VACCINE FOR THE PLAGUE OF THE 21ST CENTURY
Equitable Liens & Reimbursement: Getting Them and Beating Them

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I. INTRODUCTION This article discusses equitable marital property reimbursement and equitable interests under the Texas Family Code. There are several examples set out in the article to be used for purposes of discussion. The Appendix to the article contains provisions from the Texas Code Construction Act, Texas cases relating to equitable reimbursement, and California cases showing how calculations are made under California's apportionment approach to marital property–an approach that is somewhat analogous to the approach of the Texas equitable interest statutes. Finally, the Appendix sets out a proposed amendment to the existing Family Code provisions relating to equitable interests.

II. THE FAMILY CODE AND REIMBURSEMENT Marital property reimbursement is a court-created equitable remedy, and the Texas Family Code does not mention it. Marital property reimbursement is thus governed by case law. The two principal issues 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. TEXAS PATTERN JURY CHARGES 204.1–204.2 The Texas Pattern Jury Charges published by the State Bar of Texas contains proposed instructions and questions for the jury on Texas marital property reimbursement law. They are as follows:

> Texas law recognizes three estates: the community estate, the separate estate of the husband, and the separate estate of the wife.
>
> 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.
>
> 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.
>
> 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*.

A spouse seeking reimbursement has the burden of proving each element of the claim by a preponderance of the evidence. However, a spouse seeking reimbursement to a separate estate must prove by clear and convincing evidence that the funds expended were separate property. "Clear and convincing evidence" is that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true. The amount of the claim is measured as of the time of trial.

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.

QUESTION 1

State in dollars the amount of the reimbursement claim, if any, proved in favor of—

1. *the community estate* against
PARTY A's separate estate;

   Answer: $_____

2. *PARTY A's separate estate* against
PARTY B's separate estate.

   Answer: $_____

QUESTION 2

State in dollars the amount of the offset against such reimbursement claim, if any, proved in favor of—

1. *PARTY A's separate estate*

   Answer: $_____

2. *PARTY B's separate estate*

   Answer: $_____

IV. PROCEDURAL CONSIDERATIONS IN EQUITABLE REIMBURSEMENT

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 allegations seeking reimbursement. The form divorce petition includes reimbursement as a factor to consider in making a disproportionate decision. *See* Paragraph 11. The form divorce petition also contains a paragraph requesting reimbursement to the community estate from Respondent's separate estate, to Petitioner's separate estate from the community estate, from Respondent's separate estate to Petitioner's separate estate, and to the community estate for a *Jensen*-like claim. *See* Paragraph 13. If you intend to claim an unconventional form of reimbursement, the form book pleadings should be tweaked or augmented.

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), which 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 pleads the absence of offsetting benefits in the reimbursement paragraph.

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 Paragraph VII.I below, PJC 204.1 (2000 ed.) 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 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). The same rule was applied in *McCann v. McCann*, No. 14-97-01339-CV (Tex. App.–Houston [14th Dist.] Mar. 16, 2000, pet. requested) (not for publication) [2000 WL 280301] (wife failed to get enhanced value finding from jury and thus 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. § 3.003; *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.

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.

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).

The contrary position was taken in *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 was aided by presumption that money spent during marriage is community rather than separate). In *McCann v. McCann*, No. 14-97-01339-CV (Tex. App.–Houston [14th Dist.] Mar. 16, 2000, pet. requested) (not for publication) [2000 WL 280301], the Court applied the community presumption to funds spent improving the husband's separate property, but husband proved a portion of the expenditures were made with his separate property funds, thus rebutting the community presumption but only as to those payments.

The Pattern Jury Charge committee currently 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. STATE BAR OF TEXAS PATTERN JURY CHARGES (FAMILY) 204.1 (2000 ed.). This exception is consistent with the requirement of TEX. FAM. CODE ANN. § 3.003(b) that "the degree of proof necessary to establish that property is separate property is clear and convincing evidence."

H. 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 (2000 ed.) 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).

I. 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).

V. EQUITABLE INTERESTS UNDER THE FAMILY CODE In 1999, the Texas Legislature enacted a bill, H.B. 734, that created so-called "equitable interests" in property of spouses. (The bill is codified at Family Code Sections 3.401 through 3.406, with companion provisions codified at Section 3.006 and Section 7.002(3).)

Although equitable interests are patterned after certain types of reimbursement claims, they are not reimbursement claims. They are a quasi-ownership right. It would be unconstitutional under *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977) for the Legislature to purport to empower a trial court to take separate property of one spouse and give it to the other upon divorce. The equitable interest statute attempts to circumvent this prohibition by reaffirming the inception of title rule on the one hand while on the other hand making inroads in the rule by creating an "equitable" interest in the property which must be awarded, *Eggemeyer* notwithstanding. Whether the distinction between a legal "taking" and an "equitable" taking has sufficient substance to withstand constitutional attack remains to be seen.

It appears that these statutory provisions attempt to create an equitable interest, somewhat analogous to a reimbursement claim, to be determined upon divorce. Equitable interests arise in favor of the community estate under Sections 3.401 & 3.402, and arise in favor of the separate estates under Section 3.404. Equitable interests arise in two circumstances.

An equitable interest arises under Section 3.401when one marital estate enhances another due to a financial contribution. Section 3.401. This equitable interest is measured by the "net amount of enhancement in value" of the benefitted estate's property. Possibly this is meant to parallel an equitable reimbursement claim for adding improvements to property of another marital estate, where the measure of reimbursement is the amount of enhancement.

An equitable interest arises under Section 3.402 when property of one marital estate is used to discharge debt on property of another marital estate. Section 3.402. Some of the word smiths who helped to write the statute say that they intended for the equitable interest to be calculated according to a formula that would give an equitable interest in the whole property that is proportional to the portion of the purchase price paid by the transferring estate. In other words, at least some of the drafters may have intended for Section 3.402 to mean that if 45% of the purchase money debt on separate property was paid with community funds, then the community estate has an equitable interest in 45% of the value of the property at the time of divorce. However, the statute does not say this. Instead it says that the equitable interest is measured by the fraction of the principal of the debt on the property (only principal, not interest) paid by the transferring estate multiplied times the enhanced value of the property that is due to financial contributions by the transferring estate. Under one view, the enhanced value due to financial contributions is the amount by which the value of the property net of debt was increased by paying down the purchase money indebtedness. Another view is that the enhanced value giving rise to an equitable interest is all increase in value in the property during marriage. For purposes of the calculation, payment of the cost of improvements is treated as payment of principal of the purchase money debt. *See* Section 3.401(c). That is, in addition to paying debt on property, the transferring estate pays for improvements to the property, that cost is treated as part of the principal of the debt.

Family Code Section 3.405 provides that "use and enjoyment" of the property is not an offset to an equitable interest. This provision does not appear to preclude other types of offsetting benefits recognized in the equitable reimbursement realm, such as depreciation deductions that save taxes, etc.

Family Code Section 7.002(3) requires the court in a divorce to divide any equitable interests, which the statute suggests is a form of real or personal property. However, Section 3.006 clearly states that an equitable interest is not an ownership interest, but is instead a claim against the other spouse. This apparent inconsistency is part, but only part, of the difficulty in attempting to understand equitable interests.

Issues regarding the constitutionality of this new form of real or personal property, that is supposed not to be an ownership interest, as a violation of *Eggemeyer* have yet to be addressed.

Another unresolved issue is whether the availability of the statutory remedy of equitable interest supplants the traditional equitable reimbursement remedy. Since equitable remedies exist only where there is no adequate remedy at law, the question arises whether the statutory remedy of "equitable interests" is a legal remedy that supplants the equitable remedy of marital property reimbursement. If so, does the supplanting extend only to situations where an equitable interest is recognized?

The meaning and operation of Section 3.402 is problematic in several respects. The equitable interest applies only to "debt on" property, not other debt. What constitutes "debt on" property is unclear. What constitutes enhanced value due to financial contributions is unclear. And since "debt on" property is not limited to pre-marital debt, there is an issue of double recovery under Section 3.401 and Section 3.402 if improvements are made to separate real estate using community credit secured by lien on the property (giving rise to an equitable interest under Section 3.401) and that community loan is later paid by community funds (giving rise to an equitable interest under Section 3.402). It also appears that the exclusion of "use and enjoyment" as an offset does not prohibit consideration of income earned on the property, but that conclusion may be controversial.

An effort is being made to rewrite the equitable interest provisions so that their meaning in clearer. Proposed versions of the new statute are contained in the Appendix at p. 64 below.

VI. FAMILY CODE PROVISIONS RELATING TO EQUITABLE INTERESTS

A. FAMILY CODE SECTION 3.006

§ 3.006. Proportional Ownership of Property by Marital Estates

(a) If the community estate of the spouses and the separate estate of a spouse have an ownership interest in property, the respective ownership interests of the marital estates are determined by the rule of inception of title.

(b) An equitable interest created by Subchapter E:

(1) does not create an ownership interest in a spouse's separate property; and
(2) creates a claim against the spouse who owns the property that matures on termination of the marriage.

B. FAMILY CODE SECTION 3.401

§ 3.401. Enhancement in Value Due to Financial Contribution of Community Property

(a) The enhancement in value during a marriage of separate property owned by a spouse due to a financial contribution made with community property creates an equitable interest of the community estate in the separate property.

(b) The equitable interest created under this section is measured by the net amount of the enhancement in value of the separate property during the marriage due to the financial contribution made with community property.

C. FAMILY CODE SECTION 3.402

§ 3.402. Use of Community Property to Discharge Debt on Separate Property

(a) The use of community property to discharge all or part of a debt on separate property owned by a spouse during a marriage creates an equitable interest of the community estate in the separate property.

(b) The equitable interest created under Subsection (a) in the enhanced value of separate property due to financial contributions made with community property is computed by multiplying the net enhanced value of the separate property by the sum created by dividing:

(1) the total amount of the payments made by the community estate to reduce the principal of the debt on the separate property; by

(2) the sum of:

(A) the amount computed under Subdivision (1);

(B) the total amount of the payments made by the separate estate to reduce the principal on the debt; and

(C) the total amount of any additional amount spent by the separate estate to acquire the interest in the property.

(c) For purposes of this section, the cost of any improvements made to the separate property paid for by either the separate or community estate is included as part of the principal of the debt.

D. FAMILY CODE SECTION 3.403

§ 3.403. Application of Inception of Title Rule

(a) This subchapter does not affect the rule of inception of title under which the character of property is determined at the time the right to the property is acquired.

(b) The equitable interest created under this subchapter does not create an ownership interest in property.

E. FAMILY CODE SECTION 3.404

§ 3.404. Equitable Interest of Separate Property Estate

(a) The separate estate of a spouse has an equitable interest in the enhanced value of the separate estate of the other spouse or in the enhanced value of the community estate for:

(1) a financial contribution made to the other separate estate or to the community estate; and
(2) the discharge of all or part of a debt of the other separate estate or of the community estate.

(b) The equitable interest created by this section is measured in the manner provided by Section 3.401(b) or 3.402(b), as appropriate.

F. FAMILY CODE SECTION 3.405

§ 3.405. Use and Enjoyment of Property

The use and enjoyment of property during a marriage does not create a claim of offsetting benefits to the equitable interest created by this subchapter.

G. FAMILY CODE SECTION 3.406

§ 3.406. Equitable Lien

On termination of a marriage, the court shall impose an equitable lien on community or separate property to secure a claim arising by reason of an equitable interest as provided by this subchapter.

H. FAMILY CODE SECTION 7.002

§ 7.002. Division of Property Under Special Circumstances

In addition to the division of the estate of the parties required by Section 7.001, in a decree of divorce or annulment the court shall order a division of the following real and personal property, wherever situated, in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage:

(1) property that was acquired by either spouse while domiciled in another state and that would have been community property if the spouse who acquired the property had been domiciled in this state at the time of the acquisition;

(2) property that was acquired by either spouse in exchange for real or personal property and that would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition; or

(3) the equitable interest, as provided by Subchapter E, Chapter 3, of the:

(A) community estate in the separate estate of a spouse;

(B) separate property of a spouse in the separate property of the other spouse; and

(C) separate estate of a spouse in the community estate.

VII. PROFESSOR McKNIGHT'S COMMENTS ON EQUITABLE INTERESTS Professor McKnight made the following observations about the new equitable interest statute. McKnight, Joseph W., *Family Law: Husband and Wife*, 53 SMU L. REV. 995, 1018-1020 (2000):

In 1999 the Legislature undertook to improve the rules of marital reimbursement. The new provisions of section 3.401 (Enhancement in Value Due to Financial Contribution of Community Property) deal with community reimbursement claims for enhancement of community property. [FN162]

(a) The enhancement in value during a marriage of separate property owned by a spouse due to financial contributions made with community property creates an equitable interest of community property in the separate property.

(b) The equitable interest created under this section is measured by the net amount of the enhancement in value of the separate property during the marriage due to the financial contribution made with community property.

Applying the provisions of section 3.401 to the facts of Morris and Rusk present no particular difficulties. The community contributions were clearly of a "financial" nature. "Net amount" merely means "amount." A similar formula in section 3.404 [FN163] describes a similar means of reckoning a separate reimbursement right for enhancement of community property and enhancement of one separate estate by another separate estate in comparable situations. But in a situation similar to that in Fazakerly (and in the absence of the defenses applicable there) if it had been proved that the husband's efforts and acumen had resulted in an enhancement of the wife's separate estate, would those "contributions" have been described as "financial?" In the history of this legislation there is some indication that the draftsmen meant to exclude this ground for *1019 reimbursement by use of the term "financial." But even if that was the draftsmen's object, was that

object achieved? If the contribution is in any way measured by its effect, the result would certainly be described as "financial."

A fundamental tenet in the application of the principle of reimbursement between marital estates is that advancements between estates do not bear interest. But though one spouse may borrow from the community estate interest free for the benefit of a separate venture, that spouse is required to pay for contingent enhancement of the separate estate in the amount of the appreciation realized (equities considered) as a result of the community investment. The same principle operates in favor of separate property appropriated for community use and in favor of separate property of one spouse used for the benefit of the other separate estate.

When it comes to labor, however, only the community has toil and effort to expend personally, but labor can be bought with separate funds. Literally, the 1999 statute seems to allow reimbursement of paid separate labor but not community personal labor. Should there be such a disparity so that community personal labor goes uncompensated by a separate estate for enhancement of separate property? Should the separate owner be able to expend as much of his time and energy as he wishes on his separate estate without community compensation? Prior to the decision of the Texas Supreme Court in Jensen v. Jensen [FN164] that was the rule in Texas. But in Jensen the court laid down the rule that a spouse is allowed to expend unreimbursable community energy and effort only to maintain his separate property but not to make it productive. A real problem in applying that rule of reimbursement is evaluation of a claim such as that advanced in Fazakerly. In Jensen on remand to the trial court that task was ultimately put in the hands of a master to hear evidence and evaluate the claim. In this respect it seems appropriate that such separate and community reimbursement claims be subject to the same rules, though the formula for calculating reimbursement as provided by the court in Jensen has produced some puzzlement. Why, for example, did the court direct that cash dividends paid by the husband's separate corporate interest in Jensen should be set off against a community contribution for enhancement of the value of the husband's separate corporate shares? Those cash dividends belong to the community estate as a matter of law. [FN165] (But the amount of the dividends regularly paid is certainly an element in valuing the separate corporate enterprise and the separate shares in that corporation.) Similarly, the value of profits retained for expansion of the corporation and not paid as dividends is also a factor to *1020 be evaluated. [FN166] In section 3.405, [FN167] enacted in 1999, it is provided that use or enjoyment by a claimant for benefits rendered is not to be considered in calculating a right of reimbursement against a benefitted estate. Although this sort of setoff is always difficult to evaluate, one wonders whether its total exclusion as an equitable factor in reimbursement-evaluation can produce a fair result.

A fundamental criticism that can be made of the Jensen decision is the court's preoccupation with what was termed inadequate compensation by the separate corporation as a measure of the amount of reimbursement owed to the community estate in that instance. That approach was a consequence of the pleadings and arguments in that particular case when the question turned on whether (and to what extent) the husband had enhanced the value of the large block of separate shares of a corporation, which he personally controlled at community expense. That was a very difficult question that had not been fully explored at the trial. But though the court discussed the point in terms of adequacy of the husband's compensation by the corporation, the real issue was how much benefit the husband had contributed to the value of his separate shares as his debt to the community was the only issue before the court not whether the corporation owed him unpaid compensation. Nor was there any issue before the court as to whether the owners of the rest of the shares of the corporation (who had benefitted by share increases as much as the husband had) owed compensation to the community estate. Though the focus of the 1999 legislation on "financial" as opposed to as opposed to "non-financial" benefits as the primary test for producing marital reimbursement rights may not be the most appropriate way to formulate the reimbursement issue, the 1999 reimbursement legislation has furnished a basis for discussion of the resolution of this and related issues.

The 1999 legislation also distinguishes between enhancements in value of separate property by financial contributions of community property (section 3.401) and the use of community property

to discharge a debt "on" separate property (section 3.402 [FN168]). The most common application of this rule is found in the discharge of mortgage indebtedness on separate property with community funds. But reference to any other use of community funds for the discharge of separate obligations is pointedly omitted. Is section 3.402 (or section 3.401) applicable to the use of community funds to pay premiums on separate life insurance policies or to pay any other sort of unsecured premarital obligation?

[FN162]. Tex. Fam. Code Ann. § 3.401 (Vernon 1998).

[FN163]. Tex. Fam. Code Ann. § 3.404 (Vernon Supp. 2000). The denial of any claim or setoff against one marital estate for use on occupancy of facilities of the other under § 3.405 simplifies the calculation of reimbursement owed but whether such denial is just in many situations is highly questionable.

[FN164]. 665 S.W.2d 107 (Tex. 1984).

[FN165]. See Joseph W. McKnight, Family Law: Husband and Wife, Annual Survey of Texas Law, 38 Sw. L. J. 131, 138-39 (1984).

[FN166]. See Joseph W. McKnight, Reimbursement for Uncompensated Labor Rendered for a Closely-Held Corporation and Some Other Comments on Jensen v. Jensen, 3 The Advocate, State Bar [of Texas] Litigation Section Report 8 (no. 4 1984).

[FN167]. Tex. Fam. Code Ann. § 3.405 (Vernon Supp. 2000).

[FN168]. Tex. Fam. Code Ann. § 3.402 (Vernon Supp. 2000).

VIII. PROBATE LAWYERS' SLANT ON EQUITABLE INTERESTS Two probate lawyers have commented in print on the equitable interest statute. Gerry W. Beyer & Jerry Frank Jones, *Statutory Update*, 53 SMU L. REV. 1229, 1286 (2000):

*1287 E. Family Code

1. Sections 3.006, 3.401-3.406 & 7.002: Enhancement from Financial Contributions [FN431]

These provisions were a last minute amendment in the Senate to a house bill. [FN432] They codify the rules for measuring reimbursement when one estate makes financial contributions to another. [FN433] For example, community funds are used to build an apartment house on a husband's separate property lots; or community funds are used to pay down the mortgage on the separate property of the wife. The statute is phrased in terms of the community estate making contributions to separate property. However, in Section 3.404 the same principals are extended to all financial contributions between the various estates: his separate, her separate, their community. This bill made no provision for community time, toil, and labor contributed to separate property. [FN434]

The statute provides that such contributions create an "equitable interest" that does not create an ownership interest but rather gives rise to a "claim . . . which matures on the termination of the marriage." The amendment also provides that enhancement is the measure when community contributions discharge debt on separate property. The section on debt retirement actually provides a formula.

The formula says the equitable interest is calculated by multiplying the 'net enhanced value' (not defined) by the 'sum' (sic) created by dividing

(1) the total amount of the payments made by the community estate to reduce the principal of the debt on the separate property; by

(2) the sum of

(A) the amount computed under Subdivision (1);

(B) the total amount of the payments made by the separate estate to reduce the principal on the debt; and,

(C) the total amount of any additional amount spent by the separate estate to acquire the interest in the property.

The statute authorizes a court to impose an equitable lien. Unfortunately, it says a court "shall impose an equitable lien. . ." The amendment affirms the inception of title doctrine.

Finally, it eliminates offsets for "use and enjoyment during the marriage." For example there shall be no offset for living in the home. However, it is not clear if it also applies to income generated by the property. It is assumed that this language was carefully selected and used to deal with the frequent problem of the courts holding that living in the house is an offset. *1288 Financial contributions for improvements are not controlled by the formula. In those situations, the value of the improvements on dissolution of the marriage is the measure.

The amendment is effective September 1, 1999. It goes on to say it applies to suits for dissolution pending on September 1, 1999 or filed on or after that date. Some observers have suggested that this means this amendment only applies to actions for divorce and not to probate proceedings. There is no legislative history to suggest that distinction. There has been substantial criticism from lawyers about this statute. As a result, the legislative author has assembled a study committee of family law and probate attorneys to study the statute and make recommendations for the coming session.

[FN431]. See Tex. H.B. 734, 76th Leg., R.S. (1999).

[FN432]. They were amendments to Tex. H.B. 734 which allows Texans to convert separate property to community property, see the Texas Family Code section § 4.201.

[FN433]. *See Anderson v. Gilliland*, 684 S.W.2d 673 (Tex. 1985); see also *Penick v. Penick*, 763 S.W.2d 194 (Tex. 1988).

[FN434]. As a result, *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984) still controls.

IX. EXAMPLES FOR DISCUSSION

A. Example 1 - Payment of Debt

Husband had two debts on the date of marriage: an unpaid personal income tax liability of $50,000; and a business-related working capital loan of $25,000. Husband paid both debts, including unpaid interest, within the first 90 days of marriage, using funds from a bank account containing both Husband's separate property and community property funds. Independent from this, during marriage, Husband used cash from a commingled account (partly his separate, partly community) to pay $20,000 in family living expenses. He also paid from that account credit card charges of $12,000 incurred during marriage for family living expenses. Insofar as these facts are concerned, what is needed to: (i) prove or defeat equitable reimbursement; (ii) to prove or defeat an equitable interest?

1. In Husband's pleadings?

2. In Wife's pleadings?

3. Husband's fact witnesses and subject of testimony.

4. Wife's fact witnesses and subject of testimony.

5. Husband's expert witnesses and subject of testimony.

6. Wife's expert witnesses and subject of testimony.

7. Response to request for disclosure.

8. Possible grounds for summary judgment.

9. Possible responses to motion for summary judgment.

10. Who has what burden of producing evidence at trial? Who has what burden of persuasion? What degree of proof is necessary to avoid a directed verdict on each issue? What degree of proof is necessary to secure a favorable jury verdict on each issue?

11. What jury definitions, instructions and questions are needed, and who must request them?

12. After non-jury trial, what findings of fact and conclusions of law are needed by each party?

B. Example 2 - Using Cash to Make Improvements to Separate Property Land

Husband bought an unimproved residential lot prior to marriage for $25,000. During marriage, a house is built on the lot. Construction costs are paid with cash that are mixed separate property of Husband and community property (Husband claims 1/3 separate and 2/3 community). Of the $350,000 in construction costs, $20,000 was for draperies and appliances. Also, $10,000 was for a crystal chandelier for the dining room. After construction is completed, the spouses take up residence in the house. They live there for 3 years, then separate and file for divorce. At the temporary hearing, Husband is awarded exclusive use of the house, and Wife has to rent an apartment. After 6 months, the case goes to trial. Insofar as these facts are concerned, what is needed: (i) to prove or defeat equitable reimbursement, and (ii) to prove or defeat an equitable interest?

1. In Husband's pleadings?

2. In Wife's pleadings?

3. Husband's fact witnesses and subject of testimony.

4. Wife's fact witnesses and subject of testimony.

5. Husband's expert witnesses and subject of testimony.

6. Wife's expert witnesses and subject of testimony.

7. Response to request for disclosure.

8. Possible grounds for summary judgment.

9. Possible responses to motion for summary judgment.

10. Who has what burden of producing evidence at trial on what issues? Who has what burden of persuasion on those issues? What degree of proof is necessary to avoid a directed verdict on each issue? What degree of proof is necessary to secure a favorable jury verdict on each issue?

11. What jury definitions, instructions and questions are needed, and who must request them?

12. After non-jury trial, what findings of fact and conclusions of law are needed by each party?

C. Example 3 - Using Community Credit to Make Improvements to Separate Property Land*

Same facts as Example 2, except instead of cash being used to build the house, the house was built 100% from an interim construction loan taken out during marriage. The construction loan was for $350,000, which was rolled into a 20-year mortgage at the completion of construction. Of the $350,000 in construction costs, $20,000 was for draperies and appliances. Also, $10,000 was for a crystal chandelier for the dining room. Payments on the permanent loan were $4,327.54 per month, made up as follows:

Principal	$ 594.21
Interest	2,333.33
Insurance	400.00
Taxes	1,000.00

Fifty monthly payments were made on the permanent mortgage through the date of trial. Husband says that 1/3 of the payments were made with his separate property. The mortgage balance on the date of trial is $314,876. On the date of trial, the mortgage escrow account contained $6,000. Wife's appraisal shows the real property (lot only) to be worth $50,000 on the date of marriage, and that the house and lot combined are worth $500,000 on the date of trial. Husband's appraisal shows that the lot was worth $40,000 on the date of marriage, and on the date of trial the lot was worth $75,000, and the house was worth $325,000. Husband's appraiser says the reasonable rental value of the house was $4,000 per month.

1. As far as characterization, who owns what as separate or community property?

2. What are the community estate's equitable reimbursement claims? What offsets are available? Who has what burden of proof?

3. What are the community estate's equitable interest claims? What offsets are available? Who has what burden of proof?

* Thanks to William C. Bradley, CPA, San Antonio, for assistance in formulating this scenario.

D. Example 4 - Using Community Funds to Pay Separate Property Debt on Separate Property Real Estate

Same facts as Example 3, except the $350,000 construction loan was taken out by Husband shortly before marriage. Construction occurred during marriage. Of the $350,000 in construction costs, $20,000 was for draperies and appliances. Also, $10,000 was for a crystal chandelier for the dining room. The 20-year permanent financing of $350,000 was put in place during marriage. Wife signed the 30-year promissory note and signed the deed of trust "pro forma." Payments on the permanent loan were $4,327.54 per month, made up as follows:

Principal	$ 594.21
Interest	2,333.33
Insurance	400.00
Taxes	1,000.00

Forty-two monthly payments were made on the permanent mortgage through the date of trial. Husband says that 1/3 of the payments were made with his separate property. The mortgage balance at that date is $314,876. On the date of trial, the mortgage escrow account contained $6,000. Wife's appraisal shows the real property (house and lot) worth $50,000 on the date of marriage, and $500,000 on the date of trial. Husband's appraisal shows that the lot was worth $40,000 on the date of marriage, and on the date of trial the lot was worth $75,000 and the house was worth $325,000. Husband's appraiser says the reasonable rental value of the house was $4,000 per month for the forty-two months of occupancy.

1. As far as characterization, who owns what as separate or community property?

2. What are the community estate's equitable reimbursement claims? What offsets are available? Who has what burden of proof?

3. What are the community estate's equitable interest claims? What offsets are available? Who has what burden of proof?

E. Example 5 - Refinancing Prior to Marriage

Husband bought Tract 1 prior to marriage, for $150,000, 100% financed. Prior to marriage, Husband paid the mortgage down to $50,000. Again prior to marriage, Husband refinanced the property for $200,000 (Tract 1 had increased in value and he used the extra $150,000 raised by the refinancing to buy Tract 2 for cash). By the time of marriage, husband had paid the refinanced loan down to $100,000. During marriage, Husband paid off the loan on Tract 1 using community property cash. Tract 2 never served as collateral for any loan. What are the equitable reimbursement and equitable interest claims involved? What are the offsets?

1. Assume Tract 1 and Tract 2 decreased in value from $100,000 to $50,000 during marriage.

2. Assume Tract 1 and Tract 2 increased in value from $100,000 to $200,000 during marriage.

F. Example 6 - Refinancing During Marriage

Wife owned land prior to marriage, bought for $25,000 down and a $25,000 note. On the date of marriage, the land was worth $75,000, and the unpaid principal balance of the note was $20,000. Shortly after marriage, wife refinanced the note for $20,000. The new note, a community indebtedness, paid off the premarital debt in full. On the day of trial, $10,000 was still owed on the new note, and the land was worth $100,000. What are the reimbursement claims and equitable interest claims involved?

1. Assume the new note was secured by a lien on the land.

2. Assume the new note was not secured by a lien on the land.

X. APPENDIX

A. SAMPLE JURY INSTRUCTIONS AND QUESTIONS

B. SAMPLE JURY INSTRUCTIONS AND QUESTIONS REGARDING EQUITABLE INTERESTS.

Here are some sample jury instructions and questions relating to equitable interest claims in favor of the husband's separate estate, and offsets against claims by the community estate.

RESPONDENT'S REQUESTED INSTRUCTION NO. _____

The separate estate of a spouse has an equitable interest in the enhanced value of the community estate for:

1. a financial contribution made to the community estate; and

2. the discharge of all or part of a debt of the community estate.

The equitable interest in the enhanced value of the community estate due to a financial contribution made with the separate estate is measured by the net amount of the enhancement in value of the community estate during the marriage due to the financial contribution made with the separate estate.

The equitable interest in the enhanced value of the community estate due to the use of the separate estate to discharge all or part of a debt on the community estate is computed by multiplying the net enhanced value of the community estate by the sum created by dividing:

a. the total amount of the payments made by the separate estate to reduce the principal of the debt on the community estate; by

b. the sum of:

    1. the amount computed under paragraph a;

    2. the total amount of the payments made by the community estate to reduce the principal on the debt; and

    3. the total amount of any additional amount spent by the community estate to acquire the interest in the property.

The cost of any improvements made to the community estate, paid for by either the separate or community estate, is included as part of the principal of the debt.

ACCEPTED [ ]

REFUSED [ ]
ACCEPTED,
AS MODIFIED [ ]

_____
JUDGE PRESIDING

§ 3.404 TEX. FAM. CODE (1999).

§ 3.401(b) TEX. FAM. CODE (1999).

§ 3.402(b) TEX. FAM. CODE (1999).

§ 3.402(c) TEX. FAM. CODE (1999).

RESPONDENT'S REQUESTED QUESTION NO. _____

State in dollars the amount of **HUSBAND'** separate estate's equitable interest in the enhanced value of the community estate relating to each of the following:

a. Payment of principal, interest taxes and insurance on residence — Answer: $ _____

b. Tax benefits received by the community estate for payment of principal, interest and taxes on residence — Answer: $_____

c. Reasonable rental value of Husband's separate property lake house — Answer: $_____

d. Distribution of date-of-marriage retained earnings in Husband's professional corporation — Answer: $_____

e. Cash from NationsBank Account No. 8888888888 as of 6/30/92, lost to commingling — Answer: $_____

f. Family living expenses paid with Husband's separate property — Answer: $_____

ACCEPTED [ ]

REFUSED [ ]

ACCEPTED,
AS MODIFIED[ ]

_____
JUDGE PRESIDING

§ 3.404(a) TEX. FAM. CODE (1999).

RESPONDENT'S REQUESTED QUESTION NO. _____

State in dollars the amount of benefit received by the community estate from **HUSBAND'**s separate estate.

a. Payment of principal, interest taxes and insurance on residence — Answer: $ _____

b. Tax benefits received by the community estate for payment of principal, interest and taxes on residence — Answer: $_____

c. Reasonable rental value of Husband's separate property lake house — Answer: $_____

d. Distribution of date-of-marriage retained earnings in Husband's professional corporation — Answer: $_____

e. Cash from NationsBank Account No. 8888888888 as of 6/30/92, lost to commingling — Answer: $_____

f. Family living expenses paid with Husband's separate property — Answer: $_____

ACCEPTED [ ]

REFUSED [ ]

ACCEPTED,
AS MODIFIED[ ]

_____
JUDGE PRESIDING

§ 3.405 TEX. FAM. CODE (1999)

C. CODE CONSTRUCTION ACT. Here are selected provisions from the Texas Code Construction Act, that may be helpful in interpreting the Family Code provisions regarding equitable interests.

§ 311.001. Short Title

This chapter may be cited as the Code Construction Act.

§ 311.002. Application

This chapter applies to:

(1) each code enacted by the 60th or a subsequent legislature as part of the state's continuing statutory revision program;

(2) each amendment, repeal, revision, and reenactment of a code or code provision by the 60th or a subsequent legislature;

(3) each repeal of a statute by a code; and

(4) each rule adopted under a code.

§ 311.003. Rules Not Exclusive

The rules provided in this chapter are not exclusive but are meant to describe and clarify common situations in order to guide the preparation and construction of codes.

§ 311.011. Common and Technical Usage of Words

(a) Words and phrases shall be read in context and construed according to the rules of grammar and common usage.

(b) Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

§ 311.016. "May," "Shall," "Must," etc.

The following constructions apply unless the context in which the word or phrase appears necessarily requires a different construction or unless a different construction is expressly provided by statute:

(1) "May" creates discretionary authority or grants permission or a power.

(2) "Shall" imposes a duty.

(3) "Must" creates or recognizes a condition precedent.

(4) "Is entitled to" creates or recognizes a right.

(5) "May not" imposes a prohibition and is synonymous with "shall not."

(6) "Is not entitled to" negates a right.

(7) "Is not required to" negates a duty or condition precedent.

§ 311.021. Intention in Enactment of Statutes

In enacting a statute, it is presumed that:

(1) compliance with the constitutions of this state and the United States is intended;

(2) the entire statute is intended to be effective;

(3) a just and reasonable result is intended;

(4) a result feasible of execution is intended; and

(5) public interest is favored over any private interest.

§ 311.022. Prospective Operation of Statutes

A statute is presumed to be prospective in its operation unless expressly made retrospective.

§ 311.023. Statute Construction Aids

In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the:

(1) object sought to be attained;

(2) circumstances under which the statute was enacted;

(3) legislative history;

(4) common law or former statutory provisions, including laws on the same or similar subjects;

(5) consequences of a particular construction;

(6) administrative construction of the statute; and

(7) title (caption), preamble, and emergency provision.

§ 311.024. Headings

The heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute.

§ 311.025. Irreconcilable Statutes and Amendments

(a) Except as provided by Section 311.031(d), if statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.

(b) Except as provided by Section 311.031(d), if amendments to the same statute are enacted at the same session of the legislature, one amendment without reference to another, the amendments shall be harmonized, if possible, so that effect may be given to each. If the amendments are irreconcilable, the latest in date of enactment prevails.

(c) In determining whether amendments are irreconcilable, text that is reenacted because of the requirement of Article III, Section 36, of the Texas Constitution is not considered to be irreconcilable with additions or omissions in the same text made by another amendment. Unless clearly indicated to the contrary, an amendment that reenacts text in compliance with that constitutional requirement does not indicate legislative intent that the reenacted text prevail over changes in the same text made by another amendment, regardless of the relative dates of enactment.

(d) In this section, the date of enactment is the date on which the last legislative vote is taken on the bill enacting the statute.

(e) If the journals or other legislative records fail to disclose which of two or more bills in conflict is latest in date of enactment, the date of enactment of the respective bills is considered to be, in order of priority:

(1) the date on which the last presiding officer signed the bill;

(2) the date on which the governor signed the bill; or

(3) the date on which the bill became law by operation of law.

§ 311.032. Severability of Statutes

(a) If any statute contains a provision for severability, that provision prevails in interpreting that statute.

(b) If any statute contains a provision for nonseverability, that provision prevails in interpreting that statute.

(c) In a statute that does not contain a provision for severability or nonseverability, if any provision of the statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable.

D. *ANDERSON v. GILLILAND*.

684 S.W.2d 673

Supreme Court of Texas.

Terri L. ANDERSON, Petitioner,
v.
Cleo GILLILAND, Respondent.

No. C-3475.

Jan. 16, 1985.
Rehearing Denied Feb. 27, 1985.

Residual devisees of will appealed from order of the Probate Court, Dallas County, Bob McGuire, J., refusing to order independent executrix of estate of her deceased husband to include as asset of his estate enhanced value of her separate property due to expenditure of community funds. The Court of Appeals, Akin, J., 624 S.W.2d 243, reversed and remanded. On remand, the Probate Court, Dallas County, Robert C. Topper, J., held that enhancement in value was correct measure of amount of reimbursement due community estate, and appeal was taken. The Court of Appeals, 677 S.W.2d 105, reversed and rendered with instructions. Appeal was taken. The Supreme Court, Wallace, J., held that: (1) a claim for reimbursement for funds expended by an estate for improvements to another estate is to be measured by enhancement in value to the benefit of the estate, and (2) decedent's widow would be required to include sum of $21,923, representing one-half of the $54,000 enhancement to her separate property, less one-half of the outstanding mortgage on property, in inventory of decedent's estate.

Affirmed in part and reversed in part.

West Headnotes

[1] Husband and Wife k258
205k258

Right of an estate to reimbursement from another estate is an equitable right and should be determined by equitable principles; therefore, it is incumbent upon courts to insure that a benefitted estate is not required to pay more in reimbursement than amount in which it was benefitted by the other estate and, likewise, it is necessary to ascertain that the benefitted estate pays no less than it has been benefitted.

[2] Husband and Wife k258
205k258

A claim for reimbursement for funds expended by an estate for improvements to another estate is to be measured by enhancement in value to the benefitted estate.

[3] Husband and Wife k273(1)
205k273(1)

Decedent's widow did not properly trace any of her separate funds to improvements to her separate property to avoid inclusion of one-half of enhanced value of her property in decedent's estate.

[4] Husband and Wife k273(1)
205k273(1)

Decedent's widow, the executrix of his estate, would be required to include sum of $21,923, representing one-half of the $54,000 enhancement to her separate property resulting from amount community expanded to build home on property, less one-half of the outstanding mortgage on property, in inventory of estate of decedent.

*673 McCorkle & Westerburg, Tom S. McCorkle, Dallas, for petitioner.

Carl Luna, Garland, for respondent.

WALLACE, Justice.

This will probate suit presents the sole issue of what constitutes the measure of reimbursement.

Terri L. Anderson is the surviving daughter and devisee under the will of Lawrence Gilliland, deceased. Cleo Gilliland is the widow of Lawrence Gilliland and executrix of his estate.

At the date of the Gilliland's marriage, Mrs. Gilliland owned certain real property. During the marriage the community expended $20,237.89 to build a home on the property. At the time of Mr. Gilliland's death, this home had enhanced the separate property of Mrs. Gilliland by the sum of $54,000.00.

At trial Mrs. Anderson sought to have Mrs. Gilliland include one-half of the reimbursement due the community in the inventory of the estate of Lawrence Gilliland, *674 because of the improvements the community made to the separate estate of Mrs. Gilliland. The trial court held that the proper measure of reimbursement was the enhanced value of Mrs. Gilliland's separate property. It ordered Mrs. Gilliland to include in the inventory an amount equal to one-half of the enhancement resulting from the improvements.

The trial court also found that approximately one-third of the expenditures for the home was from Mrs. Gilliland's separate funds. The court of appeals found that Mrs. Gilliland had not properly traced any separate funds into the home. 677 S.W.2d 105, appealing after remand 624 S.W.2d 243. Mrs. Gilliland did not appeal that finding.

The court of appeals further held that the proper measure of reimbursement to an estate which has expended funds to erect improvements on another estate is the enhancement of value to the receiving estate or the cost of the improvements, whichever is less. The court of appeals rendered judgment finding the amount of reimbursement due the community was one-half of the $20,237.89 expended, less one-half of the outstanding mortgage of $10,154.00. The community monies expended in building the home were proceeds from the mortgage. We affirm the judgment of the court of appeals in part and reverse and render in part.

The various courts of appeals of Texas are not in agreement on the issue presented here. The Dallas Court of Appeals in this case acknowledged that its decision was contrary to that of the Fort Worth Court of Appeals in Cook v. Cook, 665 S.W.2d 161, (Tex.App.--Fort Worth 1983, writ ref'd n.r.e.). Cook follows Harris v. Royal, 446 S.W.2d 351 (Tex.Civ.App.--Waco 1969, writ ref'd n.r.e.). Both Cook and Royal held that enhancement alone, regardless of cost, is a proper measure of reimbursement in cases such as this.

Another view held by several courts is that the proper measure of reimbursement is enhancement or cost, whichever is less. Hale v. Hale, 557 S.W.2d 614, 615 (Tex.Civ.App.--Texarkana 1977, no writ); Trevino v. Trevino, 555 S.W.2d 792 (Tex.Civ.App.--Corpus Christi 1977, no writ); Girard v. Girard, 521 S.W.2d 714 (Tex.Civ.App.--Houston [1st Dist.] 1975, no writ).

A third measure of reimbursement set forth by another court is cost, regardless of enhancement. In Re Higley, 575 S.W.2d 432, 434 (Tex.Civ.App.--Amarillo 1978, no writ).

The confusion among the courts of appeals is due in great part to imprecise language by this court commencing with the decision of Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620 (1935). In consecutive paragraphs Dakan held:

... Hence results the rule that the community estate must be reimbursed for the cost of the buildings erected by joint labors or funds upon the separate property of one of the spouses.... Furrh v. Winston, 66 Tex. 521, 524, 1 S.W. 527, 529 (1886) (emphasis added),

and

> ... in case of reimbursement for improvements, the amount of recovery is limited to the amount of enhancement of the property at the time of partition by virtue of the improvements placed thereon. Clift v. Clift, supra, [72 Tex. 144, 149, 10 S.W. 338 (1888).]

This court has stated in several cases that the proper measure of reimbursement is the enhanced value of the benefitted estate resulting from the improvements. However, most of those statements have been dicta.

In Lindsay v. Clayman, 151 Tex. 593, 254 S.W.2d 777, 781 (1952), we stated:

> The amount of reimbursement is not determined by the cost of improvements made, but by the enhancement in value of the estate improved by virtue of the improvements made by the other estate.

In Lindsay, no reimbursement was allowed because there were no pleadings or evidence of enhancement in value.

In Sharp v. Stacy, 535 S.W.2d 345, 351 (Tex. 1976), we stated:

> *675 The principle is well established in equity that a person who in good faith makes improvements upon property owned by another is entitled to compensation therefor. The measure of compensation to the claimant is not the original cost of the improvements, but the enhancement in value of the land by reason of the improvement.

The claimant in Sharp failed to secure a finding on the enhancement in value of the property by virtue of the improvements and, therefore, was also precluded from recovery.

[1] The right of an estate to reimbursement from another estate is an equitable right and should be determined by equitable principles. Dakan, 83 S.W.2d at 627, supra. Therefore, it is incumbent upon the courts to insure that a benefitted estate is not required to pay more in reimbursement than the amount in which it was benefitted by the other estate. Likewise, it is necessary to ascertain that the benefitted estate pays no less than it has been benefitted.

The "cost only" rule, if followed, would provide an easy-to-apply measure since it would not require proof of enhancement. However, such a rule would, in many instances, permit the owner of the benefitted estate to be enriched at the expense of the contributing estate. This is true because the estate which contributes the capital necessary to construct the improvements would not share in the increase in value resulting from the investment. The "enhancement or cost, whichever is less" rule, however, would permit the benefitted estate the maximum recovery at the expense of the contributing estate in all situations. This does not comport with equity.

[2] We hold that a claim for reimbursement for funds expended by an estate for improvements to another estate is to be measured by the enhancement in value to the benefitted estate. This rule is more likely to insure equitable treatment of both the contributing and benefitted estates in most situations.

[3][4] The judgment of the court of appeals is affirmed insofar as it holds that Mrs. Gilliland did not properly trace any separate funds to the improvements to her separate property. The judgment is reversed insofar as it holds that reimbursement is measured by the cost or enhancement, whichever is less. We render judgment for Terri L. Anderson and require Cleo Gilliland to include the sum of $21,923.00, representing one-half of the $54,000.00 enhancement to her separate property, less one-half of the outstanding mortgage on the property, in the inventory of the estate of Lawrence Gilliland.

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E. PENICK v. PENICK.

783 S.W.2d 194

Supreme Court of Texas.

Robert James PENICK, Petitioner,
v.
Maria C. PENICK, Respondent.

No. C-7610.

Dec. 14, 1988.
Rehearing Overruled Feb. 21, 1990.

The 310th District Court, Harris County, Allen J. Daggett, J., granted divorce, but refused award of reimbursement to community estate for community funds expended during marriage to reduce principle indebtedness on former husband's separate real estate, and former wife appealed. The Houston Court of Appeals, 14th Supreme Judicial District, 750 S.W.2d 247, reversed and remanded, and former husband appealed. The Supreme Court, Robertson, J., held that trial court properly considered tax benefits received by community estate through depreciation of former husband's separate property as offset against reimbursement sought by community estate for amount paid by community on principal of husband's prenuptial debt on separate property.

Court of Appeals reversed.

Cook, J., filed concurring opinion.

West Headnotes

[1] Husband and Wife k258
205k258

In divorce action, outright rejection of offsetting benefits received by community estate from spouse's separate property is inconsistent with equitable nature of claim of reimbursement by community estate against spouse's separate property.

[2] Husband and Wife k258
205k258

Great latitude must be given to trial court in applying equitable principals to value claim of reimbursement in divorce action by community estate against spouse's separate property.

[3] Husband and Wife k258
205k258

Trial court properly considered tax benefits received by community estate through depreciation of former husband's separate property as offset against reimbursement sought by community estate for amount paid by community on principal of husband's prenuptial debt on separate property.

[4] Husband and Wife k258
205k258

When deciding amount of reimbursement due to community estate from spouse's separate property because of advancement of funds by community estate to separate property, payment of purchase money debt or funding capital improvement will be treated identically.

*194 Edward E. Lindsay, Houston, for petitioner.

Donald W. Rogers, Jr., Houston, for respondent.

OPINION

ROBERTSON, Justice.

This divorce case concerns the proper measure for reimbursement when community funds are used to pay a prenuptial, purchase money debt. The specific issue is whether tax benefits derived by the community estate from a spouse's separate property may be considered and offset against the sum advanced by the community estate to reduce the principal of the debt on the separate property. In reversing the judgment of the trial court, the court of appeals held that the proper measure for reimbursement in this situation was to return to the community estate the actual amount expended on the principal of the separate property debt without consideration of offsetting benefits. 750 S.W.2d 247. We hold that the trial court properly considered offsetting benefits in determining the measure of reimbursement here and, accordingly, we reverse the judgment of the court of appeals and affirm the judgment of the trial court.

Robert and Maria Penick were married on March 13, 1975. At the time of marriage Robert owned several residential rental properties. During the marriage Robert maintained and managed these *195 properties. The community estate also purchased a few rental properties, but 90% of the community estate's income was derived from Robert's separate rental property.

Prior to trial, Robert and Maria entered into a written stipulation concerning Robert's separate real property. As a part of this stipulation, the parties agreed that the

community estate had paid $104,500 to reduce the principal indebtedness on Robert's separate real property. Supported by the parties' joint tax returns, Robert testified at trial that the tax benefits to the community estate from the depreciation of his separate property exceeded the $104,500 expended by the community to reduce his separate property debt.

In determining the community property subject to division, the trial court concluded that no reimbursement was due the community because the community estate had on balance received a benefit, a reduction in its tax liability, by taking the depreciation of Robert's separate property. Maria appealed, arguing that the law of reimbursement did not permit Robert to offset any amount against those dollars paid by the community estate to reduce the principal of Robert's separate property debt. The court of appeals agreed that the community should be reimbursed for every dollar contributed to the principal of Robert's separate property debt, and so it remanded the cause to the trial court for a proper division of the community property, giving due regard to the $104,500 reimbursement owed the community estate.

[1][2][3][4] The issue in this case is whether the trial court erred in considering the tax benefits received by the community estate through the depreciation of Robert's separate property as an offset against the amount paid by the community on the principal of Robert's prenuptial debt. The rules generally applicable to reimbursement claims for prenuptial debts and particularly the proper role for offsetting benefits are unsettled. See generally, Oldham, Texas Reimbursement Law, in State Bar of Texas, Advanced Family Law Course (1988); Koons & Holmes, Characterization and Reimbursement, in State Bar of Texas, Advanced Family Law Course (1987); Cook & Dudley, Characterization, Tracing and Reimbursement, in State Bar of Texas, Marriage Dissolution (1987); Weekley, Reimbursement Between Separate and Community Estates--The Current Texas View, 39 Baylor L.Rev. 945 (1987); Heard, Orsinger, & Strieber, Characterization of Property and Reimbursement, in State Bar of Texas, Advanced Family Law Course (1986); Smith & Smith, Reimbursement in Divorce Cases, in State Bar of Texas, Marriage Dissolution (1984); Smith, Reimbursement, in State Bar of Texas, Advanced Family Law Course (1982). The confusion is, in part, attributable to this court's writings in Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620 (1935), and Colden v. Alexander, 141 Tex. 134, 171 S.W.2d 328 (1943).

Dakan did not expressly consider the role of offsetting benefits in evaluating a claim for reimbursement. It simply provided that reimbursement for a purchase money advance should be at cost to the contributing estate. Dakan, 83 S.W.2d at 628. Eight years later in Colden v. Alexander, this court indicated that consideration of offsetting benefits was proper when measuring a reimbursement claim. Neither opinion is a paragon of clarity as the following oft-cited passage from Colden demonstrates:

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. Under our law, the income during marriage from the estate of either the husband or the wife is community. The rule of reimbursement, as above announced, is purely an equitable one. 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 ***196** by the community are greater than the benefits received.

Colden, 171 S.W.2d at 334 (citations omitted).

Dakan and Colden have spawned a dizzying array of alternative or conflicting principles and presumptions for evaluating a claim for reimbursement. From the cases interpreting Dakan and/or Colden, we have gleaned the following rules applicable to purchase money reimbursement claims. As a threshold requirement, it is typically held that the contributing estate need not show enhancement or the benefit of its contribution as a condition of reimbursement. See, e.g., Nelson v. Nelson, 713 S.W.2d 146 (Tex.App.--Texarkana 1986, no writ); Fyffe v. Fyffe, 670 S.W.2d 360 (Tex.App.-- Texarkana 1984, writ dism'd w.o.j.). Instead, the payment by one marital estate of the debt of another creates a prima facie right of reimbursement.

From this general rule, some courts have carved an exception regarding interest, taxes and insurance. These courts indulge in a presumption that reimbursement is not due absent proof that the amount paid for these expenses was greater than the benefit received by the contributing estate. See, e.g., Cook v. Cook, 665 S.W.2d 161 (Tex.App.--Fort Worth 1983, writ ref'd n.r.e.); Hawkins v. Hawkins, 612 S.W.2d 683 (Tex.Civ.App.--El Paso 1981, no writ). This exception to the general rule is traceable to Colden v. Alexander and in application requires the party seeking reimbursement to show that the amount paid for taxes, interest and insurance exceeded the benefits received by the contributing estate.

Some courts, however, have rejected any concept of offsetting benefits, requiring instead that the contributing estate be fully reimbursed for all funds

paid on the purchase money debt of another estate. See, e.g., Hilton v. Hilton, 678 S.W.2d 645 (Tex.App.--Houston [14th Dist.] 1984, no writ); Brooks v. Brooks, 612 S.W.2d 233 (Tex.Civ.App.--Waco 1981, no writ); Pruske v. Pruske, 601 S.W.2d 746 (Tex.Civ.App.--Austin 1980, writ dism'd w.o.j.). Still others have made the exception the rule, drawing no distinction between how the community funds were used and permitting reimbursement only upon a showing that expenditures exceeded benefits. See, e.g., Allen v. Allen, 704 S.W.2d 600 (Tex.App.--Fort Worth 1986, no writ); Snider v. Snider, 613 S.W.2d 8 (Tex.Civ.App.--Dallas 1981, no writ); Klein v. Klein, 370 S.W.2d 769 (Tex.Civ.App.--Eastland, 1963, no writ).

The present writing of the court of appeals preserves many of the distinctions drawn in previous reimbursement cases. The court distinguishes the present case from those in which community funds were used to pay interest or taxes, thereby giving tacit approval to those cases which have found it appropriate to consider offsetting benefits when the community has paid certain separate property expenses other than the principal of the separate property debt. The court of appeals also distinguishes this case from those in which the community was alleged to have provided for improvements on separate property or to have provided time, talent and labor to benefit separate property. This disclaimer refers to the last two writings by this court on the subject of reimbursement, Anderson v. Gilliland, 684 S.W.2d 673 (Tex. 1985), and Jensen v. Jensen, 665 S.W.2d 107 (Tex. 1984).

Of these two cases Anderson is more closely analogous to our present case. It concerned the community's reimbursement claim for funds expended for capital improvements on a spouse's separate property. There, as here, we were faced with conflicting or inconsistent principles for evaluating the community's claim for reimbursement. Three distinct rules had evolved. In resolving this conflict we emphasized the equitable nature of the claim and selected what we considered the fairest measure, holding "that a claim for reimbursement for funds expended by an estate for improvements to another estate is to be measured by the enhancement in value to the benefitted estate." Anderson, 684 S.W.2d at 675.

*197 Noting that the correct measure for reimbursement under the present circumstances was unclear, the court of appeals held that the best rule was to reimburse the community for every dollar advanced on the principal of Robert's prenuptial, purchase money debt. The court of appeals further rejected consideration of any offsetting benefits under these circumstances. The court wrote that community funds used to pay the purchase price or to discharge encumbrances against separate property, as distinguished from the community's payment of taxes or interest on separate property should be reimbursed "without the necessity of proof that the expenditures exceeded benefits received by the community." 750 S.W.2d at 250.

This "dollar for dollar" reimbursement rule is inconsistent with the equitable approach we advocated in Anderson. The court of appeals, however, distinguishes Anderson because it concerned reimbursement for a capital improvement to separate property rather than reimbursement for a prenuptial, purchase money debt. A distinct and different set of rules have evolved for evaluating a reimbursement claim for capital improvements as opposed to one for purchase money.

Why we should have two distinct sets of rules for two very similar claims for reimbursement is another matter which is not entirely clear. One commentator has observed that there is no logical reason for calculating reimbursement differently in capital improvement cases and in purchase money cases and attributes the development of different rules to historical accident. Weekley, Reimbursement Between Separate and Community Estates--The Current Texas View, 39 Baylor L.Rev. 945, 974 (1987). We are likewise at a loss to make a meaningful distinction between these two types of reimbursement. We view the advancement of funds by one marital estate to another under either transaction, payment of a purchase money debt or as a capital improvement, as essentially identical and therefore subject to the same kind of measurement.

Having disregarded the traditional dichotomy between reimbursement claims for purchase money debts and capital improvements, we turn again to the holding of the court of appeals. According to the court of appeals, the correct measure for reimbursement here is to return to the community the actual amount advanced to reduce the principal indebtedness on the separate property without regard to the benefits received in return by the community estate. Because the trial court considered the tax benefits realized by the community estate from the depreciation of Robert's separate property and offset this benefit against those community funds expended on the separate property, the court of appeals concluded that the trial court had abused its discretion. We disagree.

The outright rejection of offsetting benefits is inconsistent with the equitable nature of a claim for reimbursement. Most recently in Jensen v. Jensen, we embraced the concept of offsetting benefits. In Anderson v. Gilliland, we did not consider or mention

offsetting benefits, but did emphasize that reimbursement is an equitable claim. As such, "a court of equity is bound to look at all the facts and circumstances and determine what is fair, just, and equitable." 27 Am.Jur.2d, Equity § 102 at 624 (1966). The rule applied here by the court of appeals does not serve equity because it forecloses consideration of some of the facts and circumstances material to the reimbursement claim.

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. A useful analogy between an action for quantum meruit and a claim for reimbursement has been suggested:

> The equitable doctrine of quantum meruit is based upon the principle that one receiving benefits which are unjust for him to retain ought to make restitution or pay the value of the benefit to the party contributing the benefit. Baldwin v. Smith, 586 S.W.2d 624, 632 (Tex.Civ.App.--Tyler 1979) rev'd on other grounds, 611 S.W.2d 611 (Tex. 1980). *198 Applied to claims for reimbursement, the doctrine might have three elements: (1) an estate has contributed to another estate, (2) the contributing estate has not received a quid pro quo, and (3) the benefitted estate has thereby been unjustly enriched. Thus, achievement of equity between marital estates, a goal the Texas Supreme Court aspires to attain in Anderson v. Gilliland, would seem to necessitate a consideration of offset.

Koons and Holmes, Characterization and Reimbursement, in State Bar of Texas, Advanced Family Law Course 48-9 (1987).

In the final analysis, great latitude must be given to the trial court in applying equitable principles to value a claim for reimbursement. As we said in Dakan, an equitable claim for reimbursement is not merely a balancing of the ledgers between the marital estates. Dakan, 83 S.W.2d at 627. The discretion to be exercised in evaluating a claim for reimbursement is equally as broad as that discretion subsequently exercised by the trial court in making a "just and right" division of the community property. Tex. Fam.Code Ann. § 3.63 (Vernon Supp.1 988). In the present case the trial court did not abuse its discretion by considering the tax benefits returned to the contributing community estate and the effect the depreciation deduction had on the value of Robert's separate property.

The judgment of the court of appeals is reversed and the judgment of the trial court is affirmed.

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F. ***IN RE MARRIAGE OF MARSDEN.***

IN RE MARRIAGE OF MARSDEN, 130 Cal.App.3d 426 (1982)

Docket Nos. 47922, 51438.

Court of Appeals of California, First District, Division Three.

April 1, 1982.

Appeal from Superior Court of Santa Clara County, No. P 34598,
J. Barton Phelps, Judge.

[Page 427]

COUNSEL

Robert J. Smith for Appellant.

T. Patrick Hannon, N. Perry Moerdyke, Jr., and Moerdyke & Hannon for Respondent.

OPINION

BARRY-DEAL, J.

In this opinion we will consider the issues raised in two appeals (1 Civ. No. 47922 and 1 Civ. No. 51438) which were consolidated by this court "for the purposes of oral argument and decision" by an order dated May 22, 1981. Both appeals involve the same proceeding commenced by respondent (wife) to dissolve her marriage to appellant (husband) in the Superior Court of Santa Clara County on July 17, 1978. At trial the issue of the dissolution of the marriage was bifurcated from the remaining issues presented in the proceeding. An interlocutory judgment of dissolution of marriage was entered on February 27, 1979. An interlocutory judgment pertaining to the disposition of the community property was entered on April 5, 1979. This latter interlocutory judgment provides in part: "The value, disposition and [Page 432] division of husband's pensions/annuities with CREP (#P-38492) and TIAA (#A-115014) was [sic] previously bifurcated by stipulation of counsel. In the event the parties are unable to agree, the court specifically retains jurisdiction to determine the value, disposition, and division of these two pensions/annuities."

The appeal in 1 Civil No. 47922 is from the interlocutory judgment entered on April 5, 1979. In this appeal husband contends (1) the trial court incorrectly determined the community interest in the leasehold and house he acquired prior to the marriage on which payments were made after marriage from community funds; (2) the trial court incorrectly found that certain shares of stock were community property on the ground that these shares of stock were purchased with funds from accounts in which separate and community property or funds had been commingled; (3) the trial court incorrectly concluded that there had been no periods of legal separation from the date of marriage (Feb. 1, 1971) until July 10, 1978; and (4) attorney's fees were improperly awarded to wife.

An interlocutory judgment pertaining to husband's pensions and/or annuities was filed on April 8, 1980. The appeal in 1 Civil No. 51438 is from the interlocutory judgment filed on April 8, 1980. Husband also contends on his appeal in 1 Civil No. 51438 that the trial court incorrectly determined that there had been no periods of legal separation from the date of marriage until July 10, 1978. Husband further contends in this second appeal that the interlocutory judgment, filed on April 8, 1980, is ambiguous in that it fails to specify the date of separation as the appropriate valuation date for the retirement benefits.

The facts necessary to resolve each issue will be set out in the discussion of the issue.

Legal Separation

Husband contends that there were two periods of legal separation between the parties prior to July 10, 1978. Husband alleges that the parties were separated between (1) April of 1975 and September of 1976; and (2) June of 1977 and July of 1978. The resolution of this issue is important to husband because Civil Code section 5118 Civ. provides [Page 433] that the earnings and accumulations of a spouse while living "separate and apart from the other spouse, are the separate property of the spouse." We have chosen to consider this issue first as the resolution of the issue may affect the determination of the community interest in the leasehold and house as well as certain shares of stock (1 Civ. No. 47922) and the retirement benefits (1 Civ. No. 51438).

Husband states that the interlocutory judgment entered on April 5, 1979, "with respect to the allocation of real property values and stock can only be explained by a finding that the parties did not live separate and apart." The interlocutory judgment filed on April 8, 1980, provides in part: "The parties were married February 11, 1971 and separated July 10, 1978. During the period February 11, 1971 to July 10, 1978, the parties did not live separate and apart." Husband contends that the finding that parties did not live separate and apart "was erroneous in view of the overwhelming evidence of [wife's] intent to terminate the marriage to her husband during these periods of separation."

The parties were married on February 11, 1971. On April 12, 1975, wife moved out of the house on Lathrop Drive, Stanford, in which she had lived with husband and moved into an apartment on Kingsley Street in Palo Alto. On April 25, 1975, wife filed a petition for dissolution of marriage. The April 25, 1975, action was not dismissed by wife until after she filed the present action for dissolution in July of 1978.

Wife testified although she filed the petition for dissolution in April of 1975, she did not want a divorce. Wife stated she simply wanted to work out the parties' differences. Wife rented the apartment in Palo Alto because it was close to the house on Lathrop and she wanted to remain near her husband. The parties' sexual relationship continued after wife moved out of the house on Lathrop. The parties also saw a marriage counselor during this period.

Wife went to Puerto Vallarta, Mexico, in June of 1975. Husband went to Bogota, Colombia, in the summer of 1975 to "give some lectures." On his way to Bogota and on his return trip, husband spent a few days with wife in Puerto Vallarta. Husband testified that he and wife agreed that upon her return from Puerto Vallarta in August or September of 1975 they would dissolve the marriage.

Husband was invited to lecture in Iran and asked wife if she would like to accompany him. Husband and wife left for the Middle East in [Page 434] September of 1975 and were gone for five or six weeks. Upon their return from the Middle East, wife continued to live in the apartment on Kingsley. In December of 1975 husband and wife went to Puerto Vallarta for Christmas.

Wife returned to Puerto Vallarta in June of 1976 and remained there for the summer. In September of 1976 husband met wife in Los Angeles and drove with her to the Palo Alto area. Shortly thereafter husband went on a three-week trip, and when he returned in the first week of October, "I found that completely to my surprise [wife] and her two daughters had moved back into the house."

Husband was on sabbatical leave from Stanford University from June of 1977 until July of 1978. Since husband planned to travel around the world during his leave, the parties decided to rent the house on Lathrop and that wife would live in Puerto Vallarta where husband would visit her. During this year, husband spent approximately 14 weeks in Puerto Vallarta. Husband testified that he did not believe he and wife were separated during his sabbatical because of any marriage problems. During this period he received warm and loving letters from wife. Husband subsequently learned that during this year, wife was writing letters to her mother indicating that there were problems with the marriage.[fn1] Wife also testified that during this year, she wrote to her mother and stated that she was considering terminating the marriage. However, wife testified that she was merely thinking about the possibility of ending the marriage, and "it depended on how he acted

toward me." Wife returned from Mexico in July of 1978 and removed her belongings from the house on Lathrop.

(1a) "What little law defines separation under Civil Code section 5118 Civ. holds that `living separate and apart' refers to `that condition when spouses have come to a parting of the ways with no present intention of resuming marital relations.' [Citation.] That husband and wife may live in separate residences is not determinative. [Citations.] The question is whether the parties' conduct evidences a complete and final break in the marital relationship." (In re Marriage of Baragry (1977) 73 Cal.App.3d 444, 448 [140 Cal.Rptr. 779].) [Page 435]

In Baragry, husband moved out of the family residence and took an apartment with his girl friend. Husband ate frequently at the family residence and took his family on trips. Husband went with wife to Sun Valley for a week without the children. Husband attended social functions with wife and sent gifts and cards to her on holidays. The parties continued to file joint income tax returns, and husband maintained his voting registration at the family residence. This arrangement continued for four years, although remaining nonsexual. (Id., at p. 447.)

The court in Baragry found that the parties' conduct did not demonstrate "a complete and final break in the marital relationship. Here the only evidence of such a break is the absence of an active sexual relationship between the parties and husband's cohabitation elsewhere with a girlfriend. In our view such evidence is not tantamount to legal separation." (Id., at p. 448.)

(2) The finding of the trial court that during "the period February 11, 1971 to July 10, 1978, the parties did not live separate and apart" is supported by substantial evidence. We will first consider the time period between April of 1975 and September of 1976. Admittedly wife moved out of the family residence in April of 1975 and filed a petition for dissolution. However, she took absolutely no further legal action for over three years. The parties continued their sexual relationship and attempted to resolve their marital differences with the aid of a marriage counselor. Husband joined wife in Mexico in the summer of 1975 and traveled with her to the Middle East in September and October of 1975. The parties spent Christmas together in 1975 in Mexico. They again traveled together in September of 1976. When husband returned from a trip in the first week of October of 1976, wife had moved back into the family residence.

We do not feel that such evidence establishes as a matter of law that the parties had come to a parting of the ways with no present intention of resuming marital relations. Rather, the parties' conduct would appear to be an attempt to affect a reconciliation on an international scale and certainly does not reflect a complete and final break in the marital relationship.

The only evidence that would support a finding that the parties were living separate and apart during the time period between June of 1977 and July of 1978 was the testimony regarding the letters wife wrote to her mother. However, wife testified she was merely considering the possibility [Page 436]
of terminating the marriage during this period. The evidence clearly shows that the parties were living apart during this period because husband was on a sabbatical leave and was required to do a great deal of traveling. (1b) "Living separate and apart . . . does not apply to a case where a man and wife are residing temporarily in different places due to economic or social reasons, . . ." (Makeig v. United Security Bk. & T. Co. (1931) 112 Cal.App. 138, 143 [296 P. 673].)

Valuation of Leasehold and House

Husband concedes that there is a community interest in the leasehold and house. He contends, however, that the trial court incorrectly calculated the community interest. We agree.

The pertinent facts are as follows: in 1962, husband paid to Stanford University $6,300 for an 80-year lease of a parcel of property owned by Stanford. That same year, he had a house constructed on the property which he financed by a $2,000 cash payment and the proceeds from a $30,000 loan from Stanford. Thus, the cost of the property in 1962 was $38,300. By the time the parties were married in February 1971, husband had reduced the loan by $7,000, so the outstanding balance was $23,000. During the marriage, payments from

community funds further reduced the principal due on the loan by $9,200. Between the time of separation in July 1978 and trial in February 1979, husband paid $655 on the principal.

(3a) The trial court found the fair market value (FMV) of the house and leasehold interest was $65,000 at the time of the marriage in February 1971 and $182,500 at the time of trial. It computed the appreciation as "$136,700 [sic; $126,700]", the difference between the equity at the time of trial ($182,500 less a loan balance of $13,800 equals $168,700) and the equity in 1971 ($65,000 less the $23,000 loan balance equals "$32,000 [sic; $42,000]"). It then allocated "$77,632 [sic; $71,953]" as the community interest based on the ratio of separate property loan payments ($7,000 or 43.21 percent) to the community property loan payments ($9,200 or 56.79 percent). This was clearly in error.

(4) "Where community funds are used to make payments on property purchased by one of the spouses before marriage `the rule developed through decisions in California gives to the community a pro tanto community property interest in such property in the ratio that the payments on the purchase price with community funds bear to the payments [Page 437] made with separate funds.' [Citations.]" (In re Marriage of Moore (1980) 28 Cal.3d 366, 371-372 [168 Cal.Rptr. 662, 618 P.2d 208].) In clarifying the application of the rule, the Supreme Court has recently reaffirmed a formula articulated in In re Marriage of Aufmuth (1979) 89 Cal.App.3d 446, 454-457 [152 Cal.Rptr. 668], and approved in *In re Marriage of Lucas* (1980) 27 Cal.3d 808, 816-817 [166 Cal.Rptr. 853, 614 P.2d 285], to determine the respective community and separate interests in the property. (In re Marriage of Moore, supra, 28 Cal.3d 366, 373-374.) The formula gives recognition to the economic value of any loan proceeds contributed toward the purchase of the property. Where, as in Moore and in the case before us, the loan was extended before marriage and was based on separate assets, it is a separate property contribution. The Moore court also negated the inclusion of such expenses as loan interest and taxes in the computation, thereby clearing up any ambiguity created by the holding in Vieux v. Vieux (1926) 80 Cal.App. 222 [251 P. 640]. (In re Marriage of Moore, supra, 28 Cal.3d at p. 371.)

(3b) Under the Moore/Lucas/Aufmuth formula, husband's separate property percentage interest is determined by crediting the separate property with the down payments and the full amount of the loan, less the amount by which the community property payments reduced the principal balance of the loan ($8,300 plus ($30,000 less $9,200) equals $29,100). This sum is divided by the purchase price for the separate property percentage share ($29,100 divided by $38,300 equals 75.98 percent). The community property percentage interest is found by dividing the community property payments on the loan principal by the purchase price ($9,200 divided by $38,300 equals 24.02 percent).

Husband proposes a modification of the above formula. He contends, and we agree, that he should have the benefit of approximately nine years of appreciation in the value of the property before the marriage in 1971. Husband argues that his separate property percentage interest should be 85.85 percent, based on the FMV of the property at the time of marriage ($65,000), rather than the purchase price in 1962 ($38,300).

Husband does not cite any cases directly on point, and we can find none. The Moore/Lucas/ Aufmuth formula makes no provision for prenuptial appreciation on property and therefore offers no guidance. In Moore, however, the court stated: "This rule [giving the community a pro tanto community property interest for community contributions to [Page 438] separate property] has been commonly understood as excluding payments for interest and taxes. For example in Bare v. Bare [(1967) 256 Cal.App.2d 684, 690 (64 Cal.Rptr. 335)], the Court of Appeal directed the trial court to determine the increase in equity in the house during marriage and the fair market value of it before and after the marriage, stating: `the community is entitled to a minimum interest in the property represented by the ratio of the community investment to the total separate and community investment in the property. In the event the fair market value has increased disproportionately to the increase in equity the wife is entitled to participate in that increment in a similar proportion.' [Citations.]" (In re Marriage of Moore, supra, 28 Cal.3d at p. 372, italics added.) The court further explained that "[a]mounts paid for interest, taxes and insurance do not contribute to the capital investment and are not considered part of it. A variety of expenses may be incurred in the maintenance of investment property, but such expenses are not considered in the valuation of the property except to the extent they may be relevant in determining its market value from which in turn the owners' equity is derived by subtracting the outstanding obligation." (Id., at p. 372, italics added.)

It is clear that part of our confusion results from the use of the word "equity." It is defined as "5. [t]he amount or value of a property or properties above the total of liens or charges." (Webster's New Internat. Dict. (2d ed. 1935) p. 865.) The fair market value at or near the time of purchase is usually equivalent to the purchase price. In short, the appraised value equals the cost value. Such was the case in Moore, where the respondent wife had purchased the property eight months before the marriage, and thus no question of the fair market value of the home at the time of marriage was posed. (Id., 28 Cal.3d at p. 370.)

Where the separate property is owned for a considerable period before marriage, the increase in value in an inflationary market, such as we have had for the past several decades, is substantial. The fair market value at the time of marriage would usually be significantly greater than the purchase price, and this is true in the case before us. We think it is equitable to credit the separate property interest with this prenuptial appreciation. Although we are bound by the Moore/Lucas/Aufmuth formula, and adjustments must fit within that formula,[fn2] we [Page 439] can infer from the language in Moore and Bare that recognition of prenuptial appreciation in the separate property estate is appropriate. As previously stated, the Moore court in explaining the pro tanto allocation rule noted the direction in Bare to the trial court "to determine the increase in equity in the house during marriage and the fair market value of it before and after the marriage. . . ." (In re Marriage of Moore, supra, 28 Cal.3d at p. 372.)

We therefore compute the pro tanto community and separate property interests in the house and leasehold interest as follows:

Purchase price in 1962		$ 38,300.00		
Less community payments		9,200.00	(24.02%)	
Separate property interest		$ 29,100.00	(75.98%)	
FMV at time of trial		$182,500.00		
Less purchase price	$ 38,300.00			
Appreciation before marriage	26,700.00	65,000.00		
Appreciation during marriage		$117,500.00		
Separate property interest:				
Down payments	$ 8,300.00			
Loan payments				
Before marriage	7,000.00			
After separation	655.00			
		$ 15,955.00		
Appreciation before marriage		26,700.00		
75.98% of appreciation after marriage		89,276.50		
				$131,931.50

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Community property interest:			
Loan payments	$ 9,200.00		
24.02% of appreciation after marriage	28,223.50		
			$ 37,423.50

Balance on loan at time of trial:	13,145.00
	$182,500.00

Based upon the above computations, the trial court should have awarded husband a separate property interest of $131,931.50, plus one-half of the community interest, or $18,711.75, for a total of $150,643.25. The wife's one-half share of the community interest is $18,711.75, and husband, of course, is responsible for the balance due on the loan.

Stocks

Husband contends that the trial court "incorrectly allocated the shares of stock owned by the husband at the termination of the marriage between separate and community property." Prior to marriage husband owned a substantial amount of shares of stock. During the marriage husband had a checking account at Union Bank in his name. Husband's pay check was automatically deposited into his account at Union Bank. Husband also had an account in his name at Great Western Savings and Loan. During the time the parties were married, husband sold some of the shares of stock he owned and purchased others. Husband admits that some of the proceeds from the sale of certain shares of stock were deposited in his account at Union Bank. Husband concedes "that the Union Bank account was commingled to the extent that proceeds from stock were sometimes deposited therein along with his salary checks, the salary checks being community property." However, husband states "there were numerous stock sales and purchases which never went into the Union Bank Account." Husband asserts that the "[p]roceeds from the sale of stocks, dividends and interest were deposited generally in the Great Western Savings and Loan account which he carried in his name and which he had owned prior to marriage" and the trial court incorrectly determined that the shares of stock that were purchased from funds from the Great Western Savings and Loan account were community property. Husband claims he adequately proved that certain shares of stock were purchased from funds in his Great Western Savings and Loan account or other separate property funds through the testimony of Kevin Loney, a certified public accountant. Husband states Loney "logged each stock transaction
on a [Page 441] multipaged worksheet showing each sale of stock owned prior to the marriage, the disposition of the proceeds of the sale, and the shares of stock purchased with the disposition of the proceeds of the sale. He traced each transaction by brokerage statement and amount into an account either with the Great Western Savings and Loan, Union Bank, California Federal Savings and Loan, or a stockbrokerage account. . . . Mr. Loney's worksheet showed exactly where the money came from, where it went and how it was disposed of." Accordingly, husband contends since he adequately demonstrated that certain shares of stock were purchased from his separate property account at Great Western, these shares of stock remained his separate property although purchased during marriage.

Husband made the same contention in the trial court. The trial court in its memorandum of decision gave the following explanation for its rejection of husband's contention: "Husband also argues that since the funds from the Great Western account were his separate property that stock purchased from his fund are still his separate property and that the only question of identity centers around stocks purchased from funds in the [Union] Bank. Husband's arguments along this line would be persuasive if the Court were satisfied as to the truth of husband's contentions, but it is not. The Court cannot find that husband has carried his burden of proof in establishing what stocks were purchased from funds in the Great Western account. Husband could have avoided this difficulty by some rudimentary record keeping, but he kept virtually no records in this respect and it is far too late to reconstruct them with any degree of persuasive proof."

(5) "Property acquired by purchase during a marriage is presumed to be community property, and the burden is on the spouse asserting its separate character to overcome the presumption. [Citations.] The presumption applies when a husband purchases property during the marriage with funds from an undisclosed or disputed source, such as an account or fund in which he has commingled his separate funds with community funds." (See v. See (1966) 64 Cal.2d 778, 783 [51 Cal.Rptr. 888, 415 P.2d 776].) (6) "`The mere commingling of separate with community funds in a bank account does not destroy the character of the former if the amount thereof can be ascertained.' [Citations.] As the court in Patterson [Patterson v. Patterson (1966) 242 Cal.App.2d 333, 341 (51 Cal.Rptr. 339)] stated: `If the property, or the source of funds with which it is acquired, can be traced, its separate property character remains unchanged. [Citations.] But if separate and community [Page 442] property or funds are commingled in such a manner that it is impossible to trace the

source of the property or funds, the whole will be treated as community property. . . .'" (In re Marriage of Mix (1975) 14 Cal.3d 604, 611 [122 Cal.Rptr. 79, 536 P.2d 479].)

(7) The presumption that all property acquired by either spouse during the marriage is community property may be overcome. (Id., at p. 611.) "Generally speaking there are two methods of carrying the burden of showing property purchased during the marriage to be separate: (1) direct tracing to a separate property source or (2) proof that at the time of purchase all community income was exhausted by family expenses." (Estate of Murphy (1976) 15 Cal.3d 907, 918 [126 Cal.Rptr. 820, 544 P.2d 956].)

The issue for this court to determine is whether husband, as a matter of law, introduced sufficient evidence to directly trace the source of the funds used to acquire each item of disputed property to his separate property in accordance with the standards set out by the courts of this state. "[T]he burden of establishing a spouse's separate interest in presumptive community property is not simply that of presenting proof at the time of litigation but also one of keeping adequate records. `The husband may protect his separate property by not commingling community and separate assets and income. Once he commingles, he assumes the burden of keeping records adequate to establish the balance of community income and expenditures at the time an asset is acquired with commingled property.'" (Estate of Murphy, supra, 15 Cal.3d at p. 919.) "Evidence which merely establishes the availability of separate funds on particular dates without also showing any disposition of the funds is not sufficient proof of tracing to overcome the presumption in favor of community property." (Id., at p. 918; see also In re Marriage of Mix, supra, 14 Cal.3d 604, 613-614.)

In Mix, wife "introduced into evidence a schedule compiled by herself and her accountant from her records which itemized chronologically each source of separate funds, each expenditure for separate property purposes, and the balance of separate property funds remaining after each such expenditure." (Id., 14 Cal. 3d at p. 613.) In Mix, wife conceded "that she was unable to support the schedule by correlating each itemized deposit and withdrawal on the schedule with an entry in a particular bank account due to the unavailability of various bank records as well as to the lack of such records of her own." (Id., at p. 614.) The California Supreme Court in Mix held "that the schedule [Page 443] by itself is wholly inadequate to meet the test prescribed by Hicks v. Hicks [1962] 211 Cal.App.2d 144, and to support the trial court's finding that [wife] `identified and traced' the separate property. However, the schedule was not the only evidence introduced by [wife] to effect the tracing. She personally testified that the schedule was a true and accurate record, that it accurately reflected the receipts and expenditures as accomplished through various bank accounts, although she could not in all instances correlate the items of the schedule with a particular bank account, . . ." (Ibid.) The California Supreme Court in Mix noted that the "trial court evidently believed" wife and was "warranted in inferring from this evidence that the bank records if introduced would fully verify the schedule as supported by [wife's] testimony to the effect that `separate funds . . . continue[d] to be on deposit when a withdrawal [was] made . . . for the purpose of purchasing specific property, and . . . [that] the intention of the drawer . . . [was] to withdraw such funds therefrom. . . .'" (Ibid.)

(8) There is substantial evidence in the instant case to support the trial court's finding that husband did not introduce sufficient evidence to trace directly the source of the funds used to acquire each item of disputed property to his separate property to overcome the presumption in favor of community property. Husband merely established that at most times under consideration he had sufficient separate funds available to make the purchases of the shares of stock in question. Husband has failed to show that he actually expended said funds for the purchases of the disputed shares of stock. Contrary to the assertion made by husband, the work sheet and testimony of Loney did not show "exactly where the money came from, where it went and how it was disposed of." In preparing the work sheet, Loney looked at husband's position at the end of the year. Loney looked to the stocks husband owned at the time of marriage, and then for each year the parties were married, calculated the difference between the amount of money needed to purchase the stock and the amount of money received from the sale of various stocks in a particular year. Loney assumed that the difference between these two figures was separate property of husband regardless of where the funds for the purchase were obtained or where the proceeds from the sale were deposited. For example, Loney stated that husband in 1973 purchased certain shares of stock for $11,991 and the funds to purchase the stocks came from Great Western and Union Bank. When husband sold stock the proceeds from the sale "would be spread among [husband's] accounts in some way." Loney admitted that if husband purchased stock from the account at Union Bank and then [Page 444] sold this particular stock and placed the funds in his account at Great

Western, his work sheet would not show that the funds originally were from the account at Union Bank. In other words, husband did not attempt to deposit the proceeds from the sale of stock into the same account from which the funds were obtained to purchase the stock. In 1975, the amount of money expended to purchase stock exceeded the amount of money received from the sale of stock or dividends in the amount of $1,334. In 1976, husband purchased stock in an amount which exceeded the proceeds realized from the sale of stock in that year in the amount of $1,500. These sums did not come from separate property funds.

The work sheet was inadequate by itself to overcome the presumption in favor of community property. Husband was unable to support the schedule by correlating each purchase and sale on the schedule with an entry in a particular bank account. Husband apparently concedes that the funds in the Union Bank and the stock purchased from this account are community property because the funds were so commingled that they could not be traced. Husband did not keep adequate records to establish which stocks were purchased from his account at Great Western. Loney looked at husband's position at the end of the year and was not always able to ascertain from which bank account husband obtained the funds to make his stock purchases or in which bank account he deposited the proceeds of a sale. Husband used some community property funds in his stock transactions, but the record does not establish in which transactions such funds were used. Husband indiscriminately deposited and withdrew funds from his bank accounts for his stock transactions. As noted above, Loney admitted that if husband purchased stock from the account at Union Bank and then sold this particular stock and placed the funds in his account at Great Western, his work sheet would not show that the funds originally were from the account at Union Bank. The proceeds from the sale of stock were not necessarily deposited in the account from which the funds were obtained to purchase that particular stock.

Since the records introduced by husband were prepared after the stock transactions took place and the work sheet did not correlate each stock transaction with an entry in a particular bank account and it is close to impossible to trace the source of most of the shares of stock because husband indiscriminately deposited and withdrew funds from his bank accounts for his stock transactions, the trial court did not err in determining that all of the stock purchased by husband during the marriage [Page 445] was community property on the ground that it could not determine which stocks were purchased from funds in the Great Western account. This determination was a question of fact for the trial court and its finding on the issue is supported by substantial evidence. (In re Marriage of Mix, supra, 14 Cal.3d 604, 612.)

Husband also states that certain shares of stock were acquired prior to marriage and certain other shares of stock were inherited by him "and were not traded." Husband contends that these shares of stock were his separate property. In regard to this contention husband states: "the evidence is clear that of the shares he owned prior to marriage, he never dealt with the following: 200 shares of American Telephone and Telegraph, 125 shares of Northern Illinois Gas Company, now known as Nicor, 240 shares of J.P. Morgan, 225 shares of Suburban Propane, and 100 shares of Stanford Bank, now Union Bank Corp. In addition, he had a small amount of American Telephone which was converted by that company into preferred American Telephone and was never traded by him. 33 shares of Union Electric Corporation, 10 shares of First Union Bank Corporation, 370 shares of Dividend Shares, 37 shares of Anchor Income Fund, 35 shares of Wellington Fund and an $8,000 American Financial Debenture were inherited by him and were not traded. All of these shares should have been held to be separate property. The Trial Court, admittedly faced with a large stock portfolio, only found that the American Telephone and Telegraph, Morgan Guaranty Trust, Northern Illinois Gas Company and Suburban Propane Gas were the husband's separate property."

Husband testified at trial that four of the stocks he had at the time of trial, he had acquired prior to marriage and had not engaged in any transactions involving these stocks during the marriage. Husband testified that these four stocks were American Telephone and Telegraph, J.P. Morgan, Northern Illinois Gas (now known as Nicor) and Suburban Propane Gas. Husband also contends that he owned shares of Union Bank Corporation prior to marriage and purchased additional shares after marriage. Appellant asserts that the shares of Union Bank Corporation that he acquired prior to the marriage are his separate property. The trial court did not err in determining that the shares of Union Bank Corporation were community property. Husband did not produce any adequate documentation which showed the number of shares he acquired prior to the marriage. In regard to the shares of stock husband contends that he received from his parents during the [Page 446] marriage, husband failed to introduce any evidence that in fact he received these stocks from his parents either as an inheritance or a gift.

Husband contends that a significant portion of the shares of stock that the trial court determined to be community property "was bought on a margin account on which, at the beginning of January, 1979, $38,220 was owed. . . ." In regard to the margin account, husband states the "trial court demonstrated its lack of knowledge of what constitutes a margin account because it did not take into allowance the brokerage firm's debit of $38,000 for the account. This corresponded to the market value of a substantial amount of the stock held at the time of the trial. Later on, these were sold to wipe out the margin account and to avoid the currently very high interest rates. That $38,000 actually should have been a debit to the appellant." Husband did testify that at the time of trial (Jan. 10, 1979) his "current" obligation of his margin account was about $38,000. However, husband failed to introduce any evidence that his obligation on the margin account at the time of trial was on account of any of the stocks that the trial court determined to be community property of the parties. Husband had the opportunity to produce evidence on this issue at trial, and since he failed to produce evidence regarding the transactions that resulted in a $38,000 obligation on his margin account, he cannot now contend that the trial court should have considered the amount owing on his margin account in dividing the shares of stock.

Attorney's Fees

We now turn to husband's argument that attorney's fees were improperly awarded to wife. Husband does not challenge the jurisdiction of the court in a dissolution proceeding to award attorney's fees. (See Civ. Code, § 4370 Civ.; In re Marriage of Holmgren (1976) 60 Cal.App.3d 869, 873 [130 Cal.Rptr. 440].) But he does claim that the award of $2,500 for attorney's fees to wife was excessive. He further argues that there is no evidence in the record that wife was in need of attorney's fees given the fact that wife was awarded "community property assets in the approximate amount of $200,000." Husband in making this latter argument states that there is evidence in the record that wife had sufficient funds with which to engage an attorney separate and apart from her share of the community property assets.

Civil Code section 4370 Civ., subdivision (a), authorizes the court in a dissolution proceeding to order the husband or wife "to pay such [Page 447] amount as may be reasonably necessary for the cost of maintaining or defending the proceeding and for attorneys' fees; . . ." (9) The need of a spouse for an award of attorney's fees and the amount of that award are matters addressed to the sound discretion of the trial court. (6 Witkin, Summary of Cal. Law (8th ed. 1974) Husband and Wife, § 146, pp. 5013-5014.) The exercise of this discretion will not be disturbed on appeal "without a clear showing of abuse." (In re Marriage of Holmgren, supra, 60 Cal.App.3d at p. 873.)

The fact that wife was awarded a substantial amount of community property assets in the instant case does not require a finding that the trial court abused its discretion in awarding her attorney's fees. A similar contention was considered in In re Marriage of Borson (1974) 37 Cal.App.3d 632, 639 [112 Cal.Rptr. 432], and rejected. (See 6 Witkin, Summary of Cal. Law (8th ed. 1974) Husband and Wife, § 141, pp. 5008-5009.)

Nor does it appear that the award of attorney's fees in the instant case was excessive. "`The question of the reasonableness of the order for attorney's fees is addressed to the sound discretion of the trial court [citations], and in the absence of a clear showing of abuse its determination will not be disturbed on appeal.'" (In re Marriage of Lopez (1974) 38 Cal.App.3d 93, 113 [113 Cal.Rptr. 58].)

Valuation Date for the Retirement Benefits

Husband contends that the date of separation rather than the date of trial is the appropriate valuation date for his retirement benefits. Husband reasons "[w]hile there is case law and code authority [Civil Code § 4800 Civ.(a)] indicating that the assets shall be valued as nearly as practical to the time of trial, in the case of retirement assets which continued to increase in value because of the employment of the spouse during the period of separation, utilizing the date of trial as the valuation date would give an inaccurate allocation."

The interlocutory judgment filed on April 8, 1980, provides in part: "[Husband's] TIAA/CREF pensions/annuities are to be divided in accordance with the court's prior interlocutory decree dividing the parties' community property. All contributions during the marriage and the accumulations thereon are the

community property of both parties and are to be divided equally between the parties." Husband states "the [Page 448] judgment does not specify the date on which the retirement benefits are to be valued. To that extent the judgment is uncertain and ambiguous."

(10) Contrary to husband's contention retirement benefits are not valued at the time of separation. The California Supreme Court has indicated that there are two basic solutions to the problem of the proper method for the division of pension or retirement benefits: "first, a determination by the trial court of the present value of the rights or benefits adjudged to be marital property and an equal division or adjustment of the same [citations]; and second, `if the court concludes that because of uncertainties affecting the vesting or maturation of [such] rights . . . it should not attempt to divide the present value . . . it can instead award each spouse an appropriate portion of each . . . payment as it is paid.'" (In re Marriage of Skaden (1977) 19 Cal.3d 679, 688 [139 Cal.Rptr. 615, 566 P.2d 249], italics added.) If the nonemployee spouse chooses to wait to receive the retirement benefits until the employee spouse actually retires, the "nonemployee may thereby ensure some protection for the future and may be able to share in the increased value of the pension plan." (In re Marriage of Gillmore (1981) 29 Cal.3d 418, 428 [174 Cal.Rptr. 493, 629 P.2d 1].) Accordingly, the appropriate date of valuation of retirement or pension benefits is the date of trial or the date of payment of benefits. (Id., at pp. 428-429; In re Marriage of Skaden, supra, 19 Cal.3d at pp. 687-689.) The date of valuation of retirement or pension benefits depends on when the community interest in such benefits is divided. The community interest in retirement benefits is that portion of the retirement benefits or pension attributable to employment from the date of marriage until separation. (See id., at p. 688.)

The judgment in 1 Civil No. 47922 is reversed insofar as it determines the respective interest of the parties in the house and leasehold and divides the community property. The judgment in 1 Civil No. 51438 is affirmed. Each party shall pay his or her own attorney's fees and costs on appeal.

White, P.J., and Feinberg, J., concurred.

Appellant's petition for a hearing by the Supreme Court was denied May 27, 1982. Mosk, J., was of the opinion that the petition should be granted.

[fn1] Husband in his briefs in both appeals allegedly quotes from said letters. However, these letters were not introduced into evidence, and the quotes are taken from questions asked by his counsel at trial.

[fn2] We note that the trial court is given greater flexibility in determining the community and separate interests in property where one spouse has contributed "industry" rather than community capital to separate property. (See Beam v. Bank of America (1971) 6 Cal.3d 12, 18 [98 Cal.Rptr. 137, 490 P.2d 257].) For an analysis and criticism of In re Marriage of Moore, supra, 28 Cal.3d 366, see California Family Law Report (1980) 1458-1462. [Page 449]

G. ***IN RE MARRIAGE OF MOORE.***

California Supreme Court Reports

IN RE MARRIAGE OF MOORE, 28 Cal.3d 366 (1980)

618 P.2d 208

168 Cal.Rptr. 662

In re the Marriage of LYDIE D. and DAVID E. MOORE.

DAVID E. MOORE, Appellant, v. LYDIE D. MOORE, Respondent.

Docket No. S.F. 24172.

Supreme Court of California.

October 30, 1980

Appeal from Superior Court of San Mateo County, No. 213132, F. Jose de Larios, Judge.[fn*]

[fn*] Assigned by the Chairperson of the Judicial Council.

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COUNSEL

F.J. Donehue for Appellant.

Andrew G. Wagner and Milch, Wolfsheimer, Wagner & Schmidt as Amici Curiae on behalf of Appellant.

Sullivan, Rizzo & Eisenberg and Ralph A. Rizzo for Respondent.

Daniel W. Grindle and Gade, Grindle & Hayne as Amici Curiae on behalf of Respondent.

OPINION

MANUEL, J.

David E. Moore appeals from an interlocutory judgment dissolving his marriage to Lydie D. Moore. He contests only the trial court's determination of the community property interest in the residence located at 121 Mira Way, Menlo Park and the finding that he deliberately misappropriated community property.

The principal issue to be decided in this case is the proper method of calculating the interest obtained by the community as a result of payments

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made during marriage on the indebtedness secured by a deed of trust on a residence which had been purchased by one of the parties before marriage.

Lydie purchased the house at 121 Mira Way in Menlo Park in April 1966, about eight months before the parties' marriage. The purchase price was $56,640.57. Lydie made a down payment of $16,640.57 and secured a loan for the balance of the purchase price. She took title in her name alone as "Lydie S. Doak, a single woman." Prior to the marriage she made seven monthly payments and reduced the principal loan balance by $245.18.

The parties lived in the house during their marriage and until their separation in June 1977. They made payment during this time with community funds and reduced the loan principal by $5,986.20. Lydie remained in the house and continued to make payments, reducing the principal by an additional $581.07 up to the time of trial. At that time the total principal paid on the purchase price was $23,453.02, the balance owing was $33,187.55, the market value of the house was $160,000, and the equity therein $126,812.45.

The trial court concluded that the residence was Lydie's separate property but that the community had an interest in it by virtue of the community property payments made during the course of the parties' marriage. The trial court further concluded that the community interest was to be determined according to the ratio that the reduction of principal resulting from community funds bears to the reduction of principal from separate funds. No credit was given for the amount paid for interest, taxes and insurance.

The community interest was calculated by multiplying the equity value of the house by the ratio of the community's reduction of principal to the total amount of principal reduction by both community and separate property ($5,986.20 divided by $23,453.02 equals 25.5242 percent). The amount of the community interest was thus determined to be $32,367.86. Lydie's separate property interest was calculated by multiplying the equity value of the house by the ratio of the separate property reduction of principal to the total amount of principal reduction ($17,466.82 divided by $23,453.02 equals 74.4758 percent). Lydie's separate property interest was thus determined to be $94,444.59.

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The parties agree that the community has acquired an interest in the house by virtue of the community funds used to make the payments.[fn1] They disagree, however, as to how the interest is to be determined. (1a) Appellant contends that the community property interest should be based upon the full amount of the payments made, which includes interest, taxes and insurance, rather than only on the amount by which the payments reduce the principal. He relies on Vieux v. Vieux (1926) 80 Cal.App. 222 [251 P. 64].

In Vieux, the husband contracted before marriage to buy certain property and paid $280 on account of the purchase price. After the parties' marriage they spent $553.68 of community funds for payment of principal, interest and taxes. The Court of Appeal held that the trial court erred in finding the property to be solely the husband's separate property and stated the rule as follows: "Thus property purchased by one spouse before marriage is separate property . . ., and this is true though a part of the purchase price is not paid until after marriage, in the absence of a showing that any part of the balance was paid with community funds. In any event it would be community property only to the extent and in the proportion that the purchase price is contributed by the community." (80 Cal.App. at p. 229.) The court concluded that "the community interest was entitled to share in the title to the property in the same proportion as the amount contributed to the purchase price by the community, to wit, $553.68 bore to the sum of $833.86 [sic] - the total amount paid by the respective parties therefor." (Ibid.)

Although the Vieux court included interest and taxes in its calculation, there is no indication that the issue of the propriety of doing so was presented to the court. The concern in that case was with the question of whether there should be any community interest at all. Since the Vieux court did not expressly consider the question of including interest and taxes in the community's interest in the property, we do not consider it to be persuasive authority on that issue.

(2) Where community funds are used to make payments on property purchased by one of the spouses before marriage "the rule developed

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through decisions in California gives to the community a pro tanto community property interest in such property in the ratio that the payments on the purchase price with community funds bear to the payments made with separate funds." (Forbes v. Forbes, supra, 118 Cal.App.2d 324, 325; see also Bare v. Bare (1967) 256 Cal.App.2d 684, 690 [64 Cal.Rptr. 335]; In re Marriage of Jafeman (1972) 29 Cal.App.3d 244, 257 [105 Cal.Rptr. 483]; Estate of Neilson (1962) 57 Cal.2d 733, 744 [22 Cal.Rptr. 1, 371 P.2d 745].) This rule has been commonly understood as excluding payments for interest and taxes. For example in Bare v. Bare, the Court of Appeal directed the trial court to determine the increase in equity in the house during marriage and the fair market value of it before and after the marriage, stating: "the community is entitled to a minimum interest in the property represented by the ratio of the community investment to the total separate and community investment in the property. In the event the fair market value has increased disproportionately to the increase in equity the wife is entitled to participate in that increment in a similar proportion." (256 Cal.App.2d at p. 690; accord In re Marriage of Jafeman, supra, 29 Cal.App.3d at pp. 256-257.) Decisions of other community property jurisdictions are in accord (see, e.g. Hanrahan v. Sims (1973) 20 Ariz. App. 313 [512 P.2d 617, 621]; Gapsch v. Gapsch (1954) 76 Idaho 44 [277 P.2d 278, 283, 54 A.L.R.2d 416]; Merkel v. Merkel (1951) 39 Wn.2d 102 [234 P.2d 857, 864]), and Vieux apparently stands alone in suggesting a contrary rule.

(1b) Appellant argues, however, that interest and taxes should be included in the computation because they often represent a substantial part of current home purchase payments. We do not agree. Since such expenditures do not increase the equity value of the property, they should not be considered in its division upon dissolution of marriage. The value of real property is generally represented by the owners' equity in it, and the equity value does not include finance charges or other expenses incurred to maintain the investment. Amounts paid for interest, taxes and insurance do not contribute to the capital investment and are not considered part of it. A variety of expenses may be incurred in the maintenance of investment property, but such expenses are not considered in the valuation of the property except to the extent they may be relevant in determining its market value from which in turn the owners' equity is derived by subtracting the outstanding obligation. Upon dissolution, it is the court's duty to account for and divide the assets and the debts of the community. Payments previously made for interest, taxes and insurance are neither. Moreover, if these items were considered

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to be part of the community's interest, fairness would also require that the community be charged for its use of the property.

In summary, we find no basis for departing from the present rule which excludes amounts paid for interest, taxes, and insurance from the calculation of the respective separate and community interests. We turn to that calculation in this case.

Although many formulae have been suggested, we are not persuaded that any of them would be an improvement over a formula based on the reasoning of In re Marriage of Aufmuth (1979) 89 Cal.App.3d 446 [152 Cal.Rptr. 668], which was approved in *In re Marriage of Lucas* (1980) 27 Cal.3d 808 [166 Cal.Rptr. 853, 614 P.2d 285]. We were there concerned with determining the respective community and separate interests in a residence purchased during marriage with a combination of community and separate funds where the community contributed the loan and subsequent payments on it and there was an agreement or understanding that the party contributing the separate property down payment was to retain a pro rata separate property interest. (Id., at pp. 816-817.) The formula we used there recognized the economic value of the loan taken to purchase the property. In the formula postulated in Lucas the proceeds of the loan were treated as a community property contribution on the assumption that the loan was made on the strength of the community assets. (Id., at pp. 816-817, fn. 3.)

(3) In the present situation, the loan was based on separate assets and was thus a separate property contribution; the down payment was also a separate property contribution. Therefore under the Lucas/Aufmuth formula the proceeds of the loan must be treated as a separate property contribution. Accordingly, the formula would be applied as follows: The separate property percentage interest is determined by crediting the separate property with the down payment and the full amount of the loan less the

amount by which the community property payments reduced the principal balance of the loan ($16,640.57 plus ($40,000 minus $5,986.20) equals $50,654.37). This sum is divided by the purchase price for the separate property percentage share ($50,654.37 divided by $56,640.57 equals 89.43 percent). The separate property interest would be $109,901.16, which represents the amount of capital appreciation attributable to the separate funds (89.43 percent of $103,359.43) added to the amount of equity paid by separate funds ($17,466.82). The community property percentage interest is found by

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dividing the amount by which community property payments reduced the principal by the purchase price ($5,986.20 divided by $56,640.57 equals 10.57 percent). The community property share would be $16,911.29, which represents the amount of capital appreciation attributable to community funds (10.57 percent of $103,359.43) added to the amount of equity paid by community funds ($5,986.20).

In this case the trial court used a different formula which appears to have been based upon a statement in In re Marriage of Jafeman, supra, 29 Cal.App.3d 244, 256, that might be interpreted to mean that the interests are to be determined according to the proportionate equity contributions only, with no credit given for the loan contribution. This formula might be appropriate when the obligation on the property has been fully paid. To apply it in the present situation, however, when the purchase price of the amount owing on the loan has not been fully paid ignores the role of the loan and produces inconsistencies with the principles of the Lucas/Aufmuth formula.

(4) Although the trial court erred in determining the parties' interests in the residence, the error was in David's favor. Since he was not prejudiced by the error and Lydie did not appeal, reversal of this portion of the judgment is unwarranted. (Cal. Const., art. VI, § 13; Walker v. Etcheverry (1941) 42 Cal.App.2d 472, 476 [109 P.2d 385]; Johnson v. A. Schilling & Co. (1961) 194 Cal.App.2d 123, 134 [14 Cal.Rptr. 684]; 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, §§ 212-214, pp. 4203-4204.)

(5) David also challenges the trial court's finding that he deliberately misappropriated items of community personal property by disposing of them without valuable consideration and without the consent of his wife in order to purchase alcoholic beverages. Based on this finding the court made a compensatory award to Lydie pursuant to Civil Code section 4800 Civ., subdivision (b)(2), which allows the court to "award, from a party's share, any sum it determines to have been deliberately misappropriated by such party to the exclusion of the community property . . . interest of the other party." David contends that the evidence is insufficient to support this finding. We agree.

The record discloses that a number of community property items were missing from the home at the time of separation. Both David and Lydie testified that certain community items had been disappearing during the last few years of their marriage. David said that none of

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these items were in his possession and that he did not know where they were. Lydie believed that David sold the items in order to purchase alcoholic beverages, but she did not know the prices he received for the items.

Under section 5125 Civ., subdivision (b) of the Civil Code, "A spouse may not make a gift of community personal property, or dispose of community personal property without a valuable consideration, without the written consent of the other spouse." Lydie, however, has failed to prove that David made a gift of the missing items or disposed of them without valuable consideration. The only evidence presented on the question - Lydie's belief that he disposed of the items to buy alcoholic beverages - indicates to the contrary. David could not have purchased alcoholic beverages with the items if he had not received valuable consideration for them.

Lydie suggests that the trial court's finding of deliberate misappropriation could also be upheld on the ground that David's disposal of the items violated subdivision (c) of Civil Code section 5125 Civ., which provides that "A spouse may not sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children which is community personal property,

without the written consent of the other spouse." The trial court made no findings regarding whether the items missing constituted "furniture, furnishings, or fittings of the home," and we are unable to make that determination on the record presented. Accordingly, we reverse that portion of the judgment.

The portion of the judgment determining the rights of the parties in and awarding the community property is reversed with directions to redetermine the amount, if any, that was deliberately misappropriated through violation of Civil Code section 5125 Civ., subdivision (c), and to adjust the award accordingly. The judgment is affirmed in all other respects. Each side shall bear its own costs on this appeal.

Bird, C.J., Tobriner, J., Mosk, J., Clark, J., Richardson, J., and Newman, J., concurred.

[fn1] Although the trial court designated the community's interest as an "equitable charge on/right," it is clear under California law that the interest is properly characterized as a community property interest in the house. (See Forbes v. Forbes (1953) 118 Cal.App.2d 324, 325 [257 P.2d 721]; Estate of Neilson (1962) 57 Cal.2d 733, 744 [22 Cal.Rptr. 1, 371 P.2d 745].)

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H. *IN RE MARRIAGE OF LUCAS.*

California Supreme Court Reports

IN RE MARRIAGE OF LUCAS, 27 Cal.3d 808 (1980)

614 P.2d 285

166 Cal.Rptr. 853

In re the Marriage of BRENDA G. and GERALD E. LUCAS. GERALD E. LUCAS,

Appellant, v. BRENDA G. LUCAS, Respondent.

Docket No. L.A. 31254.

Supreme Court of California.

August 7, 1980.

Appeal from Superior Court of San Diego County, No. D 112880, Ross G. Tharp, Judge.

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COUNSEL

Daniel W. Grindle, Gade, Grindle & Haynie and Goodwin & Grindle for Appellant.

Robert T. Dierdorff for Respondent.

OPINION

MANUEL, J.

Gerald E. Lucas appeals from an interlocutory judgment dissolving his marriage to Brenda G. Lucas, awarding child custody, fixing spousal and child support and dividing property. Gerald contests only the trial court's determination of the parties' ownership interests in their residence and in a vehicle, both of which were purchased with a combination of community and separate funds. In this case we must resolve a conflict among the Courts of Appeal regarding the proper method of determining separate and community property interests in a single family dwelling acquired during the marriage with both separate property and community property funds.

Brenda and Gerald were married in March 1964 and lived together continuously until their separation in December 1976. At the time of their marriage Brenda was beneficiary of a trust. The trust corpus was distributed to her free of the trust in September 1964. She immediately established a revocable inter vivos trust of which she was trustor and beneficiary. The trust, conceded by Gerald to be Brenda's separate property, had a value of approximately $44,000 at the time of trial.

In November 1968, Brenda and Gerald bought a house for $23,300. Brenda used $6,351.57 from her trust for the down payment, and they assumed a loan of $16,948.43 for the balance of the purchase price. Title to the house was taken as "Gerald E. Lucas and Brenda G. Lucas, Husband and Wife as Joint Tenants." Brenda paid $2,962 from her trust funds for improvements to the property; the remainder of the expenses on the property was paid for with community funds. At the time

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of trial the residence had a fair market value of approximately $56,250 and a loan balance of approximately $14,600, leaving a net equity of approximately $41,650. The community had reduced the principal by $2,052.32 and paid $6,801.14 in interest and $5,146.20 for taxes.

The trial court findings describe the parties' intent regarding ownership of the residence as follows: "The only discussions with regard to taking joint tenancy title to the property related to wife's understanding that title would pass to husband upon her death and that the children would benefit from this result; further, the parties contemplated that taking title in this manner would result in favorable tax consequences due to husband's veterans status. Wife did not intend to make a gift to the husband of any interest in the home purchased with her separate funds, nor did she know of any other legal significance of taking title to real property in the manner it was taken. Neither did husband intend to make a gift to wife of the payments made on the home from community funds during the period of ownership."

Brenda testified that she and Gerald did not discuss where the down payment would come from except to the extent that the payments would be higher if they did not use her trust fund and instead took a second trust deed on the house. Brenda said they had no agreement regarding the manner in which she would be disposing of the trust funds and that they did not discuss keeping the funds separate or using them to exhaust community debts. Brenda also testified that it was her intention at the time of the purchase to acquire the house for herself but that she did not discuss this with her husband. In the interlocutory judgment entered in April 1978, the trial court deducted Brenda's $2,962 payment for improvements from the equity of $41,650.50 and then awarded a community property interest in the residence of 24.42 percent with a value of $9,477.50.[fn1] A separate property interest of 75.58 percent with a value of $29,241 was confirmed to Brenda.

The Courts of Appeal have taken conflicting approaches to the question of the proper method for determining the ownership interests in a residence purchased during the parties' marriage with both separate and community funds. In In re Marriage of Bjornestad (1974) 38 Cal.App.3d 801

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[113 Cal.Rptr. 576], the Court of Appeal allowed only reimbursement for separate property contributions to the down payment on the purchase of the parties' residence. In In re Marriage of Aufmuth (1979) 89 Cal.App.3d 446 [152 Cal.Rptr. 668], the Court of Appeal developed a scheme of pro rata apportionment of the equity appreciation between the separate and community property contributions to the purchase price. The Court of Appeal in In re Marriage of Trantafello (1979) 94 Cal.App.3d 533 [156 Cal.Rptr. 556], however, held that the residence was entirely community in nature in the absence of any evidence of an agreement or understanding between the parties to the contrary.

The beginning point of analysis in each case was the nature of title taken by the parties. In Bjornestad and Trantafello, title was taken by husband and wife as joint tenants; in Aufmuth, it was taken as community property. Until modified by statute in 1965, there was a rebuttable presumption that the ownership interest in property was as stated in the title to it. (Machado v. Machado (1962) 58 Cal.2d 501 [25 Cal.Rptr. 87, 375 P.2d 55]; Gudelj v. Gudelj (1953) 41 Cal.2d 202 [259 P.2d 656]; Socol v. King (1950) 36 Cal.2d 342 [223 P.2d 627]; Tomaier v. Tomaier (1944) 23 Cal.2d 754 [146 P.2d 905].) Thus a residence purchased with community funds, but held by a husband and wife as joint tenants, was presumed to be separate property in which each spouse had a half interest. (See Socol v. King, supra, 36 Cal.2d at pp. 345-347.) The presumption arising from the form of title could be overcome by evidence of an agreement or understanding between the parties that the interests were to be otherwise. (Ibid.; Gudelj v. Gudelj, supra, 41 Cal.2d at p. 212; Machado v. Machado, supra, 58 Cal.2d at p. 506.) It could not be overcome, however, "solely by evidence as to the source of the funds used to purchase the property." (Gudelj v. Gudelj, supra, 41 Cal.2d at p. 212.) Nor could it "be overcome by testimony of a hidden intention not disclosed to the other grantee at the time of the execution of the conveyance." (Ibid; Socol v. King, supra, 36 Cal.2d at p. 346; Machado v. Machado, supra, 58 Cal.2d at p. 506.)

The presumption arising from the form of title created problems upon divorce or separation when title to the parties' residence was held in joint tenancy. (Review of Selected 1965 Code Legislation (Cont. Ed. Bar) p. 40; Final Rep. of Assem. Interim Com. on Judiciary Relating to Domestic Relations (1965) pp. 121-122, 2 Appen. to Assem. J. (1965 Reg. Sess.) hereafter referred to as Domestic Relations Rep.) Unless the presumption of separate property created by the form of title could

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be overcome by evidence of a common understanding or agreement to the contrary, a house so held could not be awarded to the wife as a family residence for her and the children. (Ibid.) In 1965 the Legislature considered various proposals to remedy this problem. The Legislature also noted that "husbands and wives take property in joint tenancy without legal counsel but primarily because deeds prepared by real estate brokers, escrow companies and by title companies are usually presented to the parties in joint tenancy form. The result is that they don't know what joint tenancy is, that they think it is community property, and then find out upon death or divorce that they didn't have what they thought they had all along and instead have something else which isn't what they had intended." (Domestic Relations Rep., p. 124.)

In 1965, in an attempt to solve these problems, the Legislature added the following provision to Civil Code section 164 Civ.: "[W]hen a single family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon divorce or separate maintenance only, the presumption is that such single family residence is the community property of said husband and wife." (Stats. 1965, ch. 1710, p. 3843; see now Civ. Code § 5110 Civ.)[fn2] The effect of this provision was to change the presumptive form of ownership to that more closely matching the intent and assumptions of most spouses who acquire and hold their residence in joint tenancy. (Review of Selected 1965 Code Legislation (Cont.Ed.Bar) pp. 40-41; Domestic Relations Rep., pp. 124-125.) There is no indication that the Legislature intended in any way to change the rules regarding the strength and type of evidence necessary to overcome the presumption arising from the form of title. (See Domestic Relations Rep., p. 124.)

(1) The presumption arising from the form of title is to be distinguished from the general presumption set forth in Civil Code section 5110 Civ. that property acquired during marriage is community property. It is the affirmative act of specifying a form of ownership in the conveyance

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of title that removes such property from the more general presumption. (See Socol v. King, supra, 36 Cal.2d at p. 346.) It is because of this express designation of ownership that a greater showing is necessary to overcome the presumption arising therefrom than is necessary to overcome the more general presumption that property acquired during marriage is community property. In the latter situation, where there is no written indication of ownership interests as between the spouses, the general presumption of community property may be overcome simply by tracing the source of funds used to acquire the property to separate property. (See In re Marriage of Mix (1975) 14 Cal.3d 604, 608-612 [122 Cal.Rptr. 79, 536 P.2d 479]; Estate of Murphy (1976) 15 Cal.3d 907, 917-919 [126 Cal.Rptr. 820, 544 P.2d 956]; See v. See (1966) 64 Cal.2d 778, 783 [51 Cal.Rptr. 888, 415 P.2d 776].) It is not necessary to show that the spouses understood or intended that property traceable to separate property should remain separate.

The rule requiring an understanding or agreement comes into play when the issue is whether the presumption arising from the form of title has been overcome. It is supported by sound policy considerations, and we decline to depart from it. To allow a lesser showing could result in unfairness to the spouse who has not made the separate property contribution. Unless the latter knows that the spouse contributing the separate property expects to be reimbursed or to acquire a separate property interest, he or she has no opportunity to attempt to preserve the joint ownership of the property by making other financing arrangements. The act of taking title in a joint and equal ownership form is inconsistent with an intention to preserve a separate property interest. Accordingly, the expectations of parties who take title jointly are best protected by presuming that the specified ownership interest is intended in the absence of an agreement or understanding to the contrary. We therefore resolve the conflict in Court of Appeal opinions by following Trantafello and disapproving Aufmuth and Bjornestad to the extent they are inconsistent with this opinion.

(2) In the present case there is no evidence of an agreement or understanding that Brenda was to retain a separate property interest in the house. Nor is there any finding by the trial court on the question. The only findings in this regard are that neither party intended a gift to the other. Such evidence and findings are insufficient to rebut the presumption arising from title set forth in Civil Code section 5110 Civ. The trial court's determination must therefore be reversed.

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Neither the parties nor the court applied the correct rules to this case, and it is possible that had they done so the proof might have been different. In the interest of justice, therefore, the matter of the community or separate property character of the residence must be remanded for reconsideration in light of these rules.

If on reconsideration the house is found to be entirely community in nature, Brenda would also be barred from reimbursement for the separate property funds she contributed in the absence of an agreement therefor. (3) It is a well-settled rule that a "party who uses his separate property for community purposes is entitled to reimbursement from the community or separate property of the other only if there is an agreement between the parties to that effect." (See v. See, supra, 64 Cal. 2d at p. 785; Weinberg v. Weinberg (1967) 67 Cal.2d 557, 570 [63 Cal.Rptr. 13, 432 P.2d 709]; In re Marriage of Epstein (1979) 24 Cal.3d 76, 82-86 [154 Cal.Rptr. 413, 592 P.2d 1165].) While the parties are married and living together it is presumed that, "unless an agreement between the parties specifies that the contributing party be reimbursed, a party who utilizes his separate property for community purposes intends a gift to the community." (In re Marriage of Epstein, supra, 24 Cal.3d at p. 82.)

(4) For guidance in the event that on reconsideration the court finds there was an understanding or agreement that Brenda was to retain a separate property interest in the residence, we discuss briefly the question of the proper method of calculating the community and separate interests. In these inflationary times when residential housing is undergoing enormous and rapid appreciation in value, we believe that the most equitable method of calculating the separate and community interests when the down payment was made with separate funds and the loan was based on a community or joint obligation is that set forth by Justice McGuire in In re Marriage of Aufmuth, supra, 89 Cal.App.3d at pages 456-457. In brief, the Aufmuth formula gives the spouse who made the separate property down payment a separate property interest in the residence in the

proportion that the down payment bears to the purchase price; the community acquires that percentage of the residence which the community loan bears to the purchase price.[fn3]

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If the trial court finds no agreement or understanding that Brenda was to retain a separate property interest in the residence, Brenda's contribution of $2,962 of separate funds for improvements should have no effect on the determination of the parties' interests, and the presumption of section 5110 Civ. is controlling. (See v. See, supra, 64 Cal.2d at p. 783.) If there was an understanding that Brenda's separate interest should be maintained, but no separate understanding with respect to improvements, Brenda should receive no additional credit for her expenditure for improvements, for it may be presumed that she intended that they redound to both the community and her separate interest in the property. (Cf., See v. See, supra, 64 Cal.2d at p. 785.)

(5) Gerald also challenges the trial court's determination that a 1976 Harvest Mini-Motorhome, purchased in January 1976 for a cash price of $10,388, was Brenda's separate property. A community property vehicle was traded in on the purchase for an allowance of $2,567. An additional cash payment of $100 was made on the purchase from community funds. The cost of insurance and license fees ($474) added to the cash price of the motorhome, less the trade-in allowance and cash down payment, left a total unpaid balance of $8,195. That sum was paid by check drawn on Brenda's separate checking account. The community contributed 24.6 percent of the cost and Brenda contributed 75.4 percent of the cost of the vehicle. The fair market value of it at the time of trial was $9,000.

The purchase contract was made out in the name of Gerald alone, but title and registration were taken in Brenda's name only. Brenda wished to have title in her name alone, and Gerald did not object. The

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motorhome was purchased for family use and was referred to and used by the parties as a "family vehicle."

The trial court confirmed the motorhome to Brenda as her separate property. The interlocutory judgment stated that Gerald "had a de minimus community property interest therein which was made a gift to respondent [Brenda] at the time of the purchase."

Contrary to Gerald's contention, the trial court's determination that he made a gift of his interest is supported by substantial evidence. Title was taken in Brenda's name alone. Gerald was aware of this and did not object. This evidence constitutes substantial support for the trial court's conclusion that Gerald was making a gift to Brenda of his community property interest in the motorhome. (See In re Marriage of Frapwell (1975) 49 Cal.App.3d 597, 600-601 [122 Cal.Rptr. 718].)

The judgment is reversed insofar as it determines the respective interests of the parties in the residence and divides the community property.

It is affirmed in all other respects.

Bird, C.J., Tobriner, J., Mosk, J., Clark, J., Richardson, J.,
and Newman, J., concurred.

[fn1] The amounts stated in the interlocutory judgment differ slightly from those stated in the findings. The figures given are those stated in the judgment.

[fn2] Section 164 Civ. was repealed in 1969 in connection with the enactment of the Family Law Act. (Stats. 1969, ch. 1608, § 3, p. 3313.) It was replaced by section 5110 Civ. which contains an almost identical provision: "When a single-family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon dissolution of marriage or legal separation only, the presumption is that such single-family residence is the community property of the husband and wife."

Although section 164 Civ. was the applicable statute when the parties in this case purchased their house, as a matter of convenience, future references in this opinion will be to the current statute, section 5110 Civ.

[fn3] The value of those interests is computed by first determining the amount of capital appreciation, which is computed by subtracting the purchase price from the fair market value of the residence. The separate property interest would be determined by adding the amount of capital appreciation attributable to separate funds to the amount of equity paid by separate funds. The community interest would be the amount of capital appreciation attributable to community funds plus the amount of equity paid by community funds; the amount of equity paid by community funds is represented by the amount by which the principal balance on the loan has been reduced.

These principles may be exemplified by considering a house purchased for $100,000, with the wife paying the entire down payment of $20,000 from separate property funds and the community contributing the rest of the purchase price in the amount of a loan for $80,000. There would be a 20 percent separate property interest and an 80 percent community property interest in the house. Assume that the fair market value of the house at the time of trial is $175,000, resulting in a capital appreciation of $75,000, and the mortgage balance at the time of separation was $78,000. The value of the separate property interest would be $35,000, which represents the amount of capital appreciation attributable to the separate funds (20 percent of $75,000) added to the amount of equity paid by separate funds ($20,000). The net value of the community property interest would be $62,000, which represents the amount of capital appreciation attributable to community funds (80 percent of $75,000) added to the amount of equity paid by community funds ($80,000 minus $78,000).

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I. *IN RE MARRIAGE OF AUFMUTH.*

California Court of Appeals Reports

IN RE MARRIAGE OF AUFMUTH, 89> <Cal.App.3d> <446> (1979)

152 Cal.Rptr. 668

In re the Marriage of MARCIA A. and LAWRENCE A. AUFMUTH.

MARCIA A. AUFMUTH, Appellant, v. LAWRENCE A. AUFMUTH, Appellant.

Docket No. 42316.

Court of Appeals of California, First District, Division Four.

February 20, 1979.

Appeal from Superior Court of Santa Clara County, No. P 29982,
Peter Anello, Judge.

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COUNSEL

Walter T. Winter and Barbara R. Dornan for Appellant Wife.

Morgan, Beauzay, Hammer, Ezgar, Bledsoe & Rucka, Paul E. Jacobs
and Philip L. Hammer for Appellant Husband.

OPINION

McGUIRE, J.[fn*]

[fn*] Assigned by the Chairperson of the Judicial Council.

Marcia Aufmuth (hereinafter wife) appeals from an interlocutory judgment dissolving the parties' marriage. Lawrence Aufmuth (husband) cross-appeals from certain provisions of the judgment.

The parties were married on August 19, 1967. Husband was then a law student and part-time clerk, and wife was a teacher. Wife worked until February 1969, when the first child of the marriage was born. During the marriage thereafter, she was a housewife. To enable husband to complete his third year of law school, the parties secured a student loan. The balance due on the loan was $1,230.98 when they separated.

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In July 1971, the parties purchased a family residence for $66,500 with a down payment of $16,500. The $50,000 balance was paid from a real estate loan evidenced by a promissory note and a deed of trust executed by both parties. Title to the property was taken in both names and as community property, and all subsequent payments and costs connected with it were paid from community earnings during the marriage. The parties agreed at trial that the fair market value of the residence was $125,000, and that the balance on the house loan was $47,000, at that time.

In January, 1974, husband became a 5 percent shareholder in a corporate law firm in exchange for promissory notes which he executed in the sum of $16,300. His interest in the corporation was held subject to a repurchase agreement which fixed the purchase price of his stock according to a prescribed formula.

The parties separated on September 1, 1975. There were two children at the time of trial, ages four and seven.

In 1976, husband's gross salary was $63,000 with a net take-home of $37,300. He also received three quarterly bonuses and a fourth year-end bonus payable in September of each year.

The following determinations by the trial court are challenged by wife's appeal and husband's cross-appeal:

1. At the time the residence was purchased, wife had a separate property interest in it valued at $16,500 (the amount of the down payment) and the community interest in it was worth $50,000.

2. At the time of trial, wife's separate property interest in the residence was worth $31,014 and the community interest in it was worth $46,986.

3. Husband's legal education was not property to be valued for division purposes, but the loan for his legal education was a community obligation.

4. In valuing the 5 percent stock interest in the corporate law firm, the factor of goodwill was to be excluded and the value was to be set as of the time of trial and not the date of separation.

5. Wife was awarded $1,000 per month in spousal support, with no fixed termination date.

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6. Wife was awarded $3,500 in attorney's fees.

THE FAMILY RESIDENCE

Wife contends that the trial court erred in failing to find that the home is her separate property, subject to the community's right of reimbursement. She argues that where, as here, the down payment on a home is made entirely with separate property of one spouse, and the balance of the purchase price was obtained through a loan secured by that property, the home is the separate property of that spouse.

On the other hand, husband contends on his cross-appeal[fn1] that the trial court erred in failing to find that the equity in the home was entirely community property. He argues that wife failed to rebut the presumption that all property acquired during marriage is community property (See v. See (1966) 64 Cal.2d 778, 781 [51 Cal.Rptr. 888, 415 P.2d 776]; Civ. Code, § 5110 Civ.), and that the down payment from wife's separate property should be treated as a gift to the community. Neither argument is well taken.

Character of the Down Payment

(1) All property owned by a husband or wife before marriage, and "that acquired afterwards by gift, bequest, devise or descent, with the rents, issues, and profits thereof," is the separate property of the acquiring spouse. (Civ. Code, §§ 5107 Civ., 5108; In re Marriage of Mix (1975) 14 Cal.3d 604, 610 [122 Cal.Rptr. 79, 536 P.2d 479].) Property purchased with separate property funds is likewise the separate property of the acquiring spouse. (In re Marriage of Mix, supra, at p. 610.) Such separate property does not change its character as a

result of the marriage or of its mere use in the marital relationship. (Patterson v. Patterson (1966) 242 Cal.App.2d 333, 340 [51 Cal.Rptr. 339].) Nor does separate property lose its character as such merely because of a change in form or identity. (Id.; Thomasset v. Thomasset (1953) 122 Cal.App.2d 116, 124 [264 P.2d 626].)

If property is separate at the time of its acquisition, "it remains so with the exception of such increase thereof as may have been due to the contribution of the community by virtue of capital or industry." (Thomasset v. Thomasset, supra, at p. 123.)

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(2) There is a statutory presumption that property acquired by either spouse during marriage is community. (Civ. Code, § 5110 Civ.; See v. See, supra, 64 Cal.2d 778 at p. 783.) This presumption is rebuttable (In re Marriage of Mix, supra, at p. 611), and it may be overcome by a preponderance of evidence. (Patterson v. Patterson, supra, 242 Cal.App.2d 333 at p. 341.) Whether or not the presumption has been rebutted is a question of fact for the trial court (Gudelj v. Gudelj (1953) 41 Cal.2d 202, 212 [259 P.2d 656]), and its findings must be upheld if supported by substantial evidence. (In re Marriage of Smith (1978) 79 Cal.App.3d 725, 742 [145 Cal.Rptr. 205].)

(3) The form of the instrument under which the parties hold title is not conclusive of the status of the property. (Gudelj v. Gudelj, supra, at p. 212.)

(4) The evidence established that the source of the funds for the down payment on the residence was a savings account which was held in trust for wife by her parents in another state. There was testimony that at the time these funds were used for the down payment there was no intent by the parents or wife to make a gift to the community. At that time, and at all times prior to the commencement of the dissolution proceeding, neither party communicated with the other as to the property status of the funds used. Thus, although title to the property was taken in both names as community property, there is substantial evidence to support the trial court's finding that the down payment was and continued to be a separate property interest held by wife in the residence. This finding is supported on the basis of an adequate tracing of the wife's separate property. It need not be based on any understanding between the parties as to the separate property character of the down payment. (In re Marriage of Mix, supra, 14 Cal.3d 604 at p. 614.)

Classification of Balance of Purchase Price

(5) The trial court was also justified in determining that the balance of the purchase price on the home, obtained with a $50,000 loan, was paid from community funds.

The character of property acquired upon credit during marriage is determined according to the intent of the lender to rely upon the separate property of the purchaser or upon a community asset. (Gudelj v. Gudelj, supra, 41 Cal.2d 202 at p. 210; Hogevoll v. Hogevoll (1943) 59 Cal.App.2d 188, 193-194 [138 P.2d 693].)

There is a presumption that the proceeds of a loan acquired during marriage are community property. (Civ. Code, § 5110 Civ.) The presumption
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may be overcome only by a showing that the loan was extended on the faith of existing separate property belonging to the acquiring spouse. (Estate of Ellis (1928) 203 Cal. 414, 416 [264 P. 743]; Estate of Abdale (1946) 28 Cal.2d 587, 592 [170 P.2d 918].) In the absence of evidence tending to show this, the trial court must find in accordance with the presumption. (Gudelj v. Gudelj, supra, at p. 210.)

Although no testimony was presented concerning the intent of the real estate lender in extending credit to the parties, it is apparent that the credit was extended on the strength of the community earnings. Wife had no separate property other than the $16,500 before the purchase of the home, she was not employed, and she had no appreciable earnings. Husband was a practicing attorney at the time and his income was the sole source of support of the community. Under these circumstances, we decline to disturb the trial court's implied finding in accordance with the presumption that the proceeds of the loan were community funds.

Separate and Community Property Interests in the Family Residence

It follows that both separate and community interests in the family home were established. (6) The presumption that all property acquired during marriage is community is controlling only when it is impossible to trace the source of the specific property. (In re Marriage of Bjornestad (1974) 38 Cal.App.3d 801, 806 [113 Cal.Rptr. 576].) Thus, "[w]here community and separate property are commingled and property is purchased with the mixed funds, . . . and each contribution is clearly ascertainable, the character of the funds remains unchanged. . . . There is both a community and a separate interest in property purchased with separate and community funds where each contribution is clearly ascertainable." (Faust v. Faust (1949) 91 Cal.App.2d 304, 309 [204 P.2d 906].)

The amounts of separate and community funds are ascertainable in the present case. As noted above, wife contributed $16,500 of her separate funds for the down payment on the home while the community contributed the balance of the purchase price in the amount of $50,000. Thus, the trial court correctly determined that wife had a separate property interest to the extent of her investment in the home and that the balance was community property.
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Computation of Separate and Community Interest in the Home

(7) The parties agree that the separate and community interests are to be computed on a pro rata basis in direct proportion to the amounts of separate and community funds invested in the property (see In re Marriage of Jafeman (1972) 29 Cal.App.3d 244, 256-257 [105 Cal.Rptr. 483]), but each contends that the trial court erred in its application of this rule.

It was stipulated that the home had a fair market value of $125,000, an increase in value of $58,500 over the original $66,500 purchase price. The mortgage balance at the date of separation was $47,000. The community contributed $50,000, and wife contributed $16,500 of her separate funds, to the original purchase price. The community interest in the property was therefore 75.19 percent ($50,000 divided by $66,500), and the remaining 24.81 percent interest was wife's separate property, when the residence was acquired.

In accordance with this formula, the trial court found that "the present value of the $16,500 initial investment in said residence is $31,014 and the present value of the joint investment is $46,986." Although not expressly stated, it is apparent that the court calculated the $31,014 figure by adding the amount of capital appreciation attributable to separate funds (24.81 percent of $58,500) to the amount of the equity paid by separate funds ($16,500); the $46,986 figure, by adding the amount of capital appreciation attributable to community funds (75.19 percent of $58,500) to the amount of equity paid by community funds ($50,000 minus $47,000).

The alternative formulas advanced by husband and wife are both incorrect. Wife would have this court conclude that the community investment in the property could not exceed the amount by which community funds increased the equity in the home, or $3,000. This position is based upon the erroneous assumption that the proceeds of the real estate loan were wife's separate property. Husband, on the other hand, would have the court distribute the total equity in the home in strict proportion to the amounts of separate and community funds invested in the property (including taxes, maintenance and related expenditures), without regard to the increase in its fair market value. The effect of this position would be to give the community a 75 percent interest in wife's original $16,500 investment, which would deny her its full reimbursement.
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SPOUSAL SUPPORT

Wife contends that the trial court's award of spousal support in the amount of $1,000 per month is so inadequate as to constitute an abuse of discretion in the circumstances of this case. She urges that the trial court failed to take into account (1) husband's ability to pay, (2) the unlikelihood of wife's employment as a teacher due to her inactivity in that field for seven years and the general unavailability of teaching positions,

(3) the needs of the parties' young children in her custody and (4) the comparative financial positions of the parties before and after dissolution.

(8) In fixing the amount of spousal support to be awarded upon dissolution of marriage, broad discretion is vested in the trial court (In re Marriage of Morrison (1978) 20 Cal.3d 437, 454 [143 Cal.Rptr. 139, 573 P.2d 41]), "and thus an appellate court must act with cautious judicial restraint, even though the particular award might appear on appeal to be modest or generous under the particular circumstances." (In re Marriage of Lopez (1974) 38 Cal.App.3d 93, 114 [113 Cal.Rptr. 58].) However, the discretion of the trial court is not unlimited. "[I]t must be exercised along legal lines, taking into consideration the circumstances of the parties, their necessities, and the financial ability of the husband." (Brawman v. Brawman (1962) 199 Cal.App.2d 876, 879-880 [19 Cal.Rptr. 106].)[fn2] An abuse of discretion will be perceived if, after calm and careful review of the entire record, it can fairly be said that no judge would reasonably make the same order under the same circumstances. (In re Marriage of Lopez, supra, at p. 114.)

(9) The record indicates that in a pendente lite proceeding which concluded on June 21, 1976, wife requested and was awarded $1,000

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spousal support. She was also awarded $500 per month child support for a total of $1,500 per month. Between June and October of 1976, wife accumulated from these payments savings of approximately $500 per month which yielded a total of approximately $2,800. The trial court could reasonably infer that she experienced no difficulty in living on support payments equalling the amounts she was awarded in the judgment. She had obtained part-time employment as a caterer by the time of trial, supplementing her income by an average of $132 per month. Under these circumstances, the award of $1,000 per month did not constitute an abuse of discretion by the trial court.

(10) Husband contends on his cross-appeal that the trial court abused its discretion in failing to order automatic termination of spousal support at the end of some reasonable period of time. He argues that in view of wife's earning capacity, her separate property, and her age (32) and good health, an award of spousal support for an unlimited period of time is unreasonable. This contention cannot be sustained. It has never been held an abuse of discretion not to terminate jurisdiction over spousal support. (In re Marriage of Wright (1976) 60 Cal.App.3d 253, 256-257 [131 Cal.Rptr. 870].) The evidence in the present case does not warrant a departure from this rule. At the time of trial, wife was employed part-time as a caterer, earning between nothing and $200 per month (gross) as available business fluctuated. This was her sole source of income except for the support she received from husband. Her education and only professional experience were limited to teaching, but she had not been employed as a teacher since the birth of the parties' first child in 1969 and her efforts to find employment in this field had been unsuccessful. Moreover, her availability for full-time employment was limited by the needs and interests of the very young children in her custody.

Husband's reliance upon In re Marriage of Morrison, supra, 20 Cal.3d 437, is misplaced. That decision holds that a trial court should not terminate jurisdiction to extend a future support order, after a lengthy marriage, unless the record clearly indicates that the supported spouse will be able to meet his or her financial needs at the time selected for termination of jurisdiction. It does not support husband's proposition that in a marriage of relatively short duration, automatic termination of spousal support is required in the absence of a showing that wife will be unable to meet her financial needs.[fn3]
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The trial court's refusal to set an automatic termination date for spousal support does not impose an undue burden on husband. If wife fulfills his present predictions by becoming self-supporting in the future, he may then apply for an order modifying spousal support in light of changed circumstances. (Cf. In re Marriage of Wright, supra, 60 Cal.App.3d 253 at p. 257.)

PROFESSIONAL EDUCATION AS A COMMUNITY ASSET

Wife next contends that the trial court erred in refusing to permit evidence regarding the value of husband's legal education as a community asset. She argues that his education must be treated as any other community asset which is to be valued and divided equally between the parties upon dissolution of marriage.

Preliminarily, we note that this issue is raised for the first time on appeal. The only mention of husband's education as a community asset at trial arose during wife's cross-examination of husband regarding his student loan.[fn4] Wife contended that the value of the education was a community asset which offset the community obligation owed Stanford University for husband's legal education. She nevertheless did not claim that a value in excess of the balance outstanding on the student loan should be placed upon husband's education, nor did she make any offer of proof by expert testimony to establish any value for the education. She is therefore precluded from raising this issue on appeal except to the extent that she seeks to offset the community obligation on the student loan by the value of husband's legal education. (6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 276, p. 4264; Witkin, Cal. Evidence (2d ed. 1966) Introduction of Evidence at Trial, § 1310 et seq., p. 1211 et seq.)

(11) Wife contends that, to the extent husband's legal education was acquired during marriage, it is a community asset because it was obtained with community funds as well as the time and effort of both spouses. She argues that it is patently unfair to deny a wife the benefit of a husband's increased earning capacity where she has contributed to its development.
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A similar argument was rejected in Todd v. Todd (1969) 272 Cal.App.2d 786 [78 Cal.Rptr. 131]. In that case, the trial court stated that the value of an education as a claimed asset is "`nothing $ -0-.'" (Id., at p. 790.) Wife appealed the trial court's valuation of the asset. The Court of Appeal held that if a spouse's legal education can be said to be community property (a proposition which the court termed "extremely doubtful"), it is manifestly of such character that a value for division between the spouses cannot be placed upon it. (Id., at p. 791.)

Wife invites this court to reexamine the twin issues of characterization and valuation of a spouse's professional education. She contends that the underlying rationale of the Todd court's conclusions is invalid. We are satisfied that the holding in Todd regarding characterization and valuation of a professional education is sound. It is well established that the word "property," as used in the statutes relating to community property, does not encompass every property right acquired by either husband or wife during marriage, such as the right to practice a profession. (Franklin v. Franklin (1945) 67 Cal.App.2d 717, 725 [155 P.2d 637].) It should be noted in the present case that, to the extent community assets were the product of husband's legal education, wife has realized their value in the award of these assets to her. Additionally, the trial court must have considered husband's earning capacity in awarding spousal and child support. (See Todd v. Todd, supra, 272 Cal.App.2d 786 at p. 791.)

The value of a legal education lies in the potential for increase in the future earning capacity of the acquiring spouse made possible by the law degree and innumerable other factors and conditions which contribute to the development of a successful law practice. A determination that such an "asset" is community property would require a division of postdissolution earnings to the extent that they are attributable to the law degree, even though such earnings are by definition the separate property of the acquiring spouse. As the court observed in In re Marriage of Fortier (1973) 34 Cal.App.3d 384, 388 [109 Cal.Rptr. 915]: "Since the philosophy of the community property system is that a community interest can be acquired only during the time of the marriage, it would then be inconsistent with that philosophy to assign to any community interest the value of the post-marital efforts of either spouse."[fn5]
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EXCLUSION OF GOODWILL AS a VALUATION FACTOR

Wife complains that the trial court failed to make a specific finding as to the existence or nonexistence of goodwill in its valuation of husband's interest in his law firm. However, she did not request a special finding on that issue: in her objections to husband's proposed findings of fact, she merely requested that the trial court find "That the Court does not find that `goodwill' should be included as an element of value in determining

the value of . . . [husband's] . . . interest in his law corporation." The trial court found in accordance with wife's request.

(12) Unless a party requests special findings or otherwise brings to the attention of the trial court its failure to find on a material issue (Code Civ. Proc., § 634 Civ. Proc.), the judgment will not be set aside because of a failure to make an express finding upon such issue if a finding on it, consistent with the judgment, results by necessary implication from the express findings which are made. (Corrigan v. Stiltz (1965) 233 Cal.App.2d 381, 384 [43 Cal.Rptr. 548].)

(13) The trial court found that husband's interest in the law firm was limited to the fair market value of his shares in the firm, computed in accordance with the formula set forth in the stock purchase agreement, and that the agreement was an arm's length transaction. Implicit in these findings is a determination that husband had no goodwill interest of any value in the law firm. The further finding that goodwill should not be considered as an element in the value of husband's interest is likewise consistent with an implied finding that goodwill was nonexistent. Under these circumstances, the judgment cannot be set aside for failure to issue findings as to the existence of goodwill as a community asset.
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(14) Wife also challenges the trial court's finding that goodwill should not be included as an element of the value of husband's interest in the law firm. The stock purchase agreement provides a formula governing the purchase and sale of shares in the corporation in accordance with the rule that, as between attorneys, an attempted sale of goodwill in a law practice is void as contrary to public policy. (Geffen v. Moss (1975) 53 Cal.App.3d 215, 225-227 [125 Cal.Rptr. 687, 79 A.L.R.3d 1232].) The formula specifically excludes any allowance for goodwill. Charles Ledworth, an accountant called by husband, testified that, in his opinion, the law firm does not have a value beyond that expressed in the formula. At the time of trial, husband was 31 years old and had been a member of the bar for only 7 years. He had been a member of his law firm for just five years, and a shareholder for only two years. In view of his youth and comparative inexperience, the trial court could reasonably conclude that he had not contributed in any substantial way to whatever goodwill the law firm might possess. These factors support the court's determination that goodwill was not to be considered in evaluating his interest in the firm.

Wife contends that husband's economic potential earning capacity and expectation of future professional income constitute professional goodwill, and are subject to division by the trial court. However, numerous cases have rejected such an interpretation of goodwill. "[I]n marital cases, the expectancy of future earnings is not synonymous with, nor should it be the basis for, determining the value of `goodwill' of a professional practice, but is simply a factor to consider in deciding if such an asset exists."[fn6] Furthermore, it would be anomalous to value a community asset solely upon the "postmarital efforts of either spouse." (In re Marriage of Lopez, supra, 38 Cal.App.3d 93 at pp. 108-109 [original italics].)

COMPUTATION OF HUSBAND'S INTEREST
IN THE PROFESSIONAL CORPORATION

Date of Valuation

The trial court found that under the formula set forth in the stock purchase agreement, husband's share in the law firm had a value of

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$23,549 as of the date of the parties' separation and a value of $35,096 as of the time of trial. The increased value of the shares was primarily attributable to work done by husband and other members of the law firm after the parties separated in September, 1975. A small portion of the increase was also due to a contribution of capital by one of the new shareholders. The court awarded husband's shares to him at a community property value of $35,096.

(15) Husband argues that the trial court was required to value the community interest in the shares as of the date of separation, rather than the date of trial. Relying upon Civil Code section 5118 Civ.,[fn7] he contends that the increase in value of the shares after separation is his separate property.

As a general rule, asset values and liabilities should be determined as near to the date of trial as reasonably practicable. (In re Marriage of Lopez, supra, 38 Cal.App.3d 93 at p. 110.) Civil Code section 5118 Civ. does not change this rule, but merely provides in effect that the postseparation earnings and accumulations of the spouses cannot be characterized as community property. (In re Marriage of Imperato (1975) 45 Cal.App.3d 432, 436-437 [119 Cal.Rptr. 590].) Thus, "[i]f the earnings of a spouse [after separation] in some manner increase the value of a community asset, the court must then determine what portion of the asset is community property and what portion is separate property. . . . Valuation on date of separation is important only when it is used in conjunction with the final valuation for apportioning community and separate property." (Id., at p. 436.)

Husband's contention that the increase in value of the shares should be considered as postseparation earnings or accumulations, within the meaning of Civil Code section 5118 Civ., is without merit. As the Imperato court observed, "[t]he word `earnings' is broader in scope than `wages' and `salary.' It can encompass income derived from carrying on a business as a sole proprietor where the earnings are the fruit or award for labor and services without the aid of capital. . . . [¶] In contrast, the earnings of a corporation are not, generally speaking, the earnings of the individual stockholder or stockholders, but are `profits' of the corporation to be distributed usually in the form of dividends. A stockholder-employee takes his earnings in salary, bonuses and other forms of benefits." (In re Marriage of Imperato, supra, 45 Cal.App.3d 432 at pp. 437-438 [italics added].)
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The Imperato court held that where the husband is the sole shareholder in a corporation and there is evidence that the corporation had not been treated by the parties as a separate entity, the corporate entity should be disregarded and treated as a sole proprietorship so that the increase in net worth from the time of separation to the time of trial would be treated as separate rather than community property. (In re Marriage of Imperato, supra, 45 Cal.App.3d 432 at p. 440.) In the present case, however, husband is not the sole shareholder in the law firm. Throughout the pretrial period of separation, he received salary, bonuses and other benefits which are attributable to his employment and represent his total postseparation earnings. On the other hand, the increase in value of the shares after the parties' separation represents the earnings of the corporation and not of husband. The evidence established that the increase in value of the corporation was primarily attributable to an increase in accounts receivable during that period. We conclude that, under these circumstances, Civil Code section 5118 Civ. is inapplicable to the postseparation increase in the net worth of a corporation.

Accuracy of Computation

The stock purchase agreement valuation formula, which the trial court used in determining the value of husband's interest in the law firm, is based in part on the total accounts receivable of the firm at the time of valuation. Husband contends that the trial court incorrectly valued his interest in the firm at $35,096 by erroneously using wife's figure of $400,960 as the amount of the firm's current accounts receivable. He argues that this figure was repudiated by wife's own expert in favor of husband's figure of $388,384. This is an inaccurate representation of the testimony. Wife's accountant testified that the value of husband's interest would be only $30,528 if the correct base figure were $388,384, but that he (the witness) had not seen any substantiation of the lower accounts-receivable figure.

The disparity between the accounts-receivable figures offered by husband and wife created a mere conflict in the evidence, the resolution of which was solely within the province of the trial court. (See 6 Witkin, Procedure, op. cit. supra, Appeal, § 245, p. 4236.)

AWARD OF ATTORNEY'S FEES

(16) Husband contends that the trial court abused its discretion in awarding attorney's fees to wife in the amount of $3,500. Civil Code

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section 4370 authorized the trial court to award such attorney's fees and costs as may be reasonably necessary to maintain or defend the proceedings. An award of attorney's fees pursuant to this section is within the trial court's discretion, and will be disturbed on appeal only upon a clear showing of abuse. (In re Marriage of Janssen (1975) 48 Cal.App.3d 425, 428 [121 Cal.Rptr. 701].)

The purpose of an award of attorney's fees to a wife is to provide her with sufficient resources to present her case. (In re Marriage of Jafeman, supra, 29 Cal.App.3d 244, 263-264.) A prerequisite of the award is a showing of her need for money to maintain the proceedings. (In re Marriage of Gonzales (1975) 51 Cal.App.3d 340, 344 [124 Cal.Rptr. 278].) The trial court must therefore consider the respective incomes of the husband and wife. (In re Marriage of Janssen, supra, 48 Cal.App.3d 425 at p. 428.)

Viewed in the light most favorable to wife, the evidence supports an implied finding of need. On the basis of wife's testimony and financial report, the trial court could reasonably conclude that her net monthly income was less than adequate to satisfy attorney's fees. In view of husband's comparatively substantial income, wife's need for expert legal counsel and husband's ability to pay cannot be questioned. No abuse of discretion appears.

The judgment is affirmed. Neither party shall recover costs on appeal.

Rattigan, Acting P.J., and Christian, J., concurred.

A petition for a rehearing was denied March 20, 1979, and the opinion was modified to read as printed above. The petition of appellant wife for a hearing by the Supreme Court was denied April 19, 1979. Newman, J., was of the opinion that the petition should be granted.

[fn1] With one exception, husband's contentions on his cross-appeal are mirror-images of wife's contentions on her appeal. They will therefore be taken up in relation to wife's contentions rather than separately.

[fn2] Civil Code, section 4801 Civ., subdivision (a), reads in pertinent part as follows:

"In any judgment decreeing the dissolution of a marriage . . . the court may order a party to pay for the support of the other party any amount, and for such period of time, as the court may deem just and reasonable. In making the award, the court shall consider the following circumstances of the respective parties:

"(1) The earning capacity and needs of each spouse.

"(2) The obligations and assets, including the separate property, of each.

"(3) The duration of the marriage.

"(4) The ability of the supported spouse to engage in gainful employment without interfering with the interests of dependent children in the custody of the spouse.

"(5) The time required for the supported spouse to acquire appropriate education, training, and employment.

"(6) The age and health of the parties.

"(7) The standard of living of the parties.

"(8) Any other factors which it deems just and equitable."

(See also In re Marriage of Lopez, supra, 38 Cal.App.3d 93 at pp. 116-117.)

[fn3] Husband suggests that the Marin County Rules of Court provide reasonable guidelines regarding duration of support. Those rules provide that in a marriage lasting less than 12 years, termination of spousal support after a period equivalent to one-half the duration of the marriage may be reasonable. However, it is clear that California has "no policy which requires the period of spousal support to bear any particular proportion to the length of the marriage." (Edwards v. Edwards (1975) 52 Cal.App.3d 12, 15 [124 Cal.Rptr. 742]. See In re Marriage of Brantner (1977) 67 Cal.App.3d 416, 423 [136 Cal.Rptr. 635].)

[fn4] The trial court sustained husband's objection to the following question: "Do you think there is value to the legal education you got?"

[fn5] Our interpretation is in accord with the majority of cases in other jurisdictions. In In re Marriage of Graham (1978) 194 Colo. 429 [574 P.2d 75], the Colorado Supreme Court concluded that an education degree has none of the attributes of "property" in the usual sense of that term: "An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of `property.' It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property." (Id., at p. 77.) The New Jersey Supreme Court has likewise held that a person's earning capacity, even when enhanced by a law degree financed by the other spouse, "should not be recognized as a separate, particular item of property." (Stern v. Stern (1975) 66 N.J. 339 [331 A.2d 257, 260].) We recognize that the Iowa Supreme Court recently held that the potential for increase in future earnings made possible by a law degree conferred upon the husband, with the aid of his wife's efforts, constitutes an asset which may be considered by the court in determining an equitable distribution of assets and property although the legal education and license to practice are not assets to be valued and distributed upon dissolution of a marriage. (In re Marriage of Horstmann (Iowa 1978) 263 N.W.2d 885, 891.) The reasoning in that decision is not persuasive, and we decline to follow it.

[fn6] Factors which may be considered in determining the existence or nonexistence of goodwill include the practitioner's age, health, past demonstrated earning power, professional reputation in the community as to his judgment, skill, knowledge, his comparative professional success, and the nature and duration of his business as a sole practitioner or as a member of a partnership or professional corporation to which his professional efforts have made a proprietary contribution. In addition, consideration should be given to the value of the fixed and other assets of the professional business with which the goodwill is to continue its relationship. (In re Marriage of Lopez, supra, 38 Cal.App.3d 93 at pp. 109-110.)

[fn7] This statute provides in pertinent part as follows: "The earnings and accumulations of a spouse . . ., while living separate and apart from the other spouse, are the separate property of the spouse."
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J. PROPOSED AMENDMENT TO EQUITABLE INTEREST STATUTE.

Following is the version of the proposed amendment to the equitable interest statute that resulted from a meeting between family lawyers and State Representative Toby Goodman on November 3, 2000.

By _____ ___.B. No. _____

A BILL TO BE ENTITLED

AN ACT

relating to the relationship between separate and community property during a marriage.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 3, Family Code, is amended by:

SUBCHAPTER E. EQUITABLE INTEREST AND CLAIM FOR REIMBURSEMENT

§ 3.401. Public Policy

In accordance with the duty of the legislature to pass laws more clearly defining the rights of spouses in relation to separate and community property, the legislature declares that, under certain circumstances, the economic contribution to the value of property during marriage made by one marital estate for the benefit of another marital estate creates an equitable interest for the contributing marital estate in the property of the benefitted marital estate as provided in this subchapter.

§ 3.402. Definitions

For purpose of this subchapter only:

(1) “Economic contribution” means the dollar amount:

(A) of the reduction of the principal amount of a debt secured by a lien on property owned

before marriage to the extent the lien existed at the time of marriage;

(B) of the reduction of the principal amount of a debt secured by a lien on property received by a spouse by gift, devise or descent during a marriage to the extent the debt existed at the time the property was received;

(C) of the reduction of the principal amount of a debt incurred during the marriage, including a home equity loan, secured by a lien on property to the extent the debt was incurred for acquisition of, or capital improvement to, property;

(D) of the reduction of the principal amount of a debt incurred during the marriage secured by a lien on property owned by a spouse for which the creditor agreed to look solely to the separate marital property estate of that spouse for repayment to the extent that the debt was incurred for acquisition of, or capital improvements to, property;

(E) of the refinancing of the principal amount of the debt of one marital estate by another marital estate; and

(F) expended for capital improvements other than by incurring debt.

(2) "Economic contribution" does not include:

(A) expenditures for ordinary maintenance and repair, taxes, interest, or insurance; nor

(B) contribution of time, toil, talent or effort by a spouse.

(3) "Equity" in specific property owned by a marital estate or the marital estates means:

(A) the present fair market value of the property less:

(B) the amount on the date of dissolution of the marriage, death of a spouse, or disposition of the property of any lawful lien or liens specific to that property.

§ 3.403. Equitable Interest Based on Economic Contribution.

(a) If a marital estate makes an economic contribution to an item of property owned by another marital estate, the contributing estate has an equitable interest with respect to the benefitted estate equal to the product of:

(1) the equity in the benefitted property at dissolution of the marriage, the death of a spouse, or disposition of the property, multiplied by:

(2) the following fraction:

(A) the numerator is the economic contribution by the contributing estate; and

(B) the denominator is the sum of:

(i) the amount computed under subsection (2)(A);

(ii) the equity of the property as of the date of marriage or, if later, the date of the first economic contribution by the contributing estate; and

(iii) the total amount of any additional economic contribution made to the property by the benefitted estate during the marriage.

(b) The amount of an equitable interest may be less than the economic contributions made by the contributing estate, but may not:

(1) cause the contributing estate to owe funds to the benefitted estate; nor

(2) exceed the equity in the property at dissolution of the marriage, the death of a spouse, or disposition of the property.

(d) Use and enjoyment of property during a marriage in which an equitable interest in the property exists does not create a claim of offsetting benefits against the equitable interest.

§ 3.404. Application of Inception of Title Rule; Ownership Interest Not Created.

(a) This subchapter does not affect the rule of inception of title under which the character of property is determined as of the first time the right to own or claim the property arises.

(b) The equitable interest created under this subchapter does not create an ownership interest in property, but rather creates an interest in the property against the spouse who owns the property that matures on dissolution of the marriage or the death of either spouse.

3.405 Equitable Lien

(a) On the dissolution of a marriage, the court shall impose an equitable lien on property of a marital estate to secure an equitable interest in that property by another marital estate.

(b) On the death of a spouse, the surviving spouse, the personal representative of the deceased spouse or the heirs of the deceased spouse, if there is no administration, may apply to a court of competent jurisdiction and that court shall impose an equitable lien on property of a marital estate to secure an equitable interest in that property by another marital estate.

(c) Subject to homestead restrictions, the equitable lien may be imposed on the entirety of a spouse's property, and is not limited to the item of property that has been benefitted from an economic contribution.

§ 3.406. Offsetting Equitable Interests.

The court shall offset an equitable interest of one marital estate held in a specific asset of another marital estate against an equitable interest in a specific asset of the first marital estate held by the second marital estate.

§ 3.407. Claim for Reimbursement.

(a) The equitable interest created by this subchapter does not abrogate a claim for reimbursement in situations not covered by this subchapter. In the event of a conflict between an equitable interest and a claim for reimbursement, the provisions establishing an equitable interest prevail.

(b) A claim for reimbursement includes:

(1) payment by one marital estate of the unsecured liabilities of another marital estate, and

(2) inadequate compensation of the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse.

(c) Benefits for use and enjoyment of property may be offset against a claim for reimbursement for expenditures to benefit a marital estate on property that does not involve an equitable interest in the property.

(d) The court shall resolve a claim for reimbursement by equitable principles.

§ 3.408. Nonreimbursable Claims.

The court may not recognize a claim for reimbursement by a marital estate based on:

(1) payment of child support, alimony, or spousal maintenance;

(2) living expenses of a spouse or a child of a spouse;

(3) contributions of property of nominal value;

(4) payment of a liability of nominal amount; or

(5) student loans owed by a spouse.