ACTIVITIES
IN THE TRIAL COURT DURING
APPEAL AND AFTER REMAND

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Family Law (1980) and Civil Appellate Law (1987)

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Chair, Family Law Section, SBOT (1999-2000)
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Chair, Continuing Legal Education Committee, State Bar of Texas (2000-01)
Member, Supreme Court Advisory Comm. on Rules of Civil Procedure (1994-2002); Chair, Subcommittee on Rules 16-165a
Associate, American Board of Trial Advocates
Member, Section Representatives to the Board Committee, State Bar of Texas (1998-2001)
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member 1994-2001) and Civil Appellate Law Exam Committee (1990-2001; Chair 1991-1995)
Tx. Bd. of Legal Specialization, Family Law Advisory Commission (1987-1993)
Appointed Member, Supreme Court Task Force on Jury Charges (1992-93)
Appointed Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Vice-President, Texas Family Law Foundation
Fellow, American Academy of Matrimonial Lawyers
Director, San Antonio Bar Association (1997-98)
Director, Texas Legal Resource Center for Child Abuse and Neglect (1991-93)
Member, State Bar of Texas' Ad Hoc Committee to Study PDP Finances (1992-93)

Professional Activities and Honors:

State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* 1996
State Bar of Texas *Certificate of Merit*, June 1995, June 1996, & June 1997
Listed in the BEST LAWYERS IN AMERICA (1987-to date)
Editor - Texas Academy of Family Law Specialists' Family Law Forum (1988-89)
Associate Editor - State Bar Appellate Section's Appellate Advocate (1988-92)

Continuing Legal Education:

Course Director, State Bar of Texas 2001 Advanced Expert Witness Course
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Course Director, Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada (1987)
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Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (1999) (2 Volume Set)

Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (1125 pages)

Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal, Volume 41 SOUTH TEXAS LAW REVIEW 111 (2000)

A Guide to Proceedings Under the Texas Parent Notification Statute and Rules, Volume 41 SOUTH TEXAS LAW REVIEW 755 (2000) (co-authored)

Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994)

Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)

Characterization of Marital Property, 39 BAY. L. REV. 909 (1988) (co-authored)

Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage that Crosses States Lines, 13 ST. MARY'S L.J. 477 (1982)

SELECTED CLE ACTIVITY

State Bar's Advanced Family Law Course
Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000)

State Bar's Marriage Dissolution Course
Property Problems Created by Crossing State Lines (1982); Child Snatching and Interfering with Possess'n: Remedies (1986); Family Law and the Family Business: Proprietorships, Partnerships and Corporations (1987); Appellate Practice (Family Law) (1990); Discovery in Custody and Property Cases (1991); Discovery (1993); Identifying and Dealing With Illegal, Unethical and Harassing Practices (1994); Gender Issues in the Everyday Practice of Family Law (1995); Dialogue on Common Evidence Problems (1995); Handling the Divorce Involving Trusts or Family Limited Partnerships (1998); The Expert Witness Manual (1999); Focus on Experts: Close-up Interviews on Procedure, Mental Health and Financial Experts (2000)

UT School of Law
Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998); Judicial Perspectives on Appellate Practice (2000)

State Bar's Advanced Evidence & Discovery Course
Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997); Evidence Grab Bag (1998); Making and Meeting Objections (1998-99); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000)

State Bar's Advanced Appellate Course
Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000)

State Bar's Annual Meeting
Objections (1991); Evidentiary Predicates and Objections (1992-93); Predicates for Documentary & Demonstrative Evidence (1994); "Don't Drink That! That's My Computer!", (1997); The Lawyer As Master of Technology: Communication With Automation (1997); If You Don't Know Where You Are Going, It Doesn't Matter How You Get There: Technology Positioning (1999); Objections Checklist (2000); Evidence from Soup to Nuts (2000)

TABLE OF CONTENTS

ACTIVITIES IN THE TRIAL COURT DURING APPEAL AND AFTER REMAND

by
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I. OVERVIEW. This paper discusses the power of a trial court to conduct proceedings relating to a case that is pending on appeal. It also discusses different kinds of remand by the appellate court, and what trial courts should do after remand. The article also discussed "law of the case," and estoppel to retry the case after remand.

II. TRIAL COURT PROCEEDINGS PENDING APPEAL. There are a variety of considerations regarding trial court proceedings during the pendency of an appeal.

A. MODIFYING THE JUDGMENT BEING APPEALED. One case suggests that a trial court does not have jurisdiction to modify a judgment that is pending appeal. In *Stubbs v. Stubbs*, 657 S.W.2d 10, 11-12 (Tex. App.–Dallas 1983), *aff'd*, 685 S.W.2d 643, 645 (Tex.1985), the court said:

> We recognize that pending appeal, the district court has no jurisdiction to consider a motion to modify. The trial judge generally has no jurisdiction to vacate or change a judgment once the case has been appealed; the appellate court has plenary jurisdiction over the matter. Carrillo v. State, 480 S.W.2d 612, 616 (Tex.1972); Ammex Warehouse Co. v. Archer, 381 S.W.2d 478, 482 (Tex. 1964).

B. BAR AGAINST ORDERS ENFORCING PROPERTY DIVISION PENDING APPEAL. Tex. Fam. Code § 9.006 permits the court to render further orders to enforce the division of property in a divorce. However, Tex. Fam. Code § 9.007(c) provides that the power of the court to render further orders to assist in the implementation of or to clarify the property division is abated while an appellate proceeding is pending. This abatement of such power does not preclude enforcement of a divorce decree through the issuance of writs such as attachment, foreclosure, etc. *English v. English*, 44 S.W.3d 102, 106 (Tex. App.–Houston [14th Dist.] 2001, no pet.).

C. TRIAL COURT ENFORCEMENT OF JUDGMENT PENDING APPEAL. The Texas Supreme Court has held that only the appellate court and not the trial court has the power to enforce by contempt judgments or orders that are on appeal. *Ex parte Boniface*, 650 S.W.2d 776, 777-78 (Tex. 1983); *Ex parte Werblud*, 536 S.W.2d 542, 544 (Tex. 1976); *Ex parte Kimbrough*, 135 Tex. 624, 146 S.W.2d 371, 372 (1941); *Ex parte Travis*, 123 Tex. 480, 73 S.W.2d 487, 489 (1934).

In *Ex parte Travis*, 123 Tex. 480, 73 S.W.2d 487 (1934), a temporary injunction was issued and appealed. During the pendency of the appeal to the Court of Civil Appeals, one of the parties sought to enforce by contempt the temporary injunction in the trial court. The trial court held the respondents in contempt of court, and fined them and jailed them. The Supreme Court granted habeas corpus, saying:

> After the jurisdiction of the Appellate Court attached, it alone was clothed with the power to adjudicate the validity or invalidity of the temporary injunction and to exercise the discretion involved in compelling obedience to the injunction pending the appeal, as well as to enforce its own final judgment, unless or until such judgment was subjected to review by a higher court. The district court could exercise no such authority while power to consider and determine these very matters lay exclusively in a higher court. Churchill v. Martin, 65 Tex. 367, 369; Wells v. Littlefield, 62 Tex. 30; Ford v. State (Tex. Civ. App.) 209 S. W. 490, 491; Hurley v. Buchanan (Tex. Civ. App.) 233 S. W. 590, 594 (4).

Id. at 489.

In *Ex parte Duncan*, 127 Tex. 507, 95 S.W. 2d 675 (1936), a temporary injunction had been appealed to the Texarkana Court of Civil Appeals. While the appeal was pending, a motion to enforce was filed in the Court of Civil Appeals. The Court of Civil Appeals conducted a hearing on the motion, and adjudicated a party in contempt and remanded him to jail for ten days. *Id.* at 678. The Supreme Court upheld the contempt finding and order made by the Court of Civil Appeals, saying:

> When the Court of Civil Appeals acquires jurisdiction of a question, that court has the right and power to issue all writs necessary to enforce and protect its jurisdiction.

Id. at 679-80]

In *Ex parte Kimbrough*, 135 Tex. 624, 146 S.W. 2d 371, 372 (1941), a final judgment issuing an

injunction was appealed. A supersedeas bond was filed. *Id.* at 371. While the appeal was pending, one of the parties filed a motion in the Court of Civil Appeals to enforce the judgment. The appellate court denied the requested relief. The aggrieved party later went to the trial court seeking enforcement. To this the Supreme Court said:

> [E]ven if the judgment had not been superseded, the contempt, if any, committed after the appeal had been perfected would have been punishable only by the Court of Civil Appeals. Ex parte Travis, et al., 123 Tex. 480, 73 S.W.2d 487.

Id. at 372.

In *Ex parte Werblud*, 536 S.W.2d 542 (Tex. 1976), a temporary injunction was granted and appealed. While the appeal was pending, one of the parties sought to enforce the injunction by filing a motion to enforce in the Court of Civil Appeals. The Court of Civil Appeals conducted a factual hearing, concluded that the respondent was in contempt, and fined him. The respondent refused to pay the fine, and so was taken into custody by the Sheriff. *Id.* at 544. The respondent sought habeas corpus from the Supreme Court. In denying habeas relief, the Supreme Court said:

> After the jurisdiction of the Appellate Court attached, it alone was clothed with the power to adjudicate the validity or invalidity of the temporary injunction and to exercise the discretion involved in compelling obedience to the injunction pending appeal.

Id. at 544.

Ex parte Boniface, 646 S.W.2d 333 (Tex. App.--Austin 1983, orig. proceeding), *overruled*, 650 S.W.2d 776 (Tex. 1983), involved a final judgment partitioning retirement benefits that had not been divided in a divorce. The former husband appealed the judgment, but did not file a supersedeas bond. While the case was on appeal the former wife sought enforcement of the judgment from the trial court. The trial court held the former husband in contempt, fined him, and remanded him to jail for 10 days, or until he paid arrearages under the judgment. The former husband sought habeas corpus relief from the Court of Appeals, on the ground that the trial court had no jurisdiction to enforce the judgment while it was on appeal. The Court of Appeals denied relief, distinguishing *Ex parte Travis* by saying that the Supreme Court precedent was limited to appeals of temporary injunctions, which were "inherently different from final judgments . . . ." *Ex parte Boniface*, 646 S.W.2d 333, 335. The former husband then went to the Supreme Court for habeas corpus relief. The Supreme Court granted habeas corpus relief, relying on *Ex parte Travis* and saying that "[t]here is no rational basis for applying a different rule to appeals from temporary injunctions and appeals from final judgments." *Ex parte Boniface*, 650 S.W.2d 776, 778 (Tex. 1983). The Supreme Court went on to say:

> [A]fter the jurisdiction of the appellate court has attached, the proceedings for enforcement must be instituted *in that court* rather than in the trial court.

Id. at 778. The Supreme Court noted: "[T]he power to enforce the trial court's order belonged to the appellate court." *Id.* at 778.

The Supreme Court again visited the issue in *Schultz v. Fifth Court of Appeals*, 810 S.W.2d 738 (Tex. 1991). There the underlying judgment was a post-judgment turnover order. The turnover order was appealed, and a supersedeas bond posted. *Id.* at 739. While the case was pending appeal, one of the parties filed an enforcement proceeding in the Dallas Court of Appeals, which denied leave to file, directing the complaining party to file the motion in the trial court. That was done, and the trial court held the respondent in contempt, and remanded him to jail. The respondent applied to the Supreme Court for writ of habeas corpus. The Supreme Court held that when the validity of the underlying order was challenged in a pending appeal, "the appellate court alone is vested with jurisdiction to enforce the injunctive provisions by contempt." *Id.* at 741. The Supreme Court mandamused the trial court to rescind all orders issued in assuming jurisdiction over enforcement of the turnover order while that order was on appeal. *Id.* at 741.

Courts of appeals disagree among themselves as to whether the trial court retains enforcement authority during appeal, particularly with regard to parent-child obligations. For example, in *Bivins v. Bivins*, 709 S.W.2d 374, 374-75 (Tex. App.--Amarillo 1986, no writ), the court of appeals held that

> The threshold question before us, therefore, is whether a support order that is part of the final judgment can be enforced, and its violation punished, by the appellate court while the case is on appeal. The Texas Family Code does not speak to the question and there is an apparent inconsistency in the case law, but we have concluded that the correct legal and practical resolution is to leave enforcement to the trial court.

In the case of *In re Gonzalez*, 981 S.W.2d 313 (Tex. App.–San Antonio 1998, pet. denied), the San Antonio court of appeals ruled that a trial court can entertain a motion to reduce child support arrearages to judgment during the pendency of an appeal from the judgment setting child support. The Dallas court of appeals arrived at an analogous ruling in *Martin*

v. O'Donnell, 690 S.W.2d 75, 76 (Tex. App.–Dallas 1985, orig. proceeding), where it held that the trial court, during appeal from a divorce decree awarding custody of children to the father, continued to have jurisdiction to enforce the custody award by writ of habeas corpus. And the Waco court of appeals, in the case of *In re Taylor*, 39 S.W.3d 406 (Tex. App.–Waco 2001, orig. proceeding), held that the trial court retained jurisdiction to entertain a contempt proceeding filed by a father against the mother for her alleged failure to supply the father with information relating to the child as required by the decree of divorce. The appellate court noted that the father was appealing the decree but that the appeal did not attack the terms of the decree for which enforcement was sought.

On the other hand, in *Whitt v. Whitt*, 684 S.W.2d 731 (Tex. App.--Houston [14th Dist.] 1984, no writ), the court held that *Boniface* means that contempt actions based on violations of child support and custody orders initiated while the case is on appeal must be filed in the appellate court where the appeal is pending, and not in the trial court. And the Corpus Christi Court of Appeals, in *Gano v. Villarreal*, 745 S.W.2d 586 (Tex. App.--Corpus Christi 1988, orig. proceeding), applied *Boniface* in issuing a writ of prohibition to stop a trial court from enforcing a sanctions order which had been appealed. The Court said:

> In *Ex parte Boniface*, 650 S.W.2d 776 (Tex. 1983), our Supreme Court determined that a trial court does not retain the jurisdiction to conduct contempt proceedings after that order has been appealed. *See also Safeguard Security Service, Inc. v. Miller*, 679 S.W.2d 699 (Tex. App.--San Antonio 1984, no writ); *Katin v. City of Lubbock*, 655 S.W.2d 360 (Tex. App.--Amarillo 1983, no writ); *Michelle Corp. v. Koehler*, 623 S.W.2d 781 (Tex. App.--El Paso 1981, writ ref'd n.r.e.).

Id. at 587. The Corpus Christi Court of Appeals likewise issued a writ of prohibition to stop a trial court enforcement proceeding over a temporary injunction on appeal in *City of Robstown v. Westergren*, 774 S.W.2d 739 (Tex. App.--Corpus Christi 1989, orig. proceeding). The following cases also have recognized that the trial court loses enforcement power or jurisdiction over its order or judgment while it is on appeal: *Greanias v. City of Houston*, 841 S.W.2d 411, 412 (Tex. App.--Houston [1st Dist.] 1992, ancillary motion); *City of San Antonio v. Clark*, 554 S.W.2d 732, 733 (Tex. Civ. App.--San Antonio 1977, ancillary motion); *Musick v. Hunt*, 364 S.W.2d 252, 254 (Tex. Civ. App.--Houston 1963, no writ); *Morris v. Rousos*, 354 S.W.2d 591, 592 (Tex. Civ. App.--Austin 1962, writ ref'd n.r.e.).

In *Roosth v. Daggett*, 869 S.W.2d 634 (Tex. App.–[14th Dist.] 1994, orig. proceeding), the court of appeals ruled that, where a decree of divorce was on appeal, the trial court retained jurisdiction to enforce the child support provisions by contempt but not the jurisdiction to enforce the award of attorney's fees to the wife.

In *Schultz v. Fifth Judicial Dist. Court of Appeals at Dallas*, 810 S.W.2d 738, 741 (Tex. 1991), the Texas Supreme Court made the following cryptic comment about two of these cases:

> Some courts have held that in certain support and other "injunctive" type orders under the Family Code, the legislature has provided that contempt jurisdiction remains in the trial court. See, e.g., Bivens v. Bivens, 709 S.W. 2d 374, 375 (Tex. App.--Amarillo 1986, no writ); Martin v. O'Donnell, 690 S.W.2d 75, 77 (Tex. App.--Dallas 1985, orig. proceeding). Such special Family Code provisions have no application in this case.

Perhaps the Supreme Court was talking about Family Code provisions that permit the trial court to render and enforce temporary orders pending appeal. If this is so, then it is unclear why these Family Code provisions would relate to the enforcement of final decrees.

An anomaly occurred in *In re Gabbai*, 968 S.W. 2d 929 (Tex. 1998). There the husband appealed a divorce decree without filing a supersedeas bond. The husband ignored the decree's command for him to sign four transfer documents. The wife filed a motion to dismiss the appeal, and the court of appeals ordered the husband to either post a supersedeas bond for $120,000, or sign the indicated documents and further to release a lis pendens he had filed on two tracts of land. The husband failed to comply and his appeal was dismissed. The trial court thereafter held the husband in contempt, partly for failing to comply with the court of appeals' order. The Supreme Court released the husband on habeas corpus, saying that the trial court could not enforce the court of appeals' order by contempt.

D. SUSPENDING ENFORCEMENT OF JUDGMENT DURING APPEAL. A party can, during an appeal, suspend the enforcement of a judgment for the recovery of money or property, by posting a supersedeas bond or alternate security.

1. General Supersedeas Bond Rule. Where the judgment is for recovery of money, the supersedeas bond must be at least the amount of the judgment, plus interest for the estimated duration of the appeal, and costs. TEX. R. APP. P. 24.2(a)(1).

Where the judgment is for recovery of property, the supersedeas bond must be for real property at least

the value of real property's rent or revenue, or for personal property the value of personal property on the date judgment is rendered. TEX. R. APP. P. 24.2(a)(2). If the judgment is for something other than money or an interest in property, the trial court has discretion to set a supersedeas bond to adequately protect the judgment creditor against loss or damage.

2. Divorce Appeal: Suspending Dissolution of Marital Bonds. The case of *In re Marriage of Richards*, 991 S.W.2d 30, 32 (Tex. App.--Amarillo 1998, no pet.), appears to suggest that where a party is appealing the actual dissolution of marital bonds (a status), no supersedeas bond can be required to suspend the effect of the dissolution of marital bonds and that perfecting the appeal suspends the effect of the marital dissolution. The court said:

> Our conclusion is supported by older authority holding that when supersedeas is not available because the decree is declaratory, such as a divorce judgment, the common law rule that the judgment is suspended when the appeal is perfected is applicable. Cooper v. Decker, 21 S.W.2d 70, 71 (Tex. Civ. App.--Dallas 1929, no writ).

3. Divorce Appeal: Suspending Money Judgment or Award of Property. *In re Marriage of Richards*, 991 S.W.2d 30, 32 (Tex. App.--Amarillo 1998, no pet.), suggests that a divorce decree that awards monetary recovery to one spouse and against the other, or provides for the transfer of property from one spouse to the other, is subject to suspension by the posting of a supersedeas bond. See TEX. R. APP. P. 24. In *Powell v. Powell*, 822 S.W.2d 181, 184 (Tex. App.--Houston [1st Dist.] 1991, writ denied), the court said that the filing of a supersedeas bond obviates the need for liens or protective injunctions. *Beavers v. Beavers*, 651 S.W.2d 52, 53 (Tex. App.–Dallas 1983, ancillary motion), ruled that where the divorce decree awarded a money judgment to the wife, suspended for so long as the husband made monthly payments, the supersedeas bond that the husband must post to suspend collection was for the full amount of the judgment, and not just the installments that would come due during the pendency of the appeal.

4. Appeal From Child Custody or Conservatorship. TEX. R. APP. P. 24.2(a)(4) provides that the supersedeas bond procedure is not available for judgments for conservatorship or custody of a child. The trial court can suspend the effect of such a judgment pending appeal, with or without the posting of a supersedeas bond. The appellate court also can suspend the effect of such a judgment, pending appeal, "upon a proper showing." Ibid.

5. Appeal from Award of Child Support. *Clay v. Clay*, 550 S.W.2d 730, 735 (Tex. Civ. App.--Houston [1st Dist.] 1977, no writ), says that "[a]n appeal from a divorce judgment even though a supersedeas bond is filed does not supersede the child support or temporary alimony provisions of the judgment."

E. ISSUING AND ENFORCING TEMPORARY ORDERS PENDING APPEAL. The Texas Family Code provides that, in both appeals from divorce and appeals in suits affecting the parent-child relationship, the trial court is authorized to issue temporary orders pending appeal, and to enforce those orders pending appeal.

1. Temporary Orders Pending Appeal of Divorce. The relevant Texas Family Code provision permitting issuance and enforcement of temporary orders pending appeal of a divorce is Section 6.709.

> § 6.709. Temporary Orders During Appeal
>
> (a) Not later than the 30th day after the date an appeal is perfected, on the motion of a party or on the court's own motion, after notice and hearing, the trial court may render a temporary order necessary for the preservation of the property and for the protection of the parties during the appeal, including an order to:
>
> (1) require the support of either spouse;
>
> (2) require the payment of reasonable attorney's fees and expenses;
>
> (3) appoint a receiver for the preservation and protection of the property of the parties; or
>
> (4) award one spouse exclusive occupancy of the parties' residence pending the appeal.
>
> (b) The trial court retains jurisdiction to enforce a temporary order under this section unless the appellate court, on a proper showing, supersedes the trial court's order.

2. Temporary Orders Pending Appeal of SAPCR Decree. The relevant Texas Family Code provision permitting issuance and enforcement of temporary orders pending appeal in a SAPCR is Section 109.001.

> § 109.001. Temporary Orders During Pendency of Appeal
>
> (a) Not later than the 30th day after the date an appeal is perfected, on the motion of any party or on the court's own motion

> and after notice and hearing, the court may make any order necessary to preserve and protect the safety and welfare of the child during the pendency of the appeal as the court may deem necessary and equitable. In addition to other matters, an order may:
>
> (1) appoint temporary conservators for the child and provide for possession of the child;
>
> (2) require the temporary support of the child by a party;
>
> (3) restrain a party from molesting or disturbing the peace of the child or another party;
>
> (4) prohibit a person from removing the child beyond a geographical area identified by the court;
>
> (5) require payment of reasonable attorney's fees and expenses; or
>
> (6) suspend the operation of the order or judgment that is being appealed.
>
> (b) A court retains jurisdiction to enforce its orders rendered under this section unless the appellate court, on a proper showing, supersedes the court's order.
>
> (c) A temporary order rendered under this section is not subject to interlocutory appeal.
>
> (d) The court may not suspend under Subsection (a)(6) the operation of an order or judgment terminating the parent-child relationship in a suit brought by the state or a political subdivision of the state permitted by law to bring the suit.

The case of *Viggiano v. Emerson*, 794 S.W.2d 564 (Tex. App.–Amarillo 1990, ancillary proceeding), held that the trial court retains the authority to issue temporary orders during the pendency of the appeal under the Family Code provisions relating to temporary orders while the case is pending in the trial court (old Section 11.11). The rationale is somewhat dubious.

III. UNLIMITED REMAND. Ordinarily when an appellate court remands a case to the trial court for a new trial, the case is reopened in its entirety. *Gordon v. Gordon*, 704 S.W.2d 490, 491 (Tex. App.--Corpus Christi 1986, writ dism'd). The litigants can amend their pleadings, *Hudson v. Wakefield*, 711 S.W.2d 628, 631 (Tex. 1986), do pre-trial discovery, and even for the first time request a jury. *See Gordon v. Gordon*, 704 S.W. 2d 490, 492 (Tex. App.--Corpus Christi 1986, writ dism'd); *Harding v. Harding*, 485 S.W.2d 297, 299 (Tex. Civ. App.--San Antonio 1972, no writ).

IV. LIMITED REMAND. The Texas Rules of Appellate Procedure permit the courts of appeals and the Supreme Court to reverse and remand as to a part of the controversy if that part is clearly separable without unfairness to the parties. TEX. R. APP. P. 81(b)(1) (as to the courts of appeals); TEX. R. APP. P. 184(b) (as to the Supreme Court). However, appellate courts cannot order a re-trial on unliquidated damages alone if liability issues are contested. *Ibid. See Smith v. Smith*, 22 S.W. 3d 140, 153 (Tex. App.–Houston [14th Dist.] 2000, no pet.) (appellate court can sever divorce property division from dissolution of marital bonds, conservatorship, and support, and remand only the property division).

When the remand by the appellate court is limited to a particular issue or issues, the trial court must confine the retrial to such issue or issues. *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986); *V-F Petroleum, Inc. v. A.K. Guthrie Operating Co.*, 792 S.W.2d 508, 510 (Tex. App.--Austin 1990, no writ); *Texacally Joint Venture v. King*, 719 S.W.2d 652, 653 (Tex. App.--Austin 1986, writ ref'd n.r.e.); *Liberty Leasing Co., Inc. v. Still*, 582 S.W.2d 255, 257-58 (Tex. Civ. App.--Houston [1st Dist.] 1979, no writ). If a trial court permits the re-trial to exceed the scope of the limited remand, the appellate court can issue a writ of prohibition to stop the improper broadening of the issues to be re-tried. *Jones v. Strauss*, 800 S.W.2d 842 (Tex.1990) (Supreme Court issued writ of prohibition to stop trial court from hearing matters beyond scope of remand from Supreme Court); *see Bilbo Freight Lines, Inc. v. State*, 645 S.W.2d 925, 927 (Tex. App.--Austin 1983, writ ref'd n.r.e.) (where the issue is an error by the trial court in interpreting a judgment and mandate of the Supreme Court, the proper remedy is a petition for mandamus in the Supreme Court). In an appeal from the subsequent re-trial, the instructions limiting the remand must be adhered to. *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986). However, the complaining party must preserve error regarding the re-trial exceeding the scope of the limited remand, or the right to complain on appeal is waived. *Estate of Stonecipher v. Estate of Butts*, 686 S.W.2d 101, 103 (Tex. 1985).

It is unusual for an appellate court to limit the remand of a jury case. *Hudson v. Wakefield*, 711 S.W.2d at 630. Any conclusion that the remand after a jury trial is limited must clearly appear from the appellate decision. *Hudson v Wakefield*, 711 S.W.2d at 630.

Limited remands are not ordered in appeals from the granting of a summary judgment, for the following reasons. The party moving for summary judgment is not required to assert in the motion for summary judgment every claim or defense upon which judgment could be rendered. The party opposing summary judgment is free upon remand to employ different evidence and raise different legal issues that were not involved in the first summary judgment proceeding. If a motion for summary judgment is not successful, the parties are free to amend their pleadings, add or delete claims or defenses, join additional parties, etc. In the appeal from a summary judgment, the appellate court must evaluate the appellate record in a light most favorable to the non-movant, to determine whether the movant has conclusively shown the absence of material fact issues and entitlement to judgment as a matter of law. The conditions for a summary judgment are so different from the conditions of a trial on the merits that a limited remand after the appeal of a summary judgment is not appropriate *See Hudson v. Wakefield*, 711 S.W.2d at 630-31.

V. HOW TO DETERMINE THE SCOPE OF REMAND. Generally, when an appellate court remands a case for a new trial, the remand is unlimited in scope. *Gordon v. Gordon*, 704 S.W.2d 490, 491 (Tex. App.--Corpus Christi 1986, writ dism'd). If the remand is to be limited to certain issues, the limited nature of the remand must clearly appear from the appellate court's decision. *Gordon v. Gordon*, 704 S.W.2d 490, 491 (Tex. App.--Corpus Christi 1986, writ dism'd); *Price v. Gulf Atlantic Life Ins. Co.*, 621 S.W.2d 185, 187 (Tex. Civ. App.--Texarkana 1981, writ ref'd n.r.e.).

VI. REMAND IN DIVORCE CASES. The reversal and remand of a divorce case presents special problems. Where the appellate court sustains an attack on the property division but not the dissolution of marital bonds, a reversal and remand of the property division does not invalidate the trial court's dissolution of the marriage. *Herschberg v. Herschberg*, 994 S.W.2d 273, 276 (Tex. App.–Corpus Christi 1999, no pet. & orig. proceeding); *Gordon v. Gordon*, 675 S.W.2d 790, 794 (Tex. App.--Corpus Christi 1986, orig. proceeding) (property division and dissolution of marital bonds are clearly separable without unfairness to the parties). On remand in such a situation, the property is to be redivided as of the date of the original divorce. *Gordon v. Gordon*, 675 S.W.2d at 794; *Petrovich v. Vautrain*, 730 S.W.2d 857, 860 (Tex. App.--Fort Worth 1987, writ ref'd n.r.e.) (date of divorce is date trial court orally rendered non-interlocutory judgment, before first appeal). In such a re-trial, the trial court has the same discretion to make a just and right division of the marital estate as it does in an original divorce proceeding. *See Goetz v. Goetz*, 567 S.W.2d 892, 894 (Tex. Civ. App.--Dallas 1978, no writ) (limited remand on property division is to be treated like a property division on divorce, and not like a post-divorce suit to partition undivided community property).

The prospect of dividing an estate as it existed several years before retrial presents thorny questions about the impact of subsequent events. For example, if an asset on hand at divorce has since depreciated or been liquidated, must the trial court ignore this fact in re-dividing the estate? In *Parker v. Parker*, 897 S.W.2d 918, 932 (Tex. App.–Fort Worth 1995, writ denied), the court said:

> [T]he determination of whether to use the time of the divorce or the time of the division as the valuation date of an asset when the divorce and division of the property occur at different dates is in fact so specific that it should be left to the discretion of the trial judge to avoid the inequities that could result by making a bright line rule.

However, the appellate court in *Grossnickle v. Grossnickle*, 935 S.W.2d 830, 837 (Tex. App.--Texarkana 1996, writ denied), said:

> In spite of the flexibility that may be given to the court in limited situations for the purposes of equity, the better rule--and the rule generally followed in Texas--is to value the community assets as of the date of the divorce. Baccus v. Baccus, 808 S.W.2d 694 (Tex.App.--Beaumont 1991, no writ); May v. May, 716 S.W.2d 705 (Tex.App.--Corpus Christi 1986, no writ).

What consideration is given to the value of the use of assets in the interim? If existing debts have been reduced or paid in the interim, which credit balance should be used by the court, and what accounting should be made of principal and interest paid in the interim? No clear answers to these questions have emerged in the case law.

When the trial court's error in dividing the property invalidates essential fact findings, a new trial with new evidence is required. *Halbert v. Halbert*, 794 S.W.2d 535, 536-37 (Tex. App.--Dallas 1990, no writ) (judgment reversed because evidence insufficient to support jury finding; new evidentiary trial required on remand of property division). When the error in dividing the marital property was an error of law impacting only the rendition of judgment, the presentation of new evidence is not necessary and the trial court should re-divide the marital property without receiving new evidence. *Barker v. Barker*, 688 S.W.2d 121, 122 (Tex. App.--Corpus Christi 1985, no writ). Even when the taking of new evidence is not required, the appellate court still cannot itself redivide the property, since this would impermissibly substitute the appellate court's discretion for the trial court's discretion. *Jacobs v.*

Jacobs, 687 S.W.2d 731, 732-33 (Tex. 1985). The property division must be remanded to the trial court for a re-division.

In *Jacobs*, the Supreme Court said:

> Under a single point of error, husband argues that the court of appeals has erred in failing to remand the entire property division to the trial court for a new division. Husband contends that the court of appeals' piecemeal editing of the property division made by the trial court is contrary to McKnight v. McKnight, 543 S.W.2d 863 (Tex. 1976). We agree.
>
> In McKnight, the appellate court found the trial court had abused its discretion in how it divided the community estate and rendered a new division of the property. In reversing this judgment and remanding to the trial court, we held that an appellate court could not substitute its discretion for that of the trial court because a "just and right" division of the community estate was a matter lying solely within the discretion of the trial court. McKnight v. McKnight, 543 S.W.2d at 867.
>
> In the present case, the court of appeals modified the trial court's property division by rendering judgment on the two reimbursement claims while limiting its remand to specific properties found to have been mischaracterized. McKnight, however, dictates a remand to the trial court of the entire community property division for a new division. Although the court of appeals appears to recognize in its opinion that the reimbursement claims materially influenced the property division, the court simply attempts by some unarticulated method to expunge the value of such claims from the community property division. The result, if it could be achieved, would be to alter the trial court's plan for a "just and right" division of the community estate.
>
> It is, however, probably impossible to excise the reimbursement claims from the community property division, absent a remand of the community property division, because such claims are not represented in the divorce decree by any specific, identifiable award of money, nor are they traceable to any specific properties. Even if the reimbursement claims could be identified in the trial court's property division, the court of appeals could not simply modify the decree by striking the reimbursement awards "because to do so would be to make a new division of the estate of the parties, a matter within the discretion of the trial court."

Yet other cases establish that a remand for a new property division can, in some circumstances, be a limited remand. For example, in *Jensen v. Jensen*, 665 S.W.2d 107, 110 (Tex. 1984), the Supreme Court remanded a property division to the trial court for the limited purpose of determining what right of reimbursement, if any, was due the community estate from the husband's separate estate, with instructions to distribute this reimbursement claim between the parties "in addition to the property division heretofore made to the parties." In *Holloway v. Holloway*, 671 S.W.2d 51, 63 (Tex. App.--Dallas 1984, writ dism'd), the court said that the failure to award reimbursement is "clearly separable without unfairness to the parties." In *McCartney v. McCartney*, 548 S.W.2d 435, 440 (Tex. Civ. App.--Houston [1st Dist.] 1976, no writ), the court of appeals remanded a divorce for the limited purpose of dividing income tax liability, without otherwise altering the property division. In *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 403 (Tex. 1979), the Supreme Court reversed a division of railroad retirement benefits but did not remand the case for a new division, since under then-prevailing federal law the trial court could neither divide *nor consider* the existence of the retirement benefits in dividing the marital estate.

There is a seeming contradiction between *Jensen* and *Jacobs* regarding the appellate court's ability to limit the retrial to just the errors corrected by the appellate court. A possible distinction is that in *Jacobs* the appellate court eliminated reimbursement claims awarded by the trial court, which might lead to the trial court altering the division of property in some other manner to make up for the lost reimbursement claims, while in *Jensen* the appellate court added a reimbursement claim, which presumably can be awarded as the trial court sees fit without necessitating changes to the rest of the property division. However, in *Gutierrez v. Gutierrez*, 791 S.W.2d 659, 663 (Tex. App.--San Antonio 1990, no writ), an error in arriving at the amount of reimbursement awarded to the wife against the husband's separate estate led to a reversal and remand of the entire property division.

A special situation arose in *McLary v. Thompson*, 65 S.W.3d 829 (Tex. App.–Fort Worth 2002, pet. pending). There the parties agreed on the property division except for a retirement plan. Since the error affected only the retirement plan, the appellate court remanded only for a redivision of the retirement plan.

VII. THE LAW OF THE CASE DOCTRINE. The law of the case doctrine provides that a question of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages. *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986); *Cockerell v Republic Mortg. Ins. Co.*, 817 S.W.2d 106, 115 (Tex. App.--

Dallas 1991, no writ) (law of case is principle that "an appellate court has passed on a legal question and remanded the cause for further proceedings, the legal question determined by the appellate court will govern the case throughout all its subsequent stages"). See generally Mike Hatchell, *Doctrine of "Law of the Case,"* in APPELLATE PROCEDURE IN TEXAS chap. 21 at 507 (1979). It is said that the doctrine narrows the issues in successive stages of the litigation, achieving uniformity of decision as well as judicial economy and efficiency. *Hudson v. Wakefield*, 711 S.W.2d at 630.

A. QUESTIONS OF LAW, NOT FACT. The law of the case doctrine applies only to questions of law, not questions of fact. *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986); *Hunter v. Eastham*, 69 S.W. 66, 68 (Tex. 1902) (finding of fact by the court of appeals which is supported by the evidence is conclusive on the Supreme Court but not on the trial court on retrial); *see generally Glenn v. Prestegord*, 456 S.W.2d 901, 902-03 (Tex. 1970) (prior appellate determination that summary judgment was improper due to defendant's failure to conclusively show absence of negligence was not law of the case as to plaintiff's failure to prove proximate cause in trial on the merits). However, in *Parker v. Parker*, 897 S.W.2d 918, 923-24 (Tex. App.–Fort Worth 1995, writ denied), the appellate court applied the law of the case doctrine in a second appeal from the re-trial of a divorce, saying that the determination in the first appeal that a settlement agreement did not constitute a valid contract, was binding on the trial court upon retrial.

B. ISSUES NOT SUBSTANTIALLY THE SAME. The doctrine of the law of the case might not be applied if the issues presented or facts presented in successive appeals are not substantially the same as those presented in the first trial. *Hudson v. Wakefield*, 71128, 630 (Tex. 1986); *see Governing Bd. v. Pannill*, 659 S.W.2d 680-81 (Tex. App.--Beaumont 1983, writ ref'd n.r.e.) (where summary judgment was reversed and case then retried on the merits, trial court not bound by law of the case doctrine when the record at trial was "vastly different" from the record on summary judgment). However, in *Hudson*, the Supreme Court's determination on appeal of a summary judgment that a clause in a contract was a covenant and not a condition precedent, was law of the case, but still did not preclude the defendant from raising at trial fraud in the inducement as a defense to the contract.

C. NOT WHERE CLEARLY ERRONEOUS. Court have refused to apply the doctrine when the prior appellate ruling is clearly erroneous. *McCrea v. Cubilla Condominium Corp.*, 769 S.W.2d 261, 263-64 (Tex. App.--Houston [1st Dist.] 1988, writ denied) (subsequent change in law announced by Supreme Court rendered opinion on prior appeal clearly erroneous, so law of the case doctrine not applied); *Texas Employers Ins. Ass'n v. Tobias*, 740 S.W.2d 1, 2 (Tex. App.--San Antonio 1986, writ denied) (does not apply where prior ruling was clearly erroneous).

D. ONLY COURT OF LAW RESORT? Some cases indicate that the law of the case doctrine does not apply to a case appealed only to the court of appeals and not the Texas Supreme Court. *Baptist Memorial Hosp. System v. Smith*, 822 S.W.2d 67, 73 (Tex. App.--San Antonio 1991, no writ)(law of the case did not arise in connection with a former opinion of that court until the Supreme Court declined to reverse the court of appeals, denying the application for writ of error with the notation "n.r.e."); *see e.g., Allied Finance Co. v. Shaw*, 373 S.W.2d 100, 106 (Tex. Civ. App.--Fort Worth 1963, writ ref'd n.r.e.); *accord, Hurd Enterprises, Ltd., v. Bruni*, 828 S.W.2d 101, 106 (Tex. App.--San Antonio 1992, writ denied) (law of case doctrine applied where Supreme Court denied writ of error on former opinion). Appellate practitioner Mike Hatchell has taken a firm position that the doctrine does apply to decisions of intermediate appellate courts. See Mike Hatchell, *Doctrine of "Law of the Case,"* in APPELLATE PROCEDURE IN TEXAS § 21.6[2][b] at 518 (1979). What happens when an appellant obtains a remand from the court of appeals, and yet in the process receives from the court of appeals a determination on the law that is adverse to the appellant's position on re-trial? In one such instance the successful appellant appealed further to the Supreme Court, complaining of the court of appeals' interpretation of the law. *See Hollingsworth v. King*, 816 S.W.2d 340 (Tex. 1991). The Supreme Court denied writ of error, but published a per curiam opinion saying that it expressed no opinion on that particular contention, and that the denial of the application should not be taken as approving "any other part of the court of appeals' opinion." One wonders if the law of the case doctrine would apply is such a situation, where the Supreme Court specifically expressed no opinion on the legal question in issue.

VIII. ESTOPPEL AS A DEFENSE UPON RE-TRIAL AFTER REMAND. In the case of *In re Marriage of Rutherford*, 614 S.W.2d 498 (Tex. Civ. App.--Amarillo 1981, writ dism'd), a divorce decree was reversed and remanded, and the wife pled the husband's acceptance of benefits under the prior decree as a defense in the re-trial. The issue of estoppel to challenge the prior judgment was submitted to a jury, which found against the husband. The trial court therefore held husband bound to the terms of the former decree of divorce, despite its having been reversed, and this application of the estoppel doctrine was affirmed on appeal. The matter of estoppel was raised on appeal after remand in yet another case, but dismissal was denied because the trial court found on remand that wife

had sold home due to financial inability to make monthly mortgage payments. *Cole v. Cole*, 568 S.W.2d 152, 155 (Tex.
Civ. App.--Dallas 1978, no writ).

IX. ENFORCEMENT OF APPELLATE COURT JUDGMENTS. When an appellate court affirms a trial court's judgment, or renders the judgment that the trial court should have rendered, the judgment becomes a judgment of both courts. *Cook v. Cameron*, 733 S.W.2d 137, 139 (Tex. 1987). It then becomes the duty of the trial court to enforce the judgment as rendered." The trial court has some measure of discretion in fulfilling the terms of the mandate. *Texacally Joint Venture v. King*, 719 S.W.2d 652, 653 (Tex. App.--Austin 1986, writ ref'd n.r.e.) (not error for trial court, after reversal and remand with instructions to enter judgment for specific performance of contract, to give party one week to perform contract). The failure or refusal of the trial court to enforce the appellate court's judgment can be cured by mandamus, prohibition, or appeal from a subsequent trial proceeding in which the issue arises. See *Cook v. Cameron*, 733 S.W.2d 137, 139 (Tex. 1987) (question of enforcement of prior Supreme Court judgment arose on appeal from trial court's order of enforcement and clarification of that prior judgment); *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984) (mandamus granted requiring trial court to reinstate temporary injunction which had been affirmed by Supreme Court and which the trial court later dissolved; the temporary injunction became a judgment of both the trial court and appellate court, and it could not be dissolved by the trial court after it had been affirmed by the Supreme Court); *Schliemann v. Garcia*, 685 S.W.2d 690, 693 (Tex. App.--San Antonio 1984, orig. proceeding) (mandamus conditionally granted where district court interfered with enforcement of judgment affirmed by the court of appeals); *Bilbo Freight Lines, Inc. v. State*, 645 S.W.2d 925, 927 (Tex. App.--Austin 1983, writ ref'd n.r.e.) (where the issue is an error by the trial court in interpreting a judgment and mandate of the Supreme Court, the proper remedy is a petition for mandamus in the Supreme Court).
The fact that a holding may be later overruled or disapproved in no way affects the rights of the parties to that former judgment. *Cook v. Cameron*, 733 S.W.2d 137, 139 (Tex. 1987) (doctrine of res judicata binds parties to result of their case); *Segrest v. Segrest*, 649 S.W.2d 610, 612 (Tex. 1983), cert. denied, 464 U.S. 894 (1983). Defenses to the former judgment that could have been raised in the former litigation cannot be raised in the enforcement proceeding, under the doctrine of res judicata. *Cook v. Cameron*, 733 S.W.2d 137, 140 (Tex. 1987).

If a second court interferes with the enforcement of a judgment affirmed by an appellate court, the appellate court can issue a writ of prohibition or other writs to protect the enforceability of its judgment. See *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680 (Tex. 1989) (appellate court can issue writ of prohibition to stop interference with enforcement of judgment previously affirmed by the appellate court).