

# FIDUCIARY ISSUES IN FAMILY LAW CASES

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## **CHAPTER 10**



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Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)  
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Member, Supreme Court Task Force on Jury Charges (1992-93)  
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President, Texas Academy of Family Law Specialists (1990-91)  
President, San Antonio Family Lawyers Association (1989-90)  
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Recipient of the Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in CLE (2009)  
Listed as Texas' Top Family Lawyer, *Texas Lawyer's Go-To-Guide* (2007)  
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Texas Academy of Family Law Specialists' *Sam Emison Award* (2003)  
State Bar of Texas *Presidential Citation* "for innovative leadership and relentless pursuit of excellence for continuing legal education" (June, 2001)  
State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)  
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- Practice Before the Supreme Court of Texas Course (2002 - 2005, 2007, 2009 & 2011)
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- Advanced Expert Witness Course (2001, 2002, 2003, 2004)
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- Editor-in-Chief of the State Bar of Texas' TEXAS SUPREME COURT PRACTICE MANUAL (2005)
- Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)
- Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)
- A Guide to Proceedings Under the Texas Parent Notification Statute and Rules*, SOUTH TEXAS LAW REVIEW (2000) (co-authored)
- Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal*, 41 SOUTH TEXAS LAW REVIEW 111 (1999)
- Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994 and Feb., 1995)
- Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)
- Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)
- Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage That Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

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State Bar of Texas' [SBOT] **Advanced Family Law Course:** Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21<sup>st</sup> Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001); Private Justice: Arbitration as an Alternative to the Courthouse (2002); International & Cross Border Issues (2002); Premarital and Marital Agreements: Representing the Non-Monied Spouse (2003); *Those Other Texas Codes: Things the Family Lawyer Needs to Know About Codifications Outside the Family Code* (2004); Pearls of Wisdom From Thirty Years of Practicing Family Law (2005); The Road Ahead: Long-Term Financial Planning in Connection With Divorce (2006); A New Approach to Distinguishing Enterprise Goodwill From Personal Goodwill (2007); The Law of Interpreting Contracts: How to Draft Contracts to Avoid or Win Litigation (2008); Effect of Choice of Entities: How Organizational Law, Accounting, and Tax Law for Entities Affect Marital Property Law (2008); Practicing Family Law in a Depressed Economy, Parts I & II (2009); Property Puzzles: 30 Characterization Rules, Explanations & Examples (2009); Troubling Issues of Characterization, Reimbursement, Valuation, and Division Upon Divorce (2010); Separate & Community Property: 30 Rules With Explanations & Examples (2010); The Role of Reasoning in Constructing a Persuasive Argument (2011); Negotiating a Family Law Case (2012) New Appellate Rules for CPS Cases (2012); Court-Ordered Sanctions (2013)

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

SBOT's **Advanced Evidence & Discovery Course:** Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997); Evidence Grab Bag (1998); Making and Meeting Objections (1998-99); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000); Predicates and Objections (2001); Building Blocks of Evidence (2002); Strategies in Making a Daubert Attack (2002); Predicates and Objections (2002); Building Blocks of Evidence (2003); Predicates & Objections (High Tech Emphasis) (2003); Court-Imposed Sanctions in Texas (2012)

SBOT's **Advanced Civil Appellate Practice Course:** Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002); New Appellate Rules and New Trial Rules (2003); *Supreme Court Trends* (2004); Recent Developments in the *Daubert* Swamp (2005); Hot Topics in Litigation: Restitution/Unjust Enrichment (2006); The Law of Interpreting Contracts (2007); Judicial Review of Arbitration Rulings: Problems and Possible Alternatives (2008); The Role of Reasoning and Persuasion in the Legal Process (2010); Sanctions on Review (Appeal and Mandamus) (2012)

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Training: Current Events in Family Law (2003); SBOT Practice Before the Supreme Court: Texas Supreme Court Trends (2003); SBOT 26<sup>th</sup> Annual Advanced Civil Trial: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Challenging Qualifications, Reliability, and Underlying Data (2003); SBOT New Frontiers in Marital Property: Busting Trusts Upon Divorce (2003); American Academy of Psychiatry and the Law: Daubert, Kumho Tire and the Forensic Child Expert (2003); AICPA-AAML National Conference on Divorce: Cutting Edge Issues—New Alimony Theories; Measuring Personal Goodwill (2006); New Frontiers' - Distinguishing Enterprise Goodwill from Personal Goodwill; Judicial Conference (2006); SBOT New Frontiers in Marital Property Law: Tracing, Reimbursement and Economic Contribution Claims In Brokerage Accounts (2007); SBOT In-House Counsel Course: When an Officer Divorces: How a Company can be Affected by an Officer's Divorce (2009); Fiduciary Litigation Trial Notebook Course: Family Law and Fiduciary Duty (2010); SBOT Handling Your First Civil Appeal The Role of Reasoning and Persuasion in Appeals (2011-2012); New Frontiers in Marital Property Law: A New Approach to Determining Enterprise and Personal Goodwill Upon Divorce (2011); AICPA-AAML National Conference on Divorce: Business Valuation Upon Divorce: How Theory and Practice Can Lead to Problems In Court & Goodwill Upon Divorce: Distinguishing Between Intangible Assets, Enterprise Goodwill, and Personal Goodwill (2012); SBOT Anatomy of Fiduciary Litigation: Voir Dire and Jury Questionnaires; History of Texas Supreme Court Jurisprudence, 170 Years of Texas Contract Law (2013); SBOT Exceptional Legal Writing: The Role of Reasoning and Persuasion in Legal Argumentation (2013); Family Law Update - 2013, Judicial Conference (2013); Family Law and Fiduciary Duty, Fiduciary Litigation Course (2013)

**Continuing Legal Education Webinars:** *Troubling Issues of Characterization, Reimbursement, Valuation, and Division Upon Divorce*; Texas Bar CLE, Live Webcast, April 20, 2012, MCLE No. 901244559 (2012); *Family Law Update - 2013*, Texas Center for the Judiciary Video



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## Family Issues in Family Law Cases

by

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**I. INTRODUCTION.** This Article compares some of the ways that fiduciary law in the family law context is similar to and different from ordinary fiduciary law.

**II. DUTIES BETWEEN SPOUSES.** Texas has long recognized that the marital relationship entails special obligations between spouses. In *Wiley and Co. v. Prince*, 21 Tex. 637, \*3 (1858), Chief Justice Hemphill wrote:

There is no relation in which more influence, more dominion can be exercised by one person over another than that exercised by the husband over the wife. They are separate in this state as to property, but in other respects the legal existence, the powers of the wife, are merged in the husband, and his conduct in obtaining gifts or suretyships from her property should therefore be watched with the most scrupulous attention.

The old legal doctrines of partial merger of identity and disabilities of coverture, which prevailed in Nineteenth Century Texas, have since been removed from Texas law. Still, the relationship of husband and wife is seen to be one of mutual trust.

**A. WHAT IS THE DUTY BETWEEN SPOUSES?**

**1. Spouses Have a Fiduciary Relationship.** A number of Texas appellate opinions say that the relationship between spouses is a fiduciary relationship. *Knight v. Knight*, 301 S.W.3d 723, 731 (Tex. App.--Houston [14th Dist.] 2009, no pet.) (“A fiduciary duty exists between a husband and a wife as to the community property controlled by each spouse”); *Smith v. Deneve*, 285 S.W.3d 904, 911 (Tex. App.--Dallas 2009, no pet.) (saying, in dicta, “[t]he marital relationship is a fiduciary one”); *Solares v. Solares*, 232 S.W.3d 873, 881 (Tex. App.--Dallas 2007, no pet.) (“A fiduciary duty exists between spouses”); *Miller v. Ludeman*, 150 S.W.3d 592, 597 (Tex. App.--Austin 2004, pet. denied) (“Husbands and wives generally owe a fiduciary duty to one another”); *Toles v. Toles*, 113 S.W.3d 899, 916 (Tex. App.--Dallas 2003, no pet.) (“A fiduciary duty exists between spouses”); *Connell v. Connell*, 889 S.W.2d 534 (Tex. App.--San Antonio 1994, writ denied) (“It is established law that the relationship between a husband and wife is a fiduciary relationship, and the spouses are bound by that fiduciary duty in dealing with the community estate”); *Buckner v. Buckner*, 815 S.W.2d 877, 880 (Tex. App.--Tyler 1991, no writ). (“It has long been recognized in Texas that a confidential relationship does exist between a husband and his wife.”). Justice Willett commented, in dicta in the case *Ditta v. Conte*, 298 S.W.3d 187, 191 (Tex. 2009):

By analogy, the marital relationship between spouses is a fiduciary relationship.<sup>FN21</sup> That special relationship is of course more than the sum of discrete actions taken by one spouse toward another. If, for example, cruelty and adultery are recognized grounds for divorce,<sup>FN22</sup> a spouse suing for divorce on those grounds should not be tasked to sue for divorce within a specific statutory limitations period. The effect of that conduct on the special relationship of trust and confidence between spouses may continue and change over time.

In *Hubbard v. Shankle*, 138 S.W.3d 474, 483 (Tex. App.--Fort Worth 2004, pet. denied), the appellate court said that “the relationship between a husband and wife is *ordinarily* a fiduciary relationship.” (Emphasis added). In *Buckner v. Buckner*, 815 S.W.2d 877, 878 (Tex. App.--Tyler 1991, no writ), the court said: “It has long been recognized in Texas that a confidential relationship does exist between a husband and his wife.” The court then goes on to say: “Having established that a fiduciary or confidential relationship exists arising out of a marriage, the burden of demonstrating the fairness of the transaction passes to the person making the representation.” In *Daniel v. Daniel*, 779 S.W.2d 110, 115 (Tex. App.--Houston [1st Dist.] 1989, no writ), the court said: “Because of the confidential relationship between a husband and a wife, courts have imposed the same duties of good faith and fair dealing on spouses as required of partners and other fiduciaries.” In *Bohn v. Bohn*, 455 S.W.2d 401, 406 (Tex. Civ. App.--Houston [1st Dist.] 1970, writ dism’d), the court said “[t]hat a confidential relationship exists between husband and wife has been recognized in Texas.” It can be seen that some courts use the

terms “fiduciary” and “confidential” interchangeably when discussing obligations between spouses.

The Texas Family Code *does not* say that a relationship of trust exists between spouses that imposes upon spouses duties that are legally equivalent to the relationship between a trustee and a beneficiary, or a principal and an agent, or a lawyer and a client, or even between partners in a general partnership. The Texas cases on point are inexact in the words they use. The duties that exist between spouses, that arise by operation of law on account of the marital relationship, can best be seen as a separate species of fiduciary duty that does not equate to the other formal fiduciary duties that arise by operation of law. For example, in *Freeman v. Freeman*, 1998 WL 830533, \*5 (Tex. App.--Austin, pet. denied) (unpublished), the appellate court denied that a fiduciary relationship existed between spouses at all times, and refused to hold that the wife’s failure to inform her husband, that he was not the father of a child born during marriage, was a breach of a fiduciary relationship.

A distinction was drawn in a Maryland case between a fiduciary relationship and a confidential relationship, in the context of spouses. *Lasater v. Guttman*, 5 A.3d 79, 93 (Md. App. 2010). The court concluded that spouses were not true fiduciaries, absent an agreement establishing that relationship. *Id.* at 94. However, spouses could have a confidential relationship, but this was not presumed by virtue of the marital relationship. *Id.* at 94. In distinguishing a fiduciary from a confidential relationship, the Maryland Court of Appeals quoted Scott on Trusts to the effect that certain consequences automatically flow from a fiduciary relationship, but the same consequences do not automatically flow from a confidential one. *Id.* The Texas Supreme

Court has distinguished between formal fiduciary obligations arising by operation of law from certain relationships (i.e., principal/agent, partners) and informal relationships arising from factual situations that may give rise to a fiduciary duty (called “confidential relationships”). *Crim Truck & Tractor Co. v. Navistar Intern. Transp.*, 823 S.W.2d 591, 594 (Tex. 1992). However the duties were similar.

Texas cases appear to use the terms fiduciary and confidential interchangeably in family law cases, and the duties do not vary depending on the label affixed.

**2. What Obligations Does the Interspousal Duty Entail?** Given that the relationship between spouses is fiduciary, or confidential, what duties does the relationship entail? Different courts have described this duty differently. In *Izzo v. Izzo*, 2010 WL1930179, \*7 (Tex. App.–Austin 2010, pet. denied), the Court said: “The fiduciary duty between spouses extends to a duty to disclose material information in business transactions”). In *Buckner v. Buckner*, 815 S.W.2d 877, 880 (Tex. App.–Tyler 1991, no writ), the court said: “The husband must disclose the material facts within his knowledge and the legal consequences flowing from them to his wife.” In *Daniel v. Daniel*, 779 S.W.2d 110, 115 (Tex. App.–Houston [1st Dist.] 1989, no writ), the court spoke of a duty of good faith and fair dealing. In *Matthews v. Matthews*, 725 S.W.2d 275, 279 (Tex. App.–Houston [1st Dist.] 1986, writ ref’d n.r.e.), which involved the enforceability of a post-marital partition agreement, the Court said: “Appellant and appellee, as husband and wife, owed each other special fiduciary duties. . . . The fiduciary relationship requires that appellant demonstrate the basic fairness of the transaction.” In *Bohn v. Bohn*, 455 S.W.2d 401, 406 (Tex. Civ.

App.–Houston [1<sup>st</sup> Dist.] 1970, writ dismissed), the court said, in connection with an interspousal transfer, that the spouse who received the property had the burden of “affirmatively showing that he acted in good faith, and that the gift was voluntarily and understandingly made.” In *Daniel v. Daniel*, 779 S.W.2d 110, 115 (Tex. App.–Houston [14th Dist.] 1989, no writ), the court said: “Because of the confidential relationship between a husband and a wife, courts have imposed the same duties of good faith and fair dealing on spouses as required of partners and other fiduciaries.” As discussed in Section II.C.4 and 5 below, a spouse may not convey away community property with the intent to deprive the other spouse of his or her interest in the property. Nor may a spouse convey away community assets in a manner that is “unfair” to the other spouse. So a single consensus description of the fiduciary obligations between spouses has not yet evolved.

**3. Fiduciary Relationship After Filing a Contested Divorce.** Several Texas appellate courts have said that the fiduciary relationship between spouses ends at the start of a contested divorce in which the spouses each have independent attorneys or financial advisors. *Boaz v. Boaz*, 221 S.W.3d 126, 133 (Tex. App.–Houston [1<sup>st</sup> Dist.] 2006, non pet.) (“adverse parties who have retained professional counsel, including husbands and wives in a suit for divorce, do not owe fiduciary duties to one another”); *Ricks v. Ricks*, 169 S.W.3d 523, 526 (Tex. App.–Dallas 2005, no pet.) (“The fiduciary duty arising from the marital relationship ceases in a contested divorce when the husband and wife each hire independent attorneys to represent them”); *Toles v. Toles*, 113 S.W.3d 899, 916 (Tex. App.–Dallas 2003, no pet.) (“A fiduciary duty exists between spouses. . . . However, that

relationship terminates in a contested divorce when a husband and wife each have independent attorneys.”); *Boyd v. Boyd*, 67 S.W.3d 398, 405 (Tex. App.–Fort Worth 2002, no pet.) (“The fiduciary duty arising from the marriage relationship does not continue when a husband and wife each hire independent professional counsel to represent them in a contested divorce proceeding”); *Parker v. Parker*, 897 S.W.2d 918, 924 (Tex. App.–Fort Worth 1995, writ denied) (“While marriage may bring about a fiduciary relationship, such a relationship terminates in a contested divorce when a husband and wife each have independent attorneys and financial advisers”); *Bass v. Bass*, 790 S.W.2d 113, 119 (Tex. App.–Fort Worth 1990, no writ) (“Although marriage may bring about a fiduciary relationship . . . , such a relationship clearly does not continue when a husband and wife hire numerous independent professional counsel to represent them respectively in a contested divorce proceeding”). The Austin Court of Appeals, however, in *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686, 701 n. 21 (Tex. App.–Austin 2005, pet. denied), rejected a categorical rule that hiring separate counsel to negotiate a property division always eliminates fiduciary obligations. It makes sense that the duty of disclosure that exists between spouses would be supplanted, at least to some extent if not entirely, by the discovery rules of procedure that govern the disclosure information in a lawsuit. However, if the relationship gives rise to a fiduciary obligation between spouses exists independent of the marriage, like a partnership relationship or an agency relationship, one would think that those duties are not altered by the filing of a divorce. And in instances where a spouse convinces the other spouse to enter into a settlement unbeknownst to his or her attorneys, the rule might not apply.

Additionally, spouses continue to be held to special duties in the management of the community property under their management and control. See Tex. Fam. Code § 6.707 (transfers of property or debts incurred during divorce are void if done with the intent to injure the other spouse.)

**4. Fiduciary Relationship Ends Upon Dissolution of Marriage.** Regardless of whether or not the divorce is contested, the dissolution of the marital bonds by divorce brings the interspousal fiduciary relationship to an end. *In re Marriage of Notash*, 118 S.W.3d 868, 872 (Tex. App.–Texarkana 2003, no pet.) (“The fiduciary duty between husband and wife terminates on divorce”); *Camacho v. Montes*, 2006 WL 2660744, \*3 (Tex. App.–Amarillo 2006, no pet.) (mem. op.) (“The formal fiduciary relationship between Frances and Delfino as husband and wife terminated on their divorce.”); *Grossnickle v. Grossnickle*, 935 S.W.2d 830, 846 (Tex. App.–Texarkana 1996, writ denied) (no fiduciary duty after divorce). An exception is created by Texas Family Code Section 9.011 which provides:

§ 9.011. Right to Future Property

(a) The court may, by any remedy provided by this chapter, enforce an award of the right to receive installment payments or a lump-sum payment due on the maturation of an existing vested or nonvested right to be paid in the future.

(b) The subsequent actual receipt by the non-owning party of property awarded to the owner in a decree of divorce or annulment creates a fiduciary obligation in favor of the owner and imposes a constructive

trust on the property for the benefit of the owner.

### **B. AS TO PERSONAL BEHAVIOR.**

Despite the fact that, as a practical matter and from an emotional perspective, marital infidelity is seen by many spouses as a breach of trust and by some spouses as perhaps the ultimate breach of trust, adultery is neither criminal nor actionable. Nor is it, according to one case, a breach of fiduciary duty. *See Freeman v. Freeman*, 1998 WL 830533, \*5 (Tex. App.—Austin (pet. denied) (hiding fact that child born into marriage was not husband’s child was held not to be a breach of fiduciary duty). Adultery may, however, be used as a ground for divorce, Tex. Fam. Code § 6.003. And adultery may be used by the trial court as a basis for a disproportionate division of the community estate. *Murff v. Murff*, 615 S.W.2d 696, 698-99 (Tex. 1981); *Young v. Young*, 609 S.W.2d 758, 762 (Tex. 1980). Spouses may be held liable for committing tortious wrongs against the other spouse, most particularly (but not limited to) causing personal injury. *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1977) (wilful and intentional torts); *Price v. Price*, 732 S.W.2d 316, 319 (Tex. 1987) (negligence). No barrier stands against interspousal suits for breach of contract, or equitable relief for recovery. Claims for injury to the community estate, however, are treated differently.

**C. AS TO MARITAL PROPERTY.** Texas family law cases recognize a fiduciary duty running between spouses as to management of the community estate. *E.g.*, *Knight v. Knight*, 301 S.W.3d 723, 731 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (“A fiduciary duty exists between a husband and a wife as to the community property controlled by each spouse”). If a spouse fraudulently disposes of community property, the community estate is injured and the community estate has a claim

against the wrongdoing spouse, and in some instances against the third-party recipient of community property. The claim is often called “fraud on the community.” As will be discussed later in connection with remedies for fraud on the community, the claim may be satisfied out of the wrongdoing spouse’s share of the community estate, or his or her separate estate, or by money judgment against the wrongdoing spouse, or in some instances against the third party who received community property. However, the Texas Supreme Court has ruled that the remedy for fraud on the community does not reside in tort. *Schlueter v. Schlueter*, 975 S.W.2d 584, 589 (Tex. 1998) (“there is no independent tort cause of action for wrongful disposition by a spouse of community assets”). Stated differently, a spouse cannot recover in tort for “a deprivation of community assets as opposed to a tort committed against a person or his or her separate property.” *Id.* at 589. Note that *Schlueter* suggests that one spouse may sue the other spouse for tortious injury to the first spouse’s personal separate property. This view was reiterated in *Chu v. Hong*, 249 S.W.3d 441, 445 (Tex. 2008). A claim for fraud on the community is remedied out of the property division, while traditional tort remedies exist for personal injury and injury to the other spouse’s separate property. *Id.* at 444.

### **1. Reconciling Management Rights With Other Spouse’s Ownership Rights.**

In dealing with improper conveyances of community property, Texas courts have had to reconcile themselves to the fact that the Texas Family Code gives sole management and control to a spouse over property that the spouse would have owned if single. Tex. Fam. Code § 3.102. The quandary was described in *Givens v. Girard Life Ins. Co. of Am.*, 480 S.W.2d 421, 427-28 (Tex. Civ. App.—Dallas 1972, writ ref ‘d n.r.e.):

Reconciliation of the managerial power of one spouse with the interest of the other spouse as equal owner is a problem inherent in the concept of management by one spouse of marital property owned in common. This concept has come down to us from the laws of Spain and Mexico, and is carried forward in the statutes above mentioned without substantial change, except that the managerial powers of the husband have been restricted and those of the wife have been extended with respect to classes of property not now before us.

Our review of the authorities reveals that the husband's power to make gifts of community property has always been limited, though the limits have never been clearly defined . . . .

Over the last 40 years, Texas courts have been moving toward more clearly defining the limits on a spouse's right to manage community property, and a consensus has emerged on how those limits should be defined. Now the rule can be stated:

Although a spouse has the right to dispose of community property under his or her control, he may not dispose of his spouse's interest in community funds if actual or constructive fraud exists.

*Greco v. Greco*, 2008 WL 4056328, \*5 (Tex. App.--San Antonio 2008, no pet.) (mem. op.). This statement requires an understanding of the parameters of actual and constructive fraud in the context of marital property rights.

**2. Fairness Standard.** The fiduciary duty existing between spouses as to the

management and disposition of community property and the other spouse's separate property is typically described in terms that differ from terms applied to other types of fiduciary duty. However, in law suits over misappropriation of marital property, Texas courts have adopted the approach from general fiduciary litigation that the allegedly wrong-doing spouse has the burden to establish fairness of the transaction. *Miller v. Miller*, 700 S.W.2d 941, 945 (Tex. App.--Dallas 1985, writ ref'd n.r.e.). As noted below, however, fairness is an issue for constructive fraud claims. Actual fraud claims require the injured spouse to prove fraudulent intent.

**3. Case Law.** Most of the case law in the area involves a spouse wrongfully conveying community property to a third party. However, some instances involve destruction of community property, others the disappearance of community property, while others involve interspousal transfers of separate property. The issues have arisen upon divorce, and also upon death. In death cases, the contest is usually over the decedent designating someone other than the spouse as beneficiary of a community property life insurance policy.

A characteristic statement of the law is in *Fanning v. Fanning*, 828 S.W.2d 135, 148 Tex. App.--Waco 1992), *aff'd in part and reversed on part on other grounds*, 847 S.W.2d 225 (Tex. 1993), where the issue was transfers to the husband's paramour:

The courts have taken a dim view toward gifts by the husband to "strangers" of the marriage, "particularly of the female variety." *Spruill v. Spruill*, 624 S.W.2d 694, 697 (Tex. App.--El Paso 1981, writ dism'd). Constructive fraud is the breach of a legal or equitable duty,

which the law declares fraudulent because it violates a fiduciary relationship. *Carnes v. Meador*, 533 S.W.2d 365, 370 (Tex. Civ. App.--Dallas 1975, writ ref'd n.r.e.). Such a trust relationship exists between a husband and wife with regard to the community property controlled by one spouse. *Id.* Thus, a presumption of constructive fraud arises when a spouse unfairly disposes of the other spouse's interest in community property. *Id.* The burden of proof is, therefore, upon the disposing spouse to prove the fairness of the disposition of the other spouse's one-half community ownership. *Id.*

*See Mazique v. Mazique*, 742 S.W.2d 805, 807-08 (Tex. App.--Houston [1st Dist.] 1987, no writ) (“a trust relationship exists between a husband and wife as to that portion of the community property controlled by the managing spouse, . . . and a presumption of fraud arises when a spouse unfairly disposes of the other spouse's one-half interest in the community”). In *Murff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981), the Supreme Court upheld an award of a money judgment to wife against her husband who “had substantial sums in savings before the separation that had disappeared by the time of trial . . . .” *See Puntarelli v. Peterson*, 405 S.W.3d 131, 139 (Tex. App.--Houston [1st Dist.] 2013, no pet.) (“While waste claims often are premised on specific transfers or gifts of community property to a third party, a waste judgment can be sustained by evidence of community funds unaccounted for by the spouse in control of those funds”).

The validity of interspousal transfers was at issue in *Bohn v. Bohn*, 455 S.W.2d 401, 409 (Tex. Civ. App.--Houston [1<sup>st</sup> Dist.] 1970, writ dism'd).

The validity of death-related transfers were at issue in *Barnett v. Barnett*, 67 S.W.3d 107 (Tex. 2001) (husband designated his estate as beneficiary of community property life insurance, and his mother inherited his estate, in fraud of the community, but the claim was preempted by ERISA); *In re Estate of Vackar*, 345 S.W.3d 588 (Tex. App.--San Antonio 2011, no pet.) (Husband leaving \$100,000 in insurance proceeds to his sister was set aside as unfair); *Carnes v. Meador*, 533 S.W.2d 365, 371 (Tex. Civ. App.--Dallas 1975, writ ref'd n.r.e.) (funds on deposit and a pre-death gift); *Murphy v. Metropolitan Life Insurance Co.*, 498 S.W.2d 278, 282 (Tex. Civ. App.--Houston [14th Dist.] 1973, writ ref'd n.r.e.) (life insurance); and *Givens v. Girard Life Ins. Co. of Am.*, 480 S.W.2d 421, 427-28 (Tex. Civ. App.--Dallas 1972, writ ref 'd n.r.e.) (proceeds from life insurance policy).

#### **4. Actual Fraud Vs. Constructive Fraud.**

In the context of claims for misappropriation of community property, a spouse may sue either for intentional fraud, or constructive fraud, or both. The distinction is often blurred by courts, which creates confusion.

Actual or intentional fraud exists when a spouse transfers community property with the intent to deprive the other spouse of his or her interest in the property. For actual fraud, the burden of proving fraudulent intent is on the claimant, and the question of whether the conveyance was “fair” is not an issue. *See Jean v. Tyson-Jean*, 118 S.W.3d 1, 9 (Tex. App.--Houston [14<sup>th</sup> Dist.] 2003, pet. denied) (distinguishing actual fraud from constructive fraud); *In re Soza*, 542 F.3d 1060, 1072 (5th Cir. 2008) (Winer, J., concurring) (distinguishing actual from constructive fraud in Texas law). *See Tex. Fam. Code* § 6.707 (transfers of property or debts incurring during pendency of divorce are void with respect to the other spouse “if the transfer was

made or the debt incurred with the intent to injure the rights of the other spouse”).

Constructive fraud does not depend upon the state of mind (or scienter) of the acting spouse. Constructive fraud is *constructive* because fraudulent intent is attributed by operation of law to the acting spouse, based on the circumstances, without regard to his/her actual motivation.

Some courts have mistakenly equated “fraud on the community” to constructive fraud. See *Boaz v. Boaz*, 221 S.W.3d 126, 133 (Tex. App.--Houston [1st Dist.] 2006, no pet.) (“Fraud on the community in the wrongful disposition of community assets is ‘[t]he breach of a legal or equitable duty which violates the fiduciary relationship existing between spouses.’”); *Knight v. Knight*, 301 S.W.3d 723, 731 (Tex. App.--Houston [14th Dist.] 2009, no pet.) (“The breach of a legal or equitable duty which violates this fiduciary relationship existing between spouses is referred to as “fraud on the community,” a judicially created concept based on the theory of constructive fraud”). In actuality, fraud on the community can be either actual fraud or constructive fraud. The Corpus Christi Court of Appeals wrote in *Nagubadi v. Nagubadi*, 2005 WL 327962, \*3 (Tex. App.--Corpus Christi 2005, no pet.) (mem. op.):

In divorce proceedings, a spouse has various remedies against another spouse for improper conduct involving the community estate. See *Schlueter v. Schlueter*, 975 S.W.2d 584, 588 (Tex. 1998). Texas recognizes the concept of “fraud on the community,” which is a wrong by one spouse that the court may consider in its division of the estate of the parties and that may justify an unequal division of the property. *Id.*

The burden of proof to demonstrate the fairness of a transfer of property outside of the community is upon the spouse responsible for the transfer; however, the complaining spouse has the initial burden to show that there was a transfer of community property in the first place.<sup>FN1</sup> *In re Marriage of Notash*, 118 S.W.3d 868, 873 (Tex. App.--Texarkana 2003, no pet.).

Fraud on the community can be committed through actual or constructive fraud. Actual fraud requires the non-managing spouse to show that the other spouse dishonestly and purposely intended to deprive the non-managing spouse of the use and enjoyment of the assets of the joint community property. See *id.* Constructive fraud does not require a showing of fraudulent intent and may be shown if a managing spouse unfairly deprives the other spouse of the benefit of the community property. See *id.* On appeal, the appellate court reviews the trial court's decision under an abuse of discretion standard, keeping in mind that trial courts are allowed to consider many factors when making a just and right division of community property, including the fraudulent wasting of community assets.

The basis for a finding of *actual* fraud on the community is proof of fraudulent intent. The basis for a finding of *constructive* fraud on the community is breach of a fiduciary duty, which requires the wrongfully-acting spouse to prove the fairness of the transaction.



Thus, the burden of proof for actual fraud is on the claimant to prove that fraudulent intent motivated a transfer. A claim of constructive fraud places the burden of proof on the transferring spouse to prove that a transfer was fair to the other spouse. Thus the matter to be proven, and the party who must prove it, is different for the two claims.

Fraud on the community must be distinguished from a claim that a transfer of separate property from one spouse to the other should be set aside on the ground of actual fraud or constructive fraud. On the few occasions this has arisen, the courts tend to apply constructive fraud standards as well as traditional grounds such as fraud, duress, and overreaching. See *Bohn v. Bohn*, 455 S.W.2d 401, 409 (Tex. Civ. App.–Houston [1<sup>st</sup> Dist.] 1970, writ *dism'd*).

**5. Confusing Actual Fraud with Fraudulent Misrepresentation.** The case of *West v. West*, 2012 WL 403912 (Tex. App.–Houston [1st Dist.] 2012, no pet.) (memo. op.), discussed the long-established division of fraud into actual fraud and constructive fraud. However, citing two non-family law cases, the Court portrayed actual fraud in terms of a conventional claim for fraudulent misrepresentation. *Id.* at \*2. Constructive fraud, in contrast, the Court said, is established by showing that one spouse unfairly deprived the other spouse of the benefit of community property. *Id.* at 2. The appellate court departed from the standard view when it equated actual fraud to a claim of fraudulent inducement. In a fraud on the community claim, actual fraud does not require proof of misrepresentations of material facts, or detrimental reliance by the other spouse. The conventional difference between actual and constructive fraud is made clear in the Pattern Jury Charges, discussed below.

**6. The Pattern Jury Charges.** The duties between spouses regarding community and separate property are described in the State Bar of Texas' PATTERN JURY CHARGES (FAMILY & PROBATE) in a series of instructions and jury questions. The Pattern Jury Charges also cover fraud relating to mishandling the other spouse's separate property. While there are relatively many cases relating to fraud on the community, in contrast the case law regarding fraud on the other spouse's separate estate is sparse. There is reason to believe, however, that the duty one spouse owes the other spouse as to the latter's separate property is different from the duties regarding community property, (i.e., there is no sole management and control over the other spouse's separate property), and the remedies for breach of the duty almost certainly differ in some respects.

The Pattern Jury Charges are set out below. These provisions define the duties, and also indicate remedies for breach of the duties. Remedies are discussed in a separate section later in this Article.

The PJC (Family) Chapter relating to fraud is set out below. The Comments reflect that the sources for the instructions and question are drawn from both family law cases and fiduciary litigation between non-spouses.

#### **PJC 206.1 Confidence and Trust Relationship between Spouses**

A relationship of confidence and trust exists between a husband and wife with regard to that portion of the community property that each controls. This relationship requires that the spouses use the utmost good faith and frankness in their dealings with each other.

Because of the nature of the spousal relationship, conduct of a spouse affecting the property rights of the other spouse may be fraudulent even though identical conduct would not be fraudulent as between nonspouses.

### COMMENT

**Source.** The foregoing instructions are modeled on *Weir v. King*, 166 S.W.2d 187 (Tex. Civ. App.--Dallas 1942, writ ref'd w.o.m.); see *Buckner v. Buckner*, 815 S.W.2d 877 (Tex. App.--Tyler 1991, n.w.h.); cf. *Miller v. Miller*, 700 S.W.2d 941 (Tex. App.--Dallas 1985, writ ref'd n.r.e.).

**Fiduciary relationship with regard to separate property.** The duty described in the foregoing instruction regarding the community property managed by a spouse could apply as well if one spouse manages the separate property of the other spouse.

### PJC 206.2 Actual Fraud by Spouse against Community Estate

#### PJC 206.2A Actual Fraud by Spouse against Community Estate—Instruction

A spouse commits fraud if *that spouse transfers community property or expends community funds for the primary purpose of depriving the other spouse of the use and enjoyment of the assets involved in the transaction*. Such fraud involves dishonesty of purpose or intent to deceive.

### PJC 206.2B Actual Fraud by Spouse against Community Estate—Questions

### QUESTION 1

Did *PARTY A* commit fraud with respect to the community-property rights of *PARTY B*?

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

If you have answered Question 1 “Yes,” then answer Question 2. Otherwise, do not answer Question 2.

### QUESTION 2

State in dollars the value, if any, by which the community estate of *PARTY A* and *PARTY B* was depleted as a result of the fraud of *PARTY A*.

Answer: \$\_\_\_\_\_

### COMMENT

**Source.** The instruction in PJC 206.2A is derived from *Land v. Marshall*, 426 S.W.2d 841 (Tex. 1968); *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1965); and *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dismiss'd). Such fraud could involve the incurring of an indebtedness rather than a direct transfer of property or expenditure of funds. Question 2 is based on Tex. Fam. Code § 7.009(b)(1).

**Other actual fraud theories.** The foregoing submission reflects only one of many theories of actual fraud that might be presented in a case involving spouses. See, e.g., *Stone v. Lawyers Title Insurance Corp.*, 554 S.W.2d 183 (Tex. 1977); Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code §§ 24.001–.013.

The variety of possible theories is too great to be comprehensively covered in this book, but the submission may be altered to present other theories.

**No independent cause of action.** A spouse has no independent cause of action against the other spouse for actual fraud on the community, but the court may consider such fraud in arriving at a “just and right” division of the community estate. *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998). The court shall calculate the value of the reconstituted estate—the total value of the community estate that would exist if fraud on the community had not occurred—and divide the value of the reconstituted estate between the parties in a manner the court deems just and right by granting any necessary legal or equitable relief. Tex. Fam. Code § 7.009.

**Include this additional instruction.** The instruction in PJC 206.1 (confidence and trust relationship between spouses) should be given with the foregoing instruction and questions.

### **PJC 206.3 Actual Fraud by Spouse against Separate Estate**

#### **PJC 206.3A Actual Fraud by Spouse against Separate Estate—Instruction**

A spouse commits fraud if *that spouse transfers separate property of the other spouse or expends separate funds of the other spouse for the primary purpose of depriving the other spouse of the use and enjoyment of that property or those funds.* Such fraud involves dishonesty of purpose or intent to deceive.

### **PJC 206.3B Actual Fraud by Spouse against Separate Estate—Questions**

#### QUESTION 1

Did *PARTY A* commit fraud with respect to the separate-property rights of *PARTY B*?

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

If you have answered Question 1 “Yes,” then answer Question 2. Otherwise, do not answer Question 2.

#### QUESTION 2

What sum of money, if paid now in cash, would fairly and reasonably compensate the separate estate of *PARTY B* for the damages, if any, resulting from the fraud of *PARTY A*?

Answer in dollars.

Answer: \$\_\_\_\_\_

#### COMMENT

**Source.** The instruction in PJC 206.3A is derived from *Land v. Marshall*, 426 S.W.2d 841 (Tex. 1968); *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1965); and *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dismissed). Such fraud could involve the incurring of an indebtedness rather than a direct transfer of property or expenditure of funds.

**Other actual fraud theories.** The foregoing submission reflects only one of many theories of actual fraud that might

be presented in a case involving spouses. See, e.g., *Stone v. Lawyers Title Insurance Corp.*, 554 S.W.2d 183 (Tex. 1977); Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code §§ 24.001–.013. The variety of possible theories is too great to be comprehensively covered in this book, but the submission may be altered to present other theories.

**Include this additional instruction.** The instruction in PJC 206.1 (confidence and trust relationship between spouses) should be given with the foregoing instruction and questions.

#### **PJC 206.4 Constructive Fraud by Spouse against Community Estate**

##### **PJC 206.4A Constructive Fraud by Spouse against Community Estate—Instruction**

*A spouse may make moderate gifts, transfers, or expenditures of community property for just causes to a third party. However, a gift, transfer, or expenditure of community property that is capricious, excessive, or arbitrary is unfair to the other spouse. Factors to be considered in determining the fairness of a gift, transfer, or expenditure are—*

1. *The relationship between the spouse making the gift, transfer, or expenditure and the recipient.*
2. *Whether there were any special circumstances tending to justify the gift, transfer, or expenditure.*
3. *Whether the community funds used for the gift, transfer, or expenditure were reasonable in proportion to the community estate remaining.*

#### **PJC 206.4B Constructive Fraud by Spouse against Community Estate—Questions**

##### QUESTION 1

Was the transfer made by *PARTY A* to *THIRD PARTY* fair?

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

If you have answered Question 1 “No,” then answer Question 2. Otherwise, do not answer Question 2.

##### QUESTION 2

State in dollars the value, if any, by which the community estate of *PARTY A* and *PARTY B* was depleted as a result of the *transfer made by PARTY A* to *THIRD PARTY*.

Answer: \$ \_\_\_\_\_

#### **COMMENT**

**Source.** The instruction in PJC 206.4A is modeled on *Mazique v. Mazique*, 742 S.W.2d 805 (Tex. App.—Houston [1st Dist.] 1987, writ ref’d n.r.e.), and *Carnes v. Meador*, 533 S.W.2d 365 (Tex. Civ. App.—Dallas 1975, writ ref’d n.r.e.).

**Other constructive fraud theories.** The foregoing submission reflects only one of many constructive fraud theories that might be presented in a case involving spouses. The variety of possible theories is too great to be comprehensively covered in this book, but the submission may be altered to present other theories.

**No independent cause of action for fraud against community estate.** A spouse has no independent cause of action against the other spouse for constructive fraud on the community estate, but the court may consider such fraud in arriving at a “just and right” division of the community estate. *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998). The court shall calculate the value of the reconstituted estate—the total value of the community estate that would exist if fraud on the community had not occurred—and divide the value of the reconstituted estate between the parties in a manner the court deems just and right by granting any necessary legal or equitable relief. Tex. Fam. Code § 7.009.

**Include this additional instruction.** The instruction in PJC 206.1 (confidence and trust relationship between spouses) should be given with the foregoing instruction and questions.

**If transaction is disputed.** The instruction as written assumes that there is no dispute that the gift, transfer, or expenditure of community property was made. If the transaction is in dispute, the foregoing submission should be conditioned on a finding that the transaction occurred.

**If separate estate was defrauded.** If constructive fraud by a spouse against the other spouse’s separate estate is in issue, Question 2 should be submitted as follows:

What sum of money, if paid now in cash, would fairly and reasonably compensate the separate estate of *PARTY B* for the damages, if any, resulting from the

*transfer made by PARTY A to THIRD PARTY?*

Answer in dollars.

Answer: \$ \_\_\_\_\_

### **PJC 206.5 Fraud Action against Nonspouse Party**

#### **PJC 206.5A Fraud Action against Nonspouse Party—Instruction**

A person commits fraud if *that person participates with a spouse in a transfer of community property for the primary purpose of depriving the other spouse of the use and enjoyment of the assets involved in the transaction.* Such fraud involves dishonesty of purpose or intent to deceive.

#### **PJC 206.5B Fraud Action against Nonspouse Party—Questions**

##### QUESTION 1

Did *NONSPOUSE PARTY* commit fraud with respect to the *community* property rights of *PARTY B*?

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

If you have answered Question 1 “Yes,” then answer Question 2. Otherwise, do not answer Question 2.

##### QUESTION 2

What sum of money, if paid now in cash, would fairly and reasonably compensate the *community estate* of *PARTY A and PARTY B* for the damages, if any,

resulting from the fraud of *NONSPOUSE PARTY*?

Answer in dollars.

Answer: \$ \_\_\_\_\_

### COMMENT

**Source.** The instruction in PJC 206.5A is derived from *Land v. Marshall*, 426 S.W.2d 841 (Tex. 1968); *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1965); and *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. Civ. App.--Houston [14th Dist.] 1975, writ dismissed). Such fraud could involve the incurring of an indebtedness rather than a direct transfer of property or expenditure of funds; similarly, it could involve separate, rather than community, property.

A judgment for fraud against a third party was affirmed in *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998), but the supreme court did not reach the question of whether the tort should be abolished. However, a third party who knowingly participates in the breach of a fiduciary duty may be liable. *Osuna v. Quintana*, 993 S.W.2d 201 (Tex. App.—Corpus Christi 1999, n.w.h.); *Connell v. Connell*, 889 S.W.2d 534 (Tex. App.—San Antonio 1994, writ denied).

**Other fraud theories.** The foregoing submission reflects only one of many theories of actual fraud that might be presented in a case involving spouses. See, e.g., *Stone v. Lawyers Title Insurance Corp.*, 554 S.W.2d 183 (Tex. 1977); *J. Michael Putman, M.D.P.A. Money Purchase Pension Plan v. Stephenson*, 805 S.W.2d 16 (Tex. App.--Dallas 1991, no writ); Uniform

Fraudulent Transfer Act, Tex. Bus. & Com. Code §§ 24.001–.013. Many theories of constructive fraud might also be presented in a case involving spouses. See, e.g., *Mazique v. Mazique*, 742 S.W.2d 805 (Tex. App.--Houston [1st Dist.] 1987, writ refused n.r.e.), and *Carnes v. Meador*, 533 S.W.2d 365 (Tex. Civ. App.--Dallas 1975, writ refused n.r.e.). The variety of possible theories is too great to be comprehensively covered in this book, but the submission may be altered to present other theories.

**If separate estate was defrauded.** In an appropriate case, the word community should be replaced with the word separate in Question 1 in PJC 206.5B, and the phrase community estate of PARTY A and PARTY B should be replaced with the phrase separate estate of PARTY B in Question 2.

**Exemplary damages.** Exemplary damages may be available in appropriate circumstances. See Tex. Civ. Prac. & Rem. Code ch. 41. Reference to damages submissions suggested for other types of cases that are contained in other volumes of the Texas Pattern Jury Charges series may be helpful in formulating an appropriate submission for the particular case.

[End of PJC quotation]

**D. AS TO SPOUSAL PROPERTY AGREEMENTS.** Several appellate opinions have commented on the effect that a marital-based fiduciary obligation may have on the two statutory defenses to a post-marital property agreement, that is: voluntariness and unconscionability. In *Marsh v. Marsh*, 949 S.W.2d 734, 740 n.4 (Tex. App.—Houston [14th Dist.] 1997, no writ), the court said: “in

post-marital agreements a fiduciary duty exists that is not present in premarital agreements between prospective spouses.” In *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686, 700-01 (Tex. App.--Austin 2005, pet. denied), the court of appeals said that the existence of a spousal fiduciary duty did not alter the burden of proof in the Family Code that the party seeking to defeat a post-marital agreement must prove either lack of voluntariness or unconscionability. However, in *Izzo v. Izzo* 2010 1930179 (Tex. App.--Austin 2010, pet. denied), the court said: “it is worth noting that even if the only fiduciary responsibility in this case arose from the general duty between spouses, such a duty would remain relevant to our analysis of the statutory affirmative defenses to enforcement of a post-marital property agreement.” In *Daniel v. Daniel*, 779 S.W.2d 110, 114 (Tex. App.--Houston [14th Dist.] 1989, no writ), the court said: “Texas courts have closely scrutinized property agreements made by spouses during marriage. Because of the confidential relationship between a husband and a wife, courts have imposed the same duties of good faith and fair dealing on spouses as required of partners and other fiduciaries.” *Accord, In re Marriage of Smith*, 115 S.W.3d 126, 135 (Tex. App.--Texarkana 2003, pet. denied) (“Because of the confidential relationship between a husband and wife, Texas courts have closely scrutinized property agreements made by spouses during marriage and have imposed the same duties of good faith and fair dealing on spouses as required of partners and other fiduciaries”).

**III. REMEDIES FOR MARITAL PROPERTY FRAUD.** The primary issues involving remedies for fraud against marital property include: (i) whether the claim lies in tort, requiring proof of the recognized elements of causes of action such as trespass,

conversion, fraud, negligence, conspiracy, etc., with concomitant remedies of actual and exemplary damages; (ii) whether the claim lies in family law, with concomitant remedies of marital property reimbursement, disproportionate division of the community estate and money judgment against the other spouse; (iii) whether the claim lies in equity, with concomitant remedies of restitution and the imposition of a resulting or constructive trust; (iv) some combination of the above; and (v) the extent to which third parties are liable.

**A. REMEDIES AGAINST THE WRONG-DOING SPOUSE.** In *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998), the Texas Supreme Court held that a spouse's claims against the other spouse for fraud on the community are not to be compensated as tort claims, but rather are to be taken into account in the division of the community estate. The Court held:

Because a wronged spouse has an adequate remedy for fraud on the community through the "just and right" property division upon divorce, we hold that there is no independent tort cause of action between spouses for damages to the community estate.

*Id.* at 585. The Supreme Court went on to say that:

[A] claim of fraud on the community is a means to an end, either to recover specific property wrongfully conveyed, ... or ... to obtain a greater share of the community estate upon divorce, in order to compensate the wronged spouse for his or her lost interest in the community estate.

*Id.* at 588. The Supreme Court distinguished community property fraud claims from tort claims, saying:

Just as in the present case, *Belz* involved alleged intentional deprivation of the wife's share of community assets. Nevertheless, despite the intentional nature of the claim, because the fraud was perpetrated on the community, the court correctly distinguished it from cases involving personal injuries for which recovery belongs to the separate estate.

*Id.* at 588.

As to punitive damages, the Court said:

Because of our holding in the present case that there is no independent tort cause of action for wrongful disposition by a spouse of community assets, the wronged spouse may not recover punitive damages from the other spouse.

*Id.* at 589.

In *Schlueter*, the Supreme Court didn't reach the question of whether a separate and independent tort claim exists against third-parties who act in concert with a spouse in committing fraud on the community. *Id.* at 590. However, the Fort Worth Court of Appeals expressly ruled that a spouse cannot sue third parties in tort for fraud on the community. In *Harper v. Harper*, 8 S.W.3d 782 (Tex. App.–Fort Worth 2000, pet. denied), the husband (Dan) invested community money in real estate, but he took title in the name of his girlfriend (Ruth). When wife died, her heir filed suit against husband and the girlfriend for breach of

fiduciary duty, fraud, and conspiracy to commit fraud on the community estate. The jury found a breach of fiduciary duty by fraud, as well as conspiracy, and awarded actual and punitive damages. The Fort Worth Court of Appeals reversed the judgment for damages. *Id.* at 784. The Court said:

. . . [F]raud on the community exists outside the realm of tort law and cannot be brought as an independent cause of action. . . . Therefore, punitive damages based on this cause of action are also not recoverable.

\* \* \*

Because there is no independent tort cause of action for fraud on the community, any damages against Dan or Ruth on that basis were erroneous.

*Id.* at 784. A similar approach was taken in *In re Estate of Fells*, 2013 WL 5777958, \*7 (Tex. App.–Beaumont 2013, no pet.) (memo. opinion), where the appellate court said:

For breach of a fiduciary duty resulting in deprivation of one-half of the community assets, a wronged spouse has the same two remedies against the estate as does a wronged spouse in a divorce action. *See Carnes v. Meador*, 533 S.W.2d 365, 370–71 (Tex.Civ.App.–Dallas 1975, writ ref'd n.r.e.). While the spouse has no independent cause of action to recover separate damages, he can (1) rescind the transfer of assets, or (2) obtain a damage assessment limited to the value of property transferred. *See Chu v. Hong*, 249 S.W.3d 441, 446 (Tex.2008) (citing *Schlueter v. Schlueter*, 975 S.W.2d 584, 588 (Tex.1998)). If the share of remaining community funds in the estate is insufficient, he may recover the



property from the funds in the donee's hands in appropriate circumstances. See *Carnes*, 533 S.W.2d at 371.

Perhaps the Supreme Court needs to consider the question of whether a fraud on the community claim is treated the same on death as on divorce. The rationale underlying *Schlueter*, was that fraud on the community could be rectified in the just and right division of marital property in a divorce. When the marriage is dissolved by death and not divorce, the community estate is automatically divided 50-50. There is no “just and right” division when the marriage is dissolved by death. So perhaps the *Schlueter* limitation should not apply.

The more recent Supreme Court case of *Chu v. Hong*, 249 S.W.3d 441 (Tex. 2008), involved a claim against a third party for participating in fraud on the community, and thus did not expressly deal with the remedy against the wrongdoing spouse. In discussing its reasoning regarding the third party, however, the Supreme Court reiterated what it had ruled in *Schlueter*, and indicated that the normal remedy for fraud on the community is an adjustment in the property division. The adjustment could be a disproportionate division of the remaining community estate, or a reimbursement claim against the wrongdoing spouse’s separate estate which brings wealth back into the community estate to be divided in the divorce.

#### **B. THE “RECONSTITUTED ESTATE.”**

In 2011, the Legislature added Section 7.009 to the Family Code, prescribing how a claim for actual or constructive fraud on the community should be handled. If the fact-finder finds that a spouse has committed actual or constructive fraud on the community, the trial court must calculate the

depletion of the community estate due to the fraud and add that back in, so as to create a “reconstituted estate.” Tex. Fam. Code § 7.009(b)(1). The reconstituted estate is to be divided in a manner that is just and right. *Id.* at § 7.009(b)(2). The court may grant the wronged spouse “an appropriate share of the community estate remaining after the actual or constructive fraud,” or award a money judgment to the wronged spouse, or both. *Id.* at § 7.009(c).

#### **C. REMEDIES AGAINST THIRD PARTIES.**

PJC 206.5 quoted above pertains to claims against third parties for participating in fraud on the community. The PJC uses the term “damages” as the measure of the remedy against the third party. The case of *Chu v. Hong*, however, invites reconsideration about whether the remedies against third parties should be categorized as (i) damages (with or without exemplary damages), (ii) restitution, (iii) constructive trust, (iv) resulting trust, (v) disgorgement, or (vi) some other category.

##### **1. For Fraud Involving Community Property.**

One might think that the language in *Schlueter* and *Chu v. Hong* suggests that “damages” is not the appropriate label for the remedy against third parties for participating in fraud on the community, and it could be argued further that exemplary damages are therefore not available. However, *Chu v. Hong* pretty clearly indicates that the preference for compensating the innocent spouse through the property division does not preclude recovery against third parties when the injured spouse cannot be made whole through the property division. The argument that the remedy against third parties for participating in fraud on the community is not damages (and therefore must be a form of equitable recovery) is clouded by the holding in *Chu v. Hong*, which says: “We hold the courts below erred in allowing one spouse to

recover damages without first recovering the community property from the spouse who took it.” *Id.* at 443. This language suggests that a damage recovery against a third party is allowed if the harm cannot be rectified through the property division. The Supreme Court went on to say:

[I]f one spouse can enlarge the community estate by suing the other's relatives, many acrimonious divorce cases will undoubtedly become more so. That may be necessary when relatives have community property in their hands; but when they do not, little is gained by adding third parties if the property can be restored through orders between the former spouses. . . . *Schlueter* requires Hong to seek restitution from her own husband before seeking it from someone else's lawyer.

*Id.* at 446. The foregoing language indicates that a third party can be liable in some way (restitution? damages?) if a remedy against the wrongdoing spouse would not undo the harm. In saying this the Supreme Court affirms the principle established in *Carnes v. Meador*, 533 S.W.2d 365, 371 (Tex. Civ. App.–Dallas 1975, writ ref'd n.r.e.), which said that to rectify fraud on the community, the aggrieved spouse must first go against property of the disposing spouse and, if that is unavailing, then against the third-party-recipient.

The Texas Supreme Court recognized that the imposition of a constructive trust as a remedy available to an aggrieved spouse for fraud on the community, in *Barnett v. Barnett*, 67 S.W.3d 107 (Tex. 2001). There, a husband deleted his wife as beneficiary of a community property life insurance policy and

instead designated his mother as beneficiary. When the husband died, the policy proceeds were paid to the mother. The widow sued the mother for fraud on the community. The Supreme Court said this about the remedy available to the wife:

Under Texas law, Marleen Barnett has a cause of action for fraud on the community. Neither Dora nor any of the other defendants challenged the court of appeals' holding that a fraud on the community occurred in this case. Marleen's state-law remedy is to impose a constructive trust on one half of the proceeds of the Prudential policy that insured the life of her estranged husband.

The recovery was limited to one-half of the policy proceeds because, upon death of a spouse, one half of the community estate belongs to each spouse and the husband was free to give away his one-half interest. *Osuna v. Quintana*, 993 S.W.2d 201, 208-09 (Tex. App.–Corpus Christi 1999, no pet); *Jackson v. Smith*, 703 S.W.2d 791, 796 (Tex. App.–Dallas 1985, no writ).

In *Barnett* there was no divorce and no ability of a court to order a disproportionate division of the community estate. In a divorce the community estate does not have to be divided 50/50. Therefore the claim for fraud on the community asserted in a divorce proceeding is for 100% of the transfer. *Osuna*, 993 S.W.2d at 209. This is why the Pattern Jury Charges ask the jury to assess 100% of the injury to the community estate. The trial court decides how this recovery is split as part of the property division.

The issue of whether the label “damages” is appropriate to use against third parties, and

the issue of whether the remedies against third parties are limited to equitable claims, impact the questions of (i) whether exemplary damages are available; and (ii) whether an equity-based claim (such as constructive trust and resulting trust) against a third party is extinguished if the wrongfully-transferred community property cannot be traced to existing assets in the hands of third parties.

In the broad history of equity, particularly in British courts up to the current time, the equitable remedy of constructive trust is available only if the misappropriated property is still in the hands of the third party at the time suit is brought against him. According to that view, the remedy of constructive trust is extinguished if the third party spends or conveys away the wrongfully-received funds or assets. In the Texas court system, where law and equity courts are combined, it can be argued that, in instances when a third party who has wrongfully received community property no longer has the property, nonetheless the third party should be made to answer to the victim by a money judgment for damages. This line of thinking has not been explicitly developed in the Texas case law at this point but it is implicit in some of the decisions and opinions in the area, and the point should be pressed by zealous advocates.

**2. For Fraud Involving Separate Property.** The reasoning of *Schlueter* and *Chu* revolves around the availability of a remedy expressed through the power of the court to award reimbursement and a disproportionate division of the community estate. The separate estates of the spouses are not subject to division in a divorce. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 139-40 (Tex. 1977). While a court could award reimbursement against one spouse in favor of the other spouse's separate estate to remedy harm to the innocent spouse's

separate estate, it can also be argued that one spouse's wrong against the other spouse's separate estate is more akin to a property wrong between strangers, and that the normal remedies in tort and equity should also be available to the aggrieved spouse, in addition to remedies available through the property division.

**3. Resulting and Constructive Trusts.** A court exercising equity powers can declare a resulting trust or impose a constructive trust on property in the hands of a third party.

**a. Resulting Trust.** A resulting trust arises by operation of law when title is conveyed to one party while consideration is provided by another. *Cohrs v. Scott*, 338 S.W.2d 127, 130 (Tex. 1960). Generally, a resulting trust can arise only when title passes, not at a later time. *Id.* at 130. This rule, often stated in the case law, does not apply between spouses. Between spouses, the inception of title rule applies, so that a resulting trust can arise only at the inception of title, even if title passes at a later time. 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 purpose of a resulting trust is to prevent unjust enrichment. *Id.* at 250. Ordinarily, the proponent of 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.). However, when marital property is in issue, the presumption of community prevails over the presumption of ownership arising from title, so proof that property is possessed by a spouse during marriage is sufficient to establish, prima facie, a resulting trust in favor

of the community even where title is held in the name of one spouse alone. See Tex. Fam. Code § 3.003.

**b. Constructive Trust.** A "constructive trust" is not really a trust; it is an equitable remedy. 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. The Supreme Court described the doctrine as follows:

A constructive trust does not, like an express trust, arise because of a manifestation of intention to create it. It is imposed by law because the person holding the title to property would profit by a wrong or would be unjustly enriched if he were permitted to keep the property.

*Omohundro v. Matthews*, 341 S.W.2d 401, 405 (Tex. 1960). *Accord, Mills v. Gray*, 210 S.W.2d 985, 987 (1948). ("a trust intentional in fact is an express trust; one intentional in law is a resulting trust; and one imposed irrespective of intention is a constructive trust").

**c. Resulting and Constructive Trusts Distinguished.** In *Mills v. Gray*, 210 S.W.2d 985, 987-88 (1948), the Texas Supreme Court drew the following distinction between a resulting trust and a constructive trust:

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. Jur. 22, § 5.]

**d. Examples.** In *Osuna v. Quintana*, 993 S.W.2d 201 (Tex. App.—Corpus Christi 1999, no pet.), the husband started a second bigamous family and bought a house and cars for their use. The trial court imposed a resulting trust for the benefit of the community estate of the first marriage, on the proceeds from foreclosure of the house and the cars. The appellate court affirmed, based on the doctrine of "purchase money resulting trust." *Id.* at 210. The trial court also awarded the wife a judgment for \$460,000 against the husband and his second wife, jointly and severally, representing money the husband had given the second wife. That judgment was affirmed, after a partial reduction due to a partial failure of proof. *Id.* at 204. In *Andrews v. Andrews*, 677 S.W.2d 171 (Tex. App.—Austin 1984, no writ), a couple had been living together for seven years and were engaged to be married when they decided to buy a house together. The male fiancé surreptitiously caused the title to the house to be taken in his name alone. The appellate court said that this behavior "was a deliberate violation of their confidential relationship, which was likewise a fiduciary relationship." *Id.* at 173. The trial court therefore imposed a constructive trust and awarded half the value of the house to the wife. This was approved by the court of appeals.

#### IV. OTHER SOURCES OF FIDUCIARY DUTIES BETWEEN SPOUSES.

**1. Power of Attorney.** It is not unusual for a spouse to hold a power of attorney for the other spouse. The agent who holds a power of attorney for a principal owes a fiduciary duty to the principal. *Sims v. Sims* 2003 WL 22025907 (Tex. App.–El Paso 2003, no pet.) (unpublished) (wife breached fiduciary duty by misusing power of attorney from husband); *Miller v. Miller*, 2002 WL 31410965 (Tex. App.–Dallas 2002, pet. denied) (unpublished) (husband who had power of attorney to manage wife’s separate property owed fiduciary duty to wife as to that separate property).

**2. Attorney-Client.** Where one spouse is an attorney and the other is not, it may happen that the attorney-spouse perform legal services or give legal advice to the non-attorney spouse. Establishing an attorney-client relationship in this way carries along with it the fiduciary duties owed by a lawyer to his/her client. *Izzo v. Izzo*, 2010 WL 1930179, \*7 (Tex. App.–Austin 2010, pet. denied) (memorandum opinion) (“... there is sufficient evidence to support the trial court’s finding of fact that John became Sharon’s attorney, investment advisor, and custodian of her assets prior to the parties’ marriage. As a result, we also agree with the trial court’s conclusion that John owed Sharon a fiduciary duty”); *Bohn v. Bohn*, 455 S.W.2d 401, 409 (Tex. Civ. App.–Houston [1<sup>st</sup> Dist.] 1970, writ dismissed) (lawyer/husband’s failure to suggest that wife seek independent legal advice regarding gift to husband raised inference of unfair conduct); *Vickery v. Vickery*, 1997 WL 751995, \*14 (Tex. App.–Houston [1<sup>st</sup> Dist.] 1997, writ denied) (unpublished opinion on motion for rehearing) (“A husband and wife owe each other special fiduciary duties. . . . Additionally, we think it is significant that Glenn is an attorney. To the extent that Glenn was advising Helen of the legal aspects of a transaction by which he would benefit, Glenn

assumed the ‘high duty of an attorney to his client.’”).

**3. Controlling to Non-Controlling Owner.** The duties owed by controlling owners of business to minority owners of businesses are complex, and can vary depending upon the type of entity. It has long been recognized that “[c]orporation officers and directors are fiduciaries, and the consequences of their acts as such are determinable under the facts in each case.” *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 576 (Tex. 1963). The duty is owed to the entity however, and not other shareholders, except in certain circumstances. It has been stated that—

A corporate officer owes a fiduciary duty to the shareholders collectively, i.e. the corporation, but he does not occupy a fiduciary relationship with an individual shareholder, unless some contract or special relationship exists between them in addition to the corporate relationship.

*Faour v. Faour*, 789 S.W.2d 620, 621-22 (Tex. App.–Texarkana 1990, writ denied). For another shareholder to sue directly, s/he must “prove the existence of a relationship . . . other than the business relationship.” *Hsu v. U.S. Small Business Admin.*, 2000 WL 31867, \*3 (Tex. App.–San Antonio 2000, no pet.) (unpublished). In *Miller v. Miller*, 700 S.W.2d 941, 945-46 (Tex. App.–Dallas 1985, writ refused n.r.e.), this other relationship was the spousal relationship.

**4. Partners.** It is not uncommon to find that spouses are partners with each other in investment partnerships or in family limited partnerships. Notwithstanding many appellate opinions characterizing the duty between partners as a fiduciary duty, the Texas Business Organizations Code *does not* define

the duty owed by partners to each other as a fiduciary duty. Tex. Bus. Org. Code § 152.204(d) (“A partner, in the partner’s capacity as partner, is not a trustee and is not held to the standards of a trustee”). The duties that partners owe each other are described in more specific terms in Tex. Bus. Org. Code § 152.203 (use partnership property only for partnership purposes), § 152.204 (duty of loyalty and duty of care and to exercise powers in good faith and in a manner the actor believes to be in the best interest of the partnership), § 152.205 (accounting for profits, refraining from acting on behalf of someone with an adverse interest, and refraining from competing), § 152.206 (duty of care is care of an ordinarily prudent person in similar circumstances), § 152.207 (duties apply during winding up). A partner can be sued by the partnership *or other partners* for breaching the partnership agreement. *Id.* § 152.210. A general partner in a limited partnership owes these same duties to limited partners. *Id.* § 153.152(a)(1)(2).

##### **5. Relationship of Trust and Confidence.**

Texas case law suggests that a confidential relationship can arise from the facts and circumstances of a particular situation, even where a fiduciary relationship does not exist by operation of law. *See Izzo v. Izzo*, 2010 WL 1930179, \*7 (Tex. App.–Austin 2010, pet. denied) (John became Sharon’s attorney, investment advisor, and custodian of her assets prior to marriage, and thus owed her fiduciary duties that existed independently from the fiduciary duty of a spouse). To prove a confidential relationship, the injured party must show a high degree of trust, influence, or confidence was placed in the wrongdoer. *Crim Truck and Tractor Co. v. Navistar Int’l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992). Once a confidential relationship is established, then duties akin to fiduciary duties arise, and the principles of fiduciary

law come into play. A spouse may be able to invoke broader fiduciary principles than the marriage relationship entails, by showing the existence of a relationship of trust and confidence. However, if the injury is suffered by the community estate, *Schlueter* and *Chu v. Hong* indicate that the recovery is to the community estate, and the remedy is to restore to the community estate what was lost, but not to add to the community estate with more than was lost.