged that his wife was an indispensable party to the suit. Relying on *Cooper*, the court concluded that a judgment binding the husband could be made without the wife's joinder.

What has sometimes been called the "doctrine of virtual representation" of the wife and her interest in community property subject to the husband's management was swept away in *Cooper* and *Dulak* with respect to those instances when joint management is appropriate.<sup>154</sup>

In *Cooper* the court gave only a hint of what might be expected in a subsequent suit involving the wife's rights. The judgment of dismissal against the husband in the first suit is not *res judicata* with respect to the rights of the wife but is conclusive as to the husband "except to the extent that it might have to be disregarded in giving [the wife] all the relief to which she may show herself entitled."<sup>155</sup> In both *Cooper* and *Dulak* it would have been most appropriate to join both spouses in the suit, thus avoiding problems of a later suit by or against the non-joined spouse.

In both *Cooper* and *Dulak* the supreme court alluded to the provision in

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had gone before it. One of the draftsmen, however, expressed the view that credit purchases might properly be dealt with under this provision. See McKnight, *Commentary on the Texas Family Code, Title 1*, 5 TEX. TECH L. REV. 281, 360-61 (1974). As is there pointed out, this residual clause may also be applied when (1) the name or names in which title is taken, or (2) the application of rules of express, resulting or constructive trust causes doubt as to whether subsection (a) [to which subsection (c) specifically relates] is clearly applicable.

153. 513 S.W.2d 205 (Tex. 1974).

154. In *Breeland v. Rice*, 496 F.2d 89 (5th Cir. 1974), the validity of old art. 4619 as it stood prior to Jan. 1, 1968, was attacked on grounds of the equal protection and due process clauses of the 14th amendment to the United States Constitution because the husband was the only necessary party to suits with respect to community property of which he was the manager. This was a sequel to *Breeland v. Rice*, 477 S.W.2d 906 (Tex. Civ. App.—Texarkana 1971, writ ref'd n.r.e.). There deeds were taken in the names of both spouses, but suit was brought only against the husband, though the wife was ultimately joined. Under the law as it then stood, taking title in the name of husband and wife could not cause a departure from the presumption that the property was community and subject to the management of the husband. The federal suit was dismissed by application of the principle of *res judicata*.

A somewhat similar argument was advanced in an attack on the Massachusetts rule that a wife is unable to achieve an involuntary partition of a tenancy by the entirety and thereby get management of half the estate. A three-judge court rejected the wife's argument. *Kline v. Mayo*, 367 F. Supp. 583 (D. Mass. 1973), discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 73-74 (1974), *aff'd*, 416 U.S. 953 (1974).

155. 513 S.W.2d at 205. See also *Williams v. Saxon*, 521 S.W.2d 88 (Tex. Civ. App.—San Antonio 1975, no writ), an alleged homestead case where neither the character of the property as separate or community nor its management status (if community) is defined.

sections 5.22(b) and (c) (as they stood at times relevant to the disputes before the court), stating that property is subject to joint management of the spouses "unless the spouses provide otherwise by power of attorney or agreement *in writing*."<sup>156</sup> Relying on this language and without hearing oral arguments, the Supreme Court of Texas reversed the holding of the Austin court of civil appeals in *Evans v. Muller*<sup>157</sup> to allow a creditor to reach jointly managed community property which the spouses has purported to put in the wife's control without a written agreement. At the time that all the foregoing disputes arose the agreement between the spouses was required to be "in writing." In 1973 the legislature rearranged the quoted language of sections 5.22(b) and (c) to read "unless the spouses provide otherwise by power of attorney in writing or other agreement." An oral or tacit understanding of the spouses should, therefore, now comply with this provision.

*Williams v. Portland State Bank*<sup>158</sup> involved the interaction of sections 5.22 and 5.24. There the power to manage two tracts of community land was in issue. The court held that a tract held in both names was community property subject to joint management of the spouses. The court seems to have held, without so stating, that another tract held in the name of the husband alone was also community property subject to joint management. A bank had agreed to lend money on a note to be executed by the spouses and secured by a deed of trust on both tracts. The wife, however, refused to execute the note or the deed of trust. Knowing of the wife's refusal, the bank accepted new instruments executed by the husband alone. After the couple's divorce, in which title to both properties was awarded to the wife, the ex-husband defaulted on the note and the wife brought suit to remove the cloud of the bank's claim from her title. The bank counterclaimed against both former spouses to foreclose its lien. The court concluded that the bank's knowledge of the wife's refusal to join in the transaction put the bank on "notice" to make further inquiry as to the extent of the husband's authority to exercise the wife's power of disposition of the land. Judgment was nonetheless entered for the bank for what would have been the ex-husband's half interest in the land. If "notice" related to the power of management, the court wrongly concluded that the community property in issue had been subject to *several* rather than joint management of the spouses.<sup>159</sup>

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156. Ch. 888, § 1, [1969] Tex. Laws 2707, 2727 (emphasis added). Note that subsection (a) does not contain a similar provision, though the lack of such a provision should not preclude a spouse's allowing the other to deal with community property subject to his or her sole management, a situation that occurs frequently when one spouse authorizes the other to order withdrawals from a bank account made up wholly of the earnings of the authorizing spouse. But such authorization would not seem to constitute the property as jointly managed community under §§ 5.22(b) or (c) for purposes of § 5.61. See McKnight, *Texas Community Property Law—Its Course of Development and Reform*, 8 CAL. W.L. REV. 117, 139 (1971).

157. 510 S.W.2d 651 (Tex. Civ. App.—Austin), *rev'd per curiam*, 516 S.W.2d 923 (Tex. 1974).

158. 514 S.W.2d 124 (Tex. Civ. App.—Beaumont 1974, writ granted but *dism'd* by agreement).

159. Or did the court relate "notice" to the applicability of § 5.24? One tract was in the joint names of the spouses; hence the deed on its face suggested an interest in the wife which might have been a separate property interest or merely a joint managerial power over community property as proved to be the case. The other tract stood in the

Suing both spouses with respect to the sole acts of one spouse will not segregate that spouse's interest for purposes of judgment if a *joint* act of the spouses had been required for disposition of an interest in the property at issue.<sup>160</sup>

Other decisions also dealt with spouses as parties to suits and the consequences of their unilateral acts. In *Myers v. Thomas*<sup>161</sup> suit was brought by the spouses for injuries sustained by the wife after the wife had reached an agreement for settlement of the claim. The appellate court held that the wife had full powers of management concerning a recovery for personal injury under section 5.22(a),<sup>162</sup> and, therefore, no cause of action for injury to the wife could be brought by the husband. In *McDonald v. Roemer*<sup>163</sup> an agricultural lessee brought suit against the husband and wife for breach of an agricultural lease entered into solely by the wife. There were apparently no allegations as to the nature of the property. Since the cause of action was for breach of contract, the court's conclusion that the husband was not a proper party thereto seems correct; no claim seems to have been asserted that the wife was acting as the husband's agent with respect to jointly managed community property.<sup>164</sup> But if the suit had been for specific performance and the property had been community property subject to joint management, it would have been appropriate to bring suit against both spouses. In *Grace v. Rahlfs*<sup>165</sup> a contract of insurance was entered into by the husband and an insurance broker for the protection of mineral interests which constituted "their business [which the spouses operated] as a team."<sup>166</sup> In a suit brought by the insurance broker against the husband for breach of the contract to pay premiums, it was contended by the defendant-husband that the wife was the proper defendant rather than the husband because she was in charge of the wells being drilled, the subject matter of the contract. The contract was one for protection from loss for drilling for oil, a business in which the husband and wife were apparently jointly engaged. The court rejected this contention, though it concluded that the insurance policies involved were "at least a community property interest."<sup>167</sup> Again the suit was one for breach of contract to which only one spouse was a party. The court held

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name of the husband alone and therefore should have been subject to § 5.24 unless the bank had actual notice of his lack of authority to dispose of the property. As to the first tract, is the court holding that § 5.24 applies as to an undivided half interest? If this line of analysis was employed by the court, in the case of the second tract the husband's power to deal with the whole tract under § 5.24 is reduced to one-half by virtue of the bank's "notice."

In any case, the court's holding would allow one spouse to achieve an involuntary partition of a community asset contrary to long-established rule. See McKnight, *Commentary to the Texas Family Code, Title I*, 5 TEX. TECH L. REV. 281, 379 (1974).

160. "Joint and several" are so often coupled with respect to liability that some may inadvertently think of the terms as perpetually conjoined and, therefore, synonymous.

161. 502 S.W.2d 941 (Tex. Civ. App.—Beaumont 1973, no writ).

162. TEX. FAM. CODE ANN. § 5.22(a) (1975).

163. 505 S.W.2d 698 (Tex. Civ. App.—San Antonio 1974, no writ).

164. Cf. *Harrington v. Pelkey*, 424 S.W.2d 507 (Tex. Civ. App.—Beaumont 1968, writ ref'd n.r.e.), noted in McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 53 (1969).

165. 508 S.W.2d 158 (Tex. Civ. App.—El Paso 1974, writ ref'd n.r.e.).

166. *Id.* at 161.

167. *Id.*

that the husband was the only proper party to the action.<sup>168</sup>

Though the principal impact of *Evans v. Muller*<sup>169</sup> is with respect to the interaction of sections 5.22 and 5.61 as to availability of particular community property to satisfy liability of a spouse to his creditor, the Austin court of civil appeals analyzed the underlying transaction in terms of section 5.22. As part of an apparent attempt to partition their community estate, without proper compliance with the formalities required by section 5.42, the husband and wife conveyed their community homestead to purchasers and took as partial payment a note naming the wife only as payee. The management status of the community realty sold was not alluded to by the court. The trial court found that the transaction did not constitute a gift by the husband to the wife and also rejected the allegation that the transaction was made with intent to defraud the husband's creditors.<sup>170</sup> One of the husband's creditors sought to garnish sums payable to the wife under the note. Without considering the possibility of characterizing the proceeds of sale of the community property for management purposes on the basis of the management of the property sold, the court seems to assume the applicability to them of section 5.22(c) rather than section 5.22(b), although the consequences with respect to the outcome of the case would be the same. The court rejected the argument of the applicability of section 5.22(a).

#### E. *Liability of Marital Property*

The close relationship between management and liability of marital property is well illustrated by *Evans v. Muller*.<sup>171</sup> The fact that a debt owed to the community and subject to joint management of the spouses was evidenced by a note payable only to the wife was of no avail to the wife in protecting a payment due on the note from the husband's creditor, who sought to garnish it as property subject to his joint management. In reversing the decision of the court of appeals the supreme court held in *Muller v. Evans*<sup>172</sup> that at all times relevant to the case<sup>173</sup> section 5.22(c) required the

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168. In response to an enquiry whether under the Ethics Act of 1973, TEX. REV. CIV. STAT. ANN. art. 6252-9b, § 4(a) (Supp. 1974), a spouse who is a state official must report the financial activities of the other spouse's separate property over which the reporting spouse has no control, the attorney general concluded that the registrant must report on the financial activities "of his spouse . . . on which activities the registrant exercises any degree of control, legal or factual." TEX. ATT'Y GEN. OP. NO. H-269 (1974).

169. 510 S.W.2d 651 (Tex. Civ. App.—Austin), *rev'd*, 516 S.W.2d 651 (Tex. 1974).

170. For a general treatment of this and some other problems under § 5.22, see Comment, *Section 5.22 of the Texas Family Code: Control and Management of the Marital Estate*, 27 SW. L.J. 837 (1973). For gifts made by a spouse in fraud of the other, see Note, *Gifts in Fraud of the Rights of the Wife*, 26 BAYLOR L. REV. 85 (1974). In *Becknal v. Atwood*, 518 S.W.2d 593 (Tex. Civ. App.—Amarillo 1974, no writ), the court said that a spouse could not complain that a transfer by the other spouse constituted a constructive fraud if the complaining spouse was a participant in the transaction.

171. 510 S.W.2d 651 (Tex. Civ. App.—Austin 1974), *rev'd*, 516 S.W.2d 923 (Tex. 1974).

172. 516 S.W.2d 923 (Tex. 1974).

173. "At the time this case was tried on January 17, 1973, and at all relevant times before, Section 5.22(c) of the Family Code required that such an agreement be 'by power of attorney or other agreement in writing.'" *Id.* at 923-24. But from September 1968 when the sale of the property occurred until January 1, 1970, when § 5.22 super-

spouses' written agreement to alter joint management of this property. Section 5.24 of the Family Code was irrelevant to the wife's argument as it operates "not for the benefit of the spouse, but instead for the protection of those third persons who may deal with the spouse in possession or in whose name the property is held."<sup>174</sup>

The common law tenancy by the entireties may be analogized to community property in some respects. Though as the tenancy by the entireties operates in some jurisdictions for purposes of liability, it is unlike Texas community property subject to joint management of the spouses, as several recent cases illustrate. Debts owed by one spouse only are not recoverable from such a tenancy but only those owed by both spouses jointly.<sup>175</sup> Such a tenancy by the entireties would not pass to the trustee in bankruptcy of one spouse only, unless that spouse acting alone had power to transfer it.<sup>176</sup> It may be argued that a Texas joint tenancy with right of survivorship between husband and wife, properly created,<sup>177</sup> should by analogy be subject to these same rules.

In *Cockerham v. Cockerham*<sup>178</sup> the wife's trustee in bankruptcy intervened in her suit for divorce, seeking payment of the wife's debts from jointly managed community property. The husband and wife had purchased realty with borrowed money. It is not clear from the opinion whether both spouses were participants in the borrowing but it may reasonably be conjectured that they were. The purchase was nonetheless a cash purchase, albeit with borrowed money. Although the lender was given a vendor's lien on the property purchased, the opinion does not reveal how the loan was discharged, though it apparently had been. The dissenting judge characterized the property as community subject to joint management of the spouses under section 5.22(c) and, therefore, subject to seizure by the wife's creditors to discharge her debts. The majority of the court, however, apparently regarded the property as subject to the sole management of the husband pursuant to a tacit understanding of the spouses, since he alone was in actual control of the business conducted there. It would seem, therefore, that the reasoning of the court

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seded ch. 309, § 1, art. 4621, [1967] Tex. Laws 735, 738, the latter article merely provided that "mixed or combined community property is subject to joint management . . . unless the spouses otherwise provide." 516 S.W.2d at 738.

174. 510 S.W.2d 651, 655. In another garnishment proceeding, *Redisco v. Laredo Mopac Employees Credit Union*, 516 S.W.2d 197 (Tex. Civ. App.—San Antonio 1974, no writ), a garnishee held funds for the wife as well as the husband without knowledge of any possible interest the husband might have had in the wife's account. Nor was it shown that the garnishee knew that its two depositors were husband and wife. Hence, the garnishee had no duty to respond with respect to funds held for the wife when garnished with respect to funds held for the husband.

That separate funds of one spouse are not subject to garnishment for debts owed by the other unless both are liable by other rules of law is spelled out clearly in § 5.61(a) of the Family Code. See also *Texas Commerce Bank Nat'l Ass'n v. Tripp*, 516 S.W.2d 256 (Tex. Civ. App.—Fort Worth 1974, writ granted).

175. *In re Kline*, 370 F. Supp. 152 (W.D. Va. 1973); *Farmington Prod. Credit Ass'n v. Estes*, 504 S.W.2d 149 (Mo. Ct. App. 1974).

176. *In re Kitrell*, 380 F. Supp. 587 (E.D. Mo. 1974).

177. See McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 21 Sw. L.J. 39, 43-44 (1967). See also McKnight, *Management, Control and Liability of Marital Property in TEXAS FAMILY LAW & COMMUNITY PROPERTY* 159, 179-82 (J. McKnight ed. 1975).

178. 514 S.W.2d 150 (Tex. Civ. App.—Waco 1974, writ granted).

in *Muller* should have been equally applicable to this case, as there was no evidence of a written understanding between the parties with respect to management. On the other hand, if the facts of *Muller* and *Cockerham* had arisen after January 1, 1974, the results as to creditors in each case would be different, unless a fraudulent intent to hinder them could be shown.<sup>179</sup> As of January 1, 1974, the position of the words "in writing" in sections 5.22 (b) and (c) were shifted so that the clause containing them reads: "unless the spouses provide otherwise by power of attorney in writing or other agreement."

Just as a spouse's trustee in bankruptcy may intervene in a suit between the spouses, an ex-spouse may intervene in the bankruptcy proceeding of a former spouse for an adjudication that certain liabilities, already fixed between them, are not affected by the discharge in bankruptcy. In *In re Nunnally*<sup>180</sup> an ex-wife, who had been awarded a money judgment on divorce either by way of reimbursement or for repayment of a loan, intervened in her ex-husband's voluntary bankruptcy proceeding. The ex-husband asserted that this claim, secured by a lien on that part of his naval retirement benefits awarded to him, as well as the award to his ex-wife for her attorney's fees, should be discharged. On behalf of the former wife the court held that the bankruptcy label of non-dischargeable "alimony" applied to this award rather than the Texas label of "property division."<sup>181</sup> On behalf of the bankrupt the court treated his retirement pay as not passing to the trustee for the benefit of his creditors.<sup>182</sup>

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179. This assertion as to fraud assumes the applicability of TEX. BUS. & COMM. CODE ANN. §§ 24.02 or 24.03 (1968) to this situation, *i.e.*, that the agreement or understanding between the spouses, evidenced in writing or otherwise, by which control is exercised by one spouse only, constitutes a "transfer" as that term is used in the statute. In making this assertion it is also assumed that such an understanding between the spouses has an impact *inter alios* as *Muller* suggests and is not limited in effect *inter se* as the draftsmen of §§ 5.22 and 5.61 almost certainly intended. This conclusion also presupposes that the provision in §§ 5.22(b), (c) allowing the spouses to provide otherwise is constitutional. It may be argued, however, that if a partition of community property between spouses cannot defeat prior creditors' claims as a broad reading of the 1948 amendment to the constitution suggests, an agreement with respect to management of jointly controlled community which would have the same effect may be equally repugnant to the Constitution. See TEX. CONST. art. XVI, § 15 (1948).

180. 506 F.2d 1024 (5th Cir. 1975).

181. The award of attorney's fees was also treated as "alimony" for bankruptcy purposes. See also *In re Smith*, No. BK-3-2065 (N.D. Tex. July 2, 1973), noted in McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 77 (1974); *In re Waller*, 494 F.2d 447 (6th Cir. 1974), where the provision of a divorce decree to the effect that the husband should hold the ex-wife harmless for all existing debts also constituted alimony; *In re Freeman*, 489 F.2d 431 (9th Cir. 1973), with respect to a contest between a California ex-husband and the bankruptcy trustee of his former wife concerning an income tax refund.

182. See *Kokoszka v. Belford*, 417 U.S. 642 (1974). An interest "designed to function as a wage-substitute" at some future period and, during that future period, to "support the basic requirements of life" for the debtor does not pass to his trustee in bankruptcy. *Id.* at 648. See also *Lines v. Frederick*, 400 U.S. 18 (1970). But the bankrupt's interest in the cash surrender value of a life insurance policy in favor of his mother (with his children as only contingent beneficiaries) passed to the trustee. See also *In re Gould*, 457 F.2d 393 (5th Cir. 1972). An earlier stage of this proceeding is noted in McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 26 Sw. L.J. 31, 41 n.85 (1972).

*In re McCoy*, 373 F. Supp. 870 (W.D. Tex. 1974), the trustee in bankruptcy was successful in asserting a claim to the debtor's recovery for wrongful death.

In recent years there have been a number of constitutional amendments affecting the homestead exemption.<sup>183</sup> Additional proposals for constitutional change may be anticipated. Though the Constitutional Convention, which met during 1974, was unable to agree to a document to submit to the electorate, the Convention had drafted new provisions on homestead. The most significant change would have allowed a mortgage to be placed on three-fourths of a rural homestead and on an urban business homestead as ordinary security for a loan. The draft further provided that a change from rural to urban homestead should not occur without the consent of the claimant,<sup>184</sup> but it retained the \$3,000 homestead exemption from state taxes.<sup>185</sup>

A recital in a mortgage of dwelling *A* that the mortgagor's dwelling *B* (a property equally capable of being a homestead) is the mortgagor's homestead<sup>186</sup> is an act of different juridical consequences from that of filing a homestead designation for tax purposes with respect to dwelling *B* when dwelling *A* is mortgaged. In *Evans v. Steiner*<sup>187</sup> the appellate court concluded that as to the second act there was a clear dispute of fact as to the homestead character of the properties which precluded summary judgment. There were also issues of fraud or mistake. As to the logically related question of whether two persons may simultaneously claim a homestead in the same property (not yet before a Texas appellate court with regard to the construction of the 1973 constitutional amendment allowing single persons to claim homesteads),<sup>188</sup> an Arizona court<sup>189</sup> concluded on the basis of an earlier Texas authority<sup>190</sup> that two or more persons with a property interest in a home may claim a homestead exemption in the same property.

Abandonment of a homestead is, of course, a question of fact. In *Atwood v. Guaranty Construction Co.*<sup>191</sup> the court decided that if a part of an urban

183. The effective date of those amendments is of some consequence. The point is discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 48 (1971). See also McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 84, n.133 (1974). Further elucidation of the point is found in *Christian v. Howeth*, No. 17595 (Tex. Civ. App.—Fort Worth, Oct. 18, 1974, no writ).

184. DRAFT TEX. CONST. art. X, § 12 (1974); cf. TEX. CONST. art. XVI, § 50.

185. DRAFT TEX. CONST. art. VIII, § 2(b) (1974). Art. VIII, §§ 2(d), (e) also allowed political subdivisions and the legislature, respectively, to give further homestead tax relief to the aged, disabled and poor. The attorney general concluded that the 1971 statute, TEX. REV. CIV. STAT. ANN. art. 7329a (Supp. 1974), providing that delinquent taxes may not be collected or foreclosed on homesteads of those over 65, is constitutional, TEX. ATT'Y GEN. OP. No. H-364 (1974), and that a person over 65 may claim tax exemption even though he has failed to do so during the statutory period. TEX. ATT'Y GEN. OP. No. H-309 (1974).

With respect to taxation of mobile homes and their homestead character, see *Hart v. Northside Ind. School Dist.*, 498 S.W.2d 459 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.); TEX. ATT'Y GEN. OP. No. H-514 (1974).

186. *Purdy v. Grove*, 35 S.W.2d 1078 (Tex. Civ. App.—Eastland 1931, writ ref'd); cf. *Texas Land & Loan Co. v. Blalock*, 76 Tex. 85, 13 S.W. 12 (1890).

187. 511 S.W.2d 430 (Tex. Civ. App.—Austin 1974, no writ).

188. See McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 84 (1974). See also Note, *Effects of Extending the Homestead Exemption to Single Adults*, 26 BAYLOR L. REV. 658 (1974).

189. *First Nat'l Bank v. Boyd*, 378 F. Supp. 961 (D. Ariz. 1974).

190. *Johnson v. Prosper State Bank*, 125 S.W.2d 707 (Tex. Civ. App.—Dallas 1939), *aff'd*, 134 Tex. 677, 138 S.W.2d 1117 (1940).

191. 63 S.W.2d 685 (Tex. Comm'n App. 1933, *judgment of the court of civil appeals rev'd and judgment of the district court aff'd*).

homestead is fenced off and redeveloped as rental property, the segregated portion loses its homestead character and a mortgage on it is valid for any purpose. In *Hollifield v. Hilton*<sup>192</sup> spouses gave a mechanic's lien for improvements on eighteen acres (a part of a sixty-acre rural homestead) developed as a mobile home park. The landowners' home was within the eighteen acres. The homestead claimants asserted that the lien could not attach to the whole eighteen acres since only a part of it was affected and the home itself had not been improved. The court held that the lien was valid for improvements even if the entire property constituted the homestead, and the claimants did not abandon any part of the property as their homestead. The use of part of the property as a mobile home park, it was concluded, was not incompatible with the claimants' assertion that the entire tract was rural homestead. In effect, the court held that the granting of a mechanic's lien for improvement of a part of a rural homestead (though not for the improvement of the dwelling itself) constitutes a valid lien on the whole homestead area, including the dwelling. The analogous urban situation is that of a mechanic's lien for adding a garage apartment to an urban home to be rented to a tenant.

The characterization, management, and liability of exempt realty and personalty were also the subject matter of continuing disputes. Management of the homestead property, whether separate or community, was before the courts in two disputes concerning conveyances. In one<sup>193</sup> a conveyance of homestead property naming the husband and wife as *grantors* was executed and acknowledged by the husband alone. Vendor's lien notes were given by the *grantee* husband and wife who were, respectively, the grantors' son-in-law and daughter. Later, the husband and wife grantors joined in executing and acknowledging a receipt and release, apparently without consideration, for the notes. A dispute arose between the grantees with respect to the validity of the conveyance subsequent to the grantees' divorce in which the property was not divided. The court concluded that the joint execution of the receipt and release ratified the conveyance and made it fully effective. Whether the transaction was for consideration, or not, was immaterial.<sup>194</sup> In the other case<sup>195</sup> the husband, as grantor of a homestead, sought damages but not specific performance under a contract of sale against the purchaser. The grantor's wife did not execute the contract nor did the husband-grantor tender a deed jointly conveying the property, or for that matter any deed

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192. 515 S.W.2d 717 (Tex. Civ. App.—Fort Worth 1974, writ ref'd n.r.e.).

193. *Kunkel v. Kunkel*, 515 S.W.2d 941 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.).

194. Though the parties stipulated that the 258 rural acres involved in the transaction were the community homestead of the grantors, that stipulation could not affect the constitutional limitation on the extent of a rural homestead and, therefore, the husband's conveyance of the acreage exceeding the 200-acre limitation was initially valid as subject to his sole community management without the wife's joinder or acknowledgement. It was essentially the position of the ex-wife grantee that the original grant was void and incapable of ratification. This contention was rejected by the court.

For post mortem situations see Note, *Survivor's Options When Homestead Tract Exceeds Constitutional Limits*, 26 BAYLOR L. REV. 671 (1974).

195. *Dickey v. Johnson*, 513 S.W.2d 876 (Tex. Civ. App.—Eastland 1974, writ ref'd n.r.e.).

at all, but the grantor and his wife merely demonstrated a joint readiness and willingness to execute a deed to the purchaser. The court concluded that the purchaser's default relieved the seller of tendering a deed joined in by his wife, and the seller was therefore entitled to his damages. "If the seller had breached the contract to convey the homestead he would have been liable for damages, even though his wife had not signed the contract."<sup>196</sup>

The United States as a creditor need not be much concerned with exemptions and related doctrines asserted under state law.<sup>197</sup> In *Diehl v. United States*<sup>198</sup> the court concluded that the federal government's tax claim was not void by reason of prior dismissal, on jurisdictional grounds, of the government's claim, and that the allegation of the deceased husband's widow that she was "an innocent spouse" was not enough to ground her claim for an injunction against the United States for collection of back income taxes against him.<sup>199</sup>

With respect to personal property,<sup>200</sup> in 1973 the legislature repealed the landlord's lien statute which had been declared unconstitutional in *Hall v. Garson*<sup>201</sup> and replaced it with provisions giving a landlord's lien for unpaid rent on the non-exempt personalty of the tenant (there defined), but without any right of seizure by the landlord except as pursuant to the terms of the written lease unless the tenant abandons the premises.<sup>202</sup> In response to an inquiry the attorney general clarified existing law by concluding that a levy-

196. *Id.* at 877. The court relied on *Buehring v. Hudson*, 219 S.W.2d 810 (Tex. Civ. App.—Galveston 1949, writ ref'd), and *Allen v. Monk*, 505 S.W.2d 523 (Tex. 1974). In *Williams v. Saxon*, 521 S.W.2d 88 (Tex. Civ. App.—San Antonio 1975, no writ), a vendee succeeded in his suit against the husband alone for specific performance of his contract to convey realty a part of which was an alleged homestead. The court held that the wife's homestead interest in the property, if any, was not affected by the judgment. But if the property was a homestead and the wife refused to join in the conveyance, the court did not explain how the decree of specific performance could be given effect.

197. See, e.g., *Herndon v. United States*, 501 F.2d 1219 (8th Cir. 1974); *United States v. Eaves*, 499 F.2d 869 (10th Cir. 1974), noted in 12 HOUS. L. REV. 281 (1974); cf. *United States v. Hershberger*, 475 F.2d 677 (10th Cir. 1973), aff'g 338 F. Supp. 804 (D. Kan. 1972), discussed in McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 42 n.124 (1973).

With regard to the homestead in bankruptcy, see *Miguel v. Walsh*, 447 F.2d 724 (9th Cir. 1971), discussed in Comment, *Bankruptcy Section 70(c): The Effect of Bankruptcy on a Homestead Which Is Subject to the Claim of a Defrauded Creditor—The Ninth Circuit View*, 45 So. CAL. L. REV. 914 (1972).

198. 373 F. Supp. 1069 (S.D. Tex. 1974).

199. See also *Babb v. Schmidt*, 496 F.2d 957 (9th Cir. 1974).

200. By way of correction of statements made with respect to *Coghlan v. Sullivan*, 480 S.W.2d 229 (Tex. Civ. App.—El Paso 1972, no writ), in McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 27 Sw. L.J. 27, 41-42 (1973), the couple were not divorced in that instance. Thus, the provisions of TEX. REV. CIV. STAT. ANN. art. 3836(a)(3) (Supp. 1974) was applicable to one of the automobiles. The question remains whether TEX. FAM. CODE ANN. § 5.61(b) (1975) would protect the wife in her claim to the automobile, the certificate of title to which was held solely in her name. As §§ 5.22(b), (c) now stand, it may be argued that placing the title in her name (if the property was indeed jointly managed community) is strong evidence that the parties agreed that the wife should have sole management of the car. The question of violation of TEX. BUS. & COMM. CODE ANN. § 24.02 or 24.03 (1968) would still be open, however. For a fuller analysis see McKnight, *Management, Control and Liability of Marital Property* in TEXAS FAMILY LAW & COMMUNITY PROPERTY 159, 175-76 (J. McKnight ed. 1975).

201. 468 F.2d 845 (5th Cir. 1972); see ch. 686, §§ 1-5 [1969] Tex. Laws 2008-09.

202. TEX. REV. CIV. STAT. ANN. art. 5236d (Supp. 1974).

ing officer may not make forcible entry to seize property subject to a writ of attachment or other process, but if entry is refused improperly, the debtor may be cited for contempt.<sup>203</sup>

## II. PARENTS AND CHILDREN

### A. Status

The threshold question with respect to a child's status is that of parentage. In 1777, in *Goodright ex dim. Stevens v. Moss*,<sup>204</sup> Lord Mansfield stated the rule that neither a husband nor a wife might give testimony that would tend to prove that the child was not that of the husband if the child was born during the marriage of the spouses. The rule with its various corollaries<sup>205</sup> has tended to defy the passage of time and changes in attitudes toward marriage. In *Davis v. Davis*<sup>206</sup> the Houston (Fourteenth District) court of civil appeals refused to follow the rule because it could not "subscribe to the position that a rule without any foundation in reason must be blindly applied by the courts out of mere habit . . ." <sup>207</sup> After careful consideration, the Supreme Court of Texas, though reversing the lower court on other grounds, sustained the soundness of this opinion and thus rejected a rule which had been allowed to stand for so long.<sup>208</sup>

The provisions of chapter 13 of the Family Code for voluntary affiliation of illegitimates were designed as part of a comprehensive code covering the status of children born out of wedlock.<sup>209</sup> But the provisions with respect to involuntary affiliation were not enacted in 1973 along with those for volun-

203. TEX. ATT'Y GEN. OP. NO. H-449 (1974). A peripheral point with regard to household furnishings was decided in *Republic Ins. Co. v. Silverton Elevators, Inc.*, 493 S.W.2d 748 (Tex. 1973), concerning a corporate house furnished to its executive as part of his compensation for the protection of which the corporation bought insurance on the house and household goods. The insurance company was adequately apprised of the fact that the household goods belonged to the executive. After the house and its contents were destroyed by fire, the insurer paid for the house but denied liability for its contents. The court held that the insurance company was liable to the executive on the policy. Issuing the policy and collecting premiums with knowledge of the facts constituted a waiver of any requirement that the insured owned a beneficial interest in the contents.

204. 2 Cowp. 591, 98 Eng. Rep. 1257 (K.B. 1777).

205. See McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 87-88 (1974).

206. 507 S.W.2d 841 (Tex. Civ. App.—Houston [14th Dist.] 1974).

207. *Id.* at 846-47.

208. *Davis v. Davis*, 521 S.W.2d 603 (Tex. 1975). The result was that the child of a putative marriage along with other legitimate children of the deceased father shared in his intestate estate whereas a child born *during*, but not *of*, his subsisting marriage did not.

When the Supreme Court of the United States made it clear that an illegitimate child has certain rights from its actual father, Texas was one of the few states that still maintained the contrary rule. Hence, proof of paternity in the case of illegitimates became a potential subject for dispute in Texas, where the subject had rarely arisen before. The imposition of duties upon fathers of illegitimates, therefore, contributed to the reconsideration of rules of evidence that might preclude disproof of paternity in the situation of adulterine bastardy to which Lord Mansfield's rule applied. For an instance involving standing of the biological father to assert paternity of an adulterine bastard (though the fact of paternity was not in dispute) after long lapse of time following the divorce of the husband and wife during whose marriage the child was born, see *L. v. R.*, 518 S.W.2d 113 (Mo. App. 1974).

209. See Smith, *Commentary to the Texas Family Code, Title 2*, 5 TEX. TECH L. REV. 389, 418 (1974).

tary affiliation,<sup>210</sup> which partially duplicate provisions of the Probate Code relating to voluntary affiliation by marriage of the parents of a bastard child.<sup>211</sup> The carefully drawn provisions of section 13.01(a)<sup>212</sup> presupposed the continued effectiveness of Lord Mansfield's rule: "The father of a child not the legitimate child of another man may institute a suit for a decree designating him as the father of the child unless the parent-child relationship has been terminated under Chapter 15 of this Code."<sup>213</sup> A beneficial consequence of Texas's failure to provide duties in fathers of illegitimates is the fact that the question was long left open with regard to the admissibility of blood grouping tests to establish non-paternity.<sup>214</sup> Without earlier contrary precedent, Texas courts should find such evidence easily acceptable.

The consequences to the parent-child relationship arising from tortious conduct by and toward third persons was before the Texas courts. In *Kennedy v. Kennedy*<sup>215</sup> the Austin court of civil appeals concluded that an unemancipated minor cannot recover for hospital and medical expenses incurred during minority or for loss of earnings during minority, but rather that only the parent has that right. The court also concluded that negligence of an adult member of a joint enterprise may not be imputed to a minor engaged in the same enterprise.<sup>216</sup> Since the family purpose, or family car, doctrine is not

210. TEX. FAM. CODE ANN. §§ 13.01-13.06 (1975).

211. TEX. PROB. CODE ANN. § 42 (1956). This provision was originally enacted in 1840. Act of Jan. 28, 1840, § 15, [1840] Tex. Laws 132, 135, 2 H. GAMMEL, LAWS OF TEXAS 306, 309 (1898). The 1840 statute provided that the child became the legitimate child of the father "if recognized by him." The 1955 version of this statute provided that the child born out of wedlock was legitimized merely by the marriage of his parents. The question with respect to whether the child was *actually* the biological offspring of the father is still there nonetheless.

212. TEX. FAM. CODE ANN. § 13.01(a) (1975).

213. *Id.* But the provision is nonetheless still viable in the absence of the rule. Cf. TEX. FAM. CODE ANN. § 12.02(a) (1975). *But see* Smith, *Commentary to the Texas Family Code, Title 2*, 5 TEX. TECH L. REV. 389, 414-15 (1974).

The succeeding language of the section with respect to the required consent of the mother or the managing conservator of the child seems of dubious validity. *But see In re K*, 520 S.W.2d 424 (Tex. Civ. App.—Corpus Christi 1974, no writ); *see* Comment, *The Putative Father's Rights After Roe v. Wade*, 6 ST. MARY'S L.J. 407 (1974). In *Slawek v. Stroh*, 62 Wis. 2d 295, 215 N.W.2d 9 (1974), the Wisconsin Supreme Court held that there is a constitutional right on the part of an alleged father to prove paternity with respect to a child born out of wedlock. *See also* *Miller v. Miller*, 504 F.2d 1067 (9th Cir. 1974), invalidating the Oregon statute which allows adoption of a child born out of wedlock with the consent of the mother without notice to or consent of the father.

214. In *Beck v. Beck*, 304 N.E.2d 541 (Ind. Ct. App. 1974), the court held such tests admissible.

215. 505 S.W.2d 393 (Tex. Civ. App.—Austin 1974, no writ).

216. In *Shockley v. Prier*, 66 Wis. 2d 394, 225 N.W.2d 495 (1975), the Supreme Court of Wisconsin concluded that a parent may maintain an action for the loss of "aid, comfort, society and companionship" of a child. In combining the parent's action with that of the child for the child's personal injuries, the court rejected the long accepted rule for measuring damages recoverable by parents for the injury of a minor child as the difference between the cost of rearing the child and the economic benefits of the child's services. The Supreme Court of Iowa held in *Handeland v. Brown*, 216 N.W.2d 574 (Iowa 1974), that a child's contribution to his own negligent injury is not a defense to a parental claim for loss of services and companionship of the child. In a New York case, *Lastowski v. Norge Coin-O-Matic, Inc.*, 44 App. Div. 2d 127, 355 N.Y.S.2d 432 (Sup. Ct. 1974), the court held that the parent's lack of supervision of an unemancipated child's conduct is not a bar to the parent's recovery for injury to the child. Interference with the parent-child relationship by another, as when a third person in defense of his own child ordered another's offensive child from a playground, may result in the intermeddler's liability if he fails to escort the child home. *Hernandez v. Toney*, 289 So. 2d

applicable in Texas, the relationship of principal and agent must be established by some other means than a declaration of the agent alone in order to establish liability for the child's negligent operation of a family automobile.<sup>217</sup>

Prior to January 1, 1974, since the parent-child relationship was subject to conditional termination, the proceeding was subject to being reopened.<sup>218</sup> Chapter 15 of the Family Code replaces the old dependency proceeding with a modern termination proceeding.<sup>219</sup> Sections 15.02(1)(B) and (E) provide grounds for termination of parental rights when the parent does not attend to the support of a child.<sup>220</sup> The one-year provision of section 15.02(1)(E) replaces article 46(a), section 6(a),<sup>221</sup> which authorized adoption with-

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318 (La. Ct. App. 1973). But in a case of related, but different, emphasis the Supreme Court of Washington in *State v. Koome*, 84 Wash. 2d 901, 530 P.2d 260 (1974), reversed the conviction of a physician for performing an abortion on an unmarried minor without obtaining the consent of her parent. The court held that the requirement of parental consent is unconstitutional as an unwarranted intrusion on the minor's right to privacy.

But the child has no cause of action against a parent for negligent supervision resulting in the child's injury. *Ryan v. Fahey*, 43 App. Div. 2d 429, 352 N.Y.S.2d 283 (Sup. Ct. 1974). A New York court also held that no right of action exists on behalf of children for deprivation of services and society of their parent caused by the tortious conduct of another. *Duhan v. Milanowski*, 75 Misc. 2d 1078, 348 N.Y.S.2d 696 (Sup. Ct. 1973), noted in 20 N.Y.L.F. 406 (1974).

217. *Jones v. Hopper*, 506 S.W.2d 768 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ). See also Note, *Has the Family Code Made Any Changes in the Liability of a Parent for His Child's Conduct?*, 26 BAYLOR L. REV. 687 (1974).

218. See Smith, *Family Law, Annual Survey of Texas Law*, 27 Sw. L.J. 45, 52 (1973).

An unusual succession of facts and legal proceedings gave rise to the dispute in *In re H—D—*, 511 S.W.2d 615 (Tex. Civ. App.—Amarillo 1974, no writ). A child was born to the mother out of wedlock. The alleged father then adopted the child and the father later married the mother informally. In the adoption, however, the mother's parental rights were "terminated." The couple were then divorced and custody of the child was granted to the husband by virtue of the fact that the mother's parental rights had been terminated. The couple later remarried. After suit was again commenced for divorce, the mother brought a bill of review to set aside the adoption, but grounds for relief by bill of review were not shown. Though the mother's petition was dismissed, her proceeding for conservatorship was severed from her divorce proceeding and remanded in spite of the disposition of the other proceeding. *In re Marriage of D—*, 511 S.W.2d 606 (Tex. Civ. App.—Amarillo 1974, no writ).

In *Clark v. Tarrant County Child Welfare Unit*, 509 S.W.2d 378 (Tex. Civ. App.—Fort Worth 1974, no writ), the court held that 1965 legislation giving a domestic relations court concurrent jurisdiction with that of district courts (impliedly repealing a 1943 statute giving district courts original jurisdiction in all dependent and neglected child cases) was not an unconstitutional infringement of the jurisdiction of district courts under TEX. CONST. art. V, § 8.

219. *Ex parte Johnny G—*, 512 S.W.2d 821 (Tex. Civ. App.—San Antonio 1974, no writ), was a dependency proceeding initiated before 1974 but tried after chapter 15 became effective. Relying on the transition provisions of title 2, ch. 543, § 4(a), [1973] Tex. Laws 1459, the court held that the law in effect prior to January 1, 1974, was properly applied. In another case arising under the old law, *Gray v. Texas*, 508 S.W.2d 454 (Tex. Civ. App.—Texarkana 1974, writ ref'd n.r.e.), the court held that failure of the trial judge to appoint a guardian ad litem for a minor in a dependency proceeding would not invalidate the proceeding when the parents of the child participated in the proceeding. Cf. *Cleaver v. Wilcox*, 499 F.2d 940 (9th Cir. 1974), with respect to appointment of counsel for indigent parents.

220. These provisions make it possible to terminate the parent-child relation when that result could not have been achieved under the old dependent and neglected child act. TEX. REV. CIV. STAT. ANN. arts. 2330-37 (1974). As to problems under the old law of the non-dependent child, see Smith, *Commentary on the Texas Family Code, Title 2*, 5 TEX. TECH L. REV. 389, 448-49 (1974), and authorities there cited. See also *Hogan v. Roop*, 500 S.W.2d 936 (Tex. Civ. App.—Waco 1973, no writ).

221. Act of June 17, 1969, ch. 700, § 3, [1969] Tex. Laws 1819 (repealed 1973).

out parental consent after failure of parental support for two years.<sup>222</sup>

Though for purposes of federal social security benefits a situation supporting equitable adoption has been found under circumstances that might not satisfy Texas law,<sup>223</sup> a relaxation in grounds for equitable adoption under state law seems to be in process. In *Deveroex v. Nelson*<sup>224</sup> the court held that a foreign contract to adopt, unenforceable at the place of contracting, will nevertheless give standing to a person claiming adoption by estoppel as "nearest relative" under section 21.23 of the Texas Insurance Code.<sup>225</sup> In *Ramsay v. Lane*<sup>226</sup> equitable adoption for purposes of inheritance was established by showing that the father, though not the mother, agreed that third persons might adopt the child and the child lived with them as their child. On that basis the court found a contract on the part of the foster parents to adopt the child and performance by the child in reliance on the agreement.

### B. Conservatorship

The act of 1973,<sup>227</sup> effective January 1, 1974, provides that when a court acquires jurisdiction of a suit affecting the parent-child relationship, that court retains continuing, exclusive jurisdiction for the adjudication of the conservatorship of children, but it may transfer the proceeding to another county where venue is proper as an accommodation to changed residence of the parties. A central record file of decrees entered in suits affecting the parent-child relationship is required to be kept by the Department of Public Welfare.<sup>228</sup> With respect to judgments entered prior to January 1, 1974, special transition provisions<sup>229</sup> prescribe in effect that proceedings for readjustment

222. For application of tests prescribed in the old statute, see *Cawley v. Allums*, 518 S.W.2d 790 (Tex. 1975); *Smallwood v. Swarner*, 510 S.W.2d 156 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.). In *Floyd v. Seward*, 520 S.W.2d 873 (Tex. Civ. App.—El Paso 1975, no writ), the court remanded the case for determination whether applying the shorter period of non-support under § 15.02(1)(E) rather than the longer period under the old law would be feasible and would not work an injustice under the transition provision of the act. The terms of this subsection also dispose of problems involved in the meaning of "abandonment" under the old statute. For the question whether imprisonment could constitute or contribute to abandonment, see *Elliott v. Maddox*, 510 S.W.2d 105 (Tex. Civ. App.—Fort Worth, no writ); *Jordan v. Hancock*, 508 S.W.2d 878 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ).

The attorney general has provided guidance with respect to several points of the adoption process. In TEX. ATT'Y GEN. OP. No. H-362 (1974) the attorney general concluded that the trial judge can include the costs of the background study on prospective parents as court costs to an adoption. In TEX. ATT'Y GEN. OP. No. H-466 (1974) the view was expressed that the district clerk is required to furnish the file of an adoption case to the department of public welfare within a reasonable time after the entry of a decree. See also TEX. ATT'Y GEN. OP. Nos. H-353, H-431 (1974) with respect to the general record keeping responsibility of the department of public welfare under TEX. FAM. CODE ANN. tit. 2 (1975). Though no Texas cases gave rise to the question of the rights of adoptive parents when a licensed agent abrogates placement, a California case defined the rights of procedural due process for the prospective adoptive parents. See *C. v. Superior Court*, 29 Cal. App. 3d 909, 106 Cal. Rptr. 123 (1973).

223. See, e.g., *Broussard v. Weinberger*, 499 F.2d 969 (5th Cir. 1974).

224. 517 S.W.2d 658 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ granted).

225. TEX. INS. CODE ANN. § 21.23 (1963). With respect to children brought into the state for the purpose of adoption, see TEX. ATT'Y GEN. OP. No. H-582 (1975).

226. 507 S.W.2d 905 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).

227. Ch. 543, § 1, [1973] Tex. Laws 1411.

228. TEX. FAM. CODE ANN. §§ 11.05, 11.17 (1975). See also TEX. ATT'Y GEN. OP. Nos. H-353, H-431 (1974).

229. Ch. 543, § 4, [1973] Tex. Laws 1459.

of conservatorship are treated as new suits for which no court has continuing, exclusive jurisdiction.<sup>230</sup> The court in which such a suit to modify conservatorship is first filed has "dominant jurisdiction to the exclusion of other courts."<sup>231</sup> The controlling venue provisions are those found in section 11.04, which places the venue at the place of residence of the child as there defined. The court of dominant jurisdiction has exclusive power to determine the venue question.<sup>232</sup> Under pre-January 1, 1974, law the court first ordering a support obligation had continuing exclusive jurisdiction to modify support obligations, but this is no longer the case in a strict sense.<sup>233</sup> "Although not required by the Code, orderly administration of the law is more likely if post-January 1 suits involving support are filed in the court that decreed the obligation [as previously required] with transfer if the forum is an improper venue."<sup>234</sup> With respect to proceedings brought prior to January 1, 1974, and still *sub judice* after January 1, 1974, the provisions of the 1973 act apply unless their application "would not be feasible or would work injustice."<sup>235</sup>

In proceedings involving the parent-child relationship, the court may make minor children, whose rights are involved in the proceedings, parties to the proceedings and appoint a guardian ad litem for them as under earlier law.<sup>236</sup> But the court's failure to make a record of the interview in chambers with the child as provided in section 14.07 is not fundamental error and the failure to object waives the error.<sup>237</sup> If it can be said with assurance that parties had a right to jury trial with respect to matters of custody and that the jury verdict was binding in those matters under former law,<sup>238</sup> that law is unchanged.<sup>239</sup> But with respect to what was denominated a right of visitation,

230. See Smith, *Procedural Aspects of Child Conservatorship* in TEXAS FAMILY LAW & COMMUNITY PROPERTY 27, 29-30 (J. McKnight ed. 1975).

231. Curtis v. Gibbs, 511 S.W.2d 263, 265 (Tex. 1974).

232. *Id.* at 268.

233. See, e.g., Casey v. Jones, 509 S.W.2d 396 (Tex. Civ. App.—Beaumont 1974, no writ). The court may now transfer venue, and the court to which venue is transferred thereafter has continuing jurisdiction. See TEX. FAM. CODE ANN. § 11.06(h) (1975).

234. Smith, *supra* note 230, at 29-30. See also Smith, *supra* note 220, at 398-99.

235. Ch. 543, § 4, [1973] Tex. Laws 1459. See Howard v. Pullicino, 519 S.W.2d 254 (Tex. Civ. App.—Austin 1975, no writ); Seaberg v. Brogunier, 515 S.W.2d 398 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.).

236. TEX. FAM. CODE ANN. § 11.10 (1975). See Peterson v. Peterson, 502 S.W.2d 178 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ).

237. Wilkinson v. Evans, 515 S.W.2d 734 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).

238. Ch. 305, § 1, [1961] Tex. Laws 663 (repealed 1973); Brunson v. Brunson, 502 S.W.2d 578 (Tex. Civ. App.—Fort Worth 1973, no writ), discussed in McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 92 (1974); Davis v. Davis, 499 S.W.2d 922 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ). With respect to unanimity of the jury verdict, see Van Wart v. Van Wart, 501 S.W.2d 359 (Tex. Civ. App.—Austin 1973, no writ). Interlocutory orders with respect to the care of children are not appealable. Gray v. State, 508 S.W.2d 454 (Tex. Civ. App.—Texarkana 1974, writ ref'd n.r.e.). With respect to temporary orders under prior law and TEX. FAM. CODE ANN. § 11.11 (1974) which carries prior law forward without substantive change, see Smith, *Commentary to the Texas Family Code, Title 2*, 5 TEX. TECH L. REV. 389, 407-08 (1974). An order transferring a suit to modify a pre-1974 order for support having venue with respect to the residence of the child is also not appealable. TEX. FAM. CODE ANN. § 11.06(f) (1974); Benckenstein v. Benckenstein, 515 S.W.2d 336 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ dism'd).

239. *In re Y*, 516 S.W.2d 199 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.).

a jury trial is not a matter of right nor is a jury verdict binding.<sup>240</sup>

Under the old law,<sup>241</sup> as under the new,<sup>242</sup> the principal factor for consideration in first fixing child conservatorship was "the best interest of the child."<sup>243</sup> As provided in section 14.01, "the court shall consider the qualifications of the respective parents without regard to sex of the parent."<sup>244</sup> Under section 14.02 a parent as managing conservator has all the powers of a parent, as enumerated in section 12.04, to the exclusion of the other parent.<sup>245</sup> If the other parent's right to inherit from the child is sought to be preserved, the right must be reserved in the decree. Grandparents and other third persons may also be appointed managing conservators if their appointment is in the best interest of the child.<sup>246</sup> An award of conservatorship to grandparents may be appropriate, even though neither of the parents are found to be "unfit persons" to care for the child.<sup>247</sup> Intervening grandparents may, however, have interests so closely aligned with those of one of the parents that it is materially unfair to allow them as well as the parent with whose interest theirs are aligned to have more than one set of peremptory challenges between them in a jury trial involving conservatorship.<sup>248</sup>

240. *Henderson v. Youngblood*, 512 S.W.2d 35 (Tex. Civ. App.—El Paso 1974, no writ); *Walker v. Showalter*, 503 S.W.2d 624 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ).

TEX. FAM. CODE ANN. § 14.08(a) (1975) makes a substantive change in the law with respect to "the terms . . . of access to the child" ("visitation" under the old law) which can be altered only on a showing that "the circumstances of the child have materially and substantially changed." See *Howard v. Pullicino*, 519 S.W.2d 254 (Tex. Civ. App.—Austin 1975, no writ).

241. Ch. 305, § 1, [1961] Tex. Laws 663.

242. TEX. FAM. CODE ANN. § 14.07 (1975).

243. *Lundstrom v. Lundstrom*, 516 S.W.2d 705 (Tex. Civ. App.—Corpus Christi 1974, no writ). With respect to the function of the jury in determining custodianship, as well as visitation rights, see notes 238-39 *supra* and accompanying text.

244. TEX. FAM. CODE ANN. § 14.01 (1975); *Adams v. Adams*, 519 S.W.2d 502 (Tex. Civ. App.—El Paso 1975, no writ); *Erwin v. Erwin*, 505 S.W.2d 370 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ), even with regard to children of tender years with respect to whom preference toward the mother was hitherto entertained. As is evident from the court's discussion in *Erwin*, the court's conclusions with regard to the child's best interest are controlling in spite of evidence of bad habits or non-conformist social practices of the favored parent. 505 S.W.2d at 372. See also *Feldman v. Feldman*, 45 App. Div. 2d 320, 358 N.Y.S.2d 507 (Sup. Ct. 1974). In *State ex rel. Watts v. Watts*, 350 N.Y.S.2d 285 (Fam. Ct. N.Y. Co. 1973), the court held that the presumption in favor of the mother's custody was in violation of federal constitutional standards of equal protection.

245. The attorney general concluded that as a mere consequence of the parent-child relationship, either parent has the right to see his child's school record regardless of custodianship. TEX. ATTY GEN. OP. No. H-ORD42 (1974). See also TEX. ATTY GEN. OP. No. H-447 (1974), on the availability of school records to a student's spouse.

With respect to schooling, see also Note, *In Loco Parentis and Due Process: Should These Doctrines Apply to Corporal Punishment?*, 26 BAYLOR L. REV. 678 (1974).

246. See, e.g., *Smitheal v. Smitheal*, 518 S.W.2d 842 (Tex. Civ. App.—Fort Worth 1975, writ dismissed); *De La Hoya v. Saldivar*, 513 S.W.2d 259 (Tex. Civ. App.—El Paso 1974, no writ); *Gibson v. Hines*, 511 S.W.2d 546 (Tex. Civ. App.—Waco 1974, no writ).

247. *Smitheal v. Smitheal*, 518 S.W.2d 842 (Tex. Civ. App.—Fort Worth 1975, writ dismissed); *Gibson v. Hines*, 511 S.W.2d 546 (Tex. Civ. App.—Waco 1974, no writ). *De La Hoya v. Saldivar*, 513 S.W.2d 259 (Tex. Civ. App.—El Paso 1974, no writ), pointed out that this result would be appropriate when the parent seeking custodianship had permitted the other person to rear the child from infancy. *In re Marriage of D—*, 511 S.W.2d 606 (Tex. Civ. App.—Amarillo 1974, no writ), is also such a case because of its peculiar facts.

248. *Perkins v. Freeman*, 518 S.W.2d 532 (Tex. 1974).

The type of change of circumstances that may justify a change of conservatorship is the same under the new law as the old, though the filing of the writ of habeas corpus to rectify the breach of a foreign state decree no longer invites an immediate contest for change of conservatorship.<sup>249</sup> There is an extraordinary comment in *Wood v. Wood*:<sup>250</sup> "There is an ever increasing inclination by domestic relations courts to consider that unreasonable and arbitrary action of one parent in refusing or hampering the right of reasonable visitation of the parent out-of-custody constitutes justification for changing the custody of the child." It is hoped that this statement cannot be demonstrated as factually accurate.

The mere filing of a supersedeas bond will not suspend a judgment involving the care and custody of the child unless the trial court or the appellate court orders the judgment superseded.<sup>251</sup> Hence, in the absence of such an order, if any act in defiance of the judgment is committed, the offending party may be held in contempt. A person may not, however, be imprisoned for contempt for an act committed outside the presence of the court without a written order.<sup>252</sup> In *Credit Bureau of Laredo, Inc. v. State*<sup>253</sup> the court concluded that if the permissible penalty for contempt is in excess of that permitted for punishment of a petty offence, there is a constitutional right to a jury trial.

The interrelationship of the Probate Code provisions dealing with the guardianship of the estate of a minor and those of the Family Code with respect to the powers of a parental managing conservator are not yet resolved. Family Code section 14.02(a) provides that a parental managing conservator has all the rights, privileges, duties, and powers of a parent "to the exclusion of the other parent," subject only to the powers of a possessory conservator in any limitation imposed by judicial order in allowing access to the child. Section 12.04(4) gives the parent "the duty to manage the estate of the child"; section 12.04(7), "the power to represent the child in legal action and to make other decisions of substantial legal significance concerning the child"; and section 12.04(8), "the power . . . to disburse any funds for the benefit of the child." On its face the provision of section 14.02(a) when read in conjunction with sections 12.04(4), (7) and (8) gives powers concurrent with those exercisable by the guardian of the estate of the child. Without

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249. Unless the child has been within the state for one year. TEX. FAM. CODE ANN. § 14.10 (1975); *Seaberg v. Brogunier*, 515 S.W.2d 398 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.). See *Brown v. Brown*, 500 S.W.2d 210 (Tex. Civ. App.—Texarkana 1973, no writ), an example of the old law under which the lines dividing habeas corpus and change of conservatorship were seriously blurred. See also *O'Dell v. Brame*, 517 S.W.2d 920 (Tex. Civ. App.—Eastland 1974, no writ).

250. 510 S.W.2d 399, 400 (Tex. Civ. App.—Fort Worth 1974, no writ).

251. *Ex parte Henderson*, 512 S.W.2d 37 (Tex. Civ. App.—El Paso 1974, no writ); TEX. R. CIV. P. 364(f).

252. *Ex parte Spencer*, 508 S.W.2d 698 (Tex. Civ. App.—Texarkana 1974, no writ).

253. 515 S.W.2d 706 (Tex. Civ. App.—San Antonio 1974, writ granted). In *Duval v. Duval*, 322 A.2d 1 (N.H. 1974), the court held that a person facing civil contempt charges was not necessarily entitled to representation by counsel, whether or not the conviction might lead to imprisonment. The court remanded the case of the contemnor, held for non-payment of child support, for the trial court's determination of whether the issues were so complex that assistance of counsel would be required in order to prevent unfairness. See also *Schutz v. Helm*, 368 F. Supp. 423 (N.D. Wis. 1973).

any reference to the Family Code, two recent cases suggest that there are circumstances when a conflict of interest between parent and child exists, so that a third person should be appointed guardian of the estate of the child,<sup>254</sup> or if the parent has been appointed guardian of the estate of the child, a guardian *ad litem* should be appointed to represent the child's interest.<sup>255</sup> A non-parental managing conservator is not, however, vested under provisions of section 14.02(b) with powers correlative to those of section 12.04(4) with respect to the management of the estate of the child, but *is* vested with those in sections 12.04(7) and (8),<sup>256</sup> unless the parent-child relationship has been terminated or the child is an orphan.<sup>257</sup> Probate Code section 118 allows a child who has attained the age of fourteen to choose a successor guardian if his nominee is suitable and competent in the judgment of the court.<sup>258</sup> The similar provision in section 14.07 of the Family Code with respect to the child's choice of his managing conservator was based on the provision of the Probate Code.<sup>259</sup>

### C. Support

In *Mitchim v. Mitchim*<sup>260</sup> the Supreme Court of Texas held that the Arizona law enables an Arizona court to render an in personam support judgment against a Texas resident not served personally with process in Arizona, in the sense of his being physically present to receive it, but rather by constructive service of process under the Arizona long-arm statute.<sup>261</sup> Texas residents are therefore vulnerable to the effects of similar statutes in other jurisdictions. If Texas should enact such a statute,<sup>262</sup> Texas courts would be empowered to make similar decrees,<sup>263</sup> as well as to render money judgments under Family Code section 14.09(c)<sup>264</sup> for arrears in child support which would be enforceable in a sister state jurisdiction. (With respect to that section in another context, it may be questioned whether an arrearage arising

254. *Phillips v. Phillips*, 511 S.W.2d 748 (Tex. Civ. App.—San Antonio 1974, no writ).

255. *Hamill v. Brashear*, 513 S.W.2d 602 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.). Under the circumstances of that case, however, the court held that the appointment of a guardian *ad litem* was inappropriate and indeed not authorized by the Probate Code.

256. TEX. FAM. CODE ANN. § 14.02(b)(6), (7) (1975).

257. *Id.* § 14.02(8).

258. *In re Estates of Carrigan*, 517 S.W.2d 817 (Tex. Civ. App.—Tyler 1974, no writ).

259. See Smith, *Commentary to the Texas Family Code, Title 2*, 5 TEX. TECH L. REV. 389, 431-32 (1974).

260. 518 S.W.2d 362 (Tex. 1975).

261. *Id.* at 364. ARIZ. R. CIV. P. 4(e)(2) provides in part: "When the defendant is a . . . person . . . [who] has caused an event to occur in this state out of which the claim which is the subject of the complaint arose, service may be made as herein provided, and when so made shall be of the same effect as personal service within the state."

262. An amendment to the Family Code would be appropriate. If a statute of broader application is wanted, TEX. REV. CIV. STAT. ANN. art. 2031b (1964) may be amended to achieve that result.

263. See *Davi v. Davi*, 456 S.W.2d 238 (Tex. Civ. App.—Texarkana 1970, writ dismissed), discussed in Smith, *Family Law, Annual Survey of Texas Law*, 26 Sw. L.J. 51, 53 n.18 (1972). See also McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 59 n.179 (1971).

264. TEX. FAM. CODE ANN. § 14.09(c) (1975).

under a court order handed down prior to January 1, 1974, could be the subject of a money decree, since the original order was made in contemplation of enforcement only by contempt.<sup>265</sup> Such a means of enforcement will, however, obviate recourse to the dull, and often rusty, blade of the Uniform Reciprocal Enforcement of Support Act,<sup>266</sup> especially if the Uniform Enforcement of Foreign Judgments Act would expedite enforcement of the Texas judgment without suit in the sister state where the spouse in arrears for child support resides.<sup>267</sup> If under the old or the present law a non-resident voluntarily enters the state to invoke the jurisdiction of the courts to enforce rights of custodianship, other than for returning a child by a writ of habeas corpus, he invokes the general jurisdiction of the court for enforcement or alteration of support payments.<sup>268</sup>

Under section 14.07<sup>269</sup> the best interest of the child is the primary concern for determination of support of the child, just as it is with respect to the appointment of a proper managing conservator. But the phrase may have somewhat different emphasis with respect to fixing support from that which it has in relation to fixing conservatorship; presumably it may be argued that it is in the best interest of the child to have the largest possible support a judge could order paid by both parents. Section 14.07(b) provides also that "the courts shall consider the circumstances of the parent." But consideration of a parent's "earning potential" in fixing support payment can present some difficulty.<sup>270</sup> Not only must a parent's financial ability to pay for the support of the child be considered but also his ability to support himself along with the ability of the parent-conservator to support the child.<sup>271</sup> But Texas law does not demand that the financial contribution of both parents be equal.<sup>272</sup>

With respect to a court order to pay child support pendente lite, once a judgment of divorce is granted, the pre-judgment order does not continue, nor will granting a new trial revive it unless the court so provides pending appeal or during other post-judgment proceedings.<sup>273</sup>

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265. *Cf. id.* § 14.05(c).

266. *Id.* ch. 21 (URESAs).

267. For an example of some of the difficulties encountered under URESAs, see *Strader v. Strader*, 517 S.W.2d 905 (Tex. Civ. App.—Waco 1974, no writ). But if any rule of law is enunciated there, it escapes me. For clarification of the rules with respect to availability of jury trial under URESAs, see *TEX. ATT'Y GEN. OP. NOS. H-218, H-270* (1974).

268. *Hollis v. Hollis*, 508 S.W.2d 179 (Tex. Civ. App.—Amarillo 1974, no writ). But under *TEX. FAM. CODE ANN.* § 14.10(d) (1975), if in the state for the sole purpose of compelling the return of the child through a habeas corpus proceeding, a foreign relator is not amenable to civil process and is subject only to the jurisdiction of that civil court in which the writ is pending and only for purposes of the writ.

269. *TEX. FAM. CODE ANN.* § 14.07 (1975).

270. See *Wetzel v. Wetzel*, 514 S.W.2d 283 (Tex. Civ. App.—San Antonio 1974, no writ).

271. *Anderson v. Anderson*, 503 S.W.2d 124 (Tex. Civ. App.—Corpus Christi 1973, no writ).

272. *Cooper v. Cooper*, 513 S.W.2d 229 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ). See also *Conway v. Dana*, 456 Pa. 536, 318 A.2d 324 (1974).

273. *Ex parte Thompson*, 510 S.W.2d 165 (Tex. Civ. App.—Dallas 1974, no writ). For a contempt decree that is both criminal and civil in nature with respect to non-payment of alimony and child support pendente lite, see *Ex parte Dean*, 517 S.W.2d 365

In *Gonzalez v. Texas Employers Insurance Ass'n*<sup>274</sup> the court held that since the Texas Workmen's Compensation Act<sup>275</sup> makes death benefits payable to children "without regard to the question of dependency," an illegitimate child has the same standing as the legitimate child to claim death benefits under the act without any showing of actual dependency. The court relied on *Weber v. Aetna Casualty & Surety Co.*<sup>276</sup> rather than put it aside on the basis of "finely carved distinctions"<sup>277</sup> which had been advanced unsuccessfully in *Weber* itself in order to bring the Texas case within the ambit of *Labine v. Vincent*.<sup>278</sup>

Just as it must weigh all factors in the ability of parents to provide for their children when making an initial order for child support payments, a court called upon to reduce or increase child support payments must review those same factors. But to say, as the court does, in *Dennis v. Dennis*<sup>279</sup> that "any economic changes brought about by [a parent's] remarriage must not militate against his dependent children" is too broad as a statement of a general proposition for the guidance of a court in considering a petition for reduction in child support payments. In another context<sup>280</sup> it was asserted that an increase in child support payments could not be ordered because the custodial parent had not filed a sworn itemized report of the manner in which prior child support payments had been expended, as required by old article 4639(a).<sup>281</sup> The court rejected this contention as not having any bearing on the exercise of judicial power with respect to ordering a parent to support a child.<sup>282</sup> Under the old law the parent seeking reduction of child support payments, as well as a change in rights of conservatorship, would proceed in the court granting the original decree for child support payments; but if the opposing parent invoked the ordinary rules of venue as to rights of conservatorship, the petitioner would have to proceed by way of the separate

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(Tex. Civ. App.—Houston [1st Dist.] 1974, no writ). For a post-divorce contempt decree of the same nature see *In re McLemore*, 515 S.W.2d 356 (Tex. Civ. App.—Dallas 1974, no writ).

274. 509 S.W.2d 423 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.). Related problems with respect to the rights of illegitimates are dealt with in White, *The Wrongful Death Statutes—A Constitutional Problem*, 12 HOUS. L. REV. 35, 54 (1975). See TEX. ATTY GEN. OP. NO. H-565 (1975), with respect to the rights of illegitimates to be covered by the state's infant immunization program.

275. TEX. REV. CIV. STAT. ANN. art. 8306, § 8a (Supp. 1974).

276. 406 U.S. 164 (1972).

277. 509 S.W.2d at 426.

278. 401 U.S. 532 (1971). TEX. REV. CIV. STAT. ANN. art. 8306, § 8a (Supp. 1974), provides that death benefits "shall be distributed among the beneficiaries as may be entitled . . . according to the laws of descent and distribution." Although the Texas statute does not require dependency, the problem of applicability of the statute in this case was "lessened . . . by undisputed proof that the minor claimant . . . lived with the deceased employee and was recognized by him as his child." 509 S.W.2d at 427.

279. 512 S.W.2d 699 (Tex. Civ. App.—Tyler 1974, no writ). On the discoverability of the assets of a subsequent spouse of a parent liable for support, see *Condon v. Condon*, 295 So. 2d 681 (Fla. App. 1974).

280. *White v. White*, 503 S.W.2d 401 (Tex. Civ. App.—Amarillo 1973, no writ).

281. Ch. 402, § 1, [1941] Tex. Laws 660.

282. As of Jan. 1, 1974, the provision was repealed and replaced with the much attenuated requirement that a *non-parental* managing conservator file an annual "report of facts concerning the child's welfare, including his whereabouts and physical condition." TEX. FAM. CODE ANN. § 14.01(d) (1975). The provision is derived from TEX. PROB. CODE ANN. § 399(a) (1956). See Smith, *Commentary to the Texas Family Code, Title 2*, 5 TEX. TECH L. REV. 389, 425 (1974).

suit in the court of the custodial parent's residence to seek a change in those rights.<sup>283</sup> Under the new law the court of original jurisdiction maintains continuing jurisdiction for all purposes of conservatorship and support under section 11.05 with power of the court to transfer the proceedings under section 11.06 to the court of appropriate venue where the child resides as defined in section 11.04(c).<sup>284</sup> The new law provides in section 14.08(d) that a motion to modify the decree of conservatorship may not be made earlier than one year after the date of the initial decree "unless the court decides on the basis of affidavit that there is reason to believe that the child's present environment may endanger his physical health or significantly impair his emotional development."<sup>285</sup> In its present form this provision may bar reconsideration of an award for child support because of the inability of the parent to comply with the award.<sup>286</sup>

In other jurisdictions the courts have concluded that reduction of the age of majority to eighteen terminates the duty of support at that age, whereas prior court orders had required support up to the former age of majority at twenty-one.<sup>287</sup> Texas courts are not, however, affected by our change of the age of majority since prior law did not authorize a judicial order for child support beyond the age of eighteen in ordinary circumstances.<sup>288</sup> In *Davidson v. Davidson*<sup>289</sup> the divorce court had ordered the father to make monthly support payments of a specified amount for each of his four children until they attained the age of eighteen. After two of the children had attained that age and a large arrearage for support had built up, the mother brought proceedings for enforcement of the decree. The trial court ordered him to pay a specified amount each week until he liquidated the arrearage. In response to the father's argument that the court lacked jurisdiction to make the order, the appellate court held that the relief was in the nature of an enforcement provision in lieu of punishment for contempt and not an order to pay child support for the support of children who had already reached the age of eighteen.<sup>290</sup>

283. Enunciation of the old law and its development is found in Smith, *Family Law, Annual Survey of Texas Law*, 22 Sw. L.J. 115, 118-21 (1968); McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 58 (1971); Smith, *Family Law, Annual Survey of Texas Law*, 26 Sw. L.J. 31, 54 (1972), in which some of the draftsmen of present legislation indicate the course of thought that generated current reform. See also Smith, *Commentary on the Texas Family Code, Title 2*, 5 TEX. TECH L. REV. 389, 396-99 (1974); Smith, *Procedural Aspects of Child Conservatorship* in TEXAS FAMILY LAW & COMMUNITY PROPERTY 27 (J. McKnight ed. 1975).

284. TEX. FAM. CODE ANN. §§ 11.04-.06 (1975). See Smith, *supra* note 282, at 395-96. For an example of the cumbersome situation under the old law, see *Shoemate v. Winkley*, 505 S.W.2d 357 (Tex. Civ. App.—El Paso 1974, no writ).

285. TEX. FAM. CODE ANN. § 14.08(d) (1975).

286. The provision should, therefore, be amended to allow that sort of modification at least.

287. See, e.g., *Rusham v. Rusham*, 21 Ariz. App. 101, 515 P.2d 1199 (1973); *Waldron v. Waldron*, 13 Ill. App. 3d 964, 301 N.E.2d 167 (1974); *Price v. Price*, 51 Mich. App. 656, 215 N.W.2d 756 (1974).

288. Ch. 305, § 1, [1961] Tex. Laws 663, carried forward in TEX. FAM. CODE ANN. § 14.05(a) (1975). But federal assistance payments for children between the ages of 18 and 21 are not affected by the change in the Texas age of majority. TEX. ATTY GEN. OP. No. H-585 (1975).

289. 501 S.W.2d 758 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ).

290. See *Ex parte Hooks*, 415 S.W.2d 166 (Tex. 1967), discussed in *Rasor, Family Law, Annual Survey of Texas Law*, 23 Sw. L.J. 60, 71 (1969).

With respect to contractual obligations to pay child support for children beyond the age of eighteen, these contracts should not be affected by the change of age of majority, unless some implied term in the contract might be deduced from the circumstances surrounding its making.<sup>291</sup> Nor does the reduction of child support payments for purposes of judicial enforcement affect the contractual rights of a promisee-spouse under a settlement agreement.<sup>292</sup> In *Lee v. Lee*<sup>293</sup> the parents had entered into a contract whereby the father would pay the mother an agreed amount monthly for the support of two minor children. The divorce court awarded custody of the two children to the mother and apparently ordered the father to pay child support in the amount agreed. After one of the children went to live with the father, he successfully sought a reduction in child support payments. The mother thereupon brought suit for enforcement of the agreement. The father defended on the ground that the parties in their contract had intended that its terms should apply only so long as the children were in the actual custody of the mother. The appellate court concluded that the parties had not reached such an understanding and the mother might enforce the terms of the contract. In another case, *In re McLemore*,<sup>294</sup> the father was also ordered to pay a certain monthly sum as provided in a property settlement agreement entered into by the husband and wife prior to their divorce. For a time, the father made the payments as ordered and also made some additional payments to cover the expenses of the children. After the father's child support payments had fallen into substantial arrears, the mother moved to have the father cited for contempt, and he was imprisoned for his failure to obey the prior order of the court. In his petition for a writ of habeas corpus the father asserted an agreement on the part of the mother to accept the additional payment in lieu of future obligations for monthly payment of child support, as well as an agreed reduction in amount. In rejecting the father's contention, the court to which the writ was addressed appears to have treated the alleged agreement between the former spouses as irrelevant.<sup>295</sup> The court said that "the extra payments made by . . . [the father] on behalf of his children were made under his common law duty to support his children. . . . The child support ordered under . . . [the old law], or its successor . . . may be viewed as a court-enforced fulfillment of this common law obligation; but voluntary payments made in fulfillment, or partial fulfillment, of the common law obligation are not necessarily to be offset against the statutory obligation enforced by a court order."<sup>296</sup> In *Lee*, in contrast to *McLemore*, the court relies wholly on contractual obligations as apart from judicial orders, whereas in *McLemore* the sanctity of the judicial order serves as the

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291. See *Ovatt v. Ovatt*, 43 Mich. App. 628, 204 N.W.2d 753 (1972); cf. *Whitt v. Whitt*, 490 S.W.2d 159 (Tenn. 1974).

292. See McKnight, *Family Law, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 94 (1974), and authorities there cited.

293. 509 S.W.2d 922 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.).

294. 515 S.W.2d 356 (Tex. Civ. App.—Dallas 1974, no writ).

295. The court also regarded the father's argument that his duty to pay was rooted in his contractual obligation as beside the point.

296. 515 S.W.2d at 358.

court's touchstone because the husband sought relief through a writ of habeas corpus. In *Lee* section 14.09(c), which after January 1, 1974, allows the enforcement of arrears in child support as a debt, was held inapplicable. In *Forney v. Jorrie*,<sup>297</sup> also initially litigated prior to January 1, 1974, the mother sought to enforce arrears of child support based wholly on non-compliance with the divorce court's decree. The old law afforded relief only by way of contempt since the mother's claim was "based upon the judgment and not [on] any purported contractual agreement for child support." The ex-husband was also in arrears in periodic payments ordered by the divorce court in lieu of a division of community property. The appellate court held that a judgment for anticipatory breach was foreclosed by the absence of pleading to support it.<sup>298</sup> In *Lee* the mother also sought recovery for unmatured payments under the doctrine of anticipatory breach. With respect to the latter, the appellate court held that she might recover the *present value* of the unmatured future support payments with interest at six percent to be used in discounting that amount.

The federal Social Service Amendments of 1974<sup>299</sup> provide for the establishment in the Department of Health, Education and Welfare of means to assist the states in locating absent parties, establishing paternity, and obtaining child support orders and enforcing them.<sup>300</sup> The Parent Locator Service established by the act should be of considerable assistance for finding missing parents through the records of federal departments and agencies. The act also allows garnishment of wages due from the federal government to any individual, as though the United States were a private employer, for the purposes of meeting obligations of child support and alimony. Since a private employer would not be subject to garnishment in this circumstance in Texas, it does not appear that the federal government offices in Texas would be either.<sup>301</sup> The act also provides for the opening of federal courts to assist the states to enforce court orders for support against absent parents under certain circumstances. The very considerable ramifications of this federal legislation must await implementation of the act.

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297. 511 S.W.2d 379 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

298. The ex-husband also argued that the court order with respect to periodic payments had not provided for acceleration on failure to comply with the order.

299. P.L. No. 93-647 (Jan. 4, 1975).

300. *Id.* pt. D, §§ 451-60.

301. *Sed quaere* with respect to federal government offices located in other jurisdictions where wages are garnishable for arrears in child support payments.