CHARACTERIZATION:
20 RULES - 20 EXAMPLES
AND MORE

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II. SCOPE OF ARTICLE. This article covers the rules of characterization of marital property as separate or community property under Texas marital property law. The article also poses certain "examples" showing difficulties which can arise in applying these seemingly straightforward rules.

IV. 20 RULES FOR CHARACTERIZING MARITAL PROPERTY. The following 20 rules can be used to determine the character of marital property as either separate or community property, under Texas law.

B. RULE 1 Marital Property

Property owned by a spouse is marital property. Marital property is either separate property or community property, or a mixture of the two.[1] Property not owned by a spouse is not marital property, and is neither separate nor community property.[2]

D. RULE 2 Inception of Title

The character of marital property as separate[3] or community[4] or mixed[5] is determined at the time of "inception of title." Inception of title occurs when a party first has a right of claim to the property by virtue of which title is finally vested.[6]

F. RULE 3 Property Acquired Before Marriage

Property which has its inception of title before marriage is separate property.[7]

H. RULE 4 Property Acquired During Marriage

Property which has its inception of title[8] during marriage is community property unless it is acquired in the following manner, in which event it is the separate property of the acquiring spouse:

(1) by gift;[9]
(2) by devise or descent;[10]
(3) by partition or exchange;[11]
(4) as income from separate property made separate by a spousal separate income agreement;[12]
(5) by survivorship;[13]
(6) in exchange for other separate property;[14]

(7) as recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.[15]

J. RULE 5 Property Acquired After Dissolution of Marriage

Property which has its inception of title after the marriage is dissolved is not community property.[16]

L. RULE 6 Presumption of Community; Burden of Persuasion

Property *possessed* by either spouse during or on dissolution of marriage is presumed to be community property, and the separate character of property must be proved by clear and convincing evidence.[17]

N. RULE 7 Commingling

When separate and community property have become so commingled as to defy resegregation and identification, the burden of persuasion to overcome the presumption of community is not discharged, and the assets in question are treated as community property.[18]

P. RULE 8 Tracing

The character of separate property is not changed by the sale, exchange, or change in form of the separate property. If separate property can be definitely traced and identified, it remains separate property regardless of the fact that the separate property undergoes mutations or changes in form.[19] Tracing involves establishing the separate property origin of the property through evidence showing the time and means by which the spouse originally obtained possession of the property.[20]

R. RULE 9 Credit Obtained During Marriage

Credit obtained by a spouse during marriage is community credit unless the lender agrees to look solely to the borrowing spouse's separate estate for repayment.[21] Property acquired with community credit is community property, and property acquired with separate credit is separate property.[22] Credit during marriage is presumptively community, and the burden is on the proponent to prove separate credit.[23] Even property acquired with community credit can become separate property by interspousal gift, partition, etc.

T. RULE 10 Presumption Arising From Deed Recitals

When a deed recites that separate property was paid for the property, or that the property is taken as the receiving spouse's separate estate, a rebuttable presumption of separate property arises.[24] Where the other spouse is grantor or otherwise chargeable with causing or acquiescing in the recital, the presumption become irrebuttable, absent fraud.[25]

V. RULE 11 Presumption Arising From Interspousal Conveyance

Where one spouse conveys property to the other spouse, there is a rebuttable presumption of gift, even absent a recital in the instrument of conveyance.[26]

X. RULE 12 Presumption From Including Other Spouse's Name in Title

Where one spouse furnishes separate property consideration and title is taken in the name of the other spouse, a rebuttable presumption of gift arises.[27] Where one spouse uses separate property to acquire property during marriage and takes title to that property in the names of both spouses, a rebuttable presumption arises that the purchasing spouse intended to make a gift of a one-half separate property interest to the other spouse.[28]

Z. RULE 13 Presumption Regarding Income From Interspousal Gift

When one spouse makes a gift of property to the other spouse, that gift is presumed to include all the income or property which might arise from the property given.[29]

BB. RULE 14 Presumption Regarding Withdrawal of Commingled Funds

Where an account contains both community and separate moneys, it is presumed that community moneys are withdrawn first.[30]

DD. RULE 15 Putting Separate Property Money in Joint Account

The act of placing separate property funds into an account under the control of both spouses does not make the funds community property.[31]

FF. RULE 16 Fixtures

Since, under the law of fixtures,[32] whatever is affixed to the land becomes part of the land,[33] improvements to realty take the character of the land, regardless of the character of the funds or credit used to make the improvements.[34]

HH. RULE 17 Corporate Assets

Since a shareholder owns shares in the corporation and not the assets of the corporation, corporate assets are neither separate nor community property,[35] unless the court pierces the corporate veil.[36] The increase during marriage in value of a separate property corporation belongs to the separate estate.[37]

JJ. RULE 18 Partnership Rights of a Spouse

Under TUPA, there are three property rights of a partner.[38] Two of these cannot be community property (to-wit: rights in specific partnership property and the right to participate in the management of the partnership).[39] One can be community property (to-wit: the partner's interest in the partnership).[40] The rules are the same under TRPA.[41]

LL. RULE 19 Trust Holdings and Distributions

Property held by a trustee for the benefit of a spouse is not owned by a spouse, and cannot be marital property.[42] However, where the spouse/beneficiary has an unconditional right to have the property free of trust, then the property is treated as if it is owned by the spouse, even though still in the hands of the trustee.[43] Where the spouse is both settlor and beneficiary of the trust, the income of the trust property is likely community income.[44] Where the trust is established by gift or will, case law is conflicting as to whether trust distribu-

tions are separate or community property.[45]

NN. RULE 20 Preemption of Texas Marital Property Law

Federal law sometimes preempts Texas marital property law.[46] In those circumstances, the federal law must be consulted to determine the rights of spouses in the property in question.

VI. EXAMPLES

B. Gift A gift is a transfer of property made voluntarily and gratuitously. *Hilley v. Hilley*, 161 Tex. 569, 342 S.W.2d 565, 568 (Tex. 1961). A gift requires: 1) an intent to make a gift; 2) delivery of the property; and 3) acceptance of the property. *See Grimsley v. Grimsley*, 632 S.W.2d 174, 177 (Tex. App.--Corpus Christi 1982, no writ). The burden of proving a gift is on the party claiming the gift. *Woodworth v. Cortez*, 660 S.W.2d 561, 564 (Tex. App.--San Antonio 1983, writ ref'd n.r.e.).

2. Lack of Consideration Lack of consideration is an essential characteristic of a gift; an exchange of consideration precludes a gift. *Pemelton v. Pemelton*, 809 S.W.2d 642, 647 (Tex. App.--Corpus Christi 1991), *rev'd on other grounds sub nom. Heggen v. Pemelton*, 836 S.W.2d 145 (Tex. 1992); *Kunkel v. Kunkel*, 515 S.W.2d 941 (Tex. Civ. App.--Amarillo 1974, writ ref'd n.r.e.). "Gift" and "onerous consideration" are exact antitheses and a recital of onerous consideration "negatives the idea of a gift." *Pemelton*, 809 S.W.2d at 647; *Ellebracht v. Ellebracht*, 735 S.W.2d 658, 659 (Tex. App.--Austin 1987, no writ); *Kitchens v. Kitchens*, 372 S.W.2d 249, 255 (Tex. Civ. App.--Waco 1963, writ dism'd). An exchange of consideration precludes a gift. *Williams v. McKnight*, 402 S.W.2d 505, 508 (Tex. 1966). *See Saldana v. Saldana*, 791 S.W.2d 316, 319 (Tex. App.--Corpus Christi 1990, no writ) (wife's testimony that she paid $ 10.00 to husband's mother in exchange for real estate was sufficient to support the trial court's finding that the property was community property and not gift).

4. Donative Intent A controlling factor in establishing a gift is the donative intent of the grantor at the time of the conveyance. *Ellebracht*, 735 S.W.2d at 659. In *Scott v. Scott*, 805 S.W.2d 835, 839-40 (Tex. App.--Waco 1991, writ denied), the jury found that the wife did not make a gift of money to the husband, even though she put a $ 100,000 certificate of deposit in his name alone. A gift cannot occur without the intent to make a gift. *Campbell v. Campbell*, 587 S.W.2d 513, 514 (Tex. Civ. App.--Dallas 1979, no writ). In *Scott*, the wife testified she had no donative intent, the jury believed her, and the appellate court affirmed. *See Haile v. Holtzclaw*, 414 S.W.2d 916, 927 (Tex. 1967) (proper to find gift based on circumstances, despite transferor's testimony of no donative intent.)

6. Transfer From Parent to Child Presumptively Gift A conveyance of title from parent to child is presumed to be a gift, but the presumption is rebuttable by evidence showing the facts and circumstances surrounding the deed's execution in addition to the deed's recitations. *Woodworth v. Cortez*, 660 S.W.2d 561, 564 (Tex. App.--1983, writ ref'd n.r.e.).

8. Gift to Both Spouses A gift made by a third party to both spouses leaves the spouses owning the gifted asset in equal undivided one-half separate property interests. *Roosth v. Roosth*, 889 S.W.2d 445, 457 (Tex. App.--

Houston [14th Dist.] 1994, writ denied) (engagement gifts and wedding gifts to both spouses were one-half the separate property of each); *Kamel v. Kamel*, 721 S.W.2d 450, 452 (Tex. App.--Tyler 1986, no writ) (where husband's father made payments on a liability owed by both spouses, the payments were a gift one-half to each spouse).

10. Gift Between Spouses A spouse can make a gift of community property to the other spouse. *See Pankhurst v. Weitinger & Tucker*, 850 S.W.2d 726, 730 (Tex. App.--Corpus Christi 1993, writ denied) (husband gave one-half of his community property interest in a cause of action to wife, to hold as her separate property).

12. Gift of Encumbered Property A grantor may make a gift of encumbered property and the conveyance may be a gift even if the grantee assumes an obligation to extinguish the encumbrance. *Taylor v. Sanford*, 108 Tex. 340, 193 S.W. 661, 662 (1917); *Kiel v. Brinkman*, 668 S.W.2d 926, 929 (Tex. App.--Houston [14th Dist.] 1984, no writ) (no showing that parents transferred land to son *in exchange* for his extinguishing the debt); *Van v. Webb*, 237 S.W.2d 827, 832 (Tex. Civ. App.--Amarillo 1951, writ ref'd n.r.e.).

D. Devise and Descent Tex. Const. art. XVI, § 15, and TEX. FAM. CODE ANN. § 5.01(a)(2) (Vernon 1995) prescribe that property acquired during marriage by devise or descent are separate property. PJC 202.03 defines "devise" as "acquisition of property by last will and testament. PJC 202.03 defines "descent" as "acquisition of property by inheritance without a will."

Under Texas law, legal title vests in estate beneficiaries immediately upon the death of the donor. TEX. PROB. CODE ANN. § 37 (Vernon Supp. 1995); *Dyer v. Eckols*, 808 S.W.2d 531, 533 (Tex. App.--Houston [14th Dist.] 1991, writ dism'd by agr.). An argument can therefore be made that income of an estate is community property of the married heirs or devisees, even though the assets are titled in the decedent and the income arising from the assets may still be in the hands of the executor.

Example 1

Wife's mother dies on 1-1-95. Wife receives substantial assets under her mother's will. The estate is open for a year, and then the unspent accumulated income and assets left to Wife are distributed to her. Wife presents the will, order admitting the will to probate, the inventory, appraisement, and list of claims, and order approving that, and a copy of the check from the independent executor, as proof that the cash she received from her mother's estate was acquired by devise, and is her separate property. Husband presents the I.E's testimony that the estate earned income a portion of which was included in Wife's check. Does Wife have a commingling problem.

F. Land: Title Acquired Before Marriage In *Hopf v. Hopf*, 841 S.W.2d 898, 900 (Tex. App.--Houston [14th Dist.] 1992, no writ), proof that husband acquired his interest in a building before marriage established that the interest was his separate property.

H. Land: Contract For Deed Before Marriage In *Riley v. Brown*, 452 S.W.2d 548 (Tex. Civ. App.--Tyler 1970, no writ), where realty was acquired under a contract for deed, or installment land contract, inception of title occurred when the contract was entered into, not when title was ultimately conveyed. In *Welder v. Lambert*, 91 Tex. 510, 44 S.W. 281, 284-85 (1898), land was put under contract for colonization with the husband and wife; after wife died, despite husband's remarriage, that contract right still belonged to the first marriage, so that title ultimately acquired during the second marriage was not community property of the second marriage. Such a contract may be oral. *Evans v. Ingram*, 288 S.W.2d 494 (Tex. Civ. App.--Waco 1926, no writ). In *Dawson v. Dawson*, 767 S.W.2d 949 (Tex. App.--Beaumont 1989, no writ), realty placed by husband under contract for deed prior to marriage was his separate property, despite the fact that title was taken during marriage in the name of both spouses, there being no evidence that a gift to wife was intended. In *In re Marriage of Read*, 634 S.W.2d 343, 347 (Tex. App.--Amarillo 1982, writ dism'd), an oral agreement for mineral lease made prior to marriage did not establish inception of title because the oral agreement was not enforceable due to the statute of frauds.

J. Land: Lease/Option with Deed in Escrow Before Marriage In *Roach v. Roach*, 672 S.W.2d 524 (Tex. App.--Amarillo 1984, no writ), where an unmarried man entered into a lease-option agreement pertaining to land, but the deed was placed into escrow, and delivered after marriage, inception of title occurred at the time of the original agreement, not when the deed was removed from escrow and delivered to the husband. The land was his separate property.

L. Land: Earnest Money Contract Before Marriage In *Wierzchula v. Wierzchula*, 623 S.W.2d 730 (Tex. App.--Houston [1st Dist.] 1981, no writ), where a man entered into an earnest money contract to purchase realty shortly before marriage, but the deed was received during marriage, inception of title occurred when the earnest money contract was signed, so that the property was the husband's separate property.

In *Carter v. Carter*, 736 S.W.2d 775 (Tex. App.--Houston [14th Dist.] 1987, no writ), the husband signed an earnest money contract and paid $1,000.00 in earnest money, shortly before marriage. The deed was received during marriage in the name of both husband and wife, and both husband and wife signed the note and deed of trust. Citing *Wierzchula*, the court of appeals held that, under the inception of title rule, title related back to the date the earnest money contract was signed and, since that predated marriage and since only the husband had signed the earnest money contract, the realty was his separate property.

In *Duke v. Duke*, 605 S.W.2d 408, 410 (Tex. Civ. App.--El Paso 1980, writ dism'd), where an earnest money contract entered into prior to marriage provided that the deed would be conveyed to "James H. Duke and wife, Barbara J. Duke." Title was taken during marriage in the name of husband and wife. It was held that the earnest money contract merged into the deed, and that the property was received by the spouses as community property.

N. Land: Earnest Money Contract During Marriage Where spouses enter into an earnest money contract to purchase land during marriage, the land is community property. *Leach v. Meyer*, 284 S.W.2d 164 (Tex. Civ. App.--Austin 1955, no writ). Where the

purchase price for the real estate is separate property, the land is separate property.

> Example 2
>
> Husband enters into earnest money contract to buy a house, made contingent upon sale of his separate property house. The contract is placed with a local title company. Some months later, the separate property house closes at the same title company, and the proceeds from sale of the separate property house are applied directly to the new house, without ever leaving the title company. Wife contends that the house is community property because the earnest money contract created a community contractual liability, and under the inception of title rule the consideration for the new house was community credit and not separate property cash. Is she right?

P. Land: Purchase During Marriage for Cash Land purchased during marriage has the character of the consideration furnished for the land. Property purchased with separate and community funds is owned as tenants in common by the separate and community estates. *Cockerham v. Cockerham*, 527 S.W.2d 162, 168 (Tex. 1975). Percentages of ownership are determined by the amount of funds contributed by each estate to the total purchase price. *Gleich v. Bongio*, 128 Tex. 606, 99 S.W.2d 881, 883 (1937).

R. Funds on Deposit The big issue with funds on deposit is the commingling of separate and community funds. The situation is well-described in the following language from *Welder v. Welder*, 794 S.W.2d 420 (Tex. App.--Corpus Christi 1990, no writ):

> [U]nder Tex. Fam. Code Ann. Sec. 5.02 (Vernon Supp. 1990), property possessed by either spouse during or on dissolution of marriage is presumed to be community property, and the party claiming it as separate has the burden to overcome this presumption by clear and convincing evidence. Estate of Hanau v. Hanau, 730 S.W.2d 663, 667 (Tex. 1987); Tarver v. Tarver, 394 S.W.2d 780, 783 (Tex. 1965); Harris v. Harris, 765 S.W.2d 798, 802 (Tex. App.--Houston [14th Dist.] 1989, writ denied). To discharge this burden a spouse must trace and clearly identify the property claimed as separate. If separate property and community property have been so commingled as to defy resegregation and identification, the statutory presumption prevails. However, when separate property has not been commingled or its identity as such can be traced, the statutory presumption is dispelled. Hanau, 730 S.W.2d at 667; Tarver, 394 S.W.2d at 783; Harris, 765 S.W.2d at 802. As long as separate property can be definitely traced and identified, it remains separate property regardless of the fact that it may undergo mutations and changes. Norris v. Vaughan, 260 S.W.2d 676, 679 (Tex. 1953).

Specifically, our courts have found no difficulty in following separate funds through bank accounts. Sibley v. Sibley, 286 S.W.2d 657, 659 (Tex. Civ. App.--Dallas 1955, writ dism'd). A showing that community and separate funds were deposited in the same account does not divest the separate funds of their identity and establish the entire amount as community when the separate funds may be traced and the trial court is able to determine accurately the interest of each party. Holloway v. Holloway, 671 S.W.2d 51, 60 (Tex. App.--Dallas 1983, writ dism'd); Harris v. Ventura, 582 S.W.2d 853, 855 (Tex. Civ. App.--Beaumont 1979, no writ). One dollar has the same value as another and under the law there can be no commingling by the mixing of dollars when the number owned by each claimant is known. Trawick v. Trawick, 671 S.W.2d 105, 110 (Tex. App.--El Paso 1984, no writ); Farrow v. Farrow, 238 S.W.2d 255, 257 (Tex. Civ. App.--Austin 1951, no writ).

In addition, when separate funds can be traced through a joint account to specific property purchased with those funds, without surmise or speculation about funds withdrawn from the account in the interim, then the property purchased is also separate. See McKinley v. McKinley, 496 S.W.2d 540, 543-44 (Tex. 1973); DePuy v. DePuy, 483 S.W.2d 883, 887-88 (Tex. Civ. App.--Corpus Christi 1972, no writ). *Welder v. Welder*, 794 S.W.2d 420, 424-25 (Tex. App.--Corpus Christi 1990, no writ).

2. <u>Showing Only Separate Funds in Account</u>

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

4. <u>Uncorroborated Assertion of Spouse</u>

Courts have held that the uncorroborated assertion that property is separate property will support a finding of separate property, in some situations. *See Holloway v. Holloway*, 671 S.W.2d 51, 56 (Tex. App.--Dallas 1983, writ dism'd) ("We know of no authority holding that a witness is incompetent to testify concerning the source of funds in a bank account without producing bank records of the deposits). *Accord*, *Faram v. Gervits-Faram*, 02-94-099-CV (Tex. App.--Fort Worth) (testimony of wife that investment accounts and T-bill were either gifts from her father or proceeds from sale of separate real estate was, standing uncontradicted, at least some evidence of the character of the property); *Peterson v. Peterson*, 595 S.W.2d 889, 892 (Tex. Civ. App.--Austin 1980, writ ref'd n.r.e.) (husband's testimony that realty was pur-

chased with separate property cash supported finding of separate property, even without evidence of activity in the account, where transaction occurred less than one month after marriage).

An uncorroborated assertion by a spouse as to separate property may not be enough to reverse a contrary finding in the trial court. In *Klein v. Klein*, 320 S.W.2d 769 (Tex. Civ. App.--Eastland 1963, no writ), the wife testified that she made a $3,000.00 separate property cash payment for a house acquired during marriage. She said that she got the money from a safety deposit box in an unnamed bank. The trial court nonetheless found that the house was community property. The appellate court affirmed, saying that the wife's testimony was not binding. *Id.* at 773.

6. Separate Funds Out First In *McKinley v. McKinley*, 496 S.W.2d 540 (Tex. 1973), the Supreme Court ruled on the tracing of funds in bank accounts. The husband had $9,500.00 of separate property money on deposit in a savings and loan account. By year end, it had earned $472.03 in interest. On January 5, the husband withdrew $472.03. The Supreme Court said that "the $9,500.00 originally deposited remained in the account and continued to earn interest, until on December 31 of the following year [1967], the account balance was $10,453.81. There were no withdrawals after the one mentioned above. All deposits were deposits of interest. On January 2 of 1968, $10,400.00 was withdrawn and used to purchase a CD. The Supreme Court concluded that the $9,500.00 originally on deposit had been "traced in its entirety" into the CD. Thus, $9,500.00 of the $10,400.00 CD was separate property. No explanation is given as to why all of the separate was deemed withdrawn from the savings account to purchase the CD before the $953.81 in community funds were tapped. It appears that separate came out first.

In *McKinley*, tracing failed as to another bank account for lack of evidence as to "the nature of funds deposited or withdrawn."

8. Community Funds Out First. In *Sibley v. Sibley*, 286 S.W.2d 657 (Tex. Civ. App.--Dallas 1955, writ dism'd) (per curiam), the husband mixed community funds in a bank account with $ 3,566.68 of wife's separate funds. There were a number of deposits and withdrawals to the account. However, the account never dropped below $ 3,566.68. Seeing the husband as a trustee of the wife's separate property funds that were in his care, the appellate court invoked a rule of trust law, that where a trustee mixes his own funds with trust funds the trustee is presumed to have withdrawn his own money first, leaving the beneficiary's on hand. Since the husband owned none of wife' separate funds, and half of the community funds, it was presumed that the community moneys in the bank account were withdrawn first, before the wife's separate moneys were withdrawn. When the account had a balance of $ 4,009.46, the sum of $ 1,929.08 was withdrawn to buy a farm. The appellate court held that all $ 442.78 in community property came out, and the rest of the withdrawal was separate property, making the farm 11% community property and 89% wife's separate property. The court said:

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

Id. at 659. *See Farrow v. Farrow*, 238 S.W.-2d 255 (Tex. Civ. App.--Austin 1957, no writ) (although husband commingled his separate,

his wife's separate, and community funds, husband did not do so wrongfully, and the amounts of each could be calculated, so that the trust principle that all mixed funds belong to the beneficiary did not apply). *See Trevino v. Trevino*, 555 S.W.2d 792, 798 (Tex. App.--Corpus Christi 1977, no writ) (where husband managed community estate, a trust relationship existed between him and wife).

Example 3

In *Sibley* the Husband mixed community property with Wife's separate property, so he was deemed to be like a trustee of her funds. What if it was Wife who mixed her separate funds with community funds, in an account under Wife's control? Using *Sibley*'s trust law analogy, Wife would be the trustee of Husband's 50% interest in the community property. Would it be presumed that Wife drew out her own separate property (100% owned by her) first, leaving community funds (50% owned by Husband)?

In *Barrington v. Barrington*, 290 S.W.2d 297, 304 (Tex. Civ. App.--Texarkana 1956, no writ), *Sibley* was cited for the proposition that community funds in a joint bank account are as a matter of law presumed to have been drawn out before separate moneys are withdrawn. Then in *Horlock v. Horlock*, 533 S.W.2d 52, 59 (Tex. Civ. App.--Houston [14th Dist.] 1976, writ dism'd), another court cited *Sibley* for the rule that "where a bank account contains both community and separate moneys, it is presumed that community moneys are drawn out first." *See also Harris v. Ventura*, 582 S.W.2d 853, 855-56 (Tex. Civ. App.--Beaumont 1979, no writ) ("where the checking account contains both community and separate funds, it is presumed that community funds are drawn out first," citing *Horlock* and *Sibley*).

Example 4

Husband puts $ 10,000 of his own separate property funds into an account with $ 10,000 in community property funds. During the marriage, money comes in and money goes out, but the balance never drops below $ 10,000, the balance at the time of divorce. Is the $ 10,000 on hand at the time of divorce Husband's separate property or community property? Under a "community out first rule," the remaining $ 10,000 is Husband's separate property. Applying the "trustee's money out first" principle mentioned in *Sibley*, it would be presumed that the husband withdrew his own wholly-owned separate property funds first, leaving community funds in which Wife has a one-half interest. On these facts, the *Sibley* rationale would lead to a "separate out first" rule. Perhaps it would be better to have a "trustee's money out first" rule as a vehicle for better achieving justice under the facts of a particular case.

10. Minimum Balance Method As *Sibley* demonstrates, the courts have applied the community out first rule to trace separate property in a mixed-funds account that never went below a certain balance. In *Snider v. Snider*, 613 S.W.2d 8 (Tex. App.--Dallas 1981, no writ), at the time of marriage, the balance in the husband's savings account exceeded $27,000.00. During marriage, interest was added to the account, and withdrawals were made, reducing the balance to

$19,642.45. More activity ensued, but the balance of the account never dropped below $19,642.45. Later, a deposit of $ 10,000.00 in separate property was made to the account, raising the separate property balance to $29,642.45. This proof was held to establish that the $29,642.45 balance in the account at the time of the husband's death was his separate property. *Id.* at 11.

> Example 5
>
> Husband and Wife have a joint account, into with they each deposit his/her own separate property funds. Both spouses write checks on the account. Since there is no community property in the account, a "community out first" rule will not work. Since the account is jointly controlled, and both spouses write checks on the account, a "trustee's money out first" rule will not work. What about a pro rata rule? What about letting the withdrawing spouse's intent control?

12. <u>Pro Rata Approach</u> An argument can be made that, where mixed funds are withdrawn from an account, the withdrawal should be pro rata in proportion to the respective balances of separate and community funds in the account. A pro rata rule was used to achieve equity in an embezzlement case, *Marineau v. General American Life Ins. Co.*, 02-930-090-CV (Tex. App.--Fort Worth 1995, nwh) [1995 WL 215951]. There the husband had embezzled $ 349,077.32 from his employer, and put it into an account where deposits totalled $ 512,594.32. Husband purchased a life insurance policy, which he paid incrementally out of the account. He later committed suicide, and the employer and the widow litigated who owned the policy proceeds. It was the employer's burden to trace its money into a specific asset. Having done that, the burden shifted to the widow (claiming through the wrongdoer) to prove what funds of the wrongdoer flowed into the asset. The employer claimed that the wrongdoer had to show the proportion of each type of funds in each payment, failing which the entire payment would be deemed to belong to the employer. The appellate court rejected this contention, relying on an Oklahoma Supreme Court case to hold that each party was entitled to a pro rata share of each payment, in the same proportion as total embezzled deposits bore to total deposits of husband's money. Thus, a sort of global average was used, as opposed to trying to calculate the respective components of each premium payment, in contradistinction to the tracing approach of some family law cases that analyze the character of each withdrawal. Perhaps the "broad overview" approach used in *Marineau* would more effectively, and certainly more cheaply, accomplish equity.

Example 6

Part 1

Husband puts $ 10,000 of community property funds into an account with $ 10,000 of Wife's separate property funds. During the marriage, Husband withdraws $ 10,000 to buy GM stock, which is on hand at the time of divorce. The rest of the money in the account is frittered away by Husband. Is the GM stock community property or is it Wife's separate property? Applying a "community out first" rule, the stock would be community property, and the Wife's separate funds were frittered away. Under a "trustee's money out first" rule, the stock would be Wife's separate and community funds were frittered away.

Part 2

Same facts as Part 1, except $ 5,000 is frittered away, then $ 10,000 in GM stock is purchased, then the remaining $ 5,000 is frittered away. Is the GM stock half community and half separate? Perhaps we should have an equitable principle that the presumption applied is one that will favor the party to whom equity should be done. That may be "separate out first" sometimes, "community out first" sometimes, and sometimes a presumption in favor of whatever gives greatest advantage to the party deserving equitable relief. Under such a rule, the trial court could find that the GM stock was entirely Wife's separate property.

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

16. Deposit Followed by Withdrawal in Close Proximity. In *Higgins v. Higgins*, 458 S.W.2d 498 (Tex. Civ. App.--Eastland 1970, no writ), the jury found that, where the husband deposited $ 71,200.00 of separate funds in a joint bank account and shortly thereafter drew out $ 70,000.00 to purchase a ranch, the ranch was the husband's separate property. That finding was affirmed by the appellate court.

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

In *McKinley v. McKinley*, 496 S.W.2d 540 (Tex. 1973), as explained above, a savings account containing $ 9,500.00 of separate property earned $ 472.03 in interest at year end. On January 2, that amount of money was withdrawn. The Supreme Court held that the interest had been withdrawn, leaving the separate property balance of $ 9,500.00.

18. Intent While the mechanical application of a rule, such as the "community out first" rule, has led to successful tracing, so too has evidence that it was intended that separate funds would be taken from a commingled account. For example, in *In re Marriage of*

Tandy, 532 S.W.2d 714, 717 (Tex. Civ. App.--Amarillo 1976, no writ), the evidence showed that the husband mixed community proceeds from grain sales in an account with $ 25,000 in proceeds from the sale of land which was half-owned by the husband as separate property. After the $ 25,000 was received, the husband paid $ 6,250 to each of his sons for their ownership interests in the land, and then paid $ 12,500 on the husband's separate property debt. The appellate court, without using a mechanical rule regarding withdrawals, held that this evidence traced the separate property. The court upheld a finding, however, that another account had been hopelessly commingled. *Id.* at 718-19.

20. <u>Recap</u> The case of *Gibson v. Gibson*, 614 S.W.2d 487, 489 (Tex. Civ. App.--Tyler 1981, no writ), contains a good recapitulation of the law in the area:

> Courts dealing with the tracing of separate property commingled with community funds have required varying degrees of particularity in identifying separate property. See 6 St. Mary's L. J. 234 (1974). Many Texas cases have been strict in demanding a "dollar for dollar" accounting of separate funds used to purchase an asset, the ownership of which is in dispute. E. g., Schmeltz v. Gary, 49 Tex. 49 (1878); Latham v. Allison, supra; West v. Austin National Bank, 427 S.W.2d 906 (Tex. Civ. App.-San Antonio 1968, writ ref'd n. r. e.); Stanley v. Stanley, 294 S.W.2d 132 (Tex. Civ. App.-Amarillo 1956, writ ref'd n. r. e., cert. den'd 354 U.S. 910, 77 S.Ct. 1296, 1 L.Ed.2d 1428).
>
> Certain other courts have been more lenient in their treatment of the tracing problem. The philosophy prompting these decisions was expressed in Farrow v. Farrow, 238 S.W.2d 255, 257 (Tex. Civ. App.-Austin 1951, no writ): "One dollar has the same value as another and under the law there can be no commingling by the mixing of dollars when the number owned by the claimant is known." In Sibley v. Sibley, 286 S.W.2d 657 (Tex. Civ. App.-Dallas 1935, writ dism'd), the court allowed appellee to trace her separate property through a series of transactions, including the deposit of the proceeds from a sale of her separate realty into a joint account containing a substantial amount of community funds and separate funds belonging to the other spouse. According to Sibley, community funds will be presumed to have been drawn out before separate funds from a joint bank account.
>
> In still other cases, spouses have been permitted to distinguish their separate funds commingled in a bank account with community money by proving that community withdrawals, e. g. for living expenses, equalled or exceeded community deposits. For example, in Coggin v. Coggin, 204 S.W.2d 47, 52 (Tex. Civ. App.--Amarillo 1947, no writ), evidence was presented to show that income from the wife's property totalled approximately $1,000 per year, while family living expenses were $200-$500 monthly. The court found that such commu-

> nity funds could not have been used to pay for the property in question since they had already been depleted in paying for the living expenses. See DePuy v. DePuy, 483 S.W.2d 883, 888 (Tex. Civ. App.--Corpus Christi 1972, no writ).

Gibson v. Gibson, 614 S.W.2d 487, 489 (Tex. Civ. App.--Tyler 1981, no writ).

T. Mineral Interests/Income The character of a mineral interest is determined according to general marital property rules. *See In re Marriage of Read*, 634 S.W.2d 343, 346 (Tex. App.--Amarillo 1982, writ dism'd) (working interest was community property). Income from a community property mineral interest is community property. Where the mineral interest is separate property: (1) royalty income is separate property; *Norris v. Vaughan*, 152 Tex. 491, 260 S.W.2d 676, 679 (1953) (this is so because a royalty payment is for the extraction or waste of the separate estate, as opposed to income from the separate estate); *Welder v. Welder*, 794 S.W.2d 420, 425 (Tex. App.--Corpus Christi 1990, no writ); (2) lease bonuses are separate property; *Lessing v. Russek*, 234 S.W.2d 891, 894 (Tex. Civ. App.--Austin 1950, writ ref'd n.r.e.); and (3) delay rentals are community property; *Lessing v. Russek*, 234 S.W.2d 891, 894 (Tex. Civ. App.--Austin 1950, writ ref'd n.r.e.); *McGarraugh v. McGarraugh*, 177 S.W.2d 296, 300-301 (Tex. Civ. App.--Amarillo 1943, writ dism'd).

V. Passive Income (Dividends, Interest, Rentals) Cash dividends from corporate stock are community property. *See Hilliard v. Hilliard*, 725 S.W.2d 722, 723 (Tex. App.--Dallas 1985, no writ); *Bakken v. Bakken*, 503 S.W.2d 315, 317 (Tex. Civ. App.--Dallas 1973, no writ). However, stock dividends deriving from separate property stock are separate property. *See Duncan v. U.S.*, 247 F.2d 845, 855 (5th Cir. 1957). Interest income is community property. *Braden v. Gose*, 57 Tex. 37 (1882). Rentals from real estate are community property. *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799, 802 (1925); *Coggin v. Coggin*, 204 S.W.2d 47, 52 (Tex. Civ. App.--Amarillo 1947, no writ) (rents and crops from separate property are community property).

Example 7

Wife owns, with her two brothers, equal undivided shares of the mineral interests which they inherited from their father. The siblings put the mineral interests into a closely-held corporation which is owned 1/3 by each of them. The corporation collects the royalty income and distributes it in thirds. The oil royalties were received by Wife as her separate property before the transfer to the corporation. The corporate dividends are received by Wife as community property, even though they are traceable to the royalty income. *See Marshall v. Marshall*, 735 S.W.2d 587, 592-93 (Tex. App.--Dallas 1987, writ ref'd n.r.e.) (revenues from oil and gas leases owned by partnership at time husband married were community property when distributed to husband as partnership profits).

X. Wages Wages earned during marriage are community property, while wages earned before marriage or after dissolution of marriage are separate property. The fact that a spouse may have entered into an employment agreement prior to marriage does not cause the wages of that spouse earned during marriage to be separate property. *See Dessommes v. Dessommes*, 543 S.W.2d 165 (Tex. Civ. App.--Texarkana 1976, writ ref'd n.r.e.); *Moore v. Moore*, 192 S.W.2d 929 (Tex. Civ. App.--Fort Worth 1946, no writ). The fact that an employment agreement is contracted during marriage does not make wages earned after the end of the marriage community property. *See Echols v. Austron, Inc.*, 529 S.W.2d 840 (Tex. Civ. App.--Austin 1975, writ ref'd n.r.e.) (bonus paid to husband after divorce was his separate property).

Example 8

Husband is a professional athlete. He signs a 3-year contract, to be paid $ 30,000 per month, plus a so-called "signing bonus" of $ 600,000, to be paid in installments of $ 200,000, at the beginning of the first, second, and third years. Payments are guaranteed as long as Husband reports for work, even if Husband is injured, unless the injury is self-inflicted, or unless Husband is convicted of a felony or drug violation, in which event the Team can cancel the contract and no further payments will be due. The divorce is tried just before the second $ 200,000 installment is due. What payments are community property? What if the signing bonus was paid up front?

Z. Retirement Benefits & Fringe Benefits Retirement benefits, to the extent they derive from employment during marriage, constitute a community asset. *Cearley v. Cearley*, 544 S.W.2d 661, 662 (Tex. 1976).

2. Private Retirement Benefits: Defined Benefit Plan Retirement benefits are considered by Texas courts to be "a mode of employee compensation earned during a given period of employment." *Cearley v. Cearley*, 544 S.W.2d 661, 662 (Tex. 1976). Thus, retirement, annuity and pension benefits earned during marriage are part of the community estate, *Id.*, at 662, while benefits earned before and after the marriage are the employee spouse's separate property. *See Berry v. Berry*, 647 S.W.2d 945, 947

(Tex. 1983). As with wages, the character of the retirement benefits is not determined by the circumstances surrounding the inception of the employment relationship, or the inception of the right to receive retirement benefits. Instead, the benefits are broken down into monthly increments, each of which is separate or community, depending upon whether the increment arises before, during or after marriage. Under the case of *Taggart v. Taggart*, 552 S.W.2d 422, 424 (Tex. 1977), the extent of the community interest is determined by a fraction, the numerator of which represents the number of months the parties were married while the retirement plan was in effect, and the denominator of which represents the total number of months the employee spouse was employed under the plan. In a divorce, the fraction is applied to a figure representing the value of the benefits as of the date of divorce. *See Berry v. Berry*, 647 S.W.2d 945, 947 (Tex. 1983). The product of the two figures gives the community interest subject to division by the court.

4. Private Retirement Benefits: Defined Contribution Plan In *Iglinsky v. Iglinsky*, 735 S.W.2d 536, 538 (Tex. App.--Tyler 1987, no writ), the appellate court held that it was improper to apply the time apportionment formula to a contribution retirement account. Instead, the court should have determined the community interest in the funds on the basis of contributions of earnings during marriage. *Id.* at 538, n. 2.

Example 9

The balance on the day of marriage in Husband's defined contribution plan account was $ 50,000. During marriage he and his employer made contributions to the plan account. The funds in the plan account also earned interest during the marriage, which was deposited into the account. Should the community share be all additions to the account between the date of marriage and the date of divorce, whether as contributions or earnings? Assume that the funds in the account were invested in company stock, and that all contributions to the account are automatically invested in company stock, whose value fluctuates with the market. Would it be improper to compare the value of the stock on the date of marriage versus on the date of divorce?

6. Fringe Benefits: Stock Options Stock options can present serious difficulties in potential conflicts between the inception of title rule and the apportionment method applied to employment benefits. If stock options are acquired as a benefit from employment, under general principles they would be community property. Consider, however, the following examples.

Example 10

Company stock options are received by the employee as a benefit of employment, but they can be exercised only after 5 years, and provided that the employee is employed with Employer at the end of the 5 year period. When an option is exercised, the employee can buy company stock from the company at the option price, regardless of the prevailing market price. Husband acquires Option #1 a few days prior to marriage, and the 5 years runs during marriage, so he uses community funds to buy company stock at the option price, which is less than market price. Husband acquires Option #2 during marriage, and the 5 years runs during marriage, so he uses community funds to buy company stock at the option price, which is less than the market price. Husband acquired Option #3 shortly before divorce, and it will not "mature" until 4-1/2 year after divorce. What is the character of: Option #1, Option #2, and Option #3? If any of the options or stock are separate property, is reimbursement due to the marital estate providing the funds to exercise the option?

8. <u>Keogh's, SEP's, and IRA's</u> Self-created trust tax sheltered accounts such as Keogh's, SEP's and IRA's, though technically trusts, are treated like regular accounts, for tracing purposes. Where the trust funds are invested in cash or CD's, the balance in the account on the date of marriage is separate property, and all interest accumulated during marriage is community property. Where the trust corpus is invested in assets with fluctuating value, a more complicated effort to trace each individual asset may be required. In *Hopf v. Hopf*, 841 S.W.2d 898, 900 (Tex. App.--Houston [14th Dist.] 1992, no writ), tracing as to IRA or Keogh account failed because the spouse presented no evidence showing the amount of the plan before marriage, on the date of marriage, or deposits and withdrawals during marriage.

10. <u>Texas Government Retirement Benefits</u> A spouse's right to Texas government employee retirement benefits are community property according to the ordinary principles of retirement benefits. *Irving Fireman's Relief and Retirement Fund v. Sears*, 803 S.W.2d 747, 749 (Tex. App.--Dallas 1990, no writ) (firemen's retirement benefits divisible upon divorce); *Morgan v. Horton*, 675 S.W.2d 602, 604 (Tex. App.--Dallas 1984, no writ) (teacher retirement funds divisible upon divorce); *Collida v. Collida*, 546 S.W.2d 708, 710 (Tex. Civ. App.--Beaumont 1977, writ dism'd) (firemen's retirement benefits divisible on divorce).

12. <u>Federal Civil Service Retirement</u> Civil service retirement benefits earned during marriage are community property. *Hoppe v. Godeke*, 774 S.W.2d 368, 370 (Tex. App.--Austin 1989, writ denied). *See* 5 U.S.C.A. § 8331 et seq. (West 1980 & Pam. Supp. 1995).

14. <u>Federal Railroad Retirement Benefits</u> The United States Supreme Court, in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979), held that retirement benefits payable under the federal Railroad

Retirement Act were not subject to division by a state court on divorce, by virtue of § 231m of the Act. *See Eichelberger v. Eichelberger*, 582 S.W.2d 395, 401 (Tex. 1979) ("the [Supreme Court's] opinion makes it clear that such benefits are not to be treated as 'property' and future benefits are not subject to division upon divorce as property"). However, with the Railroad Retirement Solvency Act of 1983, Congress added a subsection to § 231m, expressly permitting state courts to characterize certain components of the benefits as community property. See 45 U.S.C.A. § 231m(b)(2) (West 1986). Under the new statute, railroad retirement benefits involve several statutory components. See 45 U.S.C.A. § 231b (West 1986). The "basic component" is described in § 231b(a), and is designed to provide benefits equivalent to those under social security. See H.R.Rep. No. 30(I), 98th Cong., 1st Sess., reprinted in 1983 U.S.Code Cong. & Ad. News 729, 730-34. Section 231m of the statute provides that "[N]o annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated." Thus, state courts still cannot divide the basic component of railroad retirement benefits in a divorce. *See Kamel v. Kamel*, 721 S.W.2d 450, 452 (Tex. App.--Tyler 1986, no writ).

16. U.S. Military Retirement Benefits Military retirement benefits earned from years of service during the marriage are community property. *Cearley v. Cearley*, 544 S.W.2d 661, 662 (Tex. 1976); *Taggart v. Taggart*, 552 S.W.2d 422 (Tex. 1977); *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970). In *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), the U.S. Supreme Court declared that federal law preempted the division of military non-disability retired pay in a divorce. Congress later passed a statute permitting divorce courts to divide military retired pay, provided that the state had sufficient jurisdictional ties specified in the statute. 10 U.S.C. § 1408 et seq. (the USFSPA), effective Feb. 1, 1983. Military retirement benefits remain preempted except to the extent that division is permitted under the USFSPA. *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2028, 104 L.Ed.2d 675 (1989).

Any portion of the military retirement attributable to employment prior to marriage is the employee spouse's separate property. *Bloomer v. Bloomer*, 01-91-01428-CV (Tex. App.--Houston [1st Dist.] 1993, _____) [not released for publication] (involving retirement which included time in military reserves). Any portion of the retirement attributable to employment after divorce is not community property. *Berry v. Berry*, 647 S.W.2d 945, 947 (Tex. 1983). The right to receive post-divorce cost-of-living increases on the non-employed spouse's share of the retirement is community property that can be awarded on divorce. *Sutherland v. Cobern*, 843 S.W.2d 127, 131 (Tex. App.--Texarkana 1992, writ denied).

18. Social Security Benefits State courts have no power to divide Social Security disability benefits in a divorce, due to preemption by federal law. *Richard v. Richard*, 659 S.W.2d 746, 748-49 (Tex. App.--Tyler 1983, no writ) (citing cases from California, and relying upon the analysis in the *Hisquierdo* case).

BB. Disability Benefits

2. Federal Military Disability Retirement Prior to the *Mansell* decision, Texas courts were divided on whether military disability retirement benefits were divisible on divorce.

Conroy v. Conroy, 706 S.W.2d 745, 748 (Tex. App.--El Paso 1986, no writ) (are divisible); *Patrick v. Patrick*, 693 S.W.2d 52, 54 (Tex. App.--Fort Worth 1985, writ ref'd n.r.e.) (are not divisible). However, after the United States Supreme Court's decision in *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2028, 104 L.Ed.2d 675 (1989), it seems certain that military disability retirement benefits are not divisible on divorce. *See Wallace v. Fuller*, 832 S.W.2d 714, 717-18 (Tex. App.--Austin 1992, no writ) (after *Mansell*, it is clear that military non-disability retirement benefits cannot be divided in a Texas divorce).

4. Veteran's Benefits According to federal statute, Veteran's Benefits are not property. 38 U.S.C.A. § 101 (West 1991). They are not community property, and cannot be divided upon divorce. *Ex parte Burson*, 615 S.W.2d 192, 194-95 (Tex. 1981); *Kamel v. Kamel*, 721 S.W.2d 450, 453 (Tex. App.--Tyler 1986, no writ); *Ex parte Johnson*, 591 S.W.2d 453, 454 (Tex. 1979); *Ex parte Pummill*, 606 S.W.2d 707, 709 (Tex. Civ. App.--Fort Worth 1980, no writ). *See Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2028, 104 L.Ed.2d 675 (1989) (veteran's disability payments are not divisible on divorce, due to preemption).

6. Workers Compensation Benefits

b. Under State Law. The character of workers' compensation benefits is not controlled by the circumstances surrounding the inception of the right to these benefits. *See Hicks v. Hicks*, 546 S.W.2d 71, 73 (Tex. Civ. App.--Dallas 1977, no writ) (compensation for disability for a period after divorce is not community even though the injury may have occurred when the parties were married). *Accord*, *Bonar v. Bonar*, 614 S.W.2d 472, 473 (Tex. Civ. App.--El Paso 1981, writ ref'd n.r.e.) ("The law of the State is clear that workers' compensation benefits received after a divorce are not community property, even in those instances where the injury was received during the marriage").

Workers' comp. claims may also include an award for medical expenses. In *Graham v. Franco*, 488 S.W.2d 390, 396 (Tex. 1972), the Supreme Court said that a recovery for medical and related expenses incurred during marriage belongs to the community, since the community is responsible for these expenses. Under this analysis, medical payments recovered in a comp. claim would belong to the community, to the extent that the community estate was liable for them.

According to *York v. York*, 579 S.W.2d 24, 26 (Tex. Civ. App.--Beaumont 1979, no writ), workers' comp. benefits received during marriage are presumed to be community property, and the burden is on the spouse asserting a separate property interest to establish what portion of the workers' comp. award is separate property.

In *Hicks v. Hicks*, 546 S.W.2d at 74, the husband's comp. claim was pending and unsettled at the time of divorce. The appellate court held that, in a post-divorce partition suit regarding the comp. claim settled after divorce, the *non-injured* spouse has the burden to show what part of the comp. claim was community property. One commentator has suggested that the burden of proving the existence of undivided community property is on the spouse seeking to recover an interest in such property. Smith, *Characterization of Property*, 1 KAZEN, FAMILY LAW AND PROCEDURE § 11.21 (1990).

d. Under Federal Law. In *Bonar v. Bonar*, 614 S.W.2d 472 (Tex. Civ. App.--El Paso, writ ref'd n.r.e.), the ex-wife brought a partition case, arguing that her ex-husband's federal comp. award was community property, even though her ex-husband's injury occurred after divorce, because the right to receive the award constituted an earned property right which accrued by reason of the husband's employment during marriage, and because the ex-husband had elected to receive the comp. benefits in lieu of disability retirement, a portion of which had been awarded to the ex-wife in their divorce. The El Paso Court of Civil Appeals indicated that benefits under the Federal workers' comp. statute were divisible in a Texas divorce only to the extent the award represented lost earning capacity during marriage.

In contrast, in *Anthony v. Anthony*, 624 S.W.2d 388 (Tex. App.--Austin 1981, writ dism'd), the appellate court held that federal workers' compensation benefits were not analogous to Texas workers' compensation benefits, in that the federal benefits were funded out of the wages of the worker, and served as a substitute for Civil Service Disability Retirement benefits, whereas Texas workers' comp. benefits are unrelated to retirement rights, and do not replace them, and are not paid out of a fund created with the wages of the worker. In *Anthony*, the appellate court held that federal worker's comp. benefits were divisible in the same manner as retirement benefits or disability retirement benefits.

If *Bonar* is correct, then federal workers' comp. benefits will be treated just like Texas workers' comp. benefits. If *Anthony* is correct, then federal workers' comp. benefits will be treated like retirement benefits.

8. Contractual Disability Payments The courts have applied the inception of title rule to contractual disability payments, in contrast to the treatment of wages, retirement benefits, and state workers' compensation benefits. In *Simmons v. Simmons*, 568 S.W.2d 169 (Tex. Civ. App.--Dallas 1978, writ dism'd), where the right to receive disability benefits arose incident to employment during marriage, that right, and any benefits received, whether during marriage or after divorce, were held to be community property. *Accord*, *Andrle v. Andrle*, 751 S.W.2d 955, 955-56 (Tex. App.--Eastland 1988, writ denied) (disability insurance policy purchased with community funds gave rise to community payments, even after divorce; they are not separate property on the theory that they replace post-divorce income); *Copeland v. Copeland*, 544 S.W.2d 183 (Tex. Civ. App.--Amarillo 1976, no writ) (disability retirement benefits were not an award of damages but rather a property right earned during marriage). In *Rucker v. Rucker*, 810 S.W.2d 793, 794-95 (Tex. App.--Houston [14th Dist.] 1991, writ denied), the divorce decree awarded wife a portion of husband's police department retirement benefits. Six years after the divorce, ex-husband became disabled and started receiving disability benefits. Ex-wife was entitled to her portion of these benefits, because they were in the nature of retirement benefits.

DD. Contractual Rights

2. Private Life Insurance *McCurdy v. McCurdy*, 372 S.W.2d 381 (Tex. Civ. App.--Waco 1963, writ ref'd), held that the inception of title rule applies to life insurance. The court rejected the so-called "apportionment method," under which the character of the policy would be directly proportional to the amount of premiums paid by each marital estate. *Accord Pritchard v. Snow*, 530 S.W.2d

889, 893 (Tex. Civ. App.--Houston [1st Dist.] 1975, writ ref'd n.r.e.).

4. Casualty Insurance While one would think that a community property casualty insurance policy would give rise to community funds upon a casualty loss, one case says that the insurance proceeds have the character of the asset insured, regardless of the character of the policy. *Rolator v. Rolator*, 198 S.W. 391, 393 (Tex. Civ. App.--Dallas 1917, no writ).

FF. Federal Military Insurance

2. National Service Life Insurance Military personnel can obtain insurance pursuant to the National Service Life Act, 38 U.S.C.A. § 1901 et seq. (West 1991 & Supp. 1995). That statute contains nonassignability language that has been held to preempt the power of state courts to award the insurance coverage to the non-military spouse in a divorce. *See Kamel v. Kamel*, 721 S.W.2d 450, 453 (Tex. App.--Tyler 1986, no writ) (improper for court to award 60% of cash value of National Service Life Insurance policy to other spouse, due to preemption).

4. Servicemen's Group Life Insurance In *Ridgway v. Ridgway*, 454 U.S. 46, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981), the U.S. Supreme Court held that provisions of the Servicemen's Group Life Insurance Act of 1965, giving an insured service member the right to freely designate and alter the beneficiaries named under the life insurance contract, prevail over and displace a constructive trust for the benefit of the service member's children imposed upon the policy proceeds by a state court divorce decree. *See* 38 U.S.C.A. §§ 1965 et seq. (West 1991 & Supp. 1995).

HH. Money Loaned A debt for money loaned by a spouse before marriage is separate property. The character of a loan made during marriage depends on the character of the funds loaned. *See Snider v. Snider*, 613 S.W.2d 8, 11 (Tex. Civ. App.--El Paso 1981, no writ) (a claim against a third party existing on the day of marriage is separate property). *Mortenson v. Trammell*, 604 S.W.2d 269, 275-76 (Tex. Civ. App.--Corpus Christi 1980, writ ref'd n.r.e.) (where wife borrowed $ 3,500 using her separate credit and loaned the money to her daughter, the loan owed by the daughter was wife's separate property). In *Snider*, proof that during marriage credits exceeded debits to the balance of the debt successfully proved separate character to the extent of the balance on date of marriage. *Id.* Of course, interest earned on a debt during marriage is community property.

Example 11
Husband sold land before marriage, taking back a promissory note and deed of trust. Some years into marriage, the buyer defaults and Husband forecloses on the property, buying it in at the sale for the amount due on the note, including principal and unpaid interest earned during marriage. Since Husband's inception of title to the land (i.e., the deed of trust) arose prior to marriage, would the land be his separate property? Or would the land be a mixture of separate and community property, in proportion to the unpaid principal vs. unpaid interest as of the date of purchase in foreclosure? Would the answer be different if the property were sold for cash to a third party, and the proceeds paid to Husband?

JJ. Crops, Timber, Livestock, Etc. Crops grown during marriage, even on separate property land, are community property: *DeBlane v. Hugn Lynch & Co.*, 23 Tex. 25 (1859); *Coggin v. Coggin*, 204 S.W.2d 47, 52 (Tex. Civ. App.--Amarillo 1947, no writ); *McGarrangh v. McGarrangh*, 177 S.W.2d 296, 300 (Tex. Civ. App.--Amarillo 1944, writ dism'd). Timber produced from trees grown on separate real property is community property: *White v. Lynch & Co.*, 26 Tex. 195 (1862). Bricks produced from a spouse's separate property are community property: *Craxton, Wood & Co. v. Ryan*, 3 Willson 439 (Tex. Ct. App. 1888). Offspring of livestock born during marriage are community property: *Blum v. Light*, 81 Tex. 414, 16 S.W. 1090, 1092 (1891); *Gutierrez v. Gutierrez*, 791 S.W.2d 659, 665 (Tex. App.--San Antonio 1990, no writ) (offspring of separate property cattle is community property; over time, heard became commingled); *Beaty v. Beaty*, 186 S.W.2d 88, 90 (Tex. Civ. App.--Eastland 1945, no writ).

LL. Gains and Acquets Another way of looking at community property is the principle that property which is the fruit of the work, efforts, or labors of the spouses is community property, and property acquired otherwise is separate property. In *Norris v. Vaughan*, 152 Tex. 491, 260 S.W.2d 676, 682 (1953), the Court reiterated its statement in the *DeBlane* case:

> The principle which lies at the foundation of the whole system of community property is, that whatever is acquired by the joint efforts of the husband and wife, shall be their common property.

This is the so-called "affirmative test; i.e., that property is community which is acquired by the work, efforts or labor of the spouses or their agents, as income from their property, or as a gift to the community. Such property, acquired by the joint efforts of the spouses, was regarded as acquired by 'onerous title' and belonged to the community." *Graham v. Franco*, 488 S.W.2d 390, 392 (Tex. 1972).

> Example 12
> Wife buys a lottery ticket using $ 1.00 of separate property money. She wins. Are the winnings her separate or community property? According to *Dixon v. Sanderson*, 72 Tex. 359, 10 S.W. 535, 536 (1888), the winnings are community property.

NN. Unincorporated Business

2. Generally "The increase from a spouse's operation of a business always has been considered community property, even when the business itself was owned by one spouse prior to the marriage and thus was the separate property of that spouse." *Vallone v. Vallone*, 644 S.W.2d 455, 462 (Tex. 1982) (Sondock, J., dissenting). *See Epperson v. Jones*, 65 Tex. 425 (1886). In *Epperson*, the Supreme Court held that profits from the operation of a business are "community property, and cannot, therefore, be said to increase ... [spouse's] separate estate to the extent of a single dollar." *Id.* at 428. *See Moss v. Gibbs*, 370 S.W.2d 452 (Tex. 1963); *Hardee v. Vincent*, 136 Tex. 99, 147 S.W.2d 1072 (Tex. 1941); *Smith v. Bailey*, 66 Tex. 553, 1 S.W. 627 (1886); *Cleveland v. Cole*, 65 Tex. 402 (1885); *Green v. Ferguson*, 62 Tex. 525 (1884). "[U]nder the laws, the services of the family are always to be rendered for the benefit of the community, and not for its individual members . . . ." *Yates v. Houston*, 3 Tex. 433, 455 (1848). In *DeBlane v. Hugh Lynch & Co.*, 23 Tex. 25, 29 (1859), the Supreme Court said:

> The principle which lies at the foundation of the whole system of community property is, that whatever is acquired by the joint efforts of the husband and wife, shall be their common property.

4. Labor Applied to Separate Property Assets When a spouse takes a separate property asset and works it with community labor to the degree that it is significantly enhanced in value, old cases say that the end product may be transmuted into community property. For example, in *Craxton, Wood & Co. v. Ryan*, 3 White & W 439 (Tex. Ct. App. 1888), the wife made a business of working her separate property clay soil into bricks. The bricks were held to be community property. Similarly, in *DeBlane v. Hugh Lynch & Co.*, 23 Tex. 25 (1859), the wife grew crops on her separate property land, using her separate property slaves. The crops were held to be community property. Again, in *White v. Hugh Lynch & Co.*, 26 Tex. 195 (1862), where a wife took trees from her separate property land and worked them into sawed lumber, the sawed lumber was held to be community property.

> Example 13
> Are all of the proceeds from the enterprise community property, or only the *profits* from the sale of the separate property materials?

6. Mercantile Business With Inventory In an unincorporated mercantile business the inventory and equipment owned by the spouse on the day of marriage is his/her separate property. The *profit* from the sale of the inventory is community. That means that the portion of the receipts representing a return of the cost of

goods sold is separate property. *See Yaklin v. Glusing, Sharpe & Krueger*, 875 S.W.2d 380, 385 (Tex. App.--Corpus Christi 1994, no writ) (in an unincorporated used car dealership, of the $ 3.3 million in outstanding promissory notes, only the *profit* in the notes was community property). *Meshwert v. Meshwert*, 543 S.W.2d 877, 879 (Tex. Civ. App.--Beaumont 1976) (profits from heating and air conditioning business were community property), *aff'd*, 549 S.W.2d 383 (Tex. 1977). *Farrow v. Farrow*, 238 S.W.2d 255 (Tex. Civ. App.--Austin 1957, no writ) (when husband thoroughly documented receipts and expenditures connected with buying and selling real estate and livestock, separate funds of both spouses commingled in accounts with business receipts did not lose their separate identity).

8. Professional Practice The earnings from a married professional's practice are community property. *Hopf v. Hopf*, 841 S.W.2d 898, 900 (Tex. App.--Houston [14th Dist.] 1992, no writ) (CPA's practice). Business equipment, inventory, furnishings, and other items of the business on hand at the time of divorce are presumptively community property, and will be divisible unless traced. *Hopf*, 841 S.W.2d at 900.

10. Personal Goodwill Personal goodwill of a professional is not community property that can be divided upon divorce. *Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972). Goodwill in a professional business is not considered part of the marital estate unless it exists independently of the professional's skills, and the estate is otherwise entitled to share in the asset. *See Hirsch v. Hirsch*, 770 S.W.2d 924, 927 (Tex. App.--El Paso 1989, no writ); *Finn v. Finn*, 658 S.W.2d 735, 740-41 (Tex. App.--Dallas 1983, writ ref'd n.r.e.). Goodwill in a professional corporation which exists independently of a professional's personal skills may be subject to division. *Finn*, 658 S.W.2d at 740-41; *Geesbreght v. Geesbreght*, 570 S.W.2d 427, 435-36 (Tex. Civ. App.--Fort Worth 1978, writ dism'd).

12. Incorporating a Going Business A spouse who incorporates a going business cannot argue that inception of title in the corporation arose with the unincorporated business. *Allen v. Allen*, 704 S.W.2d 600, 604 (Tex. App.--Fort Worth 1986, no writ). A corporation comes into existence when the Secretary of State issues a certificate of incorporation. The character of the stock depends upon the consideration furnished to the corporation in exchange for the stock (i.e., the character of the assets contributed during the formation of the corporation). *Id.* at 604. Tracing through the incorporation of a going business was successful in: *Vallone v. Vallone*, 618 S.W.2d 820 (Tex. Civ. App.--Houston [1st Dist.] 1981), *aff'd*, 644 S.W.2d 455 (Tex. 1982); *Marriage of York*, 613 S.W.2d 764, 769-70 (Tex. Civ. App.--Amarillo 1981, no writ). Tracing failed in *Allen*, 704 S.W.2d at 603-04. Separate property capitalization of a new corporation was established in *Holloway v. Holloway*, 671 S.W.2d 51, 56-57 (Tex. App.--Dallas 1983, writ dism'd).

PP. Partnership Since January 1, 1962, general partnerships in Texas have been regulated by the Texas Uniform Partnership Act (TUPA), Tex. Rev. Civ. Stat. Ann. art. 6132b (Vernon 1970 & Supp. 1995). In 1993, the Legislature adopted the Texas Revised Partnership Act [TRPA], Tex. Rev. Civ. Stat. Ann. § 47 (Vernon Supp. 1995). TUPA applies to general partnerships existing before January 1, 1994, unless the partnership voluntarily elects to be covered by TRPA. TRPA applies to all partnerships created on or after January 1, 1994. However, after December

31, 1994, TRPA applies to all partnerships. TRPA § 10.03.

2. The Rights of a Partner Under TUPA. Under the Texas Uniform Partnership Act, TEX. REV. CIV. STAT. ANN. art. 6132b, § 28-A (Vernon 1970) [TUPA], the property rights of a partner in a partnership include: (1) his/her rights in specific partnership property; (2) his/her interest in the partnership; and (3) his/her right to participate in the management of the partnership. TUPA § 24. Of these, according to TUPA, only the partner's interest in the partnership can be community property. TUPA § 28-A. A partner's right in specific partnership property, and the right to participate in the management of a partnership, cannot be community property. TUPA § 28-A.

Similar rights exist under TRPA.

4. Partnership Assets It has been said that partners do not own individual partnership assets. *Harris v. Harris*, 765 S.W.2d 798, 803 (Tex. App.--Houston [14th Dist.] 1989, writ denied). In *Harris*, the appellate court ruled that the fact that the husband entered into an agreement as to how a certain contingent fee would be divided among partners did not make the fee community property. *Id.* at 804. However, under TUPA § 25, a partner is a co-owner with the other partners of specific partnership property, which they all hold as tenants-in-partnership. Each partner has an equal right to possess specific partnership property for partnership purposes, and can possess partnership property for non-partnership purposes, but only with the consent of his partners. TUPA § 25(2)(a). Thus, partners under TUPA have a type of co-ownership of individual partnership assets.

Under TRPA § 5.01, a partner is not a co-owner of partnership property. TRPA § 2.04 says that neither a partner nor a partner's spouse has an interest in partnership property. The Bar Committee Comment under Section 5.01 says that a partner's spouse has no community property right in partnership property.

6. Partnership Interest TUPA § 26 provides that a partner's interest in the partnership "is his share of the profits and surplus, and the same is personal property for all purposes." "Surplus" has been defined as "the excess of assets over liabilities." *See Bader v. Cox*, 701 S.W.2d 677, 681 (Tex. App.--Dallas 1986, writ ref'd n.r.e.).

Under TUPA § 28-A(2), a partner's partnership interest can be community property.

The normal rules of marital property govern whether a partnership interest is separate or community property at the time it is acquired. *See In re Marriage of Higley*, 575 S.W.2d 432 (Tex. Civ. App.--Amarillo 1978, no writ) (partnership interest acquired prior to marriage was separate property); *Horlock v. Horlock*, 593 S.W.2d 743 (Tex. Civ. App.--Houston [1st Dist.] 1980, writ ref'd n.r.e.) (limited partnership interest acquired by husband after divorce was his separate property); *York v. York*, 678 S.W.2d 110 (Tex. App.--El Paso 1984, writ ref'd n.r.e.) (partnership interest acquired during marriage deemed to be community property).

Not so certain is the issue of whether the pure inception of title rule applies to the partnership interest, or whether some form of source-of-funds or apportionment rules apply. In *Smoot v. Smoot*, 568 S.W.2d 177 (Tex. Civ. App.--Dallas 1978, no writ), the Court said:

> The community or separate nature of each partner's interest depends on the source of the property. If a married partner contributes community property, or if partnership assets are accumulated from rents or profits, then, to that extent, his interest is community property, even though such rents or profits may have resulted from the use of separate property . . . . On the other hand, if a married partner contributes separate property, then his interest in the partnership is separate property to that extent, and any appreciation in its value as a result of general economic conditions, as distinguished from labor and effort beyond that required for preservation of the separate property, remains separate property. [Citations omitted.]

Under TRPA § 5.02(a), a partner's partnership interest can be community property. Under TRPA § 1.01(12), a "partnership interest" includes the partner's share of profit and losses, and the right to receive distributions, but does not include the right to participate in management.

8. Management Rights. Under TUPA § 28-A, a partner's right to participate in the management of the partnership cannot be community property. The Bar Committee Comment to TRPA § 5.02 says that the same is true under TRPA.

10. Amendment of Partnership Agreement During Marriage The fact that the partners amend the partnership agreement during marriage does not establish that an interest in the partnership was acquired during marriage and is thus community property. Unless the partnership dissolved, the same partnership interest continues through the amendment. *See Harris v. Harris*, 765 S.W.2d 798, 803 (Tex. App.--Houston [14th Dist.] 1989, writ denied).

12. Profits Distributed From Partnership Partnership profits and surplus received by a partner during marriage is community property, regardless of whether the partnership interest is separate or community property. *Harris v. Harris*, 765 S.W.2d 798, 804 (Tex. App.--Houston [14th Dist.] 1989, writ denied); *Marshall v. Marshall*, 735 S.W.2d 587, 594 (Tex. App.--Dallas 1987, writ ref'd n.r.e.).

Example 14

Husband is partner before marriage. During marriage, Partnership liquidates a building owned by the partnership at the time of Husband's marriage. The proceeds from that liquidation are distributed to the partners. Are those distributions community property despite the fact that they are not profits?

RR. Separate Property Corporation If a spouse owns stock in a corporation at the time of marriage, the stock is that spouse's separate property. *Hilliard v. Hilliard*, 725 S.W.2d 722, 723 (Tex. App.--Dallas 1985, no writ). Any increase in value of the separate property corporation is the owning spouse's separate property, and the community estate has no ownership claim over that increase in value. *Jensen v. Jensen*, 665 S.W.2d 107, 109 (Tex. 1984). However, the community estate may have a right of reimbursement if the increase in value is attributable to undercompensation

of the spouse for labor during marriage. *Id.* at 110. Assets distributed to shareholders upon liquidation of a separate property corporation are separate property. *See Hilliard*, 725 S.W.2d at 723 (husband did not provide the trial court with corporate minutes, deed or other evidence to support claim that assets received were in liquidation of separate property stock). Stock acquired during marriage is characterized according to the ordinary rules of characterization.

> Example 15
>
> Husband's separate property Corporation is a Subchapter S corporation, so that all corporate profits drop to his tax return, regardless of whether profits are distributed. Undistributed profits are accumulated during marriage, and at the time of divorce Wife claims that such undistributed profits, already taxed on their joint tax returns, are community property. Are they? Not according to *Thomas v. Thomas*, 738 S.W.2d 342, 344 (Tex. Civ. App.--Houston [1st Dist.] 1987, writ denied).

TT. Separate Property Corporation (Corporate Veil Pierced) A corporation exists as a separate entity from its shareholders. However, this distinction can be ignored for certain purposes. The separate identity of a corporation will be ignored (i.e., the corporate veil pierced) where the corporation is the alter ego of the shareholder, and there is such a unity between the corporation and an individual that the separateness has ceased to exist. *Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex. 1986); *Southwest Livestock & Trucking Co. v. Dooley*, 884 S.W.2d 805, 809 (Tex. App.--San Antonio 1994, writ denied). The corporate veil will be pierced when there is such a unity that the separateness has ceased to exist and adherence to the fiction of separateness would, under the circumstances, sanction a fraud or promote injustice. *Southwest Livestock & Trucking Co. v. Dooley*, 884 S.W.2d at 809; *Humphrey v. Humphrey*, 593 S.W.2d 824, 826 (Tex. Civ. App.--Houston [14th Dist.] 1980, writ dism'd). *See Zisblatt v. Zisblatt*, 693 S.W.2d 944 (Tex. App.--Fort Worth 1985, writ dism'd) (corporate veil pierced in a divorce).

VV. Transactions Involving Corporate Stock

2. <u>Stock Splits</u> Shares of stock acquired through stock splits have the same character as the original stock. *Harris v. Harris*, 765 S.W.2d 798, 803 (Tex. App.--Houston [14th Dist.] 1989, writ denied); *Horlock v. Horlock*, 533 U.S. 2, 60 (Tex. Civ. App.--Houston [14th Dist.] 1975, writ dism'd).

4. <u>Tracing Through Purchases and Sales</u> In *Carter v. Carter*, 736 S.W.2d 775 (Tex. App.--Houston [14th Dist.] 1987, no writ), the parties married on December 7, 1974. Husband testified that in 1970 he received 159 shares of stock in MPI, a family-owned business, as a gift from his father. He corroborated this testimony by showing dividends reflected on his 1974 tax returns, coupled with his testimony that MPI declared dividends at the end of the year and paid them in the following year. In 1976, MPI was acquired by Stauffer Chemical Company, and husband received 4,645 shares of Stauffer in exchange for his MPI stock. In 1979, Stauffer had a 2-for-1 split, raising husband's shares to 9,290 in number. In 1981, husband sold 1,156 plus

1,000 shares of Stauffer, and expended the proceeds. Husband acquired 166 shares of Stauffer stock as a Christmas gift from his father in 1981 which he later sold, and participated in six short sales in 1982 and 1983. The trial and appellate courts held that the stock was proven to be husband's separate property. In *Horlock v. Horlock*, 533 S.W.2d 52, 59 (Tex. Civ. App.--Houston [14th Dist.] 1975, writ dism'd), husband owned stock in a corporation prior to marriage. During marriage, that corporation merged with two other corporations to create yet another corporation. The court found that the new stock was husband's separate property--this despite the fact that he and the other owners of the old corporation put $ 200,000 into the merger.

> Example 16
>
> Husband and Friend each own 50% of Corporation at time of marriage. After some years, Friend decides to sell out to Husband. Instead of Husband buying Friend's stock, they agree that Corporation will redeem Friend's stock using retained earnings of Corporation. After the redemption, Husband owns 100% of corporation, but he still has only the shares of stock he owned prior to marriage. Is Husband's interest in the corporation all his separate property, or half separate and half community? Note that the *value* of Husband's 100% interest in the corporation after the redemption is worth the same as his 50% interest immediately prior to redemption.

XX. Securities Registered in Brokerage Account In *Estate of Hanau v. Hanau*, 730 S.W.2d 663 (Tex. 1987), the Supreme Court considered several stock transactions inside a brokerage account. On the date of marriage, the husband had 200 shares of Texaco stock. That stock was later sold for $ 5,755.00, and on the same day 200 shares of City Investing stock were purchased for $ 5,634.00. The City investing stock was later sold for $ 6,021.00, and on that same day 200 shares of TransWorld stock were purchased for $ 6,170.00. $ 149.00 in cash was supplied to complete this purchase. The trial court found that the husband's tracing had failed. The Court of Appeals affirmed, on the grounds that the husband had shown merely the possibility that separate property could have been the source of funds for the purchases of stock. The Supreme Court reversed, holding that the presumption of community had been overcome *as a matter of law*. The Court said:

> [T]he petitioner has shown the chain of events leading from the Texaco stock to the TransWorld purchase and shown that no other transactions occurred on the days in question, which would have planted the seeds of doubt upon the possible source of the funds used to buy the stocks.

Id. at 666. Thus, judgment was *rendered* that the stock was husband's separate property.

Tracing failed in *Merrell v. Merrell*, 527 S.W.2d 250 (Tex. Civ. App.--Tyler 1975, writ ref'd n.r.e.), where the husband asserted a separate property interest in real property premised upon his use of the proceeds from sale of separate stock to purchase the land. The Court said:

> Appellant testified that he inherited some corporate stocks from the estate of his mother, and that he sold stocks worth approximately $ 100,000.00, and that such funds were used to finance the purchase of the duplexes. Under the record we are unable to conclude that such funds were properly traced as appellant's separate property and not commingled with appellee's separate property or the community property.
>
> The record shows that appellant had many stock and bond transactions during the marriage. He bought and sold many shares of stock and some were bought short or on margin. Bonds were also bought on margin. Sometimes he would owe his brokerage firm several thousand dollars, and at other times he would have a credit with them.

Id. at 255.

Example 17

Wife has securities registered in "street name" down at her broker's office. She buys 100 shares of GM stock using her separate property. Later she buys 100 more shares of GM stock using community funds. Her brokerage house statements now reflect 200 shares of GM. Wife later sells 100 shares of GM stock. Did she sell her separate shares, the community shares, a pro rata amount of half of each, or some other mix? Assume now that the community shares were purchased on margin (i.e., using community credit), and that the proceeds from sale of the 100 shares were used to pay Wife's margin loan. If Wife's separate property shares are deemed sold, would the remaining 100 shares be community property with Wife's separate estate being entitled to reimbursement for paying a community debt?

ZZ. Tort Recovery for Injuries Prior to Marriage Recovery for a personal injury claim that arose prior to marriage would be the injured spouse's separate property, under Family Code § 5.01(a)(1) (property owned or claimed by the spouse before marriage). Note, however, that under Family Code § 5.01(a)(3) recovery for loss of earning capacity during marriage is not a spouse's separate property. Does that mean that a recovery for loss of earning capacity of a spouse who is injured and then marries becomes partially community property upon

marriage? But under Family Code § 5.01(b), community property can only be property acquired during marriage, so that if the claim arose prior to marriage, under the inception of title rule it could not be community property.

Example 18
Prior to marriage, Husband suffers permanent impairment of his right hand and arm in an automobile accident. He recovers a judgment for $ 750,000. $ 500,000 was to compensate for diminished earning capacity for the balance of his life. A year later, Husband marries. Is any portion of the $ 500,000 community property? What if the case had been settled before marriage for $ 200,000, plus $ 3,000 per month for life? What if the case is settled after marriage for the $ 750,000?

BBB. Tort Recovery for Injuries During Marriage

2. Physical Pain and Mental Anguish (Past & Future) Under *Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972), and Section 5.01 of the Texas Family Code, a recovery for physical pain and mental anguish is separate property. TEX. FAM. CODE ANN. § 5.01 (Vernon 1993).

4. Loss of Consortium A spouse's recovery for loss of consortium (i.e., loss of the other spouse's affection, solace, comfort, companionship, society, assistance, and sexual relations necessary to a successful marriage) is the recovering spouse's separate property. *Whittlesey v. Miller*, 572 S.W.2d 665, 666 & 669 (Tex. 1978).

6. Loss of Services A recovery for loss of the other spouse's services (i.e., performance of household and domestic duties) is community property. *Whittlesey v. Miller*, 572 S.W.2d 665, 666 n. 2 (Tex. 1978).

8. Lost Earning Capacity A recovery for lost earning capacity during marriage is community property, and a recovery for lost earning capacity before marriage or after divorce is separate property. TEX. FAM. CODE ANN. § 5.01 (Vernon 1993). A panel of the Dallas Court of Appeals, in *Dawson v. Garcia*, 666 S.W.2d 254 (Tex. App.--Dallas 1984, no writ), interpreted this language to be an "all or none" proposition. That is, under the reasoning in *Dawson*, if the claim for lost earning capacity arises during marriage, it is *entirely* community property, and if it arises before marriage or after divorce it is *entirely* separate property. *Id.* at 267. Thus, the recovery was not prorated over time, as are retirement benefits or worker's compensation benefits.

An important realization eluded the panel of Justices in *Dawson*: in Texas, the character of employment income is not governed by the inception of title rule. Instead, employment is divided into components of time (typically monthly), and the income deriving from employment during that time period (be it immediate or deferred) is separate or community according to whether you are married or not during that time period.

10. Disfigurement (Past & Future) Under the reasoning of *Graham v. Franco*, and Section 5.01 of the Texas Family Code, a recovery for disfigurement is separate property.

12. <u>Physical Impairment (Past & Future)</u> Under the reasoning of *Graham v. Franco*, and Section 5.01 of the Texas Family Code, a recovery for physical impairment, past and future, is separate property.

14. <u>Medical Expenses (Past & Future)</u> Under *Graham v. Franco*, a recovery for medical expenses incurred during marriage is community property to the extent that the community estate has incurred liability for such expenses. *Graham v. Franco*, 488 S.W.2d at 396. *Accord*, *Gracia v. RC Cola-7-Up Bottling Co.*, 667 S.W.2d 517, 520 (Tex. 1984). By extension, a recovery for medical expenses incurred before marriage or after divorce should be separate property.

16. <u>Exemplary Damages</u> The Texas Supreme Court has held that a recovery of exemplary damages by a spouse for a wrong committed during marriage is community property. *Rosenbaum v. Texas Building & Mortgage Co.*, 140 Tex. 325, 167 S.W.2d 506, 508 (1943). *See generally* Hennis, *Punitive Damages: Community Property, Separate Property, or Both*, 14 COM. PROP. J. 51 (1987).

18. <u>Injury to Child</u> Any recovery for loss of earnings or earning capacity of a child during minority belongs to the parents. TEX. FAM. CODE ANN. § 151.003(5) (Vernon Supp. 1996); *Bolling v. Rodriguez*, 212 S.W.2d 838, 841-42 (Tex. Civ. App.--Galveston 1948, writ ref'd n.r.e.). One case has said that such a recovery is the community property of the parents. *Hawkins v. Schroeter*, 212 S.W.2d 843, 845 (Tex. Civ. App.--San Antonio 1948, no writ). However, if a managing conservator has been appointed for the child, that conservator has the right to the services and earnings of the child. TEX. FAM. CODE ANN. § 153.132 (Vernon Supp. 1996). A recovery for loss of the child's consortium is also available. One case held that this recovery is separate property. *Williams v. Steves Industries, Inc.*, 678 S.W.2d 205, 211 (Tex. Civ. App.--Austin 1984), *aff'd*, 699 S.W.2d 570 (Tex. 1985). And the Supreme Court has held that a recovery for loss of spousal consortium is separate property. *Whittlesey v. Miller*, 572 S.W.2d 665, 669 (Tex. 1978).

20. <u>Tracing the Personal Injury Claim</u> Where a personal injury recovery is partly separate property and partly community property, the party claiming separate property must prove what portion of the recovery is separate and what portion is community. Failing that, the presumption of community will cause the entire recovery to be treated as community property. *Kyles v. Kyles*, 832 S.W.2d 194, 198 (Tex. App.--Beaumont 1992, no writ). See McKnight, *Family Law*, 28 SW L J 66, 71-72 (1974), discussing a federal district court proceeding which found that sixty percent of the husband's personal injury recover was attributable to bodily loss, thirty percent to lost wages, earnings and earning capacity during marriage, and ten percent to future medical expenses.

DDD. Contract Damages The character of contract damages is determined by the loss being compensated by the damages. For example, a claim for lost profits from a family business is community property. *Brazos Valley Harvestore Systems, Inc. v. Beavers*, 535 S.W.2d 797, 799 (Tex. Civ. App.--Tyler 1976, writ dism'd).

FFF. Assets Held in Trust for Spouse

2. <u>What is an "Express Trust"?</u> An express trust is defined in the Texas Trust Code as a fiduciary relationship with respect to property "which arises as a relationship and which subjects the person holding title to the prop-

erty to equitable duties to deal with the property for the benefit of another." TEX. PROP. CODE ANN. § 111.004(4) (Vernon 1995). Literally speaking, under Texas property law, a trust is not an entity, like a corporation. It is a *relationship*, between an individual (i.e., the trustee) and certain property. Thus, it is not really accurate to talk about "commingling inside of a trust," or "the character of distributions from a trust." We should instead talk of the commingling of property held by a trustee, or the character of distributions by a trustee of property held in trust.

4. "Trust" Accounts. In Texas, the act of depositing funds in an account designated as a "trust account" for another person does not necessarily establish an express trust for the other person's benefit. Recitals on the bank signature card that the funds are held "in trust" for another are evidentiary only, and do not give rise to a presumption that a trust was intended. *Fleck v. Baldwin*, 141 Tex. 340, 172 S.W.2d 975, 978 (1943). In connection with a "trust account," the law requires that the settlor demonstrate the intent to create a trust "by a larger number of acts than in the case of an ordinary trust." *Frost Nat. Bank of San Antonio v. Stool*, 575 S.W.2d 321, 322 (Tex. Civ. App.--Beaumont 1978, writ ref'd n.r.e.). If a trust is found to have been intended, it is a revocable inter vivos trust, which terminates upon the death of the settlor/trustee and the proceeds are payable to the beneficiary. *See Citizens Nat. Bank of Breckenridge v. Allen*, 575 S.W.2d 654, 657 (Tex. Civ. App.--Eastland 1978, writ ref'd n.r.e.) (involving certificate of deposit held "in trust").

6. Securities Held in Settlor's Name, "as Trustee" The rules discussed above for funds on deposit "in trust" for another also apply to securities held "in trust" for another. In *Citizens Nat. Bank of Breckenridge v. Allen*, 575 S.W.2d 654 (Tex. Civ. App.--Eastland 1978, writ ref'd n.r.e.), the issue was whether the settlor/trustee intended to create a trust when she acquired a certificate of deposit in her own name, "as Trustee for" another person. The jury found, and judgment was rendered, that the settlor/trustee intended to establish a revocable trust for the benefit of the third person. The Court of Civil Appeals affirmed the judgment, finding that such an inter vivos revocable trust is permissible under Texas law, and that it becomes irrevocable and payable upon the death of the settlor/trustee. The Court also extended the rule to stock certificates held in the name of the purchaser in trust for another, where the purchaser so intends. As stated by the Court:

> The ultimate and controlling question is the intent of the purchaser. The recitals on the certificate that such is held "in trust" for another are evidentiary only, and do not give rise to a presumption that a trust was intended.

Id., at 658.

8. Undistributed Assets Held in Trust Are Not Marital Property According to the following cases, property held in trust for a spouse was not marital property: *Buckler v. Buckler*, 424 S.W.2d 514 (Tex. Civ. App.--Fort Worth 1967, writ dism'd) (undistributed income in a spendthrift trust not part of the estate of the parties, where distribution of such income was discretionary with the trustee); *In re Marriage of Burns*, 573 S.W.2d 555 (Tex. Civ. App.--Texarkana 1978, writ dism'd) (undistributed income inside discretionary distribution trust not "acquired" by the spouse during marriage, and was therefore not part of the community estate); *Currie*

v. Currie, 518 S.W.2d 386 (Tex. Civ. App.--San Antonio 1974, writ dism'd) (property inside of discretionary distribution trust was not community property of the husband; property inside another trust, as to which husband was remainder beneficiary, was not "acquired" by the spouse, and was therefore not part of the community estate). This is not so, however, when assets are voluntarily left with the trustee. *See In re Marriage of Long*, 542 S.W.2d 712 (Tex. Civ. App.--Texarkana 1976, no writ) (where one half of the corpus of the trust had passed to the husband free of trust, the income on that half of the corpus belonged to the community, despite the fact that the husband left that half in the hands of the trustee).

HHH. Assets Distributed From Trust to Spouse

2. <u>Where Spouse Creates Trust for His/Her Own Benefit Using Own Assets</u> In *Mercantile National Bank at Dallas v. Wilson*, 279 S.W.2d 650 (Tex. Civ. App.--Dallas 1955, writ ref'd n.r.e.), the Court held that the undistributed income of a trust created by wife for her own benefit, prior to marriage, is community property. *See In re Marriage of Burns*, 573 S.W.2d 555 (Tex. Civ. App.--Texarkana 1978, writ dism'd) (income on separate property corpus of trust created by spouse for his own benefit was community property to the extent it was received by husband).

4. <u>Trust Funded by Gift or Devise</u> There are a number of cases which say that income from a trust which was created in a separate property manner (i.e., by will or by gift) is received by the spouse/beneficiary as separate property. These cases do not address the question of whether a trust created by a spouse for his own benefit, using separate property, gives rise to separate or community income.

McClelland v. McClelland, 37 S.W. 350 (Tex. Civ. App. 1896, writ ref'd), is probably the most often quoted of these older cases. *McClelland*, which involved a testamentary trust created for the husband by his father, presented the issue as being a contest between the intent of the testator and community property claims of the wife. In *McClelland*, the intent of the testator won out. Thus, a monthly allowance paid by the trustee to the husband, pursuant to a provision in the will, as well as other discretionary distributions made by the trustee under the will, were held to be the husband's separate property. *See Sullivan v. Skinner*, 66 S.W. 680 (Tex. Civ. App. 1902, writ ref'd) (where wife received a life estate in land under her father's will, which provided that she was to receive the income for her sole and separate use, the rentals from the land were wife's separate property).

Several other old cases, involving a conveyance by one spouse into trust for the benefit of the other spouse, held that income from the property held in trust was also separate property. *See Hutchinson v. Mitchell*, 39 Tex. 488 (1873) ("We can find nothing in any of the Constitutions or laws of the state or republic which would prevent a man from declaring an express trust in favor of his wife, and giving her the exclusive use and enjoyment of all the rents, revenues and profits of the trust estate, provided there is no fraud in the transaction against creditors . . ."); *Shepflin v. Small*, 23 S.W. 432 (Tex. Civ. App.--El Paso 1893, no writ) (where husband and wife joined in conveyance of wife's separate property to trustee, to collect the income and use it to support the wife and children, the income was withdrawn from the community estate).

In the case of *In re Marriage of Thurmond*, 888 S.W.2d 269, 272-75 (Tex. App.--Amarillo 1994, no writ), the court of appeals without explanation treated a trust distribution from a testamentary trust as entirely separate property, even though the distribution included interest earned by the trust.

A more recent Tax Court case has reviewed the broad panorama of Texas cases on marital property law and trusts, and concluded that, where a trust is established by gift, the correct view is that distributions from the trust to a married beneficiary are the beneficiary's separate property, nothwithstanding some authorities to the contrary. This occurred in *Wilmington Trust Co. v. United States*, 83-2 USTC (1983). The Court stated:

> It is concluded that, under the law of Texas, as developed and expounded by the Texas courts, the income derived during the marriage of [the spouses] from the seven trusts that are involved in the present case constituted the separate property of [the wife], and was not community property of [the spouses]. [The wife] never "acquired"--and she will never acquire--the corpus of any of these trusts. The corpus of each trust is to be held and controlled by the trustee or trustees during [the wife's] lifetime, and, upon [the wife's] death, the corpus will pass to her issue. Accordingly, the corpus of each trust was not [the wife's] separate property, and the trust income was not from [the wife's] separate property.
>
> What [the wife] "acquired"--and what she used to purchase the stocks and establish the bank accounts that are involved in the litigation--was the income from the trust property. As the income resulted from the gifts made to trustees for [the wife's] benefit, the income necessarily constituted her separate property under section 15 of article XVI of the Texas Constitution.

Id. *See also Taylor v. Taylor*, 680 S.W.2d 645, 649 (Tex. App.--Beaumont 1984, writ ref'd n.r.e.) (trust distributions held to be separate property where trust instrument said that income of trust became part of the corpus and the parties had stipulated that corpus was separate property).

On the other hand, there are several cases suggesting that income on property held in trust is community property, even where the trust is established by gift or devise.

In *In re Marriage of Long*, 542 S.W.2d 712 (Tex. Civ. App.--Texarkana 1976, no writ), the husband was the beneficiary of a trust created prior to marriage by his parents. Prior to the divorce, the husband's right to receive half of the corpus free of trust had matured, but the husband left that half in the hands of the trustee. The Court held that once the husband's right to receive half of the corpus matured, the income on such half began to belong to the community. However, the half of the corpus which emerged from trust was itself the husband's separate property, and the income on the other half of the corpus, which remained in trust, did not belong to the community since it still "belonged to the trust." It appears to have been important to that last determination that the distribution of income was discretionary with the trustee. *Id.* at 718. *Long* can be read as tacitly agreeing that distributed income from a trust can be community property.

In *In re Marriage of Burns*, 573 S.W.2d 555 (Tex. Civ. App.--Texarkana 1978, writ dism'd), the Court determined that undistributed income in several trusts was not community property because it had been neither received nor constructively received by the husband during marriage. This rule was applied not only to several trusts established for the husband by his parents and grandparents, but also to a trust established by the husband for himself, three months after marriage, using husband's separate property. The opinion suggests, albeit somewhat obliquely, that if the income from the trusts had been received by the husband, either actually or constructively, that the income would have been community property.

In *Commissioner of Internal Revenue v. Porter*, 148 F.2d 566 (5th Cir. 1945), the Fifth Circuit Court of Appeals concluded that income distributed from a trust established by the spouse's father was received by the spouse/beneficiary as community property. The Court said that while the income remained in the hands of the trustee, it was "protected," but once it was distributed it became subject to the "ordinary impact of the law."

In *Commissioner of Internal Revenue v. Wilson*, 76 F.2d 766 (5th Cir. 1955), the Fifth Circuit held that income from property held in trust for a married man was received by him as community property, although the corpus was not community property. However, some of the distributed trust income derived from royalties and bonuses on "separate property" corpus. Also, delay rentals were received by the trustee. According to the Fifth Circuit, the delay rentals would be community property, while the royalties and bonuses would not; therefore, whatever portion of the trust income could be shown to be derived from royalties and bonuses would be separate property when received by the beneficiary. This analysis required tracing of the distributions to income received by the trust. In this regard, the Court said:

> In the accounting, outlays by the trustee specially connected with [royalties] are to be considered, and also a fair proportion of the general expenses of the trust, so as to ascertain what part of the net payment to the beneficiaries really came from royalties.

Id. at 770. Proceeds from sale of trust assets was not an issue in the case.

6. Commingling Inside Trust In *McFaddin v. Commissioner*, 148 F.2d 570 (5th Cir. 1945), a tax case, a trust was created by the mother and father of the McFaddin children. The parents conveyed two large cattle ranches into trust, subject to the debts secured by the properties and further subject to an annual payment to the mother of $30,000 per year, payable from income or, if insufficient, from the corpus.

The Tax Court ruled that children who are beneficiaries of a trust, which is created by gift of their parents, hold that interest as separate property. The Tax Court further found that the rights of the beneficiaries did not attach to the gross income, but rather to the distributable net income, of the trust, and that the gross income of the trust used by the trustees to purchase additional property could not be community income of the beneficiaries. The Tax Court further held that the fact that the property was conveyed into trust subject to debts and liens did not convert what was otherwise a gift into a transfer for onerous consideration. And oil royalties and bonuses

distributed by the trustee remained the beneficiaries' separate property.

The Fifth Circuit agreed that the res of the trust was a gift, and thus separate property. *Id.* at 572. Therefore, the oil royalties, bonuses and profits from the sale of the land "came to" the McFaddin children as separate property, taxable as separate income.

Nonetheless, the Court held that property acquired by the trust during the beneficiaries' marriages was community because separate and community funds had been commingled within the trust. The Court stated:

> The theory of the Tax Court that none of the commingled property with which the afteracquired property was purchased was community property because, under the terms of the trust instrument, gross income was treated as corpus, the rights of the beneficiaries did not attach to gross income but only to the distributable net income, and the gross income used by the trustees was, therefore, not community property, will not at all do. The taxpayers were the beneficial owners of the trust properties, and every part and parcel of them, including income from them, belonged beneficially to them, either as separate or as community property, in the same way that it would have belonged to them had the property been deeded to the taxpayers and operated by themselves. The greater part of the normal income from the property during the years preceding the tax years in question was community income. When it was commingled in a common bank account with other funds of the trust so that the constituents had lost their identity, the whole fund became community; and when it was used by the trustees to purchase additional properties, those properties, taking the character of the funds which bought them, were community property. [footnotes omitted]

Id. at 573.

The Fifth Circuit Court of Appeals also rejected the Commissioner of Internal Revenue's argument that because the trusts were spendthrift trusts, they were in effect conveyances of income to the separate use of the beneficiaries. *Id.* at 574.

In sum, the *McFaddin* case stands for proposition that income received by a trust is community or separate by the same rules as would apply had the income been received outside of trust. And if those funds are commingled, then the separate corpus of the trust can be lost to the community, upon subsequent distributions to the beneficiaries.

This rule was applied to the gross income of the trust, not just to the distributable net income. *Id.* at 573. Since the gross income was commingled in trust bank accounts with separate property receipts, the whole fund became community property, and the subsequently-acquired property was community in nature, and the oil income therefrom was similarly community.

JJJ. Community Property Held by Spouses With Right of Survivorship TEX. CONST. art. XVI, § 15, and TEX. PROB. CODE ANN. § 451 (Vernon Supp. 1995), permit spouses to hold community property with a right to survivorship in the surviving spouse. *See* TEX. REV. CIV. STAT. ANN. art. 852a, § 6.09 (Savings and Loan Act provision permitting spouses to have survivorship accounts at

savings and loan institutions). The Constitution says that the spouses "may agree in writing." The Probate Code says that an agreement between spouses creating a right of survivorship in community property "must be in writing and signed by both spouses." TEX. PROB. CODE ANN. § 452 (Vernon Supp. 1995). Upon death, the transfer to the surviving spouse occurs as a result of the agreement, and is not considered to be a testamentary transfer. *Id.* at § 454.

> Example 19
> Husband opens an IRA account using community funds, designating Wife as beneficiary to receive the contents upon Husband's death. Wife does not sign any of the IRA papers. Is this a valid survivorship arrangement? No, because the Constitution and statutes require a written agreement *between the spouses*, *signed by both spouses*.

LLL. Assets Partitioned or Exchanged; Separate Property Income Agreement The Texas Constitution and the Texas Family Code permit spouses to partition community assets into separate assets, and to exchange the interest of one spouse in particular community property for the interest of the other spouse in other community property. Assets partitioned or exchanged in this manner become the separate property of the receiving spouse. TEX. CONST. art. XVI, § 15, TEX. FAM. CODE ANN. § 5.52 (Vernon 1995). The partition and exchange can be applied to community property on hand and community property to be acquired. *Id.* Persons about to marry can also partition and exchange community property to be acquired during marriage. TEX. CONST. art. XVI, § 15. The relevant Family Code provision regarding premarital agreements, being from a uniform law, does not expressly mention partition and exchange by premarital agreement. TEX. FAM. CODE ANN. § 5.52 (Vernon 1995). Additionally, spouses (not persons about to marry) can agree that income arising from separate property will be separate property of the owner. TEX. CONST. art. XVI, § 15, TEX. FAM. CODE ANN. § 5.53 (Vernon 1995)

NNN. Funds Borrowed During Marriage Debts contracted during marriage are presumed to be on the credit of the community, unless it is shown that the creditor agreed to look solely to the separate estate of the borrowing spouse for repayment. *Cockerham v. Cockerham*, 527 S.W.2d 162, 171 (Tex. 1975). And property purchased on credit during the marriage is community property unless there is an express agreement on the part of the lender to look solely to the purchasing spouse's separate estate for satisfaction of the debt. *Glover v. Henry*, 749 S.W.2d 502, 503 (Tex. App.--Eastland 1988, no writ).

In *Jones v. Jones*, 890 S.W.2d 471, 475-76 (Tex. App.--Corpus Christi 1994, writ requested), the appellate court overturned a jury finding of separate credit, because the record contained no evidence that the lender agreed to look solely to the borrowing spouse's separate estate for repayment.

In *Holloway v. Holloway*, 671 S.W.2d 51, 57 (Tex. App.--Dallas 1983, writ dism'd), an implied agreement of separate credit was inferred by the court where loan proceeds were deposited into an account designated as husband's separate property account, and

husband alone signed the loan papers "Pat S. Holloway, Separate Property," and only husband's separate property was used as collateral.

In *Wierzchula v. Wierzchula*, 623 S.W.2d 730 (Tex. Civ. App.--Houston [1st Dist.] 1981, no writ), the court found an implied agreement, with the creditor, of separate credit where the husband had signed earnest money contract to buy a home prior to marriage, and had applied for credit prior to marriage, and the loan papers were in the husband's name alone, *despite* the fact that the note was signed by the husband *during marriage* and contained no terms restricting liability to the husband's separate estate.

In *Brazosport Bank of Texas v. Robertson*, 616 S.W.2d 363, 366 (Tex. Civ. App.--Houston [14th Dist.] 1981, no writ), the court held that a bank's loaning money to the wife over the husband's objection, where the note was signed by the wife alone and title to automobile taken in wife's name alone, constituted an implied agreement by the lender to look to wife alone for satisfaction of the debt.

In *Mortenson v. Trammell*, 604 S.W.2d 269, 275-76 (Tex. Civ. App.--Corpus Christi 1980, writ ref'd n.r.e.), the fact that the wife took a loan out in her name alone, and put up her separate property CD as collateral, was sufficient to support a jury finding of separate credit.

In *Broussard v. Tian*, 295 S.W.2d 405 (Tex. 1956), evidence that the down payment for land was made with the husband's separate property, and that all payments on the note secured by the land were also made with husband's separate property, and that the deed ran to husband alone, and that husband alone signed the note and deed of trust, and that the spouses were separated at the time of the transaction, and that the banker and husband discussed payment of the note with husband's separate property royalty income, was still not enough to support a jury finding of an agreement that the note would be paid out of the husband's separate estate.

A question arises whether such an agreement between the lender and the borrowing spouse can be proved by parol evidence. The Supreme Court expressly reserved judgment on that question in *Broussard v. Tian*, 295 S.W.2d 405 (Tex. 1956). *See Jones v. Jones*, 890 S.W.2d 471, 477 (Tex. App.--Corpus Christi 1994, writ requested) (Hinojosa, F.G., J., dissenting) (contents of promissory notes cannot be supplemented or varied by parol evidence of separate credit agreement without proof of fraud, mistake, or accident).

Example 20
Part 1

Husband purchases a car on credit, with no agreement by the lender to look solely to Husband's separate estate for repayment. The car is therefore community property. After the car is acquired, the spouses enter into a partition agreement which, among other things, sets the car aside to Husband as his separate property. The car is now Husband's separate property, despite the fact that it was acquired with community credit.

Part 2

Assume the same facts, except that the parties agree by premarital agreement that all assets acquired through a note signed only by one spouse is partitioned to that spouse as his or her separate property. When the car is purchased by community credit, is it not received by the Husband as his separate property by virtue of partition?

ENDNOTES

[1] This assumes that Texas marital property law applies. Texas marital property law applies to property acquired by spouses while domiciled in Texas, regardless of where they married. TEX. FAM. CODE ANN. § 4.01 (Vernon 1993). For non-domiciliaries, conflict of law rules will apply. *See Ossorio v. Leon*, 705 S.W.2d 219, 223 (Tex. App.--San Antonio 1985, no writ). In a Texas divorce or annulment, property is treated as if Texas marital property law controls, even where it doesn't. TEX. FAM. CODE ANN. § 3.63(b) (Vernon 1993).

[2] *See Gutierrez v. Gutierrez*, 791 S.W.2d 659, 664 (Tex. App.--San Antonio 1990, no writ) (portion of rental payments belonging to husband's brother were not community property).

[3] The controlling definition of separate property is contained in the Texas Constitution, article 15, Section 15, which reads as follows:

> Sec. 15. Separate and community property of husband and wife
>
> Sec. 15. All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property; provided that persons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse or future spouse in other community property then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse; spouses also may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned or which thereafter might be acquired by only one of them, shall be the separate property of that spouse; if one spouse makes a gift of property to the other that gift is presumed to include all the income or property which might arise from that gift of property; and spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse.

The Family Code definition of separate property comports with the constitutional definition, except that Section 5.01(a)(3) says that "the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage" is separate property. TEX. FAM. CODE ANN. § 5.01(a)(3) (Vernon 1993). This personal-injury related category of separate property, which is not in the Constitution, was validated in *Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972). Section 5.52 provides that "[p]roperty or a property interest transferred to a spouse by a partition or exchange agreement becomes his or her separate property." TEX. FAM. CODE ANN. § 5.52 (Vernon 1993).

[4] The definition of community property is set out in Section 5.01(b) of the Texas Family Code: "Community property consists of the property, other than separate property, acquired by either spouse during marriage." TEX. FAM. CODE ANN. § 5.01(b) (Vernon 1993).

[5] Property may be partly separate and partly community property, in proportion to the portion of the purchase price paid with separate and community property. *Gleich v. Bongio*, 99 S.W.2d 881, 883 (Tex. 1937). See State Bar of Texas Pattern Jury Charges PJC 202.06 (1989). In the case of *In re Marriage of Thurmond*, 888 S.W.2d 269, 272-73 (Tex. App.--Amarillo 1994, writ denied), the court reviewed various descriptions of "mixed" ownership as being "pro tanto ownership," "equitable title," and "separate interest." The court felt that the most viable characterization of the interest of the spouse's separate estate in a mixed asset is one of "equitable title." *Id.* at 273.

[6] *Welder v. Lambert*, 91 Tex. 510, 22 S.W. 281, 284-86 (1898); *Henry S. Miller Co. v. Evans*, 452 S.W.2d 426, 430 (Tex. 1970); *Saldana v. Saldana*, 791 S.W.2d 316, 319 (Tex. App.--Corpus Christi 1990, no writ), citing *Strong v. Garrett*, 148 Tex. 265, 224 S.W.2d 471 (1949).

[7] TEX. CONST. art. XVI, § 15; *Parnell v. Parnell*, 811 S.W.2d 267, 269 (Tex. App.--Houston [14th Dist.] 1991, no writ) (real estate owned by husband prior to marriage was his separate property); *Gutierrez v. Gutierrez*, 791 S.W.2d 659, 665 (Tex. App.--San Antonio 1990, no writ) (car purchased by husband prior to marriage was his separate property).

[8] *See Allen v. Allen*, 751 S.W.2d 567, 572 (Tex. App.--Houston [14th Dist.] 1988, writ denied) (mineral interest received by former husband after divorce was community property because his inception of title to the interest arose during marriage).

[9] TEX. CONST. art. XVI, § 15; TEX. FAM. CODE ANN. § 5.01(a)(2) (Vernon 1993). One consequence of this rule is that there can be no gift to the community estate. *Tittle v. Tittle*, 148 Tex. 102, 220 S.W.2d 637, 642 (1949); *Celso v. Celso*, 864 S.W.2d 652, 655 (Tex. App.--Tyler 1993, no writ). Note that when one spouse gives property to the other spouse a presumption arises that the gift includes all income or property arising from the property transferred. TEX. CONST. art. XVI, § 15; TEX. FAM. CODE ANN. § 5.04 (Vernon 1993). "Gift" means a voluntary and gratuitous transfer of property coupled with delivery, acceptance, and the intent to make a gift." State Bar of Texas Pattern Jury Charges PJC 202.03 (1992). *See Hilley v. Hilley*, 161 Tex. 569, 342 S.W.2d 565, 569 (1961) ("When an inter vivos transfer is made to either or both of the spouses during marriage, the separate or community character of the property is determined by looking to the consideration given in exchange for it. Any right, title or interest acquired for a valuable consideration paid out of the community necessarily becomes community property . . . .").

[10] TEX. CONST. art. XVI, § 15; Tex. Fam. Code Ann. § 5.01(a)(2) (Vernon 1993). "Devise" means acquisition of property by last will and testament. State Bar of Texas Pattern Jury Charges PJC 202.03 (1992). "Descent" means acquisition of property by inheritance without a will. State Bar of Texas Pattern Jury Charges PJC 202.03 (1992).

[11] TEX. CONST. art. XVI, § 15. Family Code § 5.52 provides that "[p]roperty or a property interest transferred to a spouse by a partition or exchange agreement becomes his or her separate property." TEX. FAM. CODE ANN. § 5.52 (Vernon 1993).

[12] TEX. CONST. art. XVI, § 15. *See* TEX. FAM. CODE ANN. § 5.53 (Vernon 1993).

[13] TEX. CONST. art. XVI, § 15; TEX. PROB. CODE ANN. § 451 (Vernon Supp. 1995). *See Banks v. Browning*, 873 S.W.2d 763 (Tex. App.--Fort Worth 1994, writ denied) (signature card indicating survivorship by "X" in a box was sufficient to establish survivorship agreement as to community property); *Haynes v. Stripling*, 812 S.W.2d 397 (Tex. App.--Austin 1991, no writ) (constitutional amendment retroactively validated survivorship agreement, signed prior to effective date, that was invalid under prior law).

[14] *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973); *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965).

[15] "[T]he recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage" is separate property. TEX. FAM. CODE ANN. § 5.01(a)(3) (Vernon 1993). *See Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972). However, in *Graham v. Franco* 488 S.W.2d 390, 396 (Tex. 1972), the Supreme Court said that a recovery for medical and related expenses incurred during marriage belongs to the community, since the community is responsible for these expenses.

[16] *See Burgess v. Easley*, 893 S.W.2d 87, 90-91 (Tex. App.--Dallas 1994, no writ) (although deed was executed by husband's father during marriage, it was not delivered to husband until after divorce; since a conveyance is not effective until delivery, the property was not community property); *Snider v. Snider*, 613 S.W.2d 8, 11 (Tex. Civ. App.--El Paso 1981, no writ) (dividend declared after death of husband belonged to his heirs, not the community estate). *Berry v. Berry*, 647 S.W.2d 945, 948 (Tex. 1983).

[17] TEX. FAM. CODE ANN. § 5.02 (Vernon 1993); *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965) (all property possessed at the time of dissolution of marriage is presumed to be community property). The uncorroborated testimony of a spouse is sufficient to support a finding of separate property, but is not binding on the fact finder. *Hilliard v. Hilliard*, 725 S.W.2d 722 (Tex. App.--Dallas 1985, no writ) ("Husband's uncorroborated testimony . . . is not conclusive as to whether the house was separate or community").

[18] *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973); *Jackson v. Jackson*, 524 S.W.2d 308, 311 (Tex. Civ. App.--Austin 1975, no writ).

[19] State Bar of Texas Pattern Jury Charges PJC 202.04 (1989). To overcome the presumption of community, the party asserting separate property must trace and clearly identify the property which (s)he claims to be separate. *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973); *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965). The court in *Faram v. Gervitz-Faram*, 02-94-099-CV (Tex. App.--Fort Worth 1995) [1995 WL 108637], described tracing in the following way:

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

See Celso v. Celso, 864 S.W.2d 652, 654 (Tex. App.--Tyler 1993, no writ) (trial court reversed for failing to find that husband successfully traced CD funds into purchase of house); *Scott v. Scott*, 805

S.W.2d 835 (Tex. App.--Waco 1991, writ denied).

[20] *Celso v. Celso*, 864 S.W.2d 652, 654 (Tex. App.--Tyler 1993, no writ). The Court said: "Separate property will retain its character through a series of exchanges so long as the party asserting separate ownership can overcome the presumption of community property by tracing the assets on hand during the marriage back to property that, because of its time and manner of acquisition, is separate in character"). *See Martin v. Martin*, 759 S.W.2d 463, 466 (Tex. App.--Houston [1st Dist.] 1988, no writ) (of three lots, two were separate and one community; the lots were sold for a unified price; absent proof of the sales price for each lot, all proceeds were deemed to be community property; tracing failed).

[21] *Cockerham v. Cockerham*, 527 S.W.2d 162, 171 (Tex. 1975); *Anderson v. Royce*, 624 S.W.2d 621, 623 (Tex. Civ. App.--Houston [14th Dist.] 1981, writ ref'd n.r.e.).

[22] *Glover v. Henry*, 749 S.W.2d 502, 503 (Tex. App.--Eastland 1988, no writ).

[23] *Cockerham v. Cockerham*, 527 S.W.2d 162, 171 (Tex. 1975).

[24] *Kahn v. Kahn*, 94 Tex. 114, 58 S.W. 825, 826 (1900); *Kyles v. Kyles*, 832 S.W.2d 194, 196 (Tex. App.--Beaumont 1992, no writ).

[25] *Kahn v. Kahn*, 94 Tex. 114, 58 S.W. 825, 826 (1900); *Henry S. Miller Co. v. Evans*, 452 S.W.2d 426, 431 (Tex. 1970).

[26] *Kahn v. Kahn*, 94 Tex. 114, 58 S.W. 825, 826 (1900).

[27] *Pemelton v. Pemelton*, 809 S.W.2d 642, 646 (Tex. App.--Corpus Christi 1991), *rev'd on other grounds sub nom. Heggen v. Pemelton*, 836 S.W.2d 145 (Tex. 1992).

[28] *In re Marriage of Thurmond*, 888 S.W.2d 269, 273 (Tex. App.--Amarillo 1994, no writ), citing *Cockerham v.*
Cockerham, 527 S.W.2d 162, 168 (Tex. 1975); *see Graham v. Graham*, 836 S.W.2d 308, 310 (Tex. App.--Tyler 1992, no writ) (recognizing rule but holding it was not applicable); *Peterson v. Peterson*, 595 S.W.2d 889, 892-93 (Tex. Civ. App.--Austin 1980, writ dism'd) (presumption overcome by husband's testimony that no gift was intended). In *Whorrall v. Whorrall*, 691 S.W.2d 32, 35 (Tex. App.--Austin 1985, writ dism'd), wife's testimony that she did not intend a gift was sufficient to support the trial court's finding of separate property.

[29] TEX. CONST. art XVI, § 15, TEX. FAM. CODE ANN. § 5.04 (Vernon 1993).

[30] *Horlock v. Horlock*, 533 S.W.2d 52, 59 (Tex. Civ. App.--Houston [14th Dist.] 1976, writ dism'd). *Accord*, *Harris v. Ventura*, 582 S.W.2d 853, 855-56 (Tex. Civ. App.--Beaumont 1979, no writ). See the discussion in Paragraph III.I of this article.

[31] *Celso v. Celso*, 864 S.W.2d 652, 655 (Tex. App.--Tyler 1993, no writ) ("The mere fact that the proceeds of the sale were placed in a joint account does not change the characterization of the

separate property assets. The spouse that makes a deposit to a joint bank account of his or her separate property does not make a gift to the other spouse." *See Higgins v. Higgins*, 458 S.W.2d 498, 500 (Tex. Civ. App.--Eastland 1970, no writ).

[32] A "fixture" is something that is personal but has been annexed to the realty so as to become part of it. *Fenlon v. Jaffe*, 553 S.W.2d 422, 428 (Tex. Civ. App.--Tyler 1977, writ ref'd n.r.e.). The three-pronged test for fixtures is: (i) has there been a real or constructive annexation of the personalty to the realty; (ii) was there a fitness or adaptation of the item to the uses or purposes of the realty; (iii) was it the intention of the party annexing the personalty that it would become a permanent accession to the realty? *O'Neill v. Quiltes*, 111 Tex. 345, 234 S.W. 528, 529 (1921). Intention is controlling; the first two prongs are primarily evidentiary. *Capital Aggregates, Inc. v. Walker*, 488 S.W.2d 830, 834 (Tex. Civ. App.--Austin 1969, writ ref'd n.r.e.).

[33] *Missouri Pacific Ry. Co. v. Cullers*, 81 Tex. 382, 17 S.W. 19, 22 (1891).

[34] *Lindsay v. Clayman*, 254 S.W.2d 777 (Tex. 1952).

[35] *See Snider v. Snider*, 613 S.W.2d 8, 11 (Tex. Civ. App.--El Paso 1981, no writ) ("Prior to the actual declaration of a dividend, all the accumulation of surplus in the corporation merely enhanced the value of the shares held by the husband as his separate property and the community had no claim thereto").

[36] *Parker v. Parker*, 2-94-013-CV (Tex. App.--Fort Worth 1995, writ requested) (where corporation found to be alter ego of husband, corporate assets could become part of community estate; assets owned by corporation at time of marriage were husband's separate property, but assets acquired by the corporation during marriage were community property, absent tracing).

[37] *Jensen v. Jensen*, 665 S.W.2d 107, 109 (Tex. 1984).

[38] TEX. REV. CIV. STAT. ANN. art. 6132b § 24 (Vernon 1970).

[39] TEX. REV. CIV. STAT. ANN. art. 6132b § 28-A (Vernon 1970).

[40] TEX. REV. CIV. STAT. ANN. art. 6132b § 28-A (Vernon 1970).

[41] Tex. Rev. Civ. Stat. Ann. art. 6132b § 1.01 et seq. (Vernon Supp. 1995).

[42] See Para. III.AC.

[43] See Para. III.AC.

[44] See Para. III.AD.

[45] See Para. III.AD.

[46]For a good discussion of preemption, see *Ex parte Hovermale*, 636 S.W.2d 828, 837 (Tex. App.--San Antonio 1982, orig. proceeding) (Cadena, C.J., dissenting). *See also Ridgway v. Ridgway*, 454 U.S. 46, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981) (provisions of the Servicemen's Group Life Insurance Act of 1965, giving an insured service member the right to freely designate and alter the beneficiaries named under the contract, prevail over and displace a constructive trust for the benefit of the service member's children imposed upon the policy proceeds by a state-court divorce decree); *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981) (federal law preempted power of state court to divide military retirement benefits in a divorce); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979) (federal law preempted power of state court to divide railroad retirement benefits on divorce); *Yiatchos v. Yiatchos*, 376 U.S. 306, 84 S.Ct. 742, 11 L.Ed.2d 724 (1964); *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962) (savings bond survivorship provisions in treasury regulations preempted inconsistent Texas community property law); *Wissner v. Wissner*, 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424 (1950) (National Service Life Policy benefits are the sole property of the beneficiary, and are not community property); *McCune v. Essig*, 199 U.S. 382, 26 S.Ct. 78, 50 L.Ed. 237 (1905) (veteran's right, under federal statute, to designate beneficiary of life insurance could not be controlled by state court); *Ex parte Burson*, 615 S.W.2d 192 (Tex. 1981) (Veterans Administration disability payments are not property and cannot be divided upon divorce); *Eichelberger v. Eichelberger*, 582 S.W.2d 395 (Tex. 1979) (railroad retirement preempted); *Perez v. Perez*, 587 S.W.2d 671 (Tex. 1979) (military readjustment benefits held to be separate property due to gratuitous nature under federal statute); *United States v. Stelter*, 567 S.W.2d 797 (Tex. 1978) (ex-wife could not garnish ex-husband's retired pay, under federal statute); *Valdez v. Ramirez*, 574 S.W.2d 748 (Tex. 1978) (joint survivor annuity permitted by Civil Service Retirement Act preempted contrary state law); *Ex parte Johnson*, 591 S.W.2d 453 (Tex. 1979) (federal statute precluded division of V.A. disability benefits upon divorce); *Arrambide v. Arrambide*, 601 S.W.2d 197 (Tex. Civ. App.--El Paso 1980, no writ) (federal law prohibits division of VA disability payments upon divorce).