ORDINARY REIMBURSEMENT AND CREATIVE THEORIES OF REIMBURSEMENT
Who Has the Burden of Proof of Offsets, Presentation and Defense

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ORDINARY REIMBURSEMENT AND CREATIVE THEORIES OF REIMBURSEMENT
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by

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I. INTRODUCTION This article discusses standard theories of marital property reimbursement, as well as unusual theories and possible new theories of reimbursement. As the Supreme Court of Texas said of reimbursement in *Penick v. Penick*, 783 S.W.2d 194, 197 (Tex. 1988):

> Admittedly it is difficult to announce a single formula which will balance the equities between each marital estate in every situation and for every kind of property and contribution.

With this forewarning, we enter into the difficult area of Texas marital property reimbursement law. In this Article, the estate transferring wealth is called the "transferring estate," while the estate receiving wealth is called the "receiving estate."

II. CASE LAW RULES! The Texas Family Code does not even mention marital property reimbursement. Marital property reimbursement is entirely governed by caselaw. The two principal questions in the area are: (1) when is reimbursement available; and (2) how is it measured? Secondary questions involve the role of offsetting benefits, and who has the burden of pleading, producing evidence, and persuasion. Overlaying the whole area is the idea that the decision to award reimbursement is addressed to the sound discretion of the trial court, and that error regarding reimbursement is reversible only if it renders the overall property division an abuse of discretion.

III. REIMBURSEMENT CLAIMS BETWEEN MARITAL ESTATES. The principle of reimbursement applies from community to separate, from separate to community, and from separate to separate, estates. *Dakan v. Dakan*, 125 Tex. 375, 83 S.W.2d 620, 627 (1935). Such claims can be asserted not only upon divorce, but also by heirs of a spouse, when the community estate is dissolved by death. *See Anderson v. Gilliland*, 684 S.W.2d 673 (Tex. 1985). The Supreme Court stated in *Vallone v. Vallone*, 644 S.W.2d 455, 458-59 (Tex. 1983):

> The rule of reimbursement is purely an equitable one. Colden v. Alexander, 141 Tex. 134, 171 S.W.2d 328 (1943). It obtains when the community estate in some way improves the separate estate of one of the spouses (or vice versa). The right of reimbursement is not an interest in property or an enforceable debt, per se, but an equitable right which arises upon dissolution of the marriage through death, divorce or annulment. Burton v. Bell, 380 S.W.2d 561 (Tex.1964); Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620 (1935).

In actuality, reimbursement is recognized not only for improving another marital estate, but also for paying debts or expenses of another marital estate. These different types of reimbursement are discussed below. While the reimbursement award is usually in the form of money or a money judgment, the trial court can award specific property in satisfaction of the reimbursement claim. *Hilton v. Hilton*, 678 S.W.2d 645, 649 (Tex. App.--Houston [14th Dist.] 1984, no writ) (court awarded community shares of stock to husband to satisfy reimbursement claim in favor of husband's separate estate).

Many cases talk about a "right" of reimbursement. This suggests something that is guaranteed, something which you are entitled to receive. However, there is much language in reimbursement cases indicating that the decision to award or deny reimbursement is addressed to the trial court's sound discretion. It is

probably fair to say that appellate courts speak of a "right" of reimbursement when they are speaking in generalities, and that they speak of the broad equity powers of the trial court in deciding reimbursement when they are affirming a trial court's decision on reimbursement. *See Gutierrez v. Gutierrez*, 791 S.W.2d 659, 663 (Tex.App.--San Antonio 1990, no writ) (discussing "right" versus "claim").

IV. IS THE MEASURE OF REIMBURSEMENT COST OR ENHANCEMENT? From one perspective, the measure of reimbursement boils down to a choice between two alternatives: the cost to the transferring estate versus the benefit to the receiving estate. For payment of debts, insurance and taxes, we reimburse the cost, but for improvements which increase the value of land we reimburse the enhancement. For the increase in value of a spouse's separate property ownership interest in a corporation, we reimburse the cost (as measured by the value of the uncompensated-for community labor expended to enhance the corporation), but (possibly) limited by the amount of enhancement of the spouse's interest in the business. One of the many complications that makes it difficult to erect an analytical structure in this area of law is the fact that some courts say that a receiving estate is "enhanced" to the extent that its debts or expenses are paid by another estate. *See e.g., Graham v. Graham*, 836 S.W.2d 308, 310 (Tex. App.--Texarkana 1992, no writ).

V. OFFSETTING BENEFITS. In *Vallone v. Vallone*, 644 S.W.2d 455, 459 (Tex. 1983), the Supreme Court said:

> A right of reimbursement arises when the funds or assets of one estate are used to benefit and enhance another estate without itself receiving some benefit.

Offsetting benefits are a factor in determining marital property reimbursement no matter what the nature of the reimbursement claim is. *Penick v. Penick*, 783 S.W.2d 194, 197 (Tex. 1988).

The case law is confusing as to whether: (1) the reimbursement claim is only for the excess of cost or enhancement over offsetting benefits; (2) offsetting benefits are a dollar-for-dollar offset against a reimbursement claim; or (3) offsetting benefits are a factor for the court to consider in determining reimbursement, but the trial court is not mathematically bound to subtract the offsetting benefits from the cost or enhancement in measuring reimbursement. Do the offsetting benefits actually reduce the reimbursement claim, or are they merely a factor which the trial court can or must consider in making the equitable determination of whether or not to award reimbursement? The 1989 version of PJC 204.1 instructed the jury that a claim for reimbursement was measured by the amount of the reimbursement claim, "less the value of any related benefit received by the paying estate." 5 STATE BAR OF TEXAS PATTERN JURY CHARGES PJC 204.1 (1989) (old version of PJC). Under this old version of PJC 204.1, the jury was "netting" the related offsetting benefits against the reimbursement claim to come out with a final dollar figure. In 1996, the Pattern Jury Charge committee decided to treat offsetting benefits as a separately determinable number which the trial court might or might not offset against the reimbursement claim. 5 STATE BAR OF TEXAS PATTERN JURY CHARGES PJC 204.1 (1996) (available for $85.00 from 1-800-204-2222, ask for Sales Department). Thus, the current version of PJC 204.1 asks the jury to determine the dollar amount of the reimbursement claim, and separate from that the dollar amount of the related offsets. It is then left to the trial court to decide how to handle these numbers in determining whether to award reimbursement, and if so then for how much. *See* 5 STATE BAR OF TEXAS PATTERN JURY CHARGES PJC 204.2 (1996) (whether to award reimbursement is an advisory jury question, not a binding one).

It is apparent that the 1996 version of the Pattern Jury Charges uses a quite different approach from the 1989 version. The 1996 PJC committee felt that the effect of any offsetting benefits was a matter for the trial court's discretion, and that the proper role of the jury was to determine the amount of the claim, and the amount of the offset, but not to balance the two against each other in some unrevealed way in arriving at their verdict.

On this point, in *Beavers v. Beavers*, 675 S.W.2d 296, 298 (Tex. App.--Dallas 1984, no writ), the appellate court found no error in the trial court's determination that two reimbursement claims, one against each spouse' separate estate, should be offset and no reimbursement awarded in favor of the community against either spouse's separate estate. This demonstrates the use of offset at the broad, equitable level, as opposed to the more specific level of matching dollars flowing opposite directions in connection with a specific asset or debt. *Accord, Harris v. Holland*, 867 S.W.2d 86, 88 n. 2 (Tex. App.--Texarkana 1993, no writ) (trial court had discretion to award $ 90,000 reimbursement from community estate to separate estate, despite fact that community estate paid some debts of that separate estate); *Allen v. Allen*, 704 S.W.2d 600, 607 (Tex.

App.--Fort Worth 1986, no writ) (permissible in denying reimbursement to consider multiple claims for reimbursement for spending community funds on children from prior marriages, and expenditures on one spouse's business). In *Allen*, the court said: "Where there are mutual claims for reimbursement between marital estates, one estate's claim can be offset against another's claim." *Id.* at 607. However, several cases have been reversed because the trial court did not recognize offsetting benefits in determining the amount of reimbursement.

Another question exists as to whether the offsetting benefits must relate to the property or debt giving rise to the reimbursement claim, or whether the offsetting benefits can be anything of value flowing the opposite direction between the two affected estates. The PJC requires that the offsetting benefits be related, but no authority is given to support that position. *See* 5 STATE BAR OF TEXAS PATTERN JURY CHARGES 204.1 (1996).

The case law is also not clear as to who has the burden to plead the absence or existence of offsetting benefits, and who has the burden to prove the absence, existence or amount of offsetting benefits. See Para. VI.I below.

VI. PLEADING AND PROVING REIMBURSEMENT CLAIMS.

A. Duty to Plead for Reimbursement. As a general rule, reimbursement must be pled in order for it to be awarded. In the case of *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1983), the wife was deemed to have waived her claim for reimbursement for the value of uncompensated community time, talent and labor expended by the husband in enhancing his separate estate because she pled only for reimbursement for community *funds expended*, and not for the husband's toil. In the subsequent case of *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984), a wife who likewise failed to plead for reimbursement for uncompensated community time, talent and labor expended to enhance the husband's separate estate was given a remand, "in the interest of justice," to allow her to replead her case and seek such reimbursement upon retrial. In a concurring opinion, Justice Robertson observed that the majority of the Supreme Court in *Jensen* seemed to be relaxing the rigid pleading requirements indicated in *Vallone*. No other members of the Court joined in his concurrence, however. The Texarkana court of appeals has suggested that the strict language in *Vallone* may have been subsequently ameliorated, so that general allegations for reimbursement will suffice. *See Jones v. Jones*, 699 S.W.2d 583, 586 (Tex. App.--Texarkana 1985, no writ) ("the specificity of reimbursement pleadings as required in Vallone . . . is apparently no longer required"). Where there is no pleading whatsoever for reimbursement, a property division which includes reimbursement will be reversed. *See Gay v. Gay*, 737 S.W.2d 94, 96 (Tex. App.--El Paso 1987, writ denied). The Family Law Section's Texas Family Law Practice Manual divorce pleading contains general allegations specifying the nature of the reimbursement claim, whether for "funds or assets expended," or "community time and effort expended," or "separate funds or assets expended." TEXAS FAMILY LAW PRACTICE MANUAL 3A.68 (1994).

B. Must You Plead Lack of Offsetting Benefits? It is sometimes argued that it is necessary for the party seeking reimbursement to plead that the amount of reimbursement exceeds offsetting benefits. This view was rejected in *Hilton v. Hilton*, 678 S.W.2d 645, 648 (Tex. App.--Houston [14th Dist.] 1984, no writ), rested its view on the idea that a separate estate that is not specifically liable for a community debt could never receive a benefit from paying the community debt. Under the *Hilton* rationale, offsetting benefits are as a matter of law not possible where the separate property of the non-liable spouse is used to pay a community debt. However, that would not follow where a spouse who is personally liable on the community debt pays that debt using his/her own separate property. A better, simpler approach, would be for courts to announce a rule, on who has the burden to plead offsetting benefits, that does not change from case to case.

The Texas Family Law Practice Manual divorce pleading does *not* plead the absence of offsetting benefits, nor does it allege that the reimbursement claim exceeds offsetting benefits. TEXAS FAMILY LAW PRACTICE MANUAL 3A.68 (1994).

C. Trial by Consent. In *Smith v. Smith*, 715 S.W.2d 154, 156 (Tex. App.--Texarkana 1986, no writ), the appellate court held that, although unpled, reimbursement had been tried by consent when the husband permitted evidence of enhancement of his separate property to come in without objection. *See* TEX. R. CIV. P. 67 ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings"). *See Kamel v. Kamel*, 721 S.W.2d 450, 451 (Tex. App.--Tyler 1986, no writ) (reimbursement was tried by consent).

D. Waiver of Pleading Defects. Pleading defects, both of form and of substance, must be brought to the trial court's attention before the charge is read to the jury, or in non-jury cases before the judgment is signed, or the complaints are waived. TEX. R. CIV. P. 90; *Jones v. Jones*, 699 S.W.2d 583, 586 (Tex. App.--Texarkana 1985, no writ); *Hilton v. Hilton*, 678 S.W.2d 645, 648 (Tex. App.--Houston [14th Dist.] 1984, no writ).

E. Burden of Proof on Party Seeking Reimbursement. The party who seeks reimbursement has the burden of proving that claim. *Vallone v. Vallone*, 644 S.W.2d 455, 459 (Tex. 1982). Not so clear is which party has the burden of proof on offsetting benefits: must the party seeking reimbursement show no offsetting benefits, or must the party opposing reimbursement prove the amount of offsetting benefits? *Colden v. Alexander*, 141 Tex. 134, 171 S.W.2d 328 (Tex. 1943), suggests that the burden is on the party seeking reimbursement, but that specific issue was not directly addressed. As mentioned in para. VI.I below, PJC 204.1 (1996) puts the burden of proving offsetting benefits on the party opposing reimbursement.

F. Burden to Secure Finding on Reimbursement. Not only does the party seeking reimbursement have the duty to plead it, and and prove it, but they also have the duty to secure a finding as to their claim. Absent a finding, the claim is waived. *See Holloway v. Holloway*, 671 S.W.2d 51, 58 (Tex. App.--Dallas 1983, writ dism'd) (by failing to secure jury finding as to undercompensation of husband for his efforts contributed to his separate property corporation, wife waived her reimbursement claim).

G. Community Presumption; Clear and Convincing Evidence. 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. 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"). 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).

One would think that the community presumption would apply to proving reimbursement claims--that if funds were expended in a reimbursable manner it would be presumed that the funds were community property. However, there is case authority that a party seeking reimbursement to the community for payment of a debt of the other spouse's separate estate is not aided by the presumption that all property possessed during the marriage is community. In *Jenkins v. Robinson*, 169 S.W.2d 250, 251 (Tex. Civ. App.--Austin 1943, no writ), the court said:

> [T]he burden was on appellees to prove that the notes were paid in part with community funds. [Citations omitted.] This burden is not met by merely showing that the indebtedness was paid during the time the marital relationship existed; but it must be established by a preponderance of the evidence as in any civil case not otherwise controlled by statute or law. This burden of proof is not aided by the statutory presumption that all property acquired during marriage is presumed to be community property; because this presumption would defeat the rule that the burden of proof is on appellees to show that the community property acquired under that presumption was actually used to pay off the indebtedness on the real estate.

But see Horlock v. Horlock, 533 S.W.2d 52, 60 (Tex. Civ. App.--Houston [14th Dist.] 1975, writ dism'd) (party seeking reimbursement for funds expended for maintenance of separate estate aided by presumption that money spent during marriage is community rather than separate). The same concept was stated in another way in *Younger v. Younger*, 315 S.W.2d 449, 452 (Tex. Civ. App.--Waco 1958, no writ):

> The hotel was constructed on the separate property of defendant. Plaintiff seeks reimbursement for amounts spent on the property he contends were community funds. In such situation the presumption is that the improvements were made with separate funds and plaintiff is charged with the burden of proving the amounts spend were from community funds.

The Pattern Jury Charge committee suggests instructing the jury that the spouse seeking reimbursement has the burden of proving each element of the reimbursement claim by a preponderance of the evidence, except that a claim that separate property was used in a manner that would give rise to a right of reimbursement must be established by clear and convincing evidence. 5 STATE BAR OF TEXAS PATTERN JURY CHARGES PJC 204.1 (1996). This exception is consistent with the requirement of TEX. FAM. CODE ANN. § 5.02 that "the degree of proof necessary to establish that property is separate property is clear and convincing evidence."

H. Presumption of Separate Used for Separate. In *Rolater v. Rolater*, 198 S.W. 391, 392 (Tex. Civ. App.--Dallas 1917, no writ), it was said that "payments made shortly after marriage by one of the spouses upon separate indebtedness will not be presumed to have been made out of community funds in the absence of proof in that respect." *See generally Welder v. Lambert*, 91 Tex. 510, 44 S.W. 281, 287 (1898); *Price v. McAnelly*, 287 S.W. 77 (Tex. Civ. App.--San Antonio 1926, writ dism'd) (burden on claimant to show community and not separate funds expended for separate debt).

I. Burden of Proof on Offsetting Benefits. The Pattern Jury Charge Committee treats offsetting benefits as an affirmative defense, which must be proved by the party opposing reimbursement. PJC 204.1 (1996) provides:

> A spouse seeking an offset against a claim for reimbursement has the burden of proving each element of the claim by a preponderance of the evidence. The amount of the offset is measured as of the time of trial.

The Committee gives no citation to support this view of the burden of proof on offsetting benefits. *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984), suggests that the burden of proof is on the party seeking reimbursement to show that the reimbursement claim exceeded benefits received by the transferring estate. *See Fyffe v. Fyffe*, 670 S.W.2d 360, 361 (Tex. App.--Texarkana 1984, writ dism'd) (in absence of proof of offsetting benefits, reimbursement award reversed and case remanded for retrial of property division).

The court in *Brooks v. Brooks*, 612 S.W.2d 233, 238 (Tex. App.--Waco 1981, no writ), said:

> When community funds have been expended to reduce indebtedness on separate property of one spouse, the other spouse is entitled to reimbursement of his or her share of the community funds without requiring proof that the expenditures exceeded the benefits received by the community. See Dakan v. Dakan (Tex.1935) 125 Tex. 305, 83 S.W.2d 620 at p. 628; Pruske v. Pruske (Austin Tex.Civ.App. 1980) 601 S.W.2d 746, writ dismissed; Poulter v. Poulter (Tyler Tex.Civ.App. 1978) 565 S.W.2d 107, no writ; Bazile v. Bazile (Houston 1st Tex.Civ.App. 1971) 465 S.W.2d 181, writ dismissed; Looney v. Looney (Beaumont Tex.Civ.App. 1976) 541 S.W.2d 877, no writ.

Thus, to the Waco court of appeals the burden is on the party opposing reimbursement to prove any offsetting benefits.

On the other hand, in *Hawkins v. Hawkins*, 612 S.W.2d 683, 685 (Tex. App.--El Paso 1981, no writ), the failure of the party, seeking reimbursement for payment of purchase money debt on separate property, to prove the value of offsetting benefits was fatal to the reimbursement award, and resulting in the property division being reversed and remanded for a determination of offsetting benefits. The appellate court cited authorities suggesting that successful proof of reimbursement requires proof as to offsetting benefits. In *Hawkins*, the offsetting benefits were the value to the community of living in the separate property duplex. *See Martin v. Martin*, 759 S.W.2d 463, 465 (Tex.App.--Houston [1st Dist.] 1988, no writ) (case suggests that right of reimbursement for payment of debt is not established unless it is shown that the expenditures are greater than the benefits received).

VII. WHEN MARITAL PROPERTY REIMBURSEMENT IS AVAILABLE.

A. For Cost of Paying Debts, Taxes, Interest or Insurance A claim for reimbursement arises when one marital estate pays the debts, taxes, interest or insurance of another marital estate. The following principles are involved.

1. Inception of Title. Under the inception of title rule, the character of an asset is determined by the circumstances which exist "at the time of the incipiency of the right in virtue of which [the spouse] acquired title." *Colden v. Alexander*, 141 Tex. 134, 171 S.W.2d 328, 334 (1943). Thus, "[t]he fact that community funds [are] used to pay [principal or] interest on [the husband's] prenuptial purchase-money debt, and taxes, during coverture, cannot alter the status of the husband's title." *Id.* at 334. The Supreme Court, in *Colden v. Alexander*, went on to say:

> Of course, where the husband purchases land on credit before marriage, and pays the purchase-money debt after marriage out of community funds, equity requires that the community estate be reimbursed. . . . The rule of reimbursement, as above announced, is purely an equitable one. Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620. Such being the case, we think it would follow that interest paid during coverture out of community funds on the prenuptial debts of either the husband or the wife on land, and taxes, would not even create an equitable claim for reimbursement, unless it is shown that the expenditures by the community are greater than the benefits received.

Id. at 334. The Court thus expounded the recognized rule regarding reimbursement for using community funds to pay separate property debts and taxes on separate property land. Some time later, courts included the use of community funds to pay insurance on separate property as another instance giving rise to reimbursement. *E.g.*, *Brooks v. Brooks*, 612 S.W.2d 233, 238 (Tex. App.--Waco 1981, no writ).

2. The Pattern Jury Charge 5 STATE BAR OF TEXAS PATTERN JURY CHARGES PJC 204.1 (1996) gives the following instruction regarding reimbursement arising from one marital estate's payment of debts, taxes, interest or insurance of another marital estate:

> A claim for reimbursement for funds expended by an estate to pay debts, taxes, interest, or insurance for the property of another estate is measured by the amount paid. An offset against a claim for reimbursement for funds expended by an estate to pay debts, taxes, interest, or insurance for the property of another estate is measured by the value of any related benefit received by the paying estate, such as the fair value of the use of the property by the paying estate, income received by the paying estate from the property, and any reduction in the amount of any income tax obligation of the paying estate by virtue of the paying estate's claiming tax-deductible items relating to the property, such as depreciation, interest, taxes, maintenance, and other deductible payments.

The PJC attributes this instruction to *Penick v. Penick*, 783 S.W.2d 194 (Tex. 1988), and *Colden v. Alexander*, 171 S.W.2d 329 (Tex. 1943). In *Penick*, the Supreme Court said that reimbursement is not a mathematically exact claim, and that the trial court can properly consider offsetting benefits received by the giving estate.

The "insurance" referred to above is casualty insurance. Life insurance has a different rule. It is unclear how premiums for liability insurance are treated.

This is a "cost" measure of reimbursement.

It is necessary to avoid double recovery where community money is borrowed to make improvements on separate real estate, and then payments are made on that debt during marriage. The court cannot reimburse for both the payment of the debts during marriage and the enhancement to the realty resulting from the construction loan. *Gutierrez v. Gutierrez*, 791 S.W.2d 659, 663-64 (Tex. App.--San Antonio 1990, no writ). If the loan payments exceeds the amount of enhancement, can the reimbursement claim be stated as one for payment of a debt and not one for enhancement in value? The court in the case of *In re Marriage of Louis*, 911 S.W.2d 495, 497 (Tex. App.--Texarkana 1995, no writ), said that where separate property is improved using community credit, the measure of reimbursement is enhancement of the value of the separate estate.

3. But is it a Gift? A claim for reimbursement can be defeated if it is established that the transfer, payment, etc. for which reimbursement is sought is a gift. The appellate court in *Graham v. Graham*, 836 S.W.2d 308, 310 (Tex. App.--Texarkana 1992, no writ) noted:

> Separate property payment of a community debt creates a prima facie right to reimbursement. *Penick v. Penick*, 783 S.W.2d 194, 196 (Tex. 1988); *Jones v. Jones*, 804 S.W.2d 623, 626 (Tex. App.--Texarkana 1991, no writ). Reimbursement is an equitable right and its application lies within

the broad discretion of the trial court. *Penick v. Penick*, 783 S.W.2d at 198; *Vallone v. Vallone*, 644 S.W.2d 455, 459 (Tex. 1982); *Jones v. Jones*, 804 S.W.2d at 626. Gifts, however, may not be the basis of a reimbursement claim. *Jones v. Jones*, 804 S.W.2d at 626.

See In re Marriage of Louis, 911 S.W.2d 495, 497 (Tex. App.--Texarkana 1995, no writ) (evidence supported denial of reimbursement to husband for paying community funds to discharge a debt on wife's separate property house on the ground that the payments were a gift from husband to wife). The burden of proving gift is on the party who contends that a gift was made. *Hilton v. Hilton*, 678 S.W.2d 645, 649 (Tex. App.--Houston [14th Dist.] 1984, no writ) (wife's claim that payment of community debt using separate funds was gift from husband was waived due to wife's failure to plead or prove gift).

4. Offsetting Benefits. As noted above, an important aspect of the right to reimbursement for payment of debts, taxes and insurance on realty which belongs to another marital estate is that the claim for reimbursement exists only to the extent that the value given by the estate seeking reimbursement exceeds the value received from the benefitted estate. *Colden v. Alexander*, 171 S.W.2d at 334; *Trevino v. Trevino*, 555 S.W.2d 798, 799 (Tex. Civ. App.--Corpus Christi 1977, no writ). "[R]eimbursement for [community funds spent for interest and taxes] ordinarily will not be allowed except to the extent that the amount of community funds expended exceed the benefits, if any, the community has received from the property." *Fyffe v. Fyffe*, 670 S.W.2d 360, 361-62 (Tex. App.--Texarkana 1984, writ dism'd). In *Fyffe*, since there was no evidence of the reasonable rental value of living in the separate property house, nor evidence of income tax deductions taken for interest and taxes paid, an award of reimbursement was reversed and remanded. *Accord, Gutierrez v. Gutierrez*, 791 S.W.2d 659, 662 (Tex. App.--San Antonio 1990, no writ) (property division reversed where trial court failed to consider value of living in condominium as offset to paying separate property debt on the condo). However, "an equitable claim for reimbursement is not merely a balancing of the ledgers between the marital estates." *Penick v. Penick*, 783 S.W.2d 194, 197 (Tex. 1988). Therefore, it not entirely clear that the measure of reimbursement is the difference between the amount expended and the amount of offsetting benefits. It may be more accurate to say that the trial court can consider offsetting benefits in deciding whether or not to award reimbursement.

a. Types of Offsetting Benefits. Offsetting benefits include, for example, the value to the community estate of living rent free in a home. *Fyffe v. Fyffe*, 670 S.W.2d 360, 362 (Tex. App.--Texarkana 1984, writ dism'd w.o.j.). They also include tax savings resulting from depreciation or the deductibility of the expenses paid. *Penick v. Penick*, 783 S.W.2d 194 (Tex. 1988). Rental income from the property in question would also be an offsetting benefit, although an argument could be made that the community estate was entitled to that income anyway and therefor should not suffer having its reimbursement claim reduced thereby.

b. Must the Benefits be Related? An issue arises as to whether the offsetting benefits must relate to the property whose expenses give rise to the reimbursement claim. The PJC 204.1 advances the concept that offset is available only for a "related benefit received by the paying estate . . . ." But in *Schecter v. Schecter*, 579 S.W.2d 502, 505 (Tex. Civ. App.--Dallas 1978, no writ), the appellate court ruled that it was not error for the trial court to decline to award reimbursement for mortgage payments made on wife's separate real estate using community funds, where the wife's had "spent considerable amounts of her separate funds improving the community estate." Thus, the offsetting benefits in *Schecter* were not received from the property whose debt was paid.

c. No Offset for Payment of Principal? In *Nelson v. Nelson*, 713 S.W.2d 146, 148 (Tex. App.--Texarkana 1986, no writ), the appellate court held that, insofar as reimbursement for payment of principal indebtedness is concerned, offsetting benefits are not to be considered. The same appellate court said, in *Smith v. Smith*, 715 S.W.2d 154, 161 (Tex. App.--Texarkana 1986, no writ), that offsetting benefits should be considered only where reimbursement is sought for payment of interest, taxes and insurance. It is likely that this distinction fell by the wayside in *Penick v. Penick*, 783 S.W.2d 194, 197 (Tex. 1988), where the Supreme Court said: "The outright rejection of offsetting benefits is inconsistent with the equitable nature of a claim for reimbursement."

5. Enhancement Not An Issue Enhancement of the value of the separate property in question has no bearing on reimbursement for payment of debt, taxes, interest and insurance. *Hawkins v. Hawkins*, 612 S.W.2d 683, 684 (Tex. Civ. App.--El Paso 1981, no writ); *Bazile v. Bazile*, 465 S.W.2d 181, 182 (Tex. Civ. App.--Houston [1st Dist.] 1971, writ dism'd). However, many courts say that the receiving estate is "enhanced" by having its debts or expenses paid, thus clouding this analysis.

6. Not Limited to Purchase Money Indebtedness. While many of the examples of reimbursement for payment of separate debts using community money involve payment of purchase money debt on separate property assets, the right of reimbursement is not limited to payment of purchase money debts. In *Marshall v. Marshall*, 735 S.W.2d 587, 595-96 (Tex.App.--Dallas 1997, writ ref'd n.r.e.), reimbursement was permitted where husband's partnership paid his pre-marital income tax obligations and then charged that payment to a distribution of profits.

B. For Enhancement Due to Improvements to Real Property A claim for reimbursement arises when one marital estate provides or pays for improvements to real property belonging to another marital estate. This right of reimbursement has even been applied to enhancement of a spouse's separate property life estate in land. *See Carley v. Carley*, 705 S.W.2d 371 (Tex. App.--San Antonio 1986, writ dism'd). Evidence regarding the value of the property before the improvements and the value after the improvements will fix the amount of the claim. *Magill v. Magill*, 816 S.W.2d 530, 535 (Tex. App.--Houston [1st Dist.] 1991, writ denied); *Girard v. Girard*, 521 S.W.2d 714, 718 (Tex. Civ. App.--Houston [1st Dist.] 1975, no writ). The following principles are involved.

1. Law of Fixtures. Under the law of fixtures, whatever is affixed to the land becomes part of the land. *Missouri Pacific Ry. Co. v. Cullers*, 81 Tex. 382, 17 S.W. 19, 22 (1891); *Citizen's National Bank of Abilene v. Elk Manufacturing Co.*, 17 S.W. 19 (Tex. Comm'n App. 1930, opinion adopted). In the context of marriage, if land is separate property, then any improvements affixed to the land become part of the land, and are separate property. If community property is used to improve separate real estate of a spouse, and thereby loses its community character, a right of reimbursement in favor of the community arises. *See Lindsay v. Clayman*, 254 S.W.2d 777 (Tex. 1952). A right to reimbursement also arises when separate property of one spouse is used to improve community realty, or the separate property of the other spouse.

a. What is a Fixture? A "fixture" is something that is personal but has been annexed to the realty so as to become a part of it. *Fenlon v. Jaffe*, 553 S.W.2d 422 (Tex. Civ. App.--Tyler 1977, writ ref'd n.r.e.).

b. Three-Pronged Test. The Texas Supreme Court has established a three-pronged test for fixtures: (1) has there been a real or constructive annexation of the property to the realty; (2) was there a fitness or adaptation of the item to the uses or purposes of the realty; (3) was it the intention of the party annexing it that the chattel should become a permanent accession to the freehold? *O'Neill v. Quiltes*, 111 Tex. 345, 234 S.W. 528 (1921). The latter factor is controlling; the first two 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.).

c. Examples. In *Canto v. Harris*, 660 S.W.2d 638 (Tex. App.--Corpus Christi 1983, no writ), it was held that there was no evidence to show that a metal building connected to a slab was a fixture. Also, the evidence established that the party installing the building intended to remove it later and constructed the building so as to preserve this right. *Id.* at 641. In *Long v. Chapman*, 151 S.W.2d 879, 882 (Tex. Civ. App.--Fort Worth 1941, no writ), it was held that fences are fixtures. However, in *Albert v. Kimbell, Inc.*, 544 S.W.2d 805 (Tex. Civ. App.--San Antonio 1976, no writ), it was held that a fence may or may not become part of the realty. A home can be placed upon real estate without becoming part of the realty. *Clark v. Clark*, 107 S.W.2d 421, 424 (Tex. Civ. App.--Texarkana 1937, no writ). However, where the owner places the house on the realty, a presumption arises that he intended the house to become a fixture. *Id.* at 424. In *Clark* a claim that a parol reservation was made for the home to continue to be personalty was rejected. The right to remove the chattel can be lost if not exercised within a reasonable time. *Id.* at 425.

In *Dennis v. Dennis*, 256 S.W.2d 964 (Tex. Civ. App.--Amarillo 1952, no writ), it was held that a house built by a couple with funds of the husband's mother, which was then moved to another piece of realty, became part of that realty, since there were no pleadings or proof of an agreement that the home would not become permanently annexed to the land.

A house was also in issue in *Sugatex Corporation v. Clift*, 225 S.W.2d 451 (Tex. Civ. App.--San Antonio 1949, writ ref'd n.r.e.). The suit was between a landlord and a tenant. The court said:

> This house was an ordinary frame house, built upon concrete blocks, with plumbing and electric wiring, and it would become a fixture to the real estate unless there was an agreement between Clift and Southwestern Sugar & Molasses Company that such was not to be the case.

Id. at 453. The case demonstrates the rule that in a lease situation, the parties' agreement will control whether an improvement is a fixture or not.

d. Why Concede Fixture? It might be unusual, but in certain cases a party could reasonably assert that the family home is not a fixture. This might work better with a mobile home than a house with a slab foundation. But the question can be a fact issue, and on certain facts might be won.

2. The Pattern Jury Charge. 5 STATE BAR OF TEXAS PATTERN JURY CHARGES PJC 204.1 (1996) gives the following instruction regarding reimbursement arising from one marital estate's paying for improvements to real property belonging to a different marital estate:

> A claim for reimbursement of funds expended by an estate for improvements to real property of another estate is measured by the enhancement in value to the receiving estate resulting from such expenditures. An offset against a claim for reimbursement for improvements to real property of another estate is measured by the value of any related benefit received by the paying estate, such as the fair value of the use of the property by the paying estate, income received by the paying estate from the property, and any reduction in the amount of any income tax obligation of the paying estate by virtue of the paying estate's claiming tax-deductible items relating to the property, such as depreciation, interest, taxes, maintenance, and other deductible payments.

See Anderson v. Gilliland, 684 S.W.2d 683 (Tex. 1985) (measure of reimbursement is enhancement); *Cook v. Cook*, 693 S.W.2d 785, 786 (Tex. App.--Fort Worth 1985, no writ) (measure of reimbursement is enhancement).

3. Offsetting Benefits. A reimbursement claim for improvement to realty is subject to offset for benefits received by the transferring estate. *Penick v. Penick*, 783 S.W.2d 194, 197 (Tex. 19__); *Hernandez v. Hernandez*, 703 S.W.2d 250, 253 (Tex. App.--Corpus Christi 1985, no writ) (benefit to community estate of living in separate property house rent-free for 16 years offset any reimbursement claim). Note that PJC 204.1 says that offset is available only for a "related benefit received by the paying estate." "Related" means related to the property whose improvement gave rise to the reimbursement claim. In *Schecter v. Schecter*, 579 S.W.2d 502, 505 (Tex. Civ. App.--Dallas 1978, no writ), the appellate court ruled that it was not error for the trial court to decline to award reimbursement for improvements to wife's separate real estate using community funds, where the wife's had "spent considerable amounts of her separate funds improving the community estate." Thus, the offsetting benefits in *Schecter* were not received from the property that was improved.

4. Where Improvements are Financed. A question arises when improvements are made to real estate using community credit, and the loan involved is not entirely paid off as of the time of divorce. In that instance, if the unpaid portion of the improvement loan is awarded to the owner of the improved separate property, the reimbursement claim in favor of the community estate should be limited to the portion of the community debt that was paid off during marriage. *Allen v. Allen*, 704 S.W.2d 600, 607 (Tex. App.--Fort Worth 1986, no writ). An interesting question is whether the measure of the reimbursement in that situation is the amount of payments made on the community loan prior to divorce, or the amount of enhancement of the land that was improved using the funds from the community loan. Technically, there should be no reimbursement for paying the loan with community funds since the loan was a community loan. If that's not the appropriate measure, then do you prorate the amount of enhancement between the portion of the indebtedness that was paid during marriage and the portion that will be paid after divorce? If so, is the pro rata as between all payments made before versus after divorce, or is it pro rata based on the principle paid before versus after divorce?

Yet another anomaly arose in *Kamel v. Kamel*, 721 S.W.2d 450 (Tex. App.--El Paso 196, no writ), where the spouses borrowed to build improvements on husband's separate property lot, but then made no payments on the improvement loan. Among other things, Husband's father made payments on the improvement loan, which the appellate court treated as gifts 1/2 to husband and 1/2 to wife. Thus, since the community debt was paid by a gifts to the spouses, wife was entitled to reimbursement from husband's separate estate to the extent of 1/2 of the payments on the note that were made by husband's father. The appellate court wiped out the trial court's award of reimbursement to the community estate for the improvements that were financed with community credit. The appellate court appears to have ignored the fact that the improvement loan proceeds were community property, and focused instead on whether community or separate property funds were used to pay the improvement loan. On appeal after retrial, the appellate court used [what this

Author believes to be] the correct analysis of the issues. The entire amount of enhancement by building the improvements on husband's separate property lot using community credit was a reimbursement claim in favor of the community estate. However, the payments made by husband's father, which had been found by the trial court to be gifts only to the husband and not to the wife, created a right of reimbursement in favor of husband's separate estate. The case was remanded again to sort through the reimbursement claims.

5. Where the Improved Asset is Disposed of During Marriage. The case of *Jones v. Jones*, 804 S.W.2d 623, 626 (Tex.App.--Texarkana 1991, no writ), provides:

> Reimbursement for the community does not extend to recovery for improvements on separate property that was lawfully disposed of during the marriage.

C. For Enhancement Due to Community Time, Toil, Talent or Effort An increase in the value of a separate property business "resulting from fortuitous circumstances and unrelated to an expenditure of community effort will not entitle the community estate to reimbursement." *Harris v. Harris*, 765 S.W.2d 798, 805 (Tex. App.--Houston [14th Dist.] 1989, writ denied). However, the community estate has a claim for reimbursement for uncompensated or undercompensated time, toil and talent expended by a spouse for the benefit and enhancement of his or her separate property interests, beyond that necessary to maintain the separate asset. *Id.* at 805.

1. The Pattern Jury Charge. 5 STATE BAR OF TEXAS PATTERN JURY CHARGES PJC 204.1 (1996) gives the following instruction regarding reimbursement arising from the community estate's providing the time, toil, talent or effort of a spouse, beyond that necessary to maintain the working spouse's separate estate:

> A claim for reimbursement to the community estate for the spouses' time, toil, talent, or effort expended to enhance a spouse's separate estate is measured by the value of such community time, toil, talent, and effort other than that reasonably necessary to manage and preserve the separate estate, and for which the community did not receive adequate compensation. An offset against a claim for reimbursement for the spouses' time, toil, talent, or effort expended to enhance a spouse's separate estate is measured by the compensation paid to the community in the form of *salary, bonuses, dividends, and other fringe benefits.* [*Italics* represents replaceable terms.]

The instruction is drawn from *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984). In *Gutierrez v. Gutierrez*, 791 S.W.2d 659, 665 (Tex. App.--San Antonio 1990, no writ), a wife's reimbursement claim for services rendered in maintaining husband's separate property herd of cattle was reversed where wife provided no evidence as to the value of her services. Additionally, the fact that the growth of the herd through births was community property meant that some of wife's labors bore fruit for the community estate, and to that extent would not support a reimbursement claim against the husband's separate estate.

2. Form of Business. A *Jensen* reimbursement claim against a husband's interest in a law partnership was rejected in *Harris v. Harris*, 765 S.W.2d 798 (Tex. App.--Houston [14th Dist.] 1989, writ denied), based on the husband's uncontradicted testimony that the enhancement in issue was not attributable to his labors. There seems to be no reason to treat partnerships any differently from corporations, when it comes to a *Jensen*-like reimbursement claim.

3. Must Secure Finding. Although it was established that the value of husband's separate property corporations rose from $ 1,000 to $ 30 million, and $ 3,000 to $ 60 million, as a result of his labors during marriage, the wife waived her reimbursement claim by failing to secure a jury finding regarding the value of his time contributed to the businesses. *Holloway v. Holloway*, 671 S.W.2d 51, 58 (Tex. App.--Dallas 1983, writ dism'd).

4. Back Wages. Care should be given to distinguish reimbursement for undercompensation from a claim for back wages. A claim for back wages is a claim against the corporation, not a claim against the owning spouse's separate estate. *Halamka v. Halamka*, 799 S.W.2d 351, 354-55 (Tex. App.--Texarkana 1990, no writ).

5. What Benefits are Considered? In *Jensen*, the Supreme Court said that in determining whether the owning spouse was undercompensated, you must determine the value of the time, toil and talent expended by the owner-spouse, and subtract from that compensation paid to him/her for such time, toil and talent, in the form of salary, bonuses, dividends and other fringe benefits. *Jensen v. Jensen*, 665 S.W.2d 107, 110

(Tex. 1984). One wonders why dividends would be considered compensation for time, toil and talent, when dividends are distributions of profits to owners, even those owners who contribute no effort to the profits. The Supreme Court was wrong to include dividends as a form of compensation for services rendered, although dividends arguably are an offsetting benefit received by the community estate. But then that raises the question of whether something the community is otherwise entitled to receive (to-wit: income from separate property) is a proper offset to a reimbursement claim. In determining undercompensation, the *Trawick* court said to exclude rental income received from the business for use of the husband's separate property real estate, since the community owned that rental income separate and apart from husband's labors. The court also said that money paid to wife should not be considered, unless her employment was a sham and she performed no labor. The court also said to exclude expense account reimbursements to husband, except to the extent they exceeded his true out-of-pocket expenses.

6. Is Amount of Enhancement a Cap? The court in *Trawick v. Trawick*, 671 S.W.2d 105, 108-9 (Tex.App.--El Paso 1984, no writ) (an estate case), indicated that the amount of enhancement in the separate property business is a cap on the amount of reimbursement that can be recovered for undercompensation of the spouse's labors.

D. For Investing Funds in Business. In *Halamka v. Halamka*, 799 S.W.2d 351, 354-55 (Tex. App.--Texarkana 1990, no writ), where there was inadequate evidence of the amount of community funds invested in husband's separate property business, the trial court awarded wife 60% of the community estate, in lieu of a specific reimbursement award. The decision was upheld on appeal.

E. For Payment of Premiums on Insurance Policy A claim for reimbursement arises when community funds are used to pay premiums on a separate property life insurance policy. *McCurdy v. McCurdy*, 372 S.W.2d 381 (Tex. Civ. App.--Waco 1963, writ ref'd). However, the *McCurdy* case involved the death of the insured, where the life insurance proceeds were paid to the insured spouse's estate, and the reimbursement was awarded out of those insurance proceeds. The holding of the case, and the rule announced in the case, was not applied to a claim for reimbursement during a divorce, before the death of the insured. The case of *Gray v. Bush*, 430 S.W.2d 258, 267 (Tex. Civ. App.--Fort Worth 1968, writ ref'd n.r.e.), attributed the rule to a general principle of insurance law that a party who in good faith pays premiums on a life insurance policy for another can be reimbursed out of the proceeds of the policy. Interesting questions can arise regarding reimbursement upon divorce. What if the other spouse was designated as beneficiary during the marriage? Does that negate reimbursement? Is that an offsetting benefit that must be calculated? What if the policy builds a cash value as a result of the community property premiums? Is that cash value a community asset, or does it give rise to a reimbursement claim that is part of or in addition to the amount of premiums paid with community dollars? In *Brooks v. Brooks*, 612 S.W.2d 233 (Tex. Civ. App.--Waco 1981, no writ), a trial court awarded and an appellate court affirmed reimbursement from the community estate to husband's separate estate, where husband's separate property insurance policies had been reduced in value by borrowings against cash value during marriage.

F. For Squandering Community Assets Where a spouse has misspent community funds, the courts sometimes award a money judgment as recovery for such wrongdoing. It is unclear whether the award is a form of damages, or a form of reimbursement, since it has features of both. The PJC does not recognize such an award as a form of reimbursement. See PJC 204.1. Under the PJC, such a claim would sound under actual fraud or constructive fraud, PJC 206.2 & 206.3. However, in *Rider v. Rider*, 887 S.W.2d 255, 261 (Tex. App.--Beaumont 1994, no writ), the appellate court said:

> Appellant concedes to the taking of $9,000 from the parties' joint accounts when she separated from the appellee in September of 1991. The trial chancellor was well within his prerogatives to find that this $9,000 was correctly traced to appellee's separate property funds and separate property rights. Basically, the right of reimbursement is recognized as an equitable right arising upon the dissolution of a marriage through divorce, as here. Reimbursement is realistically a claim for the return of funds and monies. Reimbursement is a matter that is discretionary with the trial court. *See Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982). The right of reimbursement is in equity. A mathematical certainty for its determination is not required.

The appellate court in *Andrews v. Andrews*, 677 S.W.2d 171, 175 (Tex. App.--Austin 1984, no writ), conceived of reimbursement as a remedy for fraud when it said: "Absent a fraud on the community, the court may not order reimbursement for gifts of community property made during the marriage to a stranger."

Reimbursement is not a remedy that can be brought against a third person. *Connell v. Connell*, 889 S.W.2d 534, 540 (Tex. App.--San Antonio 1994, writ denied). If a recovery is to be made against a third-party recipient of community property, another theory of recovery must be used.

G. For Separate Property Lost to Commingling Where separate property has been commingled and cannot be traced, courts have sometimes offered relief to the spouse who lost such assets by granting reimbursement for the separate property lost to commingling. In *Schmidt v. Huppman* 73 Tex. 112, 11 S.W. 175 (1889), a spouse owning a mercantile business at the time of marriage lost the separate identity of his date-of-marriage inventory to commingling. The trial court awarded the spouse monetary reimbursement for the amount of the inventory on that date, thus leaving only the growth in inventory (representing profit) as a community asset. In *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. Civ. App.--Houston [14th Dist.] 1975, writ dism'd), the husband lost separate property to commingling, and was awarded reimbursement to compensate. The appellate court affirmed, saying:

> The appellee comingled the proceeds of the sale of his separate property with the community property of the parties. The appellee admitted at trial and admits in his brief that the proceeds of the sale of his separate property have become completely comingled with the community estate. Appellee made no attempt at trial to trace the use of the proceeds of the sale of his separate property into any other transactions. The trial court determined in its conclusions of law that the appellee was entitled to reimbursement by reason of using his separate funds to enhance, improve and increase the value of the community estate. The trial court did not determine the amount of such reimbursement; however, the court did find as a fact that during the marriage specific properties owned by the appellee prior to the marriage were sold for a total sum in excess of $900,000, which was placed in the investment account at First City National Bank of Houston and thereafter used for the enhancement of the community estate.
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> * * *
>
> Under these cases [cited in the Opinion], the trial court was justified in awarding the husband a separate estate reimbursement. The husband's separate estate served as a strong foundation upon which the community's wealth was built. Throughout the marriage the husband utilized that foundation to provide for the appellant and to establish the $3,000,000 to $4,000,000 estate. Equity is well served by reimbursing him for that initial investment.

Id. at 58.

VIII. WHERE MARITAL PROPERTY REIMBURSEMENT IS NOT AVAILABLE

A. For Paying Family Living Expenses The separate estate is not entitled to reimbursement for paying community living expenses. *Norris v. Vaughan*, 152 Tex. 491, 260 S.W.2d 676 (1953). An effort to apply this rule to avoid reimbursement for using separate funds to pay a community mortgage was rejected in *Graham v. Graham*, 836 S.W.2d 308, 310 (Tex. App.--Texarkana 1992, no writ). And the rule was not applied where living expenses were incurred with community credit that was later paid using separate property funds. *Hilton v. Hilton*, 678 S.W.2d 645, 648 (Tex. App.--Houston [14th Dist.] 1984, no writ) (reimbursement is available for the use of separate property funds to pay community debts, even if these debts were incurred to pay community living expenses). *Accord*, *Oliver v. Oliver*, 741 S.W.2d 225, 228 (Tex.App.--Fort Worth 1987, no writ).

B. No Reimbursement for Cost of College Degree Two Texas cases have noted that reimbursement is not available for the cost of a spouse's education. *See Halbert v. Halbert*, 794 S.W.2d 535, 536 (Tex. App.--Tyler 1990, no writ), and *Frausto v. Frausto*, 611 S.W.2d 656, 660 (Tex. App.--San Antonio 1980, writ dism'd) (award of $ 20,000 partly as reimbursement for community expense of husband's education reversed, since not supported by the pleadings and the record).

In *Halbert*, the appellate court said:

> In our former opinion we also noted that the jury received a special issue concerning the expenses to the community of the appellant's veterinary degree. We stated, "Although the trial court did not specifically award the wife reimbursement for her husband's education in its division of the

community property, we caution the trial court on remand that the cost of Laurin Halbert's veterinary degree is not a reimbursable community expenditure."

IX. WHERE MARITAL PROPERTY REIMBURSEMENT MIGHT BE AVAILABLE

A. For Payment of Alimony or Child Support. An issue sometimes arises as to whether the community estate is entitled to reimbursement for a spouse's use of community property to pay his/her child support or alimony obligations owed as a result of a prior marriage. The Author knows of no published case authority on the availability of reimbursement in that situation. In *In re Marriage of Moore*, 890 S.W.2d 821, 834 (Tex.App.--Amarillo 1994, no writ), the appellate court found that it was proper for the court to submit a jury question on the amount of reimbursement due as a result of husband using community funds to pay an obligation the husband owed to a former spouse under the property settlement agreement in their divorce.

B. Where Community Credit is Used to Guarantee Corporate Debt. In *Thomas v. Thomas*, 738 S.W.2d 342 (Tex. App.--Houston [1st Dist.] 1987, writ denied), an issue arose as to whether the community estate had a reimbursement claim where community credit is used to refinance a spouse's separate property debt. In *Thomas*, a debt of husband's separate property corporation was refinanced with husband's personal guarantee, which subjected the community estate to liability and therefore was a community debt. Justice Dunn, in her concurring and dissenting Opinion, stated:

> Neither the parties' research nor ours has revealed a Texas case deciding the question of whether the community has a right to reimbursement for the use of its credit to secure a loan to refinance the husband's separate property debts. However, I am not willing to state, at this time, that this new reimbursement theory is without merit. I would analogize this situation to cases where separate debts are discharged with community funds. See Villarreal v. Villarreal, 618 S.W.2d 99 (Tex.Civ.App.--Corpus Christi 1981, no writ); Hawkins v. Hawkins, 612 S.W.2d 683 (Tex.Civ.App.--El Paso 1981, no writ). However, there is an important difference between the case before us and cases involving the discharge of a separate debt with community funds. When a debt is discharged, the cost to the community is obvious, but when a separate property debt is refinanced with the community acting as a guarantor, the cost to the community is not so readily ascertainable. In the latter situation, expert testimony would be required on the percentage risk undertaken by the community, and a dollar value would have to be assigned to that risk.
>
> In the case before us, there is no testimony concerning the cost to the community resulting from the use of their credit to guarantee the refinancing of the separate property debt. Further, there is evidence in the record that even though the guarantee was for $2,200,000, and the net community assets were approximately $660,000, the appellant was nevertheless able to negotiate a loan from the River Oaks Bank & Trust Co. subsequent to the guarantee. The appellee has, therefore, failed to meet her burden of establishing the community's right to reimbursement for the use of the community credit.

Id. at 346.

C. Subchapter S Corporation. In *Thomas v. Thomas*, 738 S.W.2d 342 (Tex. App.--Houston [1st Dist.] 1987, writ denied), the court held that retained earnings of husband's separate property Subchapter S corporation were neither separate property nor community property, since they were assets of a corporation and not assets of a spouse. This was true despite the fact that the corporation's earnings were reported on the spouses' federal income tax return and community funds were used to pay the income tax liability. In this situation, where the community estate paid income tax on earnings that remained inside husband's separate property corporation, and significantly enhanced the value of that corporation, arguably the community estate would have a claim for reimbursement to the extent of the federal income taxes paid on behalf of the husband's separate estate.

D. Where Distributions From Closely-Held Corporation Exceed Profits. In *Brooks v. Brooks*, 612 S.W.2d 233 (Tex. Civ. App.--Waco 1981, no writ), the trial court awarded and the appellate court affirmed reimbursement from the community estate to husband's separate estate upon a showing that distributions from the husband's closely-held separate property corporation exceeded profits, and that community assets were acquired with those excess distributions.

E. Interest on the Reimbursement Claim. A judgment for reimbursement should bear interest at the same rate as any other judgment. *Gutierrez v. Gutierrez*, 791 S.W.2d 659, 666 (Tex. App.--San Antonio 1990, no writ). The case of *Pearce v. Pearce*, 824 S.W.2d 195, 210 (Tex. App.--El Paso 1990, writ denied), suggests that a right exists to recover for pre-judgment interest on a reimbursement claim. In *Pearce*, the trial court denied the wife's request to amend her pleadings to seek pre-judgment interest on her reimbursement claim. The appellate court reversed the trial court, saying that the request to amend the pleadings to seek pre-judgment interest on the wife's reimbursement claim should have been granted. That indirectly suggests that the court of appeals believed that the wife had such a claim.

X. LIENS TO SECURE REIMBURSEMENT AWARDS It is probably correct to say that, where reimbursement is awarded as a money judgment to be paid after divorce, the trial court can impress a lien on the property as to which the reimbursement is awarded. However, it is probably true that a lien cannot be imposed in one separate property asset to secure a reimbursement judgment relating to another separate property asset. It is firmly established that the court cannot impose a lien on separate real estate to secure a money judgment which is used to balance the property division. *Parker v. Parker*, 897 S.W.2d 918, 937 (Tex. App.--Fort Worth 1995, writ denied). In *Heggen v. Pemelton*, 836 S.W.2d 145, 146 (Tex. 1992), the Supreme Court said:

> When dividing marital property on divorce, trial courts may impose equitable liens on one spouse's separate real property to secure the other spouse's right of reimbursement for community improvements to that property. *See, e.g., Dakan v. Dakan*, 125 Tex. 305, 83 S.W.2d 620, 627 (1935); *Smith v. Smith*, 715 S.W.2d 154, 160 (Tex. App.--Texarkana 1986, no writ); *Eggemeyer v. Eggemeyer*, 623 S.W.2d 462, 466 (Tex. App.--Waco 1981, writ dism'd) *on remand from*, 554 S.W.2d 137 (Tex. 1977). Although courts may impress equitable liens on separate real property to secure reimbursement rights, they may not impress such liens, absent any compensable reimbursement interest, simply to ensure a just and right division. *Compare Mullins v. Mullins*, 785 S.W.2d 5, 11 (Tex. App.--Fort Worth 1990, no writ) *and Smith*, 715 S.W.2d at 157 *with Eggemeyer*, 554 S.W.2d at 141 *and Johnson v. Johnson*, 804 S.W.2d 296, 299-300 (Tex. App.--Houston [1st Dist.] 1991, no writ). In the case before us, the trial court granted Mr. Pemelton an equitable lien on separate real property to secure a judgment imposed by the court simply to ensure a just and right division. Thus, the trial court erred because it allowed this lien against Ms. Heggen's separate real property for reasons other than to secure Mr. Pemelton's reimbursement interest.

There is a puzzling statement in *Jensen v. Jensen*, 665 S.W.2d 107, 110 (Tex. 1984), which suggests that a lien to secure a reimbursement award can not be imposed upon separate property corporate stock.

> Upon retrial of this case the burden of proving a charge upon the shares of RLJ owned by Mr. Jensen will be upon the claimant, Mrs. Jensen. . . . The right to reimbursement is only for the value of the time, toil and effort expended to enhance the separate estate other than that reasonably necessary to manage and preserve the separate estate, for which the community did not receive adequate compensation. . . . *However, if the right to reimbursement is proved, a lien shall not attach to Mr. Jensen's separate property shares. Rather a money judgment may be awarded.* [Emphasis added.]

The courts of appeals have called this language in *Jensen* "confusing," and have had some difficulty in dealing with it. In *Smith v. Smith*, 715 S.W.2d 154, 160 (Tex. App.--Texarkana 1986, no writ), the court of appeals essentially ignored the plain meaning of the *Jensen* language saying "We do not believe the Supreme Court of Texas by their opinion in Jensen intended to change the longstanding rule of permitting divorce courts to attach a lien to secure an award of reimbursement for improvements." The Tyler court of appeals agreed in *Kamel v. Kamel*, 760 S.W.2d 677, 680 (Tex. App.--Tyler 1988, writ denied), as to affixing equitable liens in real estate to secure reimbursement awards *for improvements made to the property*. The *Kamel* case did not extend the principle to reimbursement claims regarding payment of debt, insurance and taxes. The matter was also considered in *Gutierrez v. Gutierrez*, 791 S.W.2d 659, 666 (Tex. App.--San Antonio 1990, no writ), where the court noted the confusion and then left the question to be resolved by the trial court on remand.

You might think that *Heggen v. Pemelton* would remove doubt about imposing liens in separate property to secure judgments for reimbursement. However, the holding in *Heggen* had to to with imposing a lien in a spouse's separate property *homestead* to secure a judgment to ensure a just and right division of the

community estate. Under Texas law, a homestead is immune from all but three types of liens, and the lien in *Heggen* did not fit within those three possibilities. There is some general language in the majority Opinion that says a lien can be imposed in separate real property to secure a reimbursement award for community "improvements" to that property. *Id.* at 146. Does that extend to reimbursement for paying debts, taxes or insurance for that property? *Falor v. Falor*, 840 S.W.2d 683, 686-87 (Tex. App.--San Antonio 1992, no writ), says that a lien can be imposed upon separate property *homestead* only to secure the other spouse's right or reimbursement for paying taxes, improvements or purchase money indebtedness of the land. Does anything in the *Heggen* Opinion apply to reimbursement claims against separate property corporations, where the issue is a lien in shares and not in real estate? And a concurring Opinion was written in *Heggen*, by Justice Cornyn, stating his concern that the language in the majority Opinion regarding homestead protection might cloud the power of a divorce court to freely deal with a community property homestead upon divorce.

It should be noted that establishing that a parcel is homestead requires perhaps pleadings but for sure some evidence of that fact. *See Magill v. Magill*, 816 S.W.2d 530, 535-36 (Tex. App.--Houston [1st Dist.] 1991, writ denied). In *Falor*, 840 S.W.2d at 686, the appellate court remanded a case to the trial court to determine to what extent the rural separate property realty in question was homestead, since that affected the validity of the lien imposed on the land by the divorce court.

XI. TRIAL COURT HAS BROAD DISCRETION Although many cases speak of a "right" of reimbursement, reimbursement is not a right. Reimbursement is an equitable claim that is addressed to the trial court's discretion. Therefore, it is difficult to reverse a trial court for a decision relating to reimbursement. *See Golias v. Golias*, 861 S.W.2d 401, 403 (Tex. App.--Beaumont 1993, no writ). An error regarding reimbursement is reversible only where it is of sufficient magnitude that it makes the overall property division an abuse of discretion. Reimbursement is part and parcel of the property division.

Baccus v. Baccus, 808 S.W.2d 694, 700 (Tex. App.--Beaumont 1991, no writ), lists reimbursement as one of the factors the court can consider in dividing the estate of the parties.

> [T]he Supreme Court has held that circumstances of each marriage dictate what factors the trial court will consider in dividing the community property. *See Young v. Young*, 609 S.W.2d 758 (Tex. 1980). We are well aware of the many factors which the trial court considers daily in making "just and right" divisions. These factors include future needs for support; fault in the breakup of the marriage; disparity of incomes or of earning capacities; spouses' capacities and abilities; benefits the innocent spouse would have derived from the continuation of the marriage; business opportunities; education and training; relative physical conditions; relative financial conditions and obligations; disparity of ages; size of community estate; size of separate estate; expected inheritance of the spouses; nature of property; attorneys' fees; custody of children; *reimbursement*; gifts to a spouse during marriage; excessive community property gifts to others; wasting community assets; out-of-state property; tax consequences; and credit for temporary alimony paid. *See LeBlanc v. LeBlanc*, 761 S.W.2d 450, 452 (Tex. App.-- Corpus Christi 1988, writ denied). [Emphasis added.]

According to *Penick v. Penick*, 783 S.W.2d 194, 198 (Tex. 1988), reimbursement is an equitable right, not an absolute right, and the trial court's discretion in evaluating a claim for reimbursement is as broad as that discretion exercised by making a "just and right" division of the community property.

XII. WAIVER OF REIMBURSEMENT CLAIMS Some lawyers like to eliminate the prospect of reimbursement claims when writing premarital or post-marital agreements. Reimbursement is not a property right, and therefore is not impacted by clauses in an agreement relating to property rights. To eliminate reimbursement, there must be a waiver of reimbursement claims. *See Pearce v. Pearce*, 824 S.W.2d 195, 200 (Tex. App.--El Paso 1991, writ denied) (agreement providing that income from separate property would be separate did not waive reimbursement claims). However, where the spouses have partitioned or exchanged their future wages and the fruits of their labors, arguably no *Jensen*-type reimbursement claim can arise, since any undercompensation of the owning spouse's labors would be the separate property of the owning spouse. And if money made separate by a premarital or marital agreement is used to improve or pay expenses of a separate asset, there would be no reimbursement claim in favor of the community for the use of the funds in that manner.

The Texas Family Law Practice Manual suggests the following waiver language to be used in such agreements:

> 8. Reimbursement
>
> Any payment or contributions by one of us to satisfy the debts or otherwise benefit the separate estate of the other shall not give rise to a claim for reimbursement or an interest in any property purchased with those payments or contributions (including time, toil, and talent) unless we otherwise agree in writing. Any right of reimbursement that may arise during our marriage for payments or contributions made to the other's separate estate to the extent any payment or contribution (including time, toil, and talent) is made by one for the benefit of the other shall be presumed to be a gift to the other party's separate estate.

TEXAS FAMILY LAW PRACTICE MANUAL 31.23-24 (1992). Does the clause relating to "gift" cause a spouse to use his/her unified credit for estate tax purposes? If so, then perhaps such benefits should be partitioned or exchanged instead of given.

XIII. REIMBURSEMENT CLAIMS ON APPEAL

A. Need for Findings of Fact A judgment must be supported by findings of fact. *See* TEX. R. CIV. P. 301; *Wirth Ltd. V. Panhandle Pipe & Steel, Inc.*, 580 S.W.2d 58, 62 (Tex. Civ. App.--Tyler 1979, no writ). A judgment which includes an award of reimbursement must have findings of fact or a jury finding supporting the reimbursement award. *See Holloway v. Holloway*, 671 S.W.2d 51, 58 (Tex. App.--Dallas 1983, writ dism'd). A party whose reimbursement request is rejected by the trial court must secure findings on that claim, or must have preserved error on the trial court's failure to grant findings on the claim; otherwise the claim is waived.

In *Tschirhart v. Tschirhart*, 876 S.W.2d 507, 509 (Tex. App.--Austin 1994, no writ), both parties tried to defend their interpretation of the decree of divorce by arguing that the trial court might have awarded reimbursement to him or to her. The court of appeals said:

> We also presume that the trial court made no awards other than those listed in its judgment. For example, both parties assert on appeal that the trial court could have awarded them an amount for reimbursement claims. Neither party, however, brings a point of error complaining that the trial court's failure to make such an award would have been against the great weight and preponderance of the evidence or that reimbursement was established conclusively.

B. Disposition of Case After Reversal on Appeal Ordinarily, if a trial court's decision on reimbursement is reversed by the appellate court, it is necessary to remand the case to the trial court for a new division of the property. *See Jacobs v. Jacobs*, 687 S.W.2d 731, 732-33 (Tex. 1985) ("We hold that a court of appeals must remand the entire community estate for a new division when it finds reversible error which materially affects the trial court's 'just and right" division of the property"). This is because the grant or denial of reimbursement is addressed to the discretion of the trial court, and is part-and-parcel of the overall property division. The appellate court does not have the judicial power to dictate how the estate should be divided, so if an error occurs in the property division, including an error relating to reimbursement, it is necessary for the trial court and not the court of appeals to decide how to fix it. *Jacobs v. Jacobs*, 687 S.W.2d at 731 (when court of appeals expunged one reimbursement award for "no evidence" and the other for no pleadings, it was required that case be remanded to trial court for new property division). Even an error in characterizing as community property that is really separate requires a remand because a determination by the appellate court that an asset is separate property may give rise to a claim for reimbursement that was ignored due to the original erroneous finding that the asset was community property. For example, in *Dawson v. Dawson*, 767 S.W.2d 949, 951 (Tex. App.--Beaumont 1989, no writ), the appellate court said:

> Mr. Dawson asks this court to reverse and render. This, however, would be manifestly unjust in that the court made its original division based upon the erroneous characterization. Had the court correctly characterized the property as separate, the community estate may have been entitled to reimbursement for community funds expended on the separate property or there may have been an entirely different division of the community estate. Therefore, having found error, in the interest of justice, we reverse and remand.

However, the Supreme Court in *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1983), found error relating to reimbursement and remanded the case for the sole purpose of determining a reimbursement claim. Following *Jensen*, the Dallas court of appeals remanded a divorce case for a new trial regarding reimbursement, with instructions for the trial court to redivide the property based on the jury verdict from the first trial, as corrected on appeal, subject to the new fact findings to be obtained regarding the reimbursement claims. *Holloway v. Holloway*, 671 S.W.2d 51, 63 (Tex. App.--Dallas 1983, writ dism'd). It is not entirely clear how to square the disposition in *Jensen* with the rule in *Jacobs*.

C. Offsetting Benefits on Appeal Whether and how to weigh offsetting benefits in determining how much reimbursement to award is a matter of discretion for the trial court. As such, reversal is available only upon a showing of abuse of discretion. *See Harris v. Holland*, 867 S.W.2d 86, 88 n. 2 (Tex. App.--Texarkana 1993, no writ):

> Harris also contends that the trial court erred in reimbursing Holland for $90,000.00 in separate property used to enhance the community estate without adjusting the value of Holland's claim to reflect that the community paid some of Holland's separate property debts.
>
> An equitable claim for reimbursement is not merely a balancing of the ledgers between the marital estates. *Penick v. Penick*, 783 S.W.2d 194, 198 (Tex. 1988). The trial court has great discretion in deciding and evaluating a claim for reimbursement. Harris has failed to show that the trial court abused its discretion.

However, when there is proof of the amount of reimbursible expenditures, but no proof of the amount of offsetting benefits, what should the appellate court do? Is that a failure to establish part of the right to recover, which means that the party seeking reimbursement has not shown an entitlement to reimbursement? Or is that a failure of the party resisting reimbursement to meet his/her burden to show that the reimbursement claim should be reduced by the amount of offsetting benefits, meaning that the reimbursement claim has been established? The answer to that question depends entirely on who has the burden of proof to establish offsetting benefits. Either way, the appellate court can, and many have, remanded the question "in the interest of justice."

D. Reimbursement Must Be Within the Limits of the Evidence In *Pearce v. Pearce*, 824 S.W.2d 195, 201 (Tex. App.--El Paso 1991, writ denied), a jury finding of *Jensen* reimbursement was overturned for factually insufficient evidence, where the jury's finding of reimbursement exceeded the testimony of the value of husband's services expended to enhance his separate estate. The court said:

> Based on expert testimony, the value of Roy, Sr.'s time, toil, talent and effort was estimated to be worth a high of $1,277,000.00. The jury, however, awarded approximately $500,000.00 more for reimbursement than this evidence established. This finding is unsupported in the record. Therefore, the amount of the jury verdict is against the great weight and preponderance of the evidence as to be manifestly unjust. Enforcement of such an award would require Roy, Sr. to pay more in reimbursement than his estate was benefitted. *Gutierrez*, 791 S.W.2d at 663, citing *Anderson v. Gilliland*, 684 S.W.2d 673 (Tex. 1985).

E. COMPLAINT ON APPEAL. A party who wishes to complain about the failure of the trial court to award reimbursement must request a finding on the reimbursement claim, or the claim is waived. Whether the appellate wishes to complain about the award of reimbursement, or the failure to award reimbursement, must challenge that decision as an abuse of discretion, and must further set out a point of error complaining that the reimbursement error caused the overall property division to be an abuse of discretion. *See Thomas v. Thomas*, 738 S.W.2d 342, 345 (Tex. App.--Houston [1st Dist.] 1987, writ denied) (where court awarded community reimbursement claim of $ 150,000 to husband as part of division of estate, there any error in awarding reimbursement was harmless unless husband was thereby deprived of other property or the award makes the property division so unjust as to be an abuse of discretion).

XIV. GRANTING NEW TRIAL AFTER DEFAULT JUDGMENT To secure a new trial after suffering an adverse judgment, it is necessary to show (1) defendant's failure to answer or appear was not intentional or the result of conscious indifference on his part, but was due to a mistake or an accident; (2) the motion for new trial sets up a meritorious defense; and (3) it is filed at a time when granting it will cause no delay or other injury to the plaintiff. *Craddock v. Sunshine Bus Lines*, 134 Tex. 388, 133 S.W.2d 124 (1939).

Some courts have interpreted the third prong of the text to require that the defaulting defendant offer to reimburse the plaintiff for the cost of taking the default judgment. In *Owens v. Neely*, 866 S.W.2d 716, 719 (Tex. App.--Houston [14 Dist.] 1993, writ denied), the appellate court said:

> A defendant's failure to offer reimbursement does not automatically preclude setting aside the default judgment. *Boulware v. Security State Bank, Navasota*, 598 S.W.2d 687, 689 (Tex. Civ. App.--Houston [14th Dist.] 1980, writ ref'd n.r.e.). The offer of reimbursement of costs and for immediate trial are only factors to be considered in making a case by case review. *Cliff v. Huggins*, 724 S.W.2d 778, 779 (Tex. 1987).

Accord, Beckman v. Beckman, 716 S.W.2d 83, 85 (Tex. App.--Dallas 1986, writ dism'd).

XV. REIMBURSEMENT TO OFFSET CHILD SUPPORT CLAIMS UNDER F.C. § 76.262(A).

Section 157.262 of the Texas Family Code, "Reduction of Arrearages," governs the age old problem of courts reducing child support arrearages based upon some offset or reimbursement asserted by the obligor. The Code provision states:

> (a) In a contempt proceeding or in rendering a money judgment, the court may not reduce or modify the amount of child support arrearages.
>
> (b) The money judgment for arrearages rendered by the court may be subject to a counterclaim or offset as provided by this subchapter.

"As provided by this subchapter" refers to Section 157.008, "Affirmative Defense to Motion for Enforcement of Child Support," which permits an obligor to offset against an arrearage claim any advancements made to support the child during the time when the obligor had possession of the child in excess of his (her) court-ordered periods of possession. The statute reads:

> **§ 157.008 Affirmative Defense to Motion for Enforcement of Child Support**
>
> (a) An obligor may plead as an affirmative defense in whole or in part to a motion for enforcement of child support that the obligee voluntarily relinquished to the obligor actual possession and control of a child.
>
> (b) The voluntary relinquishment must have been for a time period in excess of any court-ordered periods of possession of and access to the child and actual support must have been supplied by the obligor.
>
> * * *
>
> (d) An obligor who has provided actual support to the child during a time subject to an affirmative defense under this section may request reimbursement for that support as a counterclaim or offset against the claim of the obligee.

TEX. FAM. CODE ANN. § 157.008 (Vernon Supp. 1996).

The appellate court in *Lewis v. Lewis*, 853 S.W.2d 850, 854 (Tex. App.--Houston [14th Dist.] 1993, no writ), noted the limited discretion of the trial court in forgiving child support arrears, other than the Family Code § 157.008 [old § 14.41] right of reimbursement:

> In other words, the trial court "acts as a mere scrivener" in "mechanically" tallying up the amount of arrearage. Id. at 153 (Phillips, C.J., dissenting). Arrearages cannot be forgiven per se. See id. at 143; TEX. FAM. CODE ANN. § 14.41(d) (Vernon 1986). But the final judgment is to be rendered only after offset and counterclaim are considered. *See Rinehold v. Rinehold*, 790 S.W.2d 404, 406 (Tex. App.--Houston [14th Dist.] 1990, no writ) and *Arnold v. Pitts*, 777 S.W.2d 773, 775 (Tex. App.--Beaumont 1989, no writ).

The appellate court also addressed the question of whether the affirmative defense includes all sums spent by the non-custodial parent during his extra period of possession of the child, even including expenditures made during a period of time for which the custodial parent was not suing. The appellate court said:

> An issue arises whether Joel can apply the actual, direct support he provided David during the entire thirty-five month period against Mary's claim for child support arrearages for the last twenty-five months. We hold that Sec. 14.41(c) only allows Joel to assert offset or counterclaim for actual, direct support expenses paid during the periods constituting Mary's claims for arrearage.

Id. at 854.

One court has held that such reimbursement is available only for expenditures made for the child that have actually been paid, and not for expenditures that have been incurred but not yet paid. *Arnold v. Pitts*, 777 S.W.2d 773, 775 (Tex. App.--Beaumont 1989, no writ).