DEALING WITH THE FAMILY HOME ON DIVORCE

By

Richard R. Orsinger

HEARD, GOGGAN, BLAIR,
WILLIAMS & HARRISON
1019 Tower Life Building
San Antonio, Texas 78205

SOUTHERN METHODIST UNIVERSITY SCHOOL OF LAW'S

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In recent years, the attention of writers and lecturers in family law has shifted from the more ordinary assets, such as cars and homes, to more complicated and unusual assets, like retirement benefits and pensions, closely-held corporations, partnerships, trusts, professional licenses, and the like.

These other assets are not, however, the ones which most often confront the family lawyer. Complex property issues most often present themselves in connection with the family home. To handle these issues properly, the practitioner must understand the full range of property law, marital property law and tax law, and must know what can happen to the family home upon divorce.

No article is available in the continuing legal education materials of this State which addresses the issues surrounding the family home in a comprehensive way. This Article is meant to serve such a purpose--gathering into one reference source relevant law, analysis and literature,

in order to illuminate the issues which can arise in dealing with the family home on divorce.

I. INTRODUCTION. The focus of this Article is the family home on divorce. However, this topic involves virtually every aspect of family law, from questions of ownership, to the definitions of separate and community property, marital property liability, homestead protection, property management rights, reimbursement, valuation, rules of cotenancy, divorce procedures and child support obligations. Insurance rights and income taxation are also important factors. These subjects are treated individually in this Article, and related through discussion and example to the family home.

II. OWNERSHIP OF THE HOME. The rights of unmarried persons in a home are governed by rules of ordinary property law, and rules of cotenancy, sometimes complicated with allegation of partnership, joint venture, resulting trust, or of fiduciary relationships giving rise to a constructive trust. Between spouses, rights in the family home are controlled by marital property rules, which can also be complicated by trust principles. This Section II summarizes the Texas rules of ownership and marital property law as they apply to the family home.

Texas marital property law is a community property system, implemented through the inception of title rule. Simply stated, in Texas a spouse's property is either separate or community, depending on the circumstances surrounding its acquisition. However, when an asset is acquired by a spouse through an entity such as a joint venture, partnership, corporation or trust, there is no ownership of the asset by the spouse. The inception of title in the entity shields all assets acquired by the entity during marriage from community ownership claims. And title does not always reflect ownership, as with an express or resulting trust, or when a constructive trust is imposed. In these instances title to property may be taken by the court from one person and awarded to another.

A. ESTABLISHING OWNERSHIP. The starting point for evaluating claims in the family home is to determine where ownership lies. If the parties are unmarried, or if the marriage is an informal marriage subject to dispute, counsel must consider who owns what interest in the house if no marriage exists. If a marriage does exist, then counsel must determine whether the property is separate or community. If title to the

home is in a corporation, partnership or trust, or in a third person, then a party may try to take title from such an entity or third person, by establishing an express trust, a resulting trust or a constructive trust. If the house is owned by an entity, perhaps ownership can be captured by proving that the entity is an alter ego of the other party. If the house was transferred away by the other party, then a suit to set aside a fraudulent conveyance, or to establish actual or constructive fraud, may be brought.

In most dissolution cases, ownership is indisputably in one or both spouses, and the issue is whether their interests are separate or community. These ownership and characterization issues are discussed in this section of the Article.

1. Presumption of Ownership From Possession. Present possession of land gives rise to a presumption of ownership in the possessor. RAY, TEXAS LAW OF EVIDENCE, CIVIL AND CRIMINAL § 110 (West 1980). A similar presumption arises from present possession of personalty. Id.

2. Presumption of Ownership From Title. A deed, when introduced into evidence, raises a presumption that the grantee in the deed is the owner of the property. Sims v. Duncan, 195 S.W.2d 156, 159 (Tex. Civ. App.--Galveston 1946, writ ref'd n.r.e.). Where two persons are named as grantees in the deed, but their interests are not specified, a presumption arises that each of the grantees is vested with title to an equal undivided interest in the property. Zephyr v. Zephyr, 679 S.W.2d 553 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.). Where the grantees are husband and wife, the presumption arises that the property is community property. Ordinarily, an interest in real property can be established only by a valid written instrument, not by parol evidence. Rocha v. Campos, 574 S.W.2d 233, 236 (Tex. Civ. App.--Corpus Christi 1978, no writ). From a practical standpoint, however, unless the holding of legal title is disputed, oral testimony of that fact will not raise objection. Still, prudence dictates that a certified copy of the deed establishing your client's ownership be available, if a dispute is possible.

B. THE LAW OF FIXTURES. Another rule of Texas law affecting the family home is the "law of fixtures." Under the law of fixtures, whatever is affixed to the land becomes part of the land. Missouri Pacific Ry. Co. v. Cullers, 81 Tex. 382, 17 S.W. 19, 22 (1891); Citizen's National Bank of Abilene v. Elk Manufacturing Co., 17 S.W. 19 (Tex. Comm'n App. 1930, opinion adopted). In the context of marriage, if land is separate property, then any improvements affixed to the land become part of the land, and are separate property. If community property is used to improve separate real estate of a spouse, and thereby loses its

community character, a right of reimbursement in favor of the community arises. See Lindsay v. Clayman, 254 S.W.2d 777 (Tex. 1952). A right to reimbursement also arises when separate property of one spouse is used to improve community realty, or the separate property of the other spouse. See the discussion of reimbursement in Section iii of this Article, at p. 41 below.

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

2. Three-Pronged Test. The Texas Supreme Court has established a three-pronged test for fixtures: (1) has there been a real or constructive annexation of the property to the realty; (2) was there a fitness or adaptation of the item to the uses or purposes of the realty; (3) was it the intention of the party annexing it that the chattel should become a permanent accession to the freehold? O'Neill v. Quiltes, 111 Tex. 345, 234 S.W. 528 (1921). The latter factor is controlling; the first two are primarily evidentiary. Capital Aggregates, Inc. v. Walker, 488 S.W.2d 830, 834 (Tex. Civ. App.--Austin 1969, writ ref'd n.r.e.).

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

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

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

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

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

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

C. SEPARATE VS. COMMUNITY. Separate property is defined in the Texas Constitution and the Texas Family Code. Community property consists of all property acquired by a spouse during marriage, that is not his or her separate property. TEX. FAM. CODE ANN. § 5.01(b) (Vernon 1975). To determine a spouse's ownership and management rights in personal property acquired while domiciled in another jurisdiction, or in realty located in another jurisdiction, one must refer to conflict of laws rules to determine the applicable law. The importance to the Texas lawyer of the laws of other states has been diminished by the addition of Section 3.63(b) to the Texas Family Code, which makes property acquired by a spouse while domiciled in another jurisdiction divisible on divorce in Texas if the property would have been community had the acquiring spouse been domiciled in Texas at the time of acquisition.[1] Conflicts analysis is still necessary, however, when evaluating rights of spouses during marriage, or upon dissolution of marriage by death.

1. Definition of Separate Property. Separate property is defined both in the Texas Constitution and in the Texas Family Code. Under the Constitution, all property owned or claimed by a spouse before marriage, and that acquired after marriage by gift, devise, or descent, is the separate property of the spouse. Spouses, or persons about to marry, can partition or exchange community property on hand or to be acquired,

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[1] The Supreme Court of Texas has also adopted this rule of law as a matter of public policy. Cameron v. Cameron, 641 S.W.2d 210 (Tex. 1982).

with the result that the partitioned or exchanged assets belong to the separate estate of one or the other spouse. Spouses also may agree that the income or property from all or part of the separate estate of one spouse shall be the separate property of that spouse. Also, where one spouse gives property to the other spouse, a presumption arises that the gift includes all income or property which might arise from the property given. TEX. CONST. art. 16 § 15 (Vernon Supp. 1986).

Section 5.01 of the Texas Family Code defines a spouse's separate property as: (1) the property owned or claimed by the spouse before marriage; (2) the property acquired by the spouse during marriage by gift, devise, or descent; and (3) the recovery for personal injury sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage. TEX. FAM. CODE ANN. § 5.01(a) (Vernon 1975). Section 5.42 of the Texas Family Code provides that property transferred to a spouse by a partition or exchange agreement becomes his or her separate property. TEX. FAM. CODE ANN. § 5.42 (Vernon Supp. 1986). Section 5.43 of the Texas Family Code provides that spouses may agree that the income or property arising from separate property assets shall be the separate property of the owning spouse. TEX. FAM. CODE ANN. § 5.43 (Vernon Supp. 1986). Section 5.04 of the Texas Family Code provides that where one spouse gives property to the other, the gift is presumed to include all the income and property which may arise from that property. TEX. FAM. CODE ANN. § 5.04 (Vernon Supp. 1986).

a. Gift. Property received by gift during marriage is separate property. What is a gift? As stated by the Texas Supreme Court in Hilley v. Hilley, 161 Tex. 569, 342 S.W.2d 565, 569 (Tex. 1961), "[a] gift is a transfer of property made voluntarily and gratuitously." There are two ways to make a gift of real estate: by deed, and by parol gift of realty when certain conditions are met. Grimsley v. Grimsley, 632 S.W.2d 174, 178 (Tex. App.--Corpus Christi 1982, no writ). Three things are required to make a gift of personalty: (1) intent to make a gift; (2) delivery of the property; and (3) acceptance of the property. Grimsley v. Grimsley, 632 S.W.2d 174, 177 (Tex. App.--Corpus Christi 1982, no writ).

(1) Burden of Proving Gift. The burden of proving an inter vivos gift is on the party claiming that the gift occurred. Woodworth v. Cortez, 660 S.W.2d 561, 564 (Tex. App.--San Antonio 1983, writ ref'd n.r.e.).

(2) Donative Intent. The controlling factor in determination of a gift inter vivos is the intent of the donor ....." Alexander v. Bowens, 595 S.W.2d 176, 178 (Tex. Civ. App.--Tyler 1980, no writ). In the case of Haile v. Holtzclaw, 414 S.W.2d 916, 927

(Tex. 1967), the Supreme Court said: "In determining whether a gift was intended by the execution of a deed, we must look to the facts and circumstances surrounding its execution in addition to the recitation in the deed itself." In Haile, the Supreme Court held the conveyance was a gift, as a matter of law, despite contrary testimony from the donor. The testimony of the donor is admissible to prove that a gift was intended to one and not both spouses. Grost v. Grost, 561 S.W.2d 223, 228 (Tex. Civ. App.--Tyler 1978, writ dism'd). The Supreme Court has held that "a witness cannot testify to the state of mind of another person." Lehman v. Corpus Christi Nat. Bank, 668 S.W.2d 687, 689 (Tex. 1984). See also Christian v. Walker, 381 S.W.2d 675 (Tex. Civ. App.--Texarkana 1964, no writ) (conclusory opinion that person made a gift is not admissible on the point).

(3) Delivery Required. There has to be actual or constructive delivery to the donee for a gift to occur; Bishop v. Bishop, 359 S.W.2d 869, 871 (Tex. 1962) (re: personalty). See Grimsley v. Grimsley, 632 S.W.2d 174 (Tex. App.--Corpus Christi 1982, no writ).

(a) Delivery For Real Estate. Possession of a deed by the grantee raises a presumption of delivery. The recording of a deed also raises a presumption of delivery. RAY, 1 TEXAS LAW OF EVIDENCE, CIVIL & CRIMINAL § 112 (1980). See Raymond v. Aquarius Condominium Owners Ass'n, Inc., 662 S.W.2d 82 (Tex. App.--Corpus Christi 1983, no writ) (filing of deed creates rebuttable presumption of delivery).

(b) Delivery For Personalty. Under Section 24.04, TEX. BUS. & COMM. CODE ANN. (Vernon 1968), a purported gift of tangible personal property is void unless the donee, or someone on his behalf, takes actual possession of the property, or unless the gift is evidenced by a deed which is either acknowledged or proved and recorded, or is evidenced by a probated will. However, statements by the donor indicating he has given the personalty to the donee raise a fact issue as to delivery. Bishop, supra at 871. And the rules regarding delivery of personalty are somewhat relaxed where donor and donee are members of a family living together in the same house. Id., at 871.

(4) Acceptance. Proof of acceptance of a gift is aided by a presumption that a donee will not refuse a gift of valuable property. See 41 TEX. JUR. 3d Gifts § 19 (1985). Also, the filing of a deed is prima facie evidence of acceptance. Raymond, supra at 91.

(5) Parol Gift of Land. To establish a parol gift of land, the proponent must show three elements: (1) the gift; (2)

possession under the gift by the donee with the donor's consent; (3) permanent and valuable improvements to the property by the donee, with the donor's knowledge and consent. Absent such improvements, a parol gift of land will be recognized only if to refuse to do so would work a fraud on the donee. Dawson v. Tumlinson, 150 Tex. 451, 242 S.W.2d 191, 192-93 (1951). The test is essentially the same as the test for a parol sale of land, announced in Hooks v. Bridgewater, 111 Tex. 122, 229 S.W. 1114 (1921), except that proof of gift instead of proof of consideration is required. Dawson, supra at 192-93. See Grimsley v. Grimsley, 632 S.W.2d 174, 178 (Tex. App.--Corpus Christi 1982, no writ) (trial court's finding of parol gift of land from man to woman prior to marriage reversed).

(6) Gift vs. Onerous Consideration. To what extent can gift occur where onerous consideration is paid for the property? As stated in Kearse v. Kearse, 276 S.W. 690, 693 (Tex. Comm'n App. 1925, jdgmt. adopted): "'Gift' and 'onerous consideration' are exact antitheses. The idea of their existence involves a paradox." The Supreme Court said that "[c]onsideration precludes the idea of a gift." Williams v. McKnight, 402 S.W.2d 505, 508 (Tex. 1966). Thus, it has been held that a recital of onerous consideration in a deed "negatives the idea of a gift (prima facie, at least)." Kitchens v. Kitchens, 372 S.W.2d 249, 255 (Tex. Civ. App.--Waco 1963, writ dism'd) (quoting Kearse, supra). In Kitchens, the fact that the "gift" deed recited the assumption by the grantee of vendor's lien notes on the property negated the idea of a gift to the transferee. Id. at 255.

However, in Kiel v. Brinkman, 668 S.W.2d 926 (Tex. App.--Houston [14th Dist.] 1984, no writ), a conveyance of real property was found to be a gift from the husband's parents to the husband even though the property was conveyed subject to an $1,800.00 mortgage which the husband paid off with a loan taken out during marriage. The Court of Appeals indicated that "[a] grantor may make a gift of encumbered property and a conveyance may be a gift even if the grantee assumes an obligation to extinguish the encumbrance." Id. at 929. The court went on to say:

> There has been no showing that as a matter of law [the husband's parents] made the conveyance to [the husband] in exchange for the [husband] extinguishing the debt. See Hilley v. Hilley, 161 Tex. 569, 342 S.W.2d 565, 569 (1961). Without such a showing it cannot be said that as a matter of law the conveyance was

> not a gift. A fact issue existed as to whether the transaction was a gift or a sale.

Id. at 929. In Kiel, a jury found that a gift was intended. Id. at 929. Arguably, the parents' intention of gift should have effect only for the equity in the property. The $1,800.00 in community credit used to acquire the land should create a fractional community property interest in the land.

See Babb v. McGee, 507 S.W.2d 821 (Tex. Civ. App.--Dallas 1974, writ ref'd n.r.e.), where the deed from husband to wife recited consideration of "Ten Dollars ($10.00) and Love and Affections." At the time of conveyance the land was subject to a note and deed of trust lien, subsequently paid with community funds. The trial court was upheld in its finding that the transfer was intended as a gift. Id. at 823.

See also John Hancock Mut. Life Ins. Co. v. Bennett, 128 S.W.2d 791, 797 (Tex. Comm'n. App. 1939, opinion adopted), where an elderly father conveyed realty to his son in exchange for the son's promise to pay the father $200.00 per year, such promise secured by lien in the land and its crops. The transaction was deemed not to be a sale for onerous consideration. The dominant purpose was to give, not to sell.

Smith v. Smith, 620 S.W.2d 619 (Tex. Civ. App.--Dallas 1981, no writ), involved land conveyed by a mother to her two daughters and their husbands, by deed reciting ten dollars and other valuable consideration, plus the execution and delivery of a $181,378.75 note to the mother, secured by vendor's lien and deed of trust, all signed by the grantees. The daughters paid the interest, but not principal, payments which came due for three years. The mother then forgave the past-due principal payments. The mother also gave the daughters $66,000.00 to be applied on the note, and reamortized the payments downwards. In one daughter's divorce, the daughter testified that the mother was distributing her estate, and put the husbands' names on the deed only so she could give $6,000.00 per year to each of her daughters without paying gift tax, instead of just $3,000.00 per daughter. The trial court found gift, since the mother intended to forgive all the principal. The appellate court rejected this argument, saying that the mother could have ceased forgiving installments at any time, leaving the daughters and their husbands bound on the note. The transaction was held to be a sale.

(7) Recital of Gift. A deed which recites consideration of "ten dollars and love and affection" is a gift deed. Indemnity Ins. Co. of North America v. Hare, 107 S.W.2d 737, 739 (Tex. Civ. App.--Beaumont 1937), rev'd in part on other grounds, First

National Bank in Hemphill v. Arnold, 128 S.W.2d 1151 (Tex. Comm'n App.--1939, opinion adopted).

(8) Deed to Both Spouses, Where real property is conveyed by gift, and both spouses are named in the deed, the gift vests in each spouse an undivided one-half separate property interest in the land. White v. White, 590 S.W.2d 587, 588 (Tex. Civ. App.--Houston [1st Dist.] 1979, no writ).

(9) Presumption of Gift From Parent to Child. There is a presumption that a parent intends to make a gift to his child if the parent delivers possession, conveys title, or purchases property in the name of the child. Burk v. Turner, 79 Tex. 276, 15 S.W. 256, 257 (1891); Woodworth v. Cortez, 660 S.W.2d 561, 564 (Tex. App.--San Antonio 1983, writ ref'd n.r.e.). See Dennis v. Dennis, 256 S.W.2d 964, 965 (Tex. Civ. App.--Amarillo 1952, no writ) (where one causes deed to be taken in name of another, without consideration from the other, presumption arises of resulting trust; where the grantee is a child of the grantor, however, the transaction is presumed to be an advancement, with absolute title in the child).

(10) Jury Issue and Instruction. A sample special issue and jury instruction on gift was set out in Hammonds v. Roper, 493 S.W.2d 569, 572 (Tex. Civ. App.--Corpus Christi 1973, writ ref'd n.r.e.):

ISSUE NO. 1

> Do you find from a preponderance of the evidence that the Plaintiff, Hammonds, made a gift of the horse, Miss Barbara, to the Defendant, Scott Roper?
>
> Answer: "He Did" or "He Did Not."
>
> We, the Jury, Answer: _____.
>
> You are instructed in connection with Issue No. 1 in order for there to have been a gift of the horse by Hammonds to Scott Roper there must have been a delivery of possession of the horse by Hammonds to Scott Roper, with the intention on the part of Hammonds to vest the ownership of the horse in question in defendant, Scott Roper, immediately and unconditionally; and an acceptance of the horse by Scott Roper."

b. Devise and Descent. Property acquired by a spouse during marriage by devise or descent is also separate property. Where a spouse acquires property in settlement of his inheritance, that too is his separate property. Estate of McWhorten v. Wooten, 622 S.W.2d 844, 846 (Tex. 1981).

2. Definition of Community Property. Community property is defined as "the property, other than separate property, acquired by either spouse during marriage." TEX. FAM. CODE ANN. § 5.01 (Vernon 1975). The Supreme Court of Texas has also developed an "affirmative test" for community property:

> [T]hat property is community which is acquired by the work, efforts or labor of the spouses or their agents, as income from their property, or as a gift to the community. Such property, acquired by the joint efforts of the spouses, was regarded as acquired by "onerous title" and belonged to the community.

Graham v. Franco, 488 S.W.2d 390, 392 (Tex. 1972).

3. Presumptions Affecting Proof of Character. There are a number of presumptions which affect the proof of whether an asset is community property or separate property of a spouse.

a. Presumption of Community Property. Property possessed by either spouse during or on dissolution of marriage is presumed to be community property. TEX. FAM. CODE ANN. § 5.02 (Vernon 1975). Whoever would show otherwise must bring forward proof that the asset in question is not community property. McKinley v. McKinley, 496 S.W.2d 540, 543 (Tex. 1973). This can be done by showing that the property is not owned by the spouse, or that it is separate property.

b. Presumption of Community Credit. There is a presumption under Texas law that "debts contracted during marriage are presumed to be on the credit of the community and thus are joint community obligations, unless it is shown the creditor agreed to look solely to the separate estate of the contracting spouse for satisfaction." Cockerham v. Cockerham, 527 S.W.2d 162, 171 (Tex. 1975). The mere intent of the spouses does not control whether the credit is community or separate. Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881 (1937).[2] Some

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[2] Note that even if the debt created to buy an asset is a community liability, the property acquired on this community credit may become the separate property of the other spouse, if a gift,

courts of appeals have taken a liberal view of what constitutes proof of an agreement by the lender to look solely to the borrowing spouse's separate estate for repayment. For example, in Brazosport Bank of Texas v. Robertson, 616 S.W.2d 363, 366 (Tex. Civ. App.--Houston [14th Dist.] 1981, no writ), the court held that the bank's loaning money to the wife over the husband's objection, where the note was signed by the wife alone and the title to the automobile taken in the wife's name alone, constituted an agreement by the lender to look to the wife alone for satisfaction of the debt. See also Holloway v. Holloway, 671 S.W.2d 51, 57 (Tex. App.--Dallas 1983, writ dism'd), where an implied agreement on part of creditor to look solely to husband's separate estate was construed from the fact that the loan proceeds were deposited into an account designated as the husband's separate property account, and that husband alone signed the loan papers "Pat S. Holloway, Separate Property," and that only husband's separate property was used a collateral. Compare with Broussard v. Tian, 295 S.W.2d 405 (Tex. 1956), where evidence that the down payment for land was made with the husband's separate property, and that all payments on the note secured by the land were also made with husband's separate property, and that the deed ran to husband alone and that husband alone signed the note and deed of trust, and that the spouses were separated at the time of the transaction, and that the banker and husband discussed payment of the note with husband's separate property royalty income, was held insufficient to support a jury finding of an agreement that the note would be paid out of the husband's separate estate.

(1) Is Parol Evidence Admissible? In Broussard v. Tian, 295 S.W.2d 405, 406 (Tex. 1956), the Supreme Court specifically reserved its opinion on whether parol evidence could be used to establish the noncommunity character of a debt incurred during marriage. Subsequent decisions appear to allow parol evidence on the point.

(2) Distinguish Joint Debt From Community Debt. The question of whether a debt is a separate or community debt is different from the question of whether the debt is a joint debt. A debt is a separate debt only if the creditor agrees to look solely to the borrowing spouse's separate estate for repayment. In this instance, the community estate and the other spouse's separate estate are not liable for the separate debt. If the debt is a community debt incurred by one spouse, then the ordinary rules of marital property liability apply. See TEX. FAM. CODE ANN. § 5.61 (Vernon Supp. 1985). A joint debt of the spouses is a debt for which each of the spouses is personally liable. Under Section 5.61 of

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partition or exchange is effected. See 3 L. SIMPKINS, TEXAS FAMILY LAW § 15.72, at 163 (Spear's 5th ed. 1976).

the Family Code, all non-exempt separate and community property is liable for a joint debt. The significance of a finding that a debt is a "community debt" is not so much the types of property which is subject to such debt, but rather, the fact that the loan proceeds, or the asset purchase with the community debt, is community property.

c. Presumptions From Deed Recitals. Presumptions as to the character of realty possessed by a spouse can arise from recitals contained in the deed. When the deed to the spouse recites that separate property consideration was paid, or that the property was taken as the grantee-spouse's separate property, a presumption of separate property arises.[3] Kahn v. Kahn, 94 Tex. 114, 58 S.W. 825, 826 (1900). Where the other spouse is transferor, or is otherwise chargeable with causing or acquiescing in the recital, the presumption of separate property becomes irrebuttable. Id. at 826. Accord, Henry S. Miller Company v. Evans, 452 S.W.2d 426, 431 (Tex. 1970); Lindsay v. Clayman, 254 S.W.2d 777, 780 (Tex. 1952). However, even the irrebuttable presumption can be overcome by proof that the recitals were inserted in the deed through fraud, accident or mistake. Henry S. Miller Company, supra, at 431.[4] Although no cases have been found so stating, the same rationale should apply where the deed recites community property, rather than separate property.

d. Presumption From Interspousal Conveyance, Without Recital of Separate Property. Even without a recital that the grantee-spouse receives the realty as separate property, where one spouse conveys realty to the other spouse, there is a presumption that the grantor-spouse made a gift to the grantee-spouse. Kahn v. Kahn, 94 Tex. 114, 58 S.W. 825 (Tex. 1900). The presumption arises even though the deed is not a gift deed. If the realty was community property, the presumption of gift applies to the entire property, not just to the grantor's undivided one-half community property interest.[5] The presumption of gift from an interspousal conveyance containing no gift language or recital of separate property is rebuttable by evidence of no donative intent. Kahn, supra at 826; Powell v. Jackson, 320 S.W.2d 20, 23 (Tex. Civ. App.--

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[3] But see Holcemback v. Holcemback, 580 S.W.2d 877 (Tex. Civ. App.--Eastland 1979, no writ), holding that when the deed conveying real property from a third party to a spouse recites separate property, and the other spouse is not a party to the transaction, no presumption arises.

[4] For a discussion of what constitutes fraud, accident or mistake, see Orsinger, Intra and Inter Family Transactions, STATE BAR OF TEXAS ADVANCED FAMILY LAW COURSE J-28--40 (1983).

[5] If such a gift is found, a presumption arises that the income or property from the property is part of the gift. TEX. CONST. art. XVI, § 15 (Vernon Supp. 1986); TEX. FAM. CODE ANN. § 5.04 (Vernon Supp. 1986).

Amarillo 1958, writ ref'd n.r.e.). Where the deed recites a conveyance as the grantee's separate property, however, the presumption of gift is irrebuttable. See discussion of the point in the previous subsection.

e. Presumption From Naming Other Spouse in the Deed. Where one spouse exchanges separate property for realty, but takes title in the name of the other spouse alone, a rebuttable presumption of gift to the grantee-spouse arises. Kahn v. Kahn, 984 Tex. 114, 58 S.W. 825, 826 (Tex. 1900); Kitchens v. Kitchens, 372 S.W.2d 249, 255-56 (Tex. Civ. App.--Waco 1963, writ dism'd). The presumption may be overcome by evidence showing a different intent. Peterson v. Peterson, 595 S.W.2d 889, 892 (Tex. Civ. App.--Austin 1980, writ ref'd n.r.e.). Where separate property consideration is exchanged for realty, and title is taken in the name of both spouses, a rebuttable presumption arises of a gift of a one-half interest in the land to the grantee-spouse. Cockerham v. Cockerham, 527 S.W.2d 162, 168 (Tex. 1975); Peterson, supra at 892. Where a spouse gives community property for realty, no presumption of gift arises from the taking of title in the name of the other spouse alone, Kahn, supra at 826, or in the name of both spouses. Gibson v. Gibson, 614 S.W.2d 487, 488 (Tex. Civ. App.--Tyler 1981, no writ).

4. Property Acquired in Other States. Conflict of laws rules generally determine which law will control the rights of spouses in property acquired while domiciled elsewhere, or in realty located outside Texas. The power of a court, in a decree of divorce or annulment, to divide such property of the spouses is controlled by Section 3.63(b) of the Texas Family Code, which applies the Texas concepts of community and separate property to property acquired by spouses while domiciled elsewhere. TEX. FAM. CODE ANN. § 3.63(b) (Vernon Supp. 1986). Outside of divorce, however, such as in lawsuits brought by creditors during marriage, or upon the dissolution of marriage by death, conflict of laws rules will determine which law controls.

a. Property Owned at Marriage. The rights of a spouse in movables owned by the other spouse at the time of marriage are determined by the law of the first marital domicile. See Avery v. Avery, 12 Tex. 54, 56-57 (1854). The rights of a spouse in the immovable assets owned by the other spouse at the time of marriage are determined by the law of the situs of the immovables. See 3 L. Simpkins, TEXAS FAMILY LAW § 16.2, at 177 (Spear's 5th ed. 1976).

b. Property Acquired During Marriage. The rights of the spouses in property acquired during marriage is controlled by the law of the marital domicile at the time of acquisition, as to movables. Oliver v. Robertson, 41 Tex. 422, 425 (1974); Tirado v. Tirado, 357

S.W.2d 468, 471-72 (Tex. Civ. App.--Texarkana 1962, writ dism'd); Huston v. Colonial Trust Co., 266 S.W.2d 231, 233 (Tex. Civ. App.--El Paso 1954, writ ref'd n.r.e.). The rights of spouses in immovables acquired during marriage is determined by the law of the situs. Commissioner v. Skaggs, 122 F.2d 721, 723 (5th Cir. 1941), cert. denied, 315 U.S. 811 (1942); Huston v. Colonial Trust Co., 266 S.W.2d 231, 233-34 (Tex. Civ. App.--El Paso 1954, writ ref'd n.r.e.); Bell v. Bell, 180 S.W.2d 466, 469 (Tex. Civ. App.--El Paso 1944, writ ref'd w.o.m.).

c. Secondary Authorities. A discussion of Texas conflict of laws rules insofar as they apply to Texas marital property law is discussed in Stewart and Orsinger, Fitting a Round Peg into a Square Hole: Section 3.63, Texas Family Code and the Marriage That Crosses State Lines, 13 ST. MARY'S L.J. 477, 497-499 (1982). See also 39 TEX. JUR. 3d Family Law § 462 (1985).

5. Property Acquired Through Other Entities. The trial court has no authority to divide assets of a business owned by a spouse. For example, the trial court was reversed for awarding specific partnership property to the wife, even though the husband owned a 50% interest in the partnership. McKnight v. McKnight, 543 S.W.2d 863, 867 (Tex. 1976). Similarly, undistributed income in a trust over which the spouse has no control is not subject to the jurisdiction of the trial court on a divorce. In re Marriage of Burns, 573 S.W.2d 555, 557-8 (Tex. Civ. App.--Texarkana 1978, writ dism'd).

D. THE INCEPTION OF TITLE RULE. The "inception of title rule" has been described as follows:

> The character of property is determined at the time of inception of title. Inception of title occurs when a party first has a right of claim to the property by virtue of which title is finally vested.

Wierzchula v. Wierzchula, 623 S.W.2d 730, 731-32 (Tex. Civ. App.--Houston [1st Dist.] 1981, no writ). The inception of title rule mandates that the separate or community character of an interest in real estate be determined by the circumstances that exist at the time the right or claim to the property arises, without regard to subsequent events relating to the property.[6]

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[6] Subsequent occurrences must still be examined for other events affecting ownership or character, such as: a subsequent transfer of the interest from the owner-spouse to another person; gifts, sales, partitions or exchanges between spouses; the passing of title upon death of a spouse; etc.

1. When Does Title Incept? Inception of title is not always acquisition of title. Under the inception of title rule, it is the origin of the ownership right that is the focus of the inquiry, not the date title is acquired. The following examples demonstrate the application of the inception of title rule to the acquisition of real estate.

a. Adverse Possession. Where the party acquiring land by adverse possession enters upon the land as a naked trespasser, he has no basis for a claim of title until limitations has run; consequently, inception of title occurs when the statute of limitations runs. If the statute runs during marriage, the property is acquired as community property, despite the fact that the holding period began before marriage. Strong v. Garrett, 148 Tex. 265, 224 S.W.2d 471, 474 (1949). However, where the adverse possession begins while the possessor has an equitable right to the property,[7] the right to the property incepts at the beginning of the period of adverse possession. In such a case, where possession begins before marriage, the property is acquired as separate property, even if title is acquired during marriage. Id. at 474.

b. Contract for Deed. The ultimate acquisition of a deed pursuant to a contract for deed, or installment land contract, relates back to the time the contract was entered into. See Riley v Brown, 452 S.W.2d 548 (Tex. Civ. App.--Tyler 1970, no writ) (where contract of sale or purchase was entered into during marriage, it was community property, even though title was taken by the husband after divorce).

c. Lease/Option, With Deed Placed in Escrow. The case of Roach v. Roach, 672 S.W.2d 524 (Tex. App.--Amarillo 1984, no writ), involved a deed signed before marriage but delivered after marriage. Prior to marriage, the grantor signed a deed conveying the property to the husband, and it was placed into escrow. The property was under a "lease-option" for a seven-year period. Some seven years later, after a payment of $2,500.00 was made from community funds, the deed was delivered to the husband. The trial court found the property to be community. The appellate court disagreed, finding that the title acquired during marriage reverted back and vested as of the time the deed was placed in escrow, before marriage. The property was therefore the husband's separate property. Id. at 531.

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[7] In Strong v. Garrett, the husband moved onto a parcel pursuant to a deed which accidentally conveyed the wrong tract of land. Because he had, at the time his possession began, an equitable right to reform the deed, inception of title occurred at the time of the faulty conveyance, and not when limitations ran.

d. Earnest Money Contract. In Wierzchula v. Wierzchula, 623 S.W.2d 730 (Tex. App.--Houston [1st Dist.] 1981, no writ), the husband entered into an earnest money contract prior to marriage. Also prior to marriage, he applied for a loan guaranty from the Veteran's Administration. He received the loan commitment. Then he married. Then he received the deed to the land, and executed a promissory note, "in his individual capacity," and a deed of trust. The trial court found the property to be his separate property because his claim to the property arose prior to marriage, when the earnest money contract was entered into. The Court of Appeals affirmed. The appellate court acknowledged that a presumption arose that the property was acquired on community credit and was therefore community property. The court held, however, that the husband overcame the presumption of community credit, by showing that the application for the loan was made as a single man, that the loan commitment was to a single man, that the deed was to the husband as a single man, and that he alone signed the note and deed of trust.

e. Residential Leasehold Interest. Although no authority could be found, where a residential lease is entered into prior to marriage, the leasehold interest would seem to be the lessee-spouse's separate property.

2. Tracing. Property acquired during marriage in exchange for other property ordinarily has the same character as the consideration given. Thus, where a new asset is acquired in exchange for a separate property asset, then the new asset is separate property. And where a new asset is acquired in exchange for a community property asset, then the new asset is community property. An exception to this rule occurs when the acquisition is given, partitioned or exchanged to the other spouse, in which event the fact of the gift, partition or exchange supervenes to make the new asset the receiving spouse's separate property, regardless of the consideration given. Through tracing, a party can follow an asset back through all of its changes in form to its original inception of title. Tracing is discussed in detail in Section II.E. of this Article, beginning at p. 19 below.

3. Source of Later Payments on Debt Irrelevant to Character. Under the inception of title rule, the source from which deferred payments are made on the purchase price of an asset has no effect on the character of the asset. Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881 (1937).

E. TRACING. Tracing is the process of overcoming the presumption of community property.

1. The Tracing Process. In many instances, one or the other spouses will assert a separate property interest in the home. Someone will engage in tracing. This tracing process, and its application to the family home, is explored in this part of the Article.

There is a presumption that all property possessed by a spouse during marriage is community property. TEX. FAM. CODE ANN. § 5.02 (Vernon 1985). This presumption is rebuttable, but the party asserting otherwise must prove the contrary by satisfactory evidence. McKinley v. McKinley, 496 S.W.2d 540, 543 (Tex. 1973); Tarver v. Tarver, 394 S.W.2d 780, 783 (Tex. 1965). To meet this burden of proof, the party asserting separate character must trace and clearly identify the property which he or she claims to be separate. McKinley, supra at 543. As stated in Jackson v. Jackson, 524 S.W.2d 308, 311 (Tex. Civ. App.--Austin 1975, no writ):

> It appears from the cases decided under the statutes that difficulty in tracing and identifying property claimed to be separate most frequently arises with respect to personalty which has been so commingled with community property as to defy resegregation and identification, in which instances the burden is not discharged and the statutory presumption that the entire mass is community controls its disposition. Tarver, supra . . . .

In this portion of the Article, the methods of tracing are discussed.

2. Presumptions Relevant to Tracing. Successful tracing requires the artful use and avoidance of presumptions. Presumptions relevant to marital property law are discussed elsewhere in this Article. These include: the presumption that the holder of legal title is the owner (see p. 3); the presumption that all property possessed by either spouse during marriage is community (see p. 12); the presumption of community credit (see p. 12); the presumption from interspousal transfers (see p. 14); the presumption from deed recitals (see p. 14); and the presumption of gift in conveyance from parent to child (see p. 10). The following presumptions also are important in the tracing process.

a. The "Community-Out-First" Rule. The so-called "community-out-first" rule is the mainstay of the tracing effort involving commingled funds in bank accounts. Some courts have said that when separate and community funds are mixed in a bank account, a presumption arises that community funds are withdrawn first. It is unclear whether this presumption can be overcome by testimony of specific intent to the

contrary. An argument can be made that there is, in reality, no such rule as the "community- out-first" rule, and that the rule really is the "trustee's-money-out-first" rule. An argument can even be made for a pro-rata rule. Other possible rules are LIFO (last in--first out) and FIFO (first in--first out). While it is not the purpose of this Article to put the "community-out-first" rule on trial, some exploration of the arguments for and against the rule is undertaken to illuminate its application to the family home.

(1) The Birth of the Rule. The "community-out-first" rule was born in the case of Sibley v. Sibley, 286 S.W.2d 657 (Tex. Civ. App.--Dallas 1955, writ dism'd). In Sibley, community funds were mixed together in a bank account with the wife's separate funds. There were a number of deposits and withdrawals to the account. However, the account never dropped below the sum of $3,566.68, which represented the total of wife's separate property funds which had been placed into the account. The rule of trust law, that where a trustee mixes his own funds with trust funds the trustee is presumed to have withdrawn his own money first, leaving the beneficiary's on hand, was applied to this situation. It was therefore presumed that the community moneys in the joint bank account were withdrawn first, before the wife's separate moneys were withdrawn. The court said:

> [S]ince there were sufficient funds in the bank, at all times material here, to cover [the wife's] separate estate balance at the time of the divorce, such balance will be presumed to be her community funds.

Id. at 659. One wonders if Sibley would have promulgated a "separate-out-first" rule had the husband mixed his own separate property funds with community funds. Applying the trust principle used in Sibley, the husband's wholly-owned funds would have been presumed expended and the funds in which his wife had an interest (to-wit: community funds) would have been presumed to remain.

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

writ) ("where the checking account contains both community and separate funds, it is presumed that community funds are drawn out first," citing Horlock and Sibley).

(3) Secondary Authorities. See Comment, The Commingling of Separate and Community Funds: The Requirement of Tracing in Texas, 6 ST. MARY'S L.J. 234 (1974); Stewart & Patterson, Commingling and Tracing, STATE BAR OF TEXAS ADVANCED FAMILY LAW COURSE (1979).

b. The Presumption of Continuation of a Circumstance. Another presumption useful to the tracing process is the presumption that a circumstance, once shown to exist, continues. See Commercial Credit Corp v. Smith, 143 Tex. 612, 187 S.W.2d 363 (1945); Pete v. Stevens, 582 S.W.2d 892, 894 (Tex. Civ. App.--San Antonio 1979, writ ref'd n.r.e.). Thus, once a condition is established, the burden shifts to the other party to show that it somehow changed.

c. Burden on Party With Peculiar Knowledge. Where evidence is peculiarly within the knowledge or control of a party, its failure to produce it raises the presumption that, if offered, the evidence would have been unfavorable to that party. Edwards v. Shell Oil Co., 611 S.W.2d 904, 907 (Tex. Civ. App.--Eastland 1981, writ ref'd n.r.e.). The presumption can come into play where the party defending a tracing attack is unable to find the relevant records.

d. Presumption Regarding Destruction of Evidence. Destruction by a party of relevant evidence raises a presumption that the evidence would have been unfavorable to the party destroying same. Fuller v. Preston State Bank, 667 S.W.2d 214, 220 (Tex. Civ. App.--Dallas 1983, writ ref'd n.r.e.). Again, this presumption can come into play when the other side has destroyed records you need for your tracing.

e. Similarity of Unproven Foreign Law. Where there is no indication of the law of another jurisdiction, it will be presumed that the law of that other jurisdiction is identical to the law of Texas. Etchison v. Greathouse, 596 S.W.2d 233 (Tex. Civ. App.--Amarillo 1980, no writ). Given the ease of establishing the law of sister states under the judicial notice provisions of Rule 202 of the Texas Rules of Evidence, it is expected that this presumption will, in the future, operate more in the area of the law of foreign countries. See TEX. R. EVID. 203. Still, the presumption may help in presenting the case on appeal if proper steps are not taken by opposing counsel in the trial court.

3. Sample Tracing Cases. There is no better way to approach tracing than to see it in action. Sample tracing cases are set out in the following pages. Since experience shows that tracing the twisted trail from a separate property source into the family home leads through bank accounts, CD's, title companies, stock brokerage accounts, other pieces of real estate and virtually every other conceivable transaction, the cases presented cover a number of different tracing situations. These represent only a few of many tracing cases on the books.

a. The Beeler Case. Beeler v. Beeler, 363 S.W.2d 305 (Tex. Civ. App.--Beaumont 1962, writ dism'd), demonstrates the tracing of proceeds received from the sale of separate realty into the down payment on the family residence. The case also shows the tracing of separate funds into payments on a community mortgage, giving rise to a reimbursement claim.

(1) The Facts and Holding. The facts and holding in Beeler were as follows:

(1) When the parties married, the husband owned a 425 acre ranch, and a small herd of cattle. The parties lived there for 17 months, and the ranch and cattle were sold. The husband received $16,275.00 in cash, and a vendor's lien note for $33,725.00, payable in ten annual installments, plus interest at 5% per year. Id. at 306.

(2) The wife claimed that calves were born to the husband's cows during the first 17 months of marriage, and that community funds were used to construct improvements which enhanced the value of the ranch. The trial court found that although calves were born, the evidence did not establish the exact number, or their value. The court also found that no material improvements were added which enhanced the value of the husband's ranch. Since sufficient evidence supported these findings, the court of civil appeals upheld the trial court's finding that the vendor's lien note was the husband's separate property. Id. at 307.

(3) On the day of sale, husband and wife borrowed $15,000.00, to be repaid in six annual installments of $2,500.00 each, with such payments due on the same day as payments came due on the husband's vendor's lien note, which was assigned to the bank as collateral

for the $15,000.00 loan. Taking $9,000.00 of the proceeds from the sale of the 425 acres, and the $15,000.00 in loan proceeds, the spouses purchased 18 acres of land, the deed reciting cash consideration paid by the spouses, with both spouses as grantees. Id. at 307.

(4) The trial court found that "while the community estate was secondarily liable for payment of the note, there was no reasonable possibility that a resort to the community estate of the parties would ever have been necessary to obtain repayment of the loan." Id. at 307. The trial court found that the entire 18 acres were husband's separate property.

(5) This finding of the trial court was reversed. Having been acquired during marriage, the 18 acres was presumptively community property. By proving the contribution of $9,000.00 in separate property proceeds from the sale of the 425 acres, the husband established a 9/24ths separate property interest in the 18 acres. However, there was no proof that the bank agreed to look solely to the husband's separate estate for repayment of the $15,000.00 loan. Consequently, the credit was community credit, and the loan proceeds were community as well. Thus, the community owned 15/24ths of the 18 acres. Id. at 307.[8]

(6) The evidence also reflected that during the marriage, the husband deposited the payments he received from his separate property note into a joint account, then wrote a check on this account to pay the $15,000.00 debt on the 18 acres. The wife claimed that the payments from the separate property note thus commingled. The trial court found, however, that the parties had agreed to pay the new note with the proceeds from the old note, and that "it was not the

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[8] The court cited Goodloe v. Williams, 302 S.W.2d 235, (Tex. Civ. App.--Texarkana 1957, writ ref'd), for the proposition that "in order for deferred payments upon the purchase of real estate during marriage to create separate property of one of the spouses, it must have ben agreed at the time of the purchase between the parties to the deed that the land was to be the separate property of one of the spouses and that the deferred payments should be paid out of that spouse's separate funds." Beeler, supra at 308. This rule applies where the grantor is the extender of credit.

intention of the parties to commingle such funds with the community funds of the parties." The appellate court found that the momentary deposit of such funds into a joint bank account did not convert "the $2,500.00, plus interest" into community funds. "Such sum, in each instance, was, in effect, earmarked a trust fund, in equity already belonging to the bank from the moment collected by appellee. . . . . This being so, the installments paid upon the bank note were paid from the separate funds of appellee and his separate estate is therefore entitled to reimbursement therefor." Id. at 308.

(7) The appellate court rendered judgment that 9/24ths of the 18 acres was the husband's separate property, and 15/24ths community, and that the husband had made three annual payments on the community note with his separate property, (raising a reimbursement claim). The case was remanded for the trial court to "hear evidence involving the equities of the parties as affecting the home place in conformity with this opinion, and render such judgment thereon as will be fair and just . . . ." Id. at 309.

(2) Comments. In Beeler, the presumption of community was overcome by proof that the property was acquired partly in exchange for separate property funds. The husband successfully traced proceeds from the sale of separate property into the down payment for new property. Beeler says that the presumption of community credit can be overcome only by proof that the creditor agreed to look solely to the borrowing spouse's separate estate for repayment. The husband traced separate property payments received on a promissory note, through a joint bank account, and into the mortgage on the residence. The separate property deposits were $3,372.50 each, plus interest, while the payments on the mortgage were $2,500.00 each, plus interest. The appellate court did not consider the character of other funds in the account, since it was agreed by all concerned (including the bank) that the payments from the separate property note would be used to pay the community indebtedness. The deposits were deemed to be held in trust, equitably owned by the bank from the moment of collection by the husband. Nothing was mentioned about the community nature of the interest included in each deposit. As to pleadings, the husband pled separate property, but apparently not for reimbursement. The appellate court gave him reimbursement anyway, but the sufficiency of the pleadings was not challenged.

b. The Snider Case. Often, establishing a separate property interest in the home requires proof that separate funds were used in the down payment for the home. Snider v. Snider, 613 S.W.2d 8 (Tex. App.--Dallas 1981, no writ), involved tracing a bank account that never dropped below a certain balance. The case also involved a note receivable from a pre-marital loan.

(1) The Facts and Holding. The facts and holding in Snider were as follows:

(1) At the time of marriage, the balance in the husband's savings account exceeded $27,000.00. During marriage, interest was added to the account, and withdrawals were made, reducing the balance to $19,642.45. More activity ensued, but the balance of the account never dropped below $19,642.45. Later, another deposit of separate property was made to the account, raising the balance to $29,642.45. This proof was held to establish that the $29,642.45 balance in the account at the time of the husband's death was his separate property. Id. at 11.

(2) On the date of marriage, the husband's wholly-owned corporation owed the husband $3,228.87. Thereafter, the interest always accumulated faster than payments were made on the note. Thus, the balance due on the date of marriage was "a traceable and identifiable part of the balance on hand at the husband's death." Id. at 11.

(2) Comments. In tracing the bank account, the court tacitly charged all withdrawals against the community funds in the account. Thus, the separate balance was never reduced by any of the withdrawals. The tracing regarding the note is a variation on the same theme. All payments were attributed to accrued interest, and not unpaid principal.

c. The Ventura Case. Harris v. Ventura, 582 S.W.2d 853 (Tex. Civ. App.--Beaumont 1979, no writ), is a case where funds mixed in a bank account were successfully traced.

(1) The Facts and Holding. The facts and holding were as follows:

(1) The tracing relating to the University National Bank account is confusing. It appears, however, that the Court reasoned as follows. On April 12, 1974, the balance in the account was $460.15. This balance was presumptively community property. On April 16, the sum of $7,825.79 was deposited. This was proceeds from the sale of husband's real estate owned prior to marriage, and was therefore his separate property. On July 2, $1,174.62 was deposited, of which $878.63 was from husband's inheritance. Between April 12, 1974, and January 1, 1975, other deposits were made to the account, representing interest earned, admittedly community property.

(2) The total of the community deposits to the account, plus the beginning balance, was $1,339.63. Separate property deposits totalled $8,704.42 (i.e., $7,825.79 + $878.63). Withdrawals during the period totalled $5,046.54. The Court concluded that the husband's heirs had traced $3,657.88 of the bank balance as husband's separate property. [They must have subtracted total withdrawals from total separate property deposits, or $8,704.42 - $5,046.54 = $3,657.88].

(3) If $3,657.88 of the ending balance was separate property, then the community balance must have been $1,339.63 [i.e., $4,997.51 - $3,657.88 = $1,339.63]. But, applying the community-out-first rule, the initial community balance of $460.15 had been drawn out in the first withdrawal. Therefore, the community balance was overstated by $460.15. Adding this amount to the previously-determined separate property balance gave a new total ending balance of separate funds of $4,118.03. Subtracting $4,118.03 from the ending balance of $4,997.51, gave a community balance of $879.48. The wife owned half of this, or $439.74. [See p. 856.]

(4) Tracing failed as to two City National Bank accounts. The only evidence on source of deposits was husband's testimony that "[s]ome was gifts and some may have been my social security check. I don't remember." That constituted no more than a scintilla of evidence.

(5) The trial court was reversed for finding the contents of a savings account to be wife's separate property. The account contained funds owned by wife prior to marriage, plus interest earned thereon, both before and after marriage. No sums were ever withdrawn from the account. There was no evidence of the amount of interest in the account. The wife therefore failed to overcome the presumption of community. In the interest of justice, however, the case was remanded for the limited purpose of the wife making such proof.

(6) Tracing was upheld as to three CD's and a promissory note. Husband sold certain land prior to marriage, taking a promissory note secured by deed of trust as part of the consideration. The note was assigned to a bank prior to marriage, then assigned back to husband during the marriage. The trial court found the transaction to be the creation and release of a security interest, rather than a conveyance out and back. Husband foreclosed on his note, and bought the property at the trustee's sale, without paying cash, by giving only a credit on the note. Husband later sued for deficiency on the note. The land was then sold by the husband, who received some cash from the sale and took back a note from the buyer. The CD's in question were purchased with this cash. The trial court held the note and CD's were husband's separate property. This finding was affirmed.

(2) Comments. There is not enough information in the opinion to determine exactly what process the court of appeals used in tracing the commingled bank account. However, it is apparent that the court accepted the proposition that by showing the

character of each deposit, and presuming that community funds are drawn out first, a party can trace separate property funds which have been mixed with community funds in a bank account. The court also traced the separate nature of husband's interest in the land owned prior to marriage, into a note, then through a conveyance and re-conveyance of the note to and from a bank, back into the land, and finally into a new note and CD's. No recognition was given to any interest which may have accumulated on the original note, prior to foreclosure, or on the CD's. Compare with San Antonio Loan & Trust Co. v. Hamilton, 283 S.W.2d 19 (Tex. 1955) (property re-acquired through foreclosure was traced partly to unpaid interest and partly to unpaid principal, in ratio interest bore to principal at the time the note was foreclosed).

d. The Cowart Case. Cowart v. Cowart, 515 S.W.2d 359 (Tex. Civ. App.--Beaumont 1974, writ ref'd n.r.e.), was a partition suit to divide stock in the Peco Oil Company. During the marriage, the husband exchanged his interest in the oil company for two promissory notes. Nothing was mentioned in the divorce decree regarding these two notes. After the divorce, the stock was returned to the husband, and the notes were cancelled. The wife sought to partition the stock, and the question was whether the husband could trace the stock.

(1) The Facts and Holding. The facts and holding in Cowart were as follows:

(1) The husband's father testified that the husband's mother died intestate. At the time they owned two tracts of land, one of 93 acres and one of 150 acres. Several years later, in order to give his two girls and two boys their inheritance, the father borrowed cash against the land, gave his daughters the cash and conveyed both tracts of land to the husband, for a recited consideration of $3,000.00 in cash paid and a note from husband for $3,000.00.

(2) The father then assigned the $3,000.00 note to the Federal Land Bank, and husband and wife signed a deed of trust to the Bank to secure a $2,730.00 note. Husband then conveyed the 150 acre tract to his brother, who assumed $2,000.00 of the note to the Bank, leaving husband owing $730.00 on that note. Later, after the note had been reduced to $500.00, husband sold the 93 acre tract to his brother for

$7,500.00. After paying the $500.00 balance left on his note, husband netted $7,000.00.

(3) Husband testified that he used $1,000.00 of that $7,000.00 to buy 100 shares of insurance company stock. The remaining $6,000.00 was deposited into the "farm account," which he kept separate from community funds. He later bought the Peco Oil Company stock with the $6,000.00.

(4) After husband and wife separated, the 51% owner of Peco Oil Company told husband he didn't want Peco involved in a divorce. He convinced husband to exchange his 49% stock for two notes, with the right to repurchase after the divorce. Husband sold the stock and received two notes, secured by company stock. After the divorce, he reacquired the stock by cancelling the notes.

(5) The jury found the Peco stock to be husband's separate property. Although there was no recital of separate property in the deed from husband's father to the husband, two of the grantees and husband testified that the $3,000.00 cash consideration was not paid and the transaction represented a division of husband's inheritance. Any argument about the funds used to reduce the $730.00 debt to $500.00, would go to reimbursement only, not ownership. Since the stock was husband's separate property, it was immaterial whether the stock transaction during divorce was a sham. Judgment on the verdict was affirmed.

(2) Comments. In Cowart, the husband managed to overcome a number of community presumptions. It constitutes proof that even difficult tracing problems can be overcome with the right answer to the right special issue.

e. The Klein Case. In Klein v. Klein, 320 S.W.2d 769 (Tex. Civ. App.--Eastland 1963, no writ), the wife testified that she made a $3,000.00 separate property cash payment for the house acquired during marriage. She got the money from a safety deposit box in an

unnamed bank. The trial court was not bound by her testimony. The trial court's finding that the house was community property was affirmed. Id. at 773.

f. A Few Pointers. There are some recurrent issues to consider in tracing into a house. First, get a copy of the closing statement from the title company, to find out how much earnest money was paid, and how much was paid as closing cost, pre-paid interest, loan origination fee, discount points, pro-rated property taxes and insurance, etc. See how the deed was taken. Does it recite separate property, and if so, at whose suggestion? Look at the loan application and loan papers. Do they suggest separate or community credit? Calculate the percent of the purchase price provided by separate property. This should come off the top of the sales proceeds. Any community mortgage on the property should be paid out of the community portion of the proceeds. Get all checks, deposit slips and bank statements for the accounts through which the separate funds travelled on their way into the home. If part of the down payment was a gift, who can testify as to the identity of the donee? If the house was given with a mortgage attached, was it assumed or just subject to? If assumed, what was the value of the house on the date of acquisition, and the amount of the loan on that date? Arguably only the equity on that day could be a gift, if in fact any of it is a gift. Last but not least, see if the other side will admit that your client put "x dollars of her separate property" into the house.

4. Use of Tracing Sheets. If it becomes necessary to trace separate funds in a bank account over an extended period of time, with a number of deposits and withdrawals, counsel should consider using tracing sheets. Tracing sheets were first published in Jim Stewart's and Kirk Patterson's article in the 1979 Advanced Family Law Course entitled "Commingling and Tracing," STATE BAR OF TEXAS ADVANCED FAMILY LAW COURSE (1979). A copy of such a tracing sheet is included in the Appendix of this Article, at p. __. The tracing sheet demonstrates a hypothetical tracing effort. Various entries on the sheet are explained by footnotes set out on the following page. By judicious use of tracing sheets, and using the "community-out-first" rule as needed, you can maintain a running balance of the separate and community portions of an account. Some judges and lawyers will freely allow the tracing sheets into evidence; others will object or sustain an objection to admissibility. Even if the sheets are not initially admitted into evidence, they should still be usable as a demonstrative aid and, if nothing else, can be admitted under the authority of the Webster College case. Speier v. Webster College, 616 S.W.2d 617 (Tex. 1981) (charts and diagrams designed to summarize or emphasize evidence are admissible into evidence, within the discretion of the court).

F. EXPRESS, RESULTING AND CONSTRUCTIVE TRUSTS. The law presumes that the legal holder of title is the owner of the property. This presumption can be overcome by showing that the property is held for another, as part of an express or resulting trust, or by use of the constructive trust doctrine.

1. Express Trust. The presumption of ownership can be rebutted by proof that title is held solely as trustee under an express trust. An express trust comes into existence when a person who has legal and equitable dominion over property executes an intention to create the express trust. Mills v. Gray, 147 Tex. 33, 10 S.W.2d 985, 987-88 (1948). An "express trust" is defined in the Property Code as "a fiduciary relationship with respect to property which arises as a manifestation by the settlor of an intention to create the relationship and which subjects the person holding title to the property to equitable duties to deal with the property for the benefit of another person." TEX. PROP. CODE ANN. § 111.004(4) (Vernon 1984). See McAdams v. Ogletree, 348 S.W.2d 75 (Tex. Civ. App.--Beaumont 1961, writ ref'd n.r.e.) (daughter found to hold realty in trust for her mother).

a. Requirement of Writing. An express trust is normally not enforceable unless created by a written instrument, signed by the settlor [creator], containing the terms of the trust. TEX. PROP. CODE ANN. § 112.004 (Vernon 1984).[9] See Nolana Development Ass'n. v. Corsi, 682 S.W.2d 246, 249 (Tex. 1985) (under the Texas Trust Act, the act of denominating a party as "Trustee" on a real estate instrument does not, by itself, create an express trust).

(1) Exceptions for Personalty. Two exceptions to the requirement exist for an express trust containing only personalty. First, a signed written trust document is not required where personalty is transferred to a trustee who is not a beneficiary or settlor, and the settlor expresses the intent to create a trust. TEX. PROP. CODE ANN. § 112.004(1) (Vernon 1984). The second exception exists where the owner of personalty makes a declaration in writing that he holds the property as trustee for another person as beneficiary, or for the owner and another person as beneficiaries. TEX. PROP. CODE ANN. § 112.004(2) (Vernon

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[9] For many years, express trusts were governed by the Texas Trust Act, TEX. REV. STAT. ANN. art. 7425b (Vernon 1960). In 1983, the Texas Legislature replaced the Texas Trust Act with the Texas Trust Code, and moved its location to Chapters 111-115 of the Texas Property Code. The Texas Trust Act applies to express trusts created before January 1, 1984, and the Texas Trust Code to express trusts created on or after January 1, 1984. The new Code applies to all transactions relating to any trust, occurring on or after January 1, 1984, regardless of when the trust was created. TEX. PROP. CODE ANN. § 111.006 (Vernon 1984).

1984). In such an instance, the written declaration need not set out the trust's terms.

b. Recission of Trust Conveyance. If there is fraud in a conveyance to a trustee, then the transaction can be cancelled through an action in equity. If title was received by the trustee from a third person, title can be placed in the proper party through the resulting trust or constructive trust doctrines, discussed below. See generally 57 TEX. JUR. 2d Trusts § 36 (1964).

2. Resulting Trust. A resulting trust arises by operation of law when title is conveyed to one party while consideration is paid by another, Cohrs v. Scott, 338 S.W.2d 127, 130 (Tex. 1960). A resulting trust can only arise at the time title passes, Id. at 130. There is one exception: a resulting trust also arises when a conveyance is made to a trustee pursuant to an express trust, which fails for any reason. Nolana Development Ass'n v. Corsi, 682 S.W.2d 246, 250 (Tex. 1984). The party claiming a resulting trust has the burden of overcoming the presumption of ownership arising from title by "clear, satisfactory and convincing" proof of the facts giving rise to the resulting trust, Stone v. Parker, 446 S.W.2d 734, 736 (Tex. Civ. App.--Houston [14th Dist.] 1969, writ ref'd n.r.e.).

a. The Villarreal Case. Villarreal v. Villarreal, 618 S.W.2d 99 (Tex. Civ. App.--Corpus Christi 1981, no writ), involved a home purchased by a husband "as a single man" several weeks before his marriage. On divorce, the wife claimed resulting trust. The trial court ordered the house sold and the proceeds divided equally. The appellate court reversed, holding the home to be the husband's separate property under the inception of title rule. The court said:

> [S]ince the [wife] paid no part of the cash down-payment to buy the house, executed no notes or other instruments evidencing the debt, and obligated herself in no way to discharge the debt, then we hold that no resulting trust arose out of the transaction.

Id. at 101. No mention was made in the case of a constructive trust.

b. Irrebuttable Presumption From Written Conveyance. Where an inter vivos conveyance is evidenced by a writing stating that the transferee is to take the property for his own benefit, extrinsic evidence is not admissible to show an unstated intent that the transferee holds the property in trust for another. Messer v. Johnson, 422 S.W.2d 908, 912 (Tex. 1968). Thus, in the Messer case, where the

husband signed a deed conveying realty to the wife as her separate property, the husband could not present parol evidence to establish a resulting trust in favor of the community estate, absent allegation and proof of fraud, duress or mistake. Id. at 912.

3. Constructive Trust. A "constructive trust" is not really a trust; it is an equitable remedy. Oak Cliff Bank & Trust Co. v. Steenberger, 497 S.W.2d 489 (Tex. Civ. App.--1973, writ ref'd n.r.e.). The court imposes a "constructive trust" when an equitable title or interest ought to be, as a matter of equity, recognized in someone other than the taker or holder of legal title. Mills v. Gray, 1417 Tex. 33, 210 S.W.2d 985, (1948). The Texas Supreme Court said: "A transaction may, depending on the circumstances, provide the basis for a constructive trust where one party to that transaction holds funds which in equity and good conscience should be possessed by another." Meadows v. Bierschwale, 516 S.W.2d 125, 131 (Tex. 1974). Thus, a constructive trust arises, not by agreement, but rather by fiat of the court, as an equitable remedy to undo an unjust enrichment. A constructive trust most often arises in connection with the breach of a fiduciary duty, constituting constructive fraud. See Smith, Special Problems in Marital Property--Part II, STATE BAR OF TEXAS ADVANCED FAMILY LAW COURSE J-1-ff (1985); Orsinger, Intra and Inter Family Transactions, STATE BAR OF TEXAS ADVANCED FAMILY LAW COURSE J-40-ff (1983).

a. The Burgess Case. Burgess v. Burgess, 282 S.W.2d 118 (Tex. Civ. App.--Waco 1955, writ ref'd n.r.e.), involved a purchase of a duplex immediately prior to marriage. The future wife contributed $7.95 of the purchase price and the balance of the down payment of $250.00 was paid by the future husband with money borrowed from his father. The deed conveyed the property to the future husband alone, who subsequently transferred the property to his parents without the knowledge of his future wife. The parties married and moved into the duplex. The husband's parents moved into the other side of the duplex, and paid no rent. The wife claimed that the duplex was purchased in contemplation of marriage as "joint property." The appellate court said:

> It is our view that the action of Cortis and Carmaleita Burgess on January 20, 1941, at which time they agreed jointly to purchase the property in question and made a joint contribution at that time for its purchase, created an undivided one-half trust interest in her favor.

Id. at 121.

b. The Maxie Case. Maxie v. Maxie, 635 S.W.2d 175 (Tex. App.--Houston [1st Dist.] 1982, writ dism'd), involved a home purchased just prior to marriage. The wife claimed that she gave the husband $300.00 at the time the home was purchased, which he used as part of the $800.00 down payment. The husband contributed $100.00 from his cash on hand, and $400.00 from the proceeds of a loan. Title was taken in the name of the husband alone "as a single man." Twenty-six days later, the parties married. The wife testified that the husband had agreed that the property would be their marital home, and that their earnings were commingled in a joint account and part of her salary used to make monthly mortgage payments on the home. The husband admitted receiving $300.00 of the wife's money, which he placed in his checking account. He withdrew $400.00 from this account for part of the down payment. The jury found an implied constructive trust for the joint and mutual benefit of both parties. The appellate court affirmed the judgment, saying that the evidence supported a jury finding that "a purchase money constructive trust had been created for the benefit of appellee." Id. at 177. The appellate court distinguished Villarreal v. Villarreal, 618 S.W.2d 99 (Tex. Civ. App.--Corpus Christi 1981, no writ), in that Villarreal was a resulting trust case, whereas the wife sued in Maxie for a constructive trust. The court also deemed it significant that in Villarreal the wife had contributed none of the purchase price, whereas in Maxie the wife had contributed $300.00 toward the down payment. The court, in Maxie, appears to have mixed some features of a resulting trust with some features of a constructive trust. See Smith, Special Problems in Marital Property, Part II, STATE BAR OF TEXAS ADVANCED FAMILY LAW COURSE (1985).

c. The Andrews Case. Andrews v. Andrews, 677 S.W.2d 171 (Tex. App.--Austin 1984, no writ), involves the purchase of a residence prior to marriage. The parties, who were then engaged to be married, agreed jointly to buy a residence to use as their marital homestead, and to use their joint borrowing power to secure the loan, and to repay the loan jointly. The woman completed a loan application, and gave it to the man. He, however, submitted a different application to the lender, one that had not been signed by the woman. The initial documents reflected both their names. Prior to closing, the man had the woman's name stricken from the papers, and took title in his name alone. The woman did not pay any earnest money. At his suggestion, she did not attend the closing. Only the man signed the note and deed of trust. Two weeks after the purchase, the parties married and began living in the house. Loan payments were made with community funds. The home was improved with community funds and labor, as well. Some years later, wife learned that the deed was in husband's name alone. She filed for divorce. Husband claimed the home as his separate property. The trial court found

that a confidential and fiduciary relationship pre-existed the house purchase. The parties had been seeing each other for seven years, were living together and were engaged to be married. To husband's arguments that wife had no interest because she paid none of the purchase price at inception of title, the appellate court stated:

> John Andrews argues that because Cynthia Mae Andrews did not contribute to the down-payment for the purchase of the residence, she cannot be the beneficiary of a resulting trust. This may be true. Nevertheless, this Court does not understand that appellee was required to prove a contribution to the down-payment for the purchase of the house as a condition for the imposition of a constructive trust as distinguished from a resulting trust.

Id. at 174.

d. The Johnston Case. Johnston v. Mabrey, 677 S.W.2d 236 (Tex. App.--Corpus Christi 1984, no writ), was a constructive trust case, involving two people who remarried each other a second time. After the divorce in August, 1975, the parties continued an intimate relationship. In October of 1975, the man purchased a home for $6,500.00 cash plus a promissory note for $30,000.00. The woman occasionally spent the night with the man at the property, and in May of 1976, she moved into the house to live. Back in March of 1976, the man deeded the property to the woman. Both continued to live on the property. The parties later remarried. The husband testified that the property was deeded to the wife prior to the second marriage "for the purposes that it would be held in trust for us to live in for the rest of our lives." The trial court imposed a constructive trust and ordered the house sold and the proceeds divided equally. The Court of Appeals affirmed. The Court specifically indicated that a meretricious relationship and confidential relationship are not mutually exclusive. Although the dispensation of sexual favors will not alone support the imposition of a constructive trust, it could be a factor to consider in determining whether a fiduciary relationship exists. The Court concluded that a confidential relationship did exist, and affirmed the trial court's judgment.

e. Constructive vs. Resulting Trusts. It can be seen from the foregoing cases that the exact contours of the resulting trust and constructive trust doctrines are not well understood. The Texas Supreme Court drew the following distinctions between resulting and constructive trusts, in Mills v. Gray, 147 Tex. 33, 210 S.W.2d 985 (1948):

> Resulting and constructive trusts are distinguishable, but there is some confusion between them. From a practical viewpoint, a resulting trust involves primarily the operation of the equitable doctrine of consideration - the doctrine that valuable consideration and not legal title determines the equitable title or interest resulting from a transaction - whereas a constructive trust generally involves primarily a presence of fraud, in view of which equitable title or interest should be recognized in some person other than the taker or holder of the legal title. [Citing 54 AM. JR. 22, § 5.]

Id. at 987-88.

4. Effect of Trust Doctrines on Deed Recitals. The three trust doctrines, express trust, resulting trust, and constructive trust, can all be used to overcome the presumption of ownership arising from legal title. They can also all be used to overcome the presumption that property on hand or acquired during marriage is community property. And all three trust doctrines can be used to overcome the presumption that arises when a third party conveys property to one spouse, as his or her separate property, without the concurrence of the other spouse. However, where one spouse is charged with a recital that realty is conveyed as the other spouse's separate property, the presumption of separate property cannot be overcome by the express and resulting trust doctrines. In such an instance, the injured spouse must secure a recission and cancellation of the recital or the transfer for fraud, accident or mistake (if grantor), or must impose a constructive trust (if the injured spouse should in equity have been grantee).

G. PLEADING REQUIREMENTS. It is sometimes said that there are relaxed rules of pleading in divorce cases, particularly when the pleadings concern property division. E.g., Roach v. Roach, 672 S.W.2d 524, 529 (Tex. App.--Amarillo 1984, no writ). This is a dangerous rule to rely upon.

1. Pleadings Required to be Under Oath. Certain pleadings are required by the Texas Rules of Civil Procedure to be made under oath. For example, Rule 93 requires a party to plead under oath that the plaintiff is not entitled to recover in the capacity in which he sues, or that the defendant is not liable in the capacity in which he is sued. TEX. R. CIV. P. 93(c). A denial of partnership must also be made under oath. TEX. R. CIV. P. 93(f). A plea that any party alleged to be a corporation not incorporated must also be verified. TEX. R. CIV. P. 93(g).

Allegations of lack of consideration and failure of consideration must also be sworn to. TEX. R. CIV. P. 93(j).

2. Pleading Separate Property. There are cases which suggest that a party must plead separate property for evidence to be admitted on the point. For example, in Cox v. Cox, 439 S.W.2d 862, 864 (Tex. Civ. App.--San Antonio 1969, no writ), Chief Justice Barrow wrote that "Appellee should have alleged that [his partnership interest] was his separate property, as well as the basis for such claim. [citations omitted]. We have been cited to no authority and have found none to support appellee's contention that his sworn inventory [which mentioned his claim for separate property] dispensed with the necessity of pleading this claim." Id. at 864-65. Nonetheless, the court found no error in the admission of evidence as to the separate character of the assets. In Lowery v. Lowery, 136 S.W.2d 269, 270 (Tex. Civ. App.--Beaumont 1940, writ dism'd), the court held that a party who listed in his pleadings certain assets as being separate property was limited to proof only regarding those items and not other allegedly separate property assets omitted from the listing in the pleadings. In Bobbitt v. Bobbitt, 223 S.W.2d 478, 485 (Tex. Civ. App.--Amarillo 1920, writ dism'd), the court held that a general denial was not sufficient to warrant introduction of evidence of separate character, when that claim was based upon the law of another state. But see Roach v. Roach, 672 S.W.2d 524, 529 (Tex. App.--Amarillo 1980, no writ) (allowing proof of separate property even absent pleadings of separate property). In light of this authority, one secondary authority made the following suggestion:

> The cases are divided as to the level of detail required in allegations concerning separate property. Some cases follow the modern rule that a general allegation disclosing the existence of separate property is sufficient. However, it has also been stated that the petition should identify specific items of separate property and state the facts on which their separate characterization is based. In view of the risks involved in listing specific items of property, caution requires that the petition request the division of all community and separate property, include a list of all separate items claimed, and state categorically that the list is not exclusive. It also suggested that the petition request a sworn inventory and appraisement of all the marital property [footnotes omitted].

2 KAZEN, FAMILY LAW, TEXAS PRACTICE AND PROCEDURE 42.01(8)[c] at 42-19 (1982).

3. Pleading for Reimbursement. The necessity of pleadings to support reimbursement is only slightly less controversial than with separate property. In the case of Vallone v. Vallone, 644 S.W.2d 455 (Tex. 1983), the wife was deemed to have waived her right to 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), the 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. It has been said many times, however, that a party seeking reimbursement has the burden to plead and prove the claim. Prudence dictates that any reimbursement claim be pled.

4. Pleading for Recission, Trust. Etc. The party who would alter the presumptions arising from delivery of deeds, execution of documents, possession of property, holding of title, etc. has the burden to plead and prove why these presumptions should be set aside.

III. REIMBURSEMENT BETWEEN SPOUSES. Under certain circumstances, Texas law recognizes a right of reimbursement between marital estates.[10] A right of reimbursement can arise when the wealth of one marital estate is used to pay the debts or obligations of another estate; where money or property of one estate is used to construct improvements to land belonging to another marital estate; and where uncompensated-for time, talent, toil and labor of the community is used to enhance the value of one of the spouse's separate estate.

A. FOR PAYING DEBTS AND OBLIGATIONS. Under the inception of title rule, the character of an asset is determined by the circumstances which exist "at the time of the incipiency of the right in virtue of which [the spouse] acquired title." Colden v. Alexander, 141 Tex. 134, 171 S.W.2d 328, 334 (1943). Thus, "[t]he fact that community funds [are] used to pay interest on [the husband's] prenuptial

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[10] The principle of reimbursement applies from community to separate, from separate to community, and from separate to separate, estates. Dakan v. Dakan, 125 Tex. 375, 83 S.W.2d 620, 627 (1935). Such claims can be asserted not only upon divorce, but also by heirs of a spouse, when the community estate is dissolved by death. See Anderson v. Gilliland, 684 S.W.2d 673 (Tex. 1985).

purchase-money debt, and taxes, during coverture, cannot alter the status of the husband's title." Id. at 334. The Supreme Court, in Colden v. Alexander, went on to say:

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

The Court thus expounded the recognized rule regarding reimbursement for using community funds to pay separate property debts and taxes on separate property land. Some time later, courts included the use of community funds to pay insurance on separate property as another instance giving rise to reimbursement. E.g., Brooks v. Brooks, 612 S.W.2d 233, 238 (Tex. App.--Waco 1981, no writ). An important aspect of the right to reimbursement for payment of debts, taxes and insurance on realty belonging to another marital estate is that the claim for reimbursement exists only to the extent that the value given by the estate seeking reimbursement exceeds the value received from the benefitted estate. Colden v. Alexander, supra at 334; Trevino v. Trevino, 555 S.W.2d 798, 799 (Tex. Civ. App.--Corpus Christi 1977, no writ).[11] But see Brooks v. Brooks, 612 S.W.2d 233, 238 (Tex. App.--Waco 1981, no writ) ("when community funds have been used 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"). Enhancement of the value of the separate property in question has no bearing on this type of reimbursement. Hawkins v. Hawkins, 612 S.W.2d 683, 684 (Tex. Civ. App.--El Paso 1981, no writ); Bazile v. Bazile, 465

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[11] This may not be so for reimbursement to the separate estate for paying community debts. In Hilton v. Hilton, 678 S.W.2d 645, 648 (Tex. App.--Houston [14th Dist.] 1984, no writ), the court held it unnecessary to plead or prove lack of offsetting benefits because the separate estate could not possibly benefit from discharge of a community debt. In point of fact, the separate estate is benefited by discharge of a community debt wherever the debt would be collectible out of the spouse's separate estate.

S.W.2d 181, 182 (Tex. Civ. App.--Houston [1st Dist.] 1971, writ dism'd).[12]

1. Burden to Plead and Prove. The party seeking reimbursement has the burden to plead and prove this right. The burden of proof also includes proving that the benefits received by the community estate did not exceed the community claim for reimbursement. For example, in Klein v. Klein, 370 S.W.2d 769, 774 (Tex. Civ. App.--Eastland 1963, no writ), the court held that where the house had been rented at times during the marriage, in the absence of proof that the income from the property was less than the amount paid out by the community, the reimbursement claim failed. But see Pruske v. Pruske, 601 S.W.2d 746, 748 (Tex. Civ. App.--Austin 1980, writ dism'd), rejecting Klein and holding that the "better rule" is to allow reimbursement to the community without a showing that the expenditures exceeded the benefits received by the community. Pruske, in turn, was rejected by the Fort Worth Court of Appeals in Cook v. Cook, 665 S.W.2d 161, 164 (Tex. App.--Fort Worth 1984, writ ref'd n.r.e.), which held that benefits to the community are relevant in determining reimbursement for payment of taxes and interest, but that reimbursement for principal reduction is not affected by benefits received by the community estate.

2. Presumptions Affecting Proof. 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. As stated in Jenkins v. Robinson, 169 S.W.2d 250, 251 (Tex. Civ. App.--Austin 1943, no writ):

> [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

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[12] Jackson v. Jackson, 524 S.W.2d 308, 312 (Tex. Civ. App.--Austin 1975, no writ) suggests the contrary, but is clearly wrong. Paying a debt could never increase the value of a piece of real estate.

property acquired under that presumption was actually used to pay off the indebtedness on the real estate.

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). See 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. But see Horlock v. Horlock, 533 S.W.2d 52, 60 (Tex. Civ. App.--Houston [14th Dist.] 1975, writ dism'd) (party seeking reimbursement for funds expended for maintenance of separate estate aided by presumption that money spent during marriage is community rather than separate).

3. Types of Offsetting Benefits. Where the family home is the separate property of one spouse, an obvious offset to a claim for reimbursement for use of community funds to pay debt, taxes or insurance on the family home, is the value of living in the home during the marriage. Cook v. Cook, 665 S.W.2d 161, 164 (Tex. App.--Fort Worth 1984, writ ref'd n.r.e.). Where the home has at times been rented out during the marriage, the rents received are an offsetting benefit. Klein v. Klein, 370 S.W.2d 769, 774 (Tex. Civ. App.--Eastland 1963, no writ). Where the non-owner spouse is allowed to live in the house after divorce, the value of this right should also be considered in offset. For analogous arguments relating to reimbursement for improvements, see Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620, 628 (1935) (inequitable to allow widow full reimbursement for community funds used to improve separate realty of husband without considering fact that she will enjoy the improvements under her homestead interest in the property). However, this element is not a bar to seeking reimbursement, in Snider v. Snider, 613 S.W.2d 8, 9 (Tex. App.--Dallas 1981, no writ) (equity does not prohibit widow from occupying separate property homestead while seeking reimbursement for improvements.) In Snider, offsetting benefits included the deductibility of the expenditures against community income. Id. at 10. Fyffe v. Fyffe, 670 S.W.2d 360, 362 (Tex. App.--Texarkana 1984, writ dism'd), held that reimbursement was available from community property expended for interest and taxes on separate property only upon a showing that these expenditures were not offset by benefit to the community, such as the value of occupying the home rent-free, and the amount of income tax savings from deductions taken by the community for the sums expended. In Trawick v. Trawick, 671 S.W.2d 105, 109 (Tex. App.--El Paso 1984, no writ), it was suggested in connection with reimbursement for community labors used to enhance a separate property corporation, that no offset

should be recognized for rental income from separate property since that income belonged to the community by operation of law, without regard to the reimbursement question.

4. Can Separate be Reimbursed from Community? The rule of reimbursement between marital estates for payment of debts, taxes and insurance becomes complicated when a spouse is seeking reimbursement from the community estate to his or her separate estate for separate property funds used to pay community debts, taxes or insurance. There are a number of cases saying that the expenditure of separate property funds on community obligations is a "gift" to the community estate. Norris v. Vaughn, 152 Tex. 491, 260 S.W.2d 676, 683 (1953); Trevino v. Trevino 555 S.W.2d 792, 802 (Tex. Civ. App.--Corpus Christi 1977, no writ); In re Marriage of Long, 542 S.W.2d 712, 717 (Tex. Civ. App.--Texarkana 1976, no writ). But see Hilton v. Hilton, 678 S.W.2d 645, 648 (Tex. App.--Houston [14th Dist.] 1984, no writ) (recognizing separate estate's right of reimbursement for separate funds used to pay community debts). Several cases have awarded reimbursement "in gross" for overall sums contributed by the separate estate to the welfare of the community. See Schmidt v. Huppman, 73 Tex. 112, 11 S.W. 175 (1889); Horlock v. Horlock, 533 S.W.2d 52, 56-58 (Tex. Civ. App.--Houston [14th Dist.] 1981, writ dism'd). In Brooks v. Brooks, 612 S.W.2d 233, (Tex. App.-- Waco 1981, no writ), the court approved an award to the husband's separate property corporation of restitution for corporate capital used for family support.

B. FOR CONSTRUCTING IMPROVEMENTS. After a number of years of uncertainty, the Texas Supreme Court recently established the rule of reimbursement where community funds are used to construct improvements to separate realty: the community estate is entitled to reimbursement in the amount of the enhancement resulting to the separate estate. Anderson v. Gilliland, 684 S.W.2d 673 (Tex. 1985). All earlier cases, of which there are many, saying that the rule is the cost of the improvements, or the lesser or greater of cost or enhancement, have been overruled.

1. Burden to Plead and Prove. The party who seeks reimbursement for improvements to another marital estate has the burden to plead and prove the right of reimbursement. Vallone v. Vallone, 644 S.W.2d 455, 459 (Tex. 1983); Lindsay v. Clayman, 151 Tex. 593, 254 S.W.2d 777, 781 (1952); Weatherall v. Weatherall, 403 S.W.2d 524, 526 (Tex. Civ. App.--Houston 1966, no writ). See generally Wachendorfer v. Wachendorfer, 615 S.W.2d 852, 854 (Tex. Civ. App.--Houston [1st Dist.] 1981, no writ) ("spouse seeking community reimbursement for enhancement of the separate estate of the other spouse has the burden of

pleading and proving the amount of the community contribution and the enhanced value"). However, a party can waive the right to complain at the lack of pleadings by failing to object to the evidence offered at trial to support such a claim. Pruske v. Pruske, 601 S.W.2d 746, 749 (Tex. Civ. App.--Austin 1980, writ dism'd).

2. Presumptions Affecting Proof. There are several cases saying that improvements made on separate real estate are presumed to have been made with separate funds. Younger v. Younger, 315 S.W.2d 449, 452 (Tex. Civ. App.--Waco 1958, no writ); King v. King, 218 S.W.2d 1093, 1096 (Tex. Civ. App.--San Antonio 1920, no writ). It can thus be argued that the presumption that property possessed by a spouse during marriage is community property does not apply. Jenkins v. Robinson, 169 S.W.2d 250, 251 (Tex. Civ. App.--Austin 1943, no writ). Considering the age and writ histories of these cases, they may not be authoritative. Also, a contrary approach was taken in Horlock v. Horlock, 533 S.W.2d 52, 60 (Tex. Civ. App.--Houston [14th Dist.] 1976, writ dism'd), which applied a presumption "that assets purchased and money spent during marriage are community rather than separate property." At issue in Horlock was the expenditure of funds to preserve separate property corporate stock of the husband, not the use of funds to make improvements to separate property realty. The issue of which presumption obtains would seem, however, to cut across this distinction. See also Hartman v. Hartman, 253 S.W.2d 480 (Tex. Civ. App.--Austin 1952, no writ).

3. Proving Amount of Enhancement. The amount of enhancement is to be determined as of the time of partition. Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620, 628 (1935); Girard v. Girard, 521 S.W.2d 714, 717 (Tex. Civ. App.--Houston [1st Dist.] 1975, no writ). Where the improvements were entirely paid for by the estate seeking reimbursement, the amount of enhancement can be shown by evidence of the value of the property at the time of partition, both with and without the improvements. The difference between the two values is the amount of enhancement. Girard, supra at 718. Where only part of the improvements were paid by the estate seeking reimbursement, as when an addition was added with community funds to a separate property house, then the party seeking reimbursement must isolate the increment in value attributable to that portion for which reimbursement will lie. If a mixture of funds was used to improve the property, then the added value of the improvements could be apportioned accordingly, on a fractional basis. A cheap and usually successful way to prove enhancement is for your client to testify that the property was enhanced in value at least by the amount of cost of the improvements. See Snider v. Snider, 613 S.W.2d 8, 9 (Tex. Civ. App.--Dallas 1981, no writ). Frequently even the opposing party will

admit this much. See Pruske v. Pruske, 601 S.W.2d 746, 749 (Tex. Civ. App.--Austin 1980, writ dism'd). See, however, Sharp v. Stacy, 525 S.W.2d 721, 724 (Tex. Civ. App.--Eastland, 1975), aff'd, 535 S.W.2d 345 (Tex. 1976), which said that evidence as to the cost of improvements was immaterial to the question of the extent to which improvements enhanced the value of land.

4. Offset for Benefits Received? In Anderson v. Gilliland, 684 S.W.2d 673 (Tex. 1985), the Supreme Court did not specifically address the question of whether benefits received by the community estate from the enhanced separate realty should work to offset the reimbursement claim. Some earlier cases have indicated that no offset is necessary in this particular situation, in contrast to the other areas of marital reimbursement. There is language in Dakan v. Dakan to the contrary:

> It is no equity to permit the surviving spouse to impress certain property bought and improved principally by community funds as a homestead, to be used during his or her lifetime, being the direct beneficiary of such improvement, to demand repayment in full of the exact amount advanced, together with interest thereon, and to be enforced by the foreclosure of a lien upon such property . . . .

Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620, 628 (1935).

C. FOR UNCOMPENSATED TIME, TALENT AND LABOR.

The Supreme Court has addressed the question of reimbursement for uncompensated time, talent, toil and labor expended to enhance the value of one spouse's separate property corporation. Jensen v. Jensen, 665 S.W.2d 107 (Tex. 1984); Vallone v. Vallone, 644 S.W.2d 455 (Tex. 1984). In that situation, the community estate is entitled to reimbursement for the reasonable value of uncompensated-for time, talent, toil and labor of a spouse, beyond that reasonably necessary to manage and preserve the separate estate, which enhanced the value of his separate property corporation, and for which the community did not receive adequate compensation. Jensen, supra at 110. Note that this rule applies only to labors exceeding those reasonably necessary to maintain the separate estate. Id. at 110. See Norris v. Vaughn, 152 Tex. 491, 260 S.W.2d 676 (1953). This rule of reimbursement is more in the nature of a "reimbursement of cost" rule, as opposed to a strict enhancement rule, as used in Anderson v. Gilliland. Also, inherent in the Jensen rule is the offsetting of value received by the community estate in exchange for the husband's time, talent, toil and labor. It is only the uncompensated-for time, talent, toil and labor of the spouse that can be recovered under this

reimbursement theory. The fact finder is to consider not only salary, but also bonuses, dividends, and other fringe benefits. Jensen, supra at 110.

1. Does It Apply to the Family Home? The Vallone and Jensen cases did not address labor spent enhancing a spouse's separate real estate. Those cases addressed only the husband's separate property corporation. One case has rejected the existence of a right to reimbursement for community labor spent enhancing separate real estate. Hale v. Hale, 557 S.W.2d 614, 615 (Tex. Civ. App.--Texarkana 1977, no writ). However, the rule announced in Hale was expressly disapproved in the Vallone opinion, giving rise to the inference that reimbursement is in fact available for uncompensated community time, talent, toil and labor used to enhance one spouse's separate real estate. Whether the compensation to be considered is merely wages, or whether is includes rental income received from the property, or the reasonable value of living in the improvements, could perhaps be argued. Because the rules of reimbursement from area to area are not uniform, it is difficult to predict how the Supreme Court will rule when it finally addresses the question. Although symmetry in the law is nice, it certainly is not necessary, and may not even be possible.

2. Burden to Plead and Prove. The party seeking reimbursement for enhancement of the separate estate by contribution of uncompensated time, talent or labor has the burden to plead and prove this claim. Vallone v. Vallone, 644 S.W.2d 455, 459 (Tex. 1983).

D. ENFORCING THE REIMBURSEMENT AWARD. Reimbursement may be awarded in several ways. It may be reflected in the division of community property. It may be granted in the form of an unsecured judgment. Or such a judgment may be secured. Or the court may order a sale of the property of the spouse, with a portion of the proceeds to be paid to the party deserving reimbursement. The court may wish to secure the judgment by an equitable lien, created in the decree of divorce.

1. Adjusted Out of Community Property. The Supreme Court, in Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620, 628-29 (1935), expressed its preference that reimbursement be adjusted out of available community property, if possible.

2. An Unsecured Judgment. The court may award reimbursement in the form of an unsecured judgment in favor of one spouse and against the other. Such a judgment operates in personam against the other spouse, and if abstracted, creates a judgment lien on non-

exempt realty in the county where abstracted. The judgment can be enforced by writ of execution and ultimate sale of non-exempt property.

3. Judgment Secured by Equitable Lien. In Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620, 627 (1935), the Supreme Court addressed the question of whether an equitable claim for reimbursement could be secured by equitable lien fixed in the separate property. While instructing that the reimbursement should be made, if possible, first out of the community property subject to division, the Court approved the trial court's impressing a lien or order of sale upon the property of a spouse to secure the payment of a money judgment to the other spouse for reimbursement. Id. at 628-29. More recently, courts of appeals have ruled that impressing such a lien in a spouse's separate property real estate does not violate the rule of Eggemeyer v. Eggemeyer, that the court in a divorce cannot divest one spouse of title to separate realty and award it to the other spouse. E.g. Buchan v. Buchan, 592 S.W.2d 367, 371 (Tex. Civ. App.--Tyler 1980, writ dism'd).

4. Ordering Property Sold, and Proceeds Divided Properly. The court also has the power to order the property sold, with instructions to pay the party deserving reimbursement a proper portion of the proceeds. Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620, 629 (1935). However, sale of the property is a last alternative. In Dakan, an action involving reimbursement claims filed upon the death of a spouse, the Supreme Court said:

> The district court has the power to determine and adjust the rights of the parties in this suit, and may justly treat this as an equitable partition proceeding. In making such partition, all of the property in which the parties are jointly interested should be dealt with as a whole, and partition made, as far as possible, in kind, giving due recognition to the homestead rights. In case a complete partition in kind cannot be had, so as to award each party his or her equitable portion, the court can, if necessary, award certain property to one or more of the interested parties, impressing it with a money charge in favor of another, which charge may be ordered enforced by sale, if not satisfied by payment of the money within a fixed period of time.

Id. at 629. From Dakan, it appears that sale of the property is the least desirable alternative.

E. STATUTE OF LIMITATIONS FOR REIMBURSEMENT CLAIMS. The right to seek reimbursement between marital estates arises upon the dissolution of marriage by death or divorce. Burton v. Bell, 380 S.W.2d 561 (Tex. 1964). The applicable statute of limitations for reimbursement claims was the two year statute relating to debts not evidenced by a writing, TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon 1958). Burton v. Bell, supra at 565. The statute of limitations for debts is now set out in TEX. CIV. PRAC. & REM. CODE § 16.003 (Vernon Supp. 1986). This statute is now a four year statute. Where the cause of action for reimbursement arises from the death of a spouse, the statute as to the decedent's heirs is suspended for 12 months, or until an executor or administrator is appointed for the deceased spouse's estate. TEX. CIV. PRAC. & REM. CODE ANN. § 16.062 (Vernon Supp. 1986). Any claim for reimbursement arising out of events during the marriage should be raised in the divorce or it may be barred by the doctrine of res judicata. The statute of limitations does not begin to run until dissolution of the marriage, by which time the issue will have either been litigated or barred.

IV. HOMESTEAD RIGHTS AND LIMITATIONS. The attorney who must deal with the family home on divorce should know the laws pertaining to homestead. This includes both the protection of the homestead from claims of creditors and limitations on the power of the spouses to deal with the homestead.

A. THE HOMESTEAD. The homestead is an interest in land which, by operation of state constitution and statute, is not subject forced sale under legal process. There are also restrictions on the conveyance of the homestead by a spouse, and circumstances under which a surviving spouse may continue the homestead after the death of the spouse who owns an interest in the property.

1. What is a "Homestead." A "homestead" is an estate in land, not just a privilege of exemption or possession. Andrews v. Security Nat. Bank of Wichita Falls, 121 Tex. 409, 50 S.W.2d 253, 256 (1932); Villarreal v. Laredo Nat. Bank, 677 S.W.2d 600, 607 (Tex. App.--San Antonio 1984, no writ). The homestead exemption does not depend upon unqualified fee ownership of the land. Villarreal v. Laredo Nat. Bank, 677 S.W.2d 600, 606 (Tex. App.--San Antonio 1984, no writ); Gann v. Montgomery, 210 S.W.2d 255, 258 (Tex. Civ. App.--Fort Worth 1948, writ ref'd n.r.e.). The homestead right is akin to a life estate. Sparks v. Robertson, 203 S.W.2d 622 (Tex. Civ. App.--Austin 1947, writ ref'd).

2. Acquisition of Homestead. This subsection discusses how a party acquires a homestead interest in land.

a. Homestead Requires Some Interest in Land. Homestead can adhere only to some title or interest in land. Villarreal v. Laredo Nat. Bank, 677 S.W.2d 600, 606 n. 3 (Tex. App.--San Antonio 1984, no writ). However, fee simple ownership in the land is not required. Id. at 606. Sufficient interests include tenancy in common, tenancy at will, and a right of present possession. Id. at 606 n. 3. In Villarreal, the provision in the decree of divorce allowing the wife "use and occupancy" of the house until the youngest child turned 18 was a sufficient interest to support a homestead claim for the wife, as against a creditor, even though ownership of the house was awarded by the Decree of Divorce to the husband.

b. When Right Arises. A homestead right arises upon the intention of a person to use the premises for homestead purposes, coupled with occupancy or some overt act of preparing to occupy the premises for that purpose. Kostelnik v. Roberts, 680 S.W.2d 532, 536 (Tex. App.--Corpus Christi 1984, writ ref'd n.r.e.). Davis v. McClarken, 378 S.W.2d 358, 360 (Tex. Civ. App.--Eastland 1954, no writ).

c. Designation of Homestead. The fact that the owner has or has not designated the property as homestead for property tax purposes is not controlling. Dodd v. Harper, 670 S.W.2d 646 (Tex. App.--Houston [1st Dist.] 1983, no writ). Such designation, or the lack thereof, is merely one evidentiary factor to consider on the ultimate question, which is whether the claimant intended to make the property his homestead.

(1) Forcing Designation. The Property Code provides a way for a creditor to require a person to declare a homestead. Where execution is issued against someone who holds land which might be homestead, the judgment creditor can give the judgment debtor notice to designate homestead. The notice must state that upon failure of the debtor to designate a homestead, the court will appoint a commissioner to make such a designation, at the debtor's expense. TEX. PROP. CODE ANN. § 41.021 (Vernon Supp. 1986). The debtor has until 10:00 a.m. on the Monday following the twentieth day after service of notice to designate his homestead, by filing a written designation with the court issuing writ of execution. The designation must include a plat. TEX. PROP. CODE ANN. § 41.022 (Vernon Supp. 1986). If the debtor fails to do so, then on motion of the judgment creditor filed within 90 days of issuance of execution, the court issuing execution must appoint a commissioner, together with a surveyor and others whose assistance is needed. The commissioner is to file his designation, and plat, on behalf of the judgment debtor, within 60 days of appointment, or within such time as the court may allow. Either the judgment creditor or the judgment debtor may,

within 10 days thereafter, request a hearing from the court on the designation, and by filing exceptions to the designation prior to hearing be entitled to present evidence for or against the designation. TEX. PROP. CODE ANN. § 41.023 (Vernon Supp. 1986). After the hearing, the court designates the homestead, and orders sale of any excess property. The fees and expenses of the commissioner, appraiser and others appointed, are taxed against the debtor as costs of execution. TEX. PROP. CODE ANN. § 41.023 (Vernon Supp. 1986).

3. Size of Homestead. The size of the homestead is set in Section 41.002 of the Texas Property Code. An urban homestead consists of not more than one acre of land, which can be in one or more lots, together with any improvements thereon. TEX. PROP. CODE ANN. § 41.002(a) (Vernon Supp. 1986). A rural homestead for a family is not more than 200 acres, and for an individual not more than 100 acres, whether in one or more parcels, together with any improvements thereon. TEX. PROP. CODE ANN. § 41.002(b) (Vernon Supp. 1986). The sizes given in the Property Code apply to all homesteads, regardless of when they were created. TEX. PROP. CODE ANN. § 41.002(c) (Vernon Supp. 1986).

4. Loss of Homestead. A homestead interest can be lost by death, abandonment or alienation. Posey v. Commercial National Bank, 55 S.W.2d 515 (Tex. Comm'n App.--1932, judgment adopted).

a. Death. As stated above, the homestead status can terminate as a result of death. Upon the death of both spouses, the property ceases to be homestead. Williamson v. Lewis, 346 S.W.2d 957, 959 (Tex. Civ. App.--Fort Worth 1961, writ ref'd). The fact that one spouse dies does not deprive the survivor of an existing homestead right. Julian v. Andrews, 491 S.W.2d 721, 727 (Tex. Civ. App.--Fort Worth 1973, writ ref'd n.r.e.). Accord, Cox v. Messer, 469 S.W.2d 611 (Tex. Civ. App.--Tyler 1971, no writ).

b. Abandonment. The homestead status of land can be lost by abandonment. Paddock v. Siemoneit, 147 Tex. 571, 218 S.W.2d 428 (1949). If the homestead claimant is married, however, the homestead cannot be abandoned without the consent of the claimant's spouse. TEX. PROP. CODE ANN. § 41.004 (Vernon Supp. 1986).

(1) Temporary Absence Not Fatal. It has been held that a temporary absence from a homestead, and even temporary removal to another state, does not alone constitute abandonment of the homestead. McFarland v. Rousseau, 667 S.W.2d 929, 931 (Tex. Civ. App.--Corpus Christi 1984, no writ).

(2) Temporary Renting Not Fatal. The temporary renting of the homestead does not destroy its homestead character provided the claimant has not acquired another homestead. TEX. PROP. CODE ANN. § 41.003 (Vernon Supp. 1986).

(3) Moving Out Upon Separation Not Fatal. Several courts have faced the question of whether a spouse's leaving the home upon marital separation constitutes abandonment of that spouse's homestead interest.

(a) The Posey Case. In Posey v. Commercial Nat. Bank, 55 S.W.2d 515 (Tex. Comm'n App. 1932, judgm't adopted), a husband conveyed his one-half community property interest in the parties' home to his wife in anticipation of divorce. Creditors of the husband claimed the conveyance constituted an abandonment of his homestead protection, and that his one-half interest was received by the wife subject to the husband's debts. The court rejected the argument, holding that the husband's homestead interest inured to the benefit of the wife.

(b) The Sakowitz Case. In Sakowitz Bros. v. McCord, 162 S.W.2d 437 (Tex. Civ. App.--Galveston 1942, no writ), creditors argued that the filing of a divorce and issuance of a temporary injunction denying the husband access to the parties' home constituted abandonment by the husband of the homestead protection of his one-half interest in the property. The court held that once the homestead character of property is established, it continues through a divorce for so long as some members of the family continue to occupy the property.

(c) The Rimmer Case. In Rimmer v. KcKinney, 649 S.W.2d 365 (Tex. App.--Fort Worth 1983, no writ), creditors argued that a husband had abandoned the homestead character of his one-half community property interest in the parties' home when he moved from the home after the divorce was filed and later conveyed his one-half interest to his wife pursuant to the decree of divorce. Because the wife and two daughters continued to live in the house, the court held that its homestead character continued. The appellate court observed certain differences from the facts in the Sakowitz Bros. case: that in Rimmer the husband moved out voluntarily, rather than in obeisance to an injunction; and further that the conveyance in Rimmer was from husband to wife, rather than from both spouses to a third party, as in Sakowitz Bros. The differences were not deemed significant.

(d) Other Authorities. See also Villarreal v. Laredo Nat. Bank, 677 S.W.2d 600, 606 (Tex. App.--San

Antonio 1984, no writ) ("[a]s a general rule, the complete breaking up of the family for any cause does not operate to forfeit the homestead right of one who has acquired it and continues to use the property as his home"); Wierzchula v. Wierzchula, 623 S.W.2d 730, 732 (Tex. Civ. App.--Houston [1st Dist.] 1981, no writ) ("[t]he homestead character of the property is not destroyed by a divorce if one of the parties to the divorce continues to maintain it as homestead").

The fact that one spouse moves out of the community homestead does not destroy the homestead

CONCLUSION: status of the property so long as the other spouse and/or children continue to use the property as their homestead.[13]

5. Homestead in Other Spouse's Separate Property. A spouse can have a homestead interest in land which is the separate property of the other spouse. Villarreal v. Laredo Nat. Bank, 677 S.W.2d 600, 606 (Tex. App.--San Antonio 1984, no writ). This interest, or the right to use the property as a residence, can be awarded to the custodial spouse for the duration of the minority of the parties' children.[14] Hedtke v. Hedtke, 248 S.W.2d 21, 12 (Tex. 1923). See Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 138 (Tex. 1977); Villarreal v. Laredo Nat. Bank, 677 S.W.2d 600, 606 (Tex. App.--San Antonio 1984, no writ). An argument can be made that the homestead interest of the non-owner spouse in separate property of the other spouse can be awarded to the non-owner spouse, thereby excluding the owner-spouse from use of his land, even where there are no minor children. The Supreme Court, in Hedtke v. Hedtke, 112 Tex. 404, 248 S.W. 21, 23 (1923), said:

> In disposing of the property of the parties it is competent for the court to consider the homestead character of any of the property, separate or community, and the homestead needs of either the husband or the wife or the children; and, the right of use and occupancy of homestead property, as of any other, may be

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[13] Note, however, that the insured spouse's relocation of his residence may affect insurance coverage. See discussion in Section VII of the Article, beginning at p. _____below.

[14] Presumably such a use can be continued for as long as the child support obligation continues, which now can extend beyond majority, until "the end of the school year in which the child graduates, if he or she is fully enrolled in an accredited primary or secondary school in a program leading toward a high school diploma." See TEX. FAM. CODE ANN. § 14.05(a) (Vernon Supp. 1986).

adjudged to the husband, the wife, or the children.

B. LIENS. Under the Texas constitution,[15] only three liens can be foreclosed against a homestead: purchase money liens, tax liens, and builder's and mechanic's liens.[16] TEX. CONST. art. XVI, § 50 (Vernon Supp. 1985). A judgment lien in favor of one spouse, created in a decree of divorce, cannot be foreclosed against a homestead interest, except to the extent that the lien fits one of the three recognized exceptions: to secure an obligation to pay money in exchange for the home, or to secure a claim for reimbursement for payment of purchase money principle or interest, or for payment of property taxes on the property, or for payment of indebtednesses secured by vendor's liens or builder's and mechanic's liens in the property. Eggemeyer v. Eggemeyer, 623 S.W.2d 462, 466 (Tex. App.--Austin 1981, writ dism'd).

1. Vendor's Lien. A vendor's lien is a lien retained in the deed conveying title to the purchaser, which lien secures the unpaid portion of the purchase price of the property. The vendor's lien can further be secured by a deed of trust, providing for non-judicial foreclosure if default is made in the payment of the purchase money indebtedness.

2. Mechanic's, Contractor's or Materialman's Lien. The mechanic's, contractor's or materialman's lien is covered by Chapter 53 of the Texas Property Code. Chapter 53: describes persons entitled to the lien, and the property which is subject thereto; describes the procedure for perfecting the lien; provides for the withholding of funds by the owner on behalf of subcontractors; etc. If these issues become important in a family law case, reference should be made to these provisions. Ordinarily, however, the family home will be homestead, and will be protected by Section 41.001 of the Texas Property Code. Section 41.001 provides that an encumbrance may be properly fixed on homestead property for work and material used in constructing improvements on the property only "if contracted for in writing before the material is furnished or the labor is performed and in a manner required for the conveyance of a homestead,

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[15] Federal law preempts state homestead protection in certain instances. See United States v. Rodgers, 103 U.S. 2132 (1983). See discussion in Section IV.D. of this Article, beginning at p. ____below.

[16] The Texas Property Code says that "[e]ncumbrances may be properly fixed on homestead property for: (1) purchase money; (2) taxes on the property; or (3) work and material used in constructing improvements on the property if contracted for in writing before the material is furnished or the labor is performed and in a manner required for the conveyance of a homestead, with joinder of both spouses if the homestead claimant is married." TEX. PROP. CODE ANN. § 41.001 (Vernon Supp. 1985).

with joinder of both spouses if the homestead claimant is married." TEX. PROP. CODE ANN. § 41.001 (Vernon Supp. 1986).

3. Tax Lien. On January 1 of each year a tax lien attaches to property to secure all taxes, penalties and interest ultimately imposed for the year on that property. TEX. PROP. CODE ANN. § 32.01 (West Supp. 1986). This lien takes priority over a homestead interest in the property. Id. § 32.05(a) (Vernon 1982). The lien also has priority over other debts of the owner, even if they are secured by a prior lien on the property. Id. § 32.05(b) (Vernon 1982). Priority as to a federal tax lien is controlled by Texas law subject, however, to any contrary provision of federal law on the subject. Id. § 32.04 (Vernon 1982). The tax lien may be foreclosed.

4. Equitable Lien. On divorce, where the court awards the house to one party and a money judgment to the other for his or her interest in the home, the money judgment can be secured by an equitable lien, created in the decree of divorce, which is enforceable against a claim of homestead. Lettieri v. Lettieri, 654 S.W.2d 554 (Tex. App.--Fort Worth 1983, writ dism'd). In Wierzchula v. Wierzchula, 623 S.W.2d 730, 732 (Tex. Civ. App.--Houston [1st Dist.] 1981, no writ), the court said that in a divorce action a lien could be placed on a spouse's separate property homestead "to secure the payment of the amount awarded to the other spouse for the spouse's homestead interest." An equitable lien can also be awarded to secure a judgment for reimbursement for payments made on purchase money loans, home improvement loans, or property taxes on the home. Eggemeyer v. Eggemeyer, 623 S.W.2d 462, 466 (Tex. App.--Austin 1981, writ dism'd). See Buchan v. Buchan, 592 S.W.2d 367 (Tex. Civ. App.--Tyler 1979, writ dism'd) (husband awarded judgment to offset leasehold interest in wife's separate property residence taken from him in divorce). Professor McKnight stated:

> Texas courts have generally acknowledged that in a suit for divorce a lien may be placed upon a spouse's homestead in order to secure the payment of a money judgment awarded to the other spouse for his or her homestead interest.

McKnight, Family Law: Husband and Wife, 38 SW. L.J. 131, 154 (1984).

a. But Only For Interest in Homestead. Professor McKnight has suggested that the homestead is not subject to the imposition of an equitable lien for any claims "except liens for improvements and taxes attributable to the premises and interest in the property made the basis of the homestead and for improvements and taxes." McKnight, supra

at 154-55, citing Eggemeyer v. Eggemeyer, 623 S.W.2d 462, 466 (Tex. Civ. App.--Waco 1981, writ dism'd); Day v. Day, 610 S.W.2d 195, 199 (Tex. Civ. App.--Tyler 1980, writ ref'd n.r.e.). It appears that an equitable lien can also be fixed in the homestead for a reimbursement claim for payment of a vendor's lien indebtedness, as well. An interesting question exists regarding a separate property home. Where the home is the separate property of one spouse, can the other spouse be given a judgment secured by lien in the homestead for his or her "homestead interest" in the other spouse's separate property? The answer appears to be "yes." Thus, although Eggemeyer would prohibit the divesting of title to separate realty and awarding it to the other spouse, perhaps a money judgment can be awarded to the other spouse who relinquishes his or her "homestead interest" in the other spouse's separate property home.

5. Implied Vendor's Lien. The Texas Supreme Court has recently ruled that where one party sells realty on credit to another, an implied vendor's lien arises to secure the debt. McGoodwin v. McGoodwin, 671 S.W.2d 880 (Tex. 1984). In McGoodwin, the wife conveyed her interest in the parties' homestead to the husband pursuant to an agreement incident to divorce. No vendor's lien was retained in the deed. The Supreme Court held that an implied vendor's lien arose from the property settlement agreement, securing the wife's one-half community property interest conveyed. The Court specifically noted that the lien only reached the undivided one-half community property interest actually conveyed by the wife pursuant to the property settlement agreement. Id. at 883.

A similar result was reached by the Austin Court of Appeals, in Colquette v. Forbes, 680 S.W.2d 536 (Tex. App.--Austin 1984, no writ), where an implied vendor's lien was held to have arisen from the agreement incident to divorce even though no vendor's lien was retained in the deed conveying the husband's one-half community property interest in the property to the wife. See McKnight, Family Law: Husband and Wife, 39 SW. L. J. 1, 19, 26-27 (1985).

6. Equitable Subrogation to Lien. Under certain circumstances, where a party pays an indebtedness secured by lien, that party is equitably subrogated to the lienholder's secured position. In Citizens Sav. Bank & Trust Co. v. Spencer, 105 S.W.2d 671,677 (Tex. Civ. App.--Amarillo), writ dism'd, 110 S.W.2d 1151 (Tex. 1937), it was said: