MARITAL PROPERTY ISSUES: TRACING, REIMBURSEMENT, AND CLAIMS FOR ECONOMIC CONTRIBUTION

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CURRICULUM VITAE OF RICHARD R. ORSINGER

Education: Washington & Lee University, Lexington, Virginia (1968-70)
University of Texas (B.A., with Honors, 1972)
University of Texas School of Law (J.D., 1975)

Licensed: Texas Supreme Court (1975); U.S. District Court, Western District of Texas (1977-1992; 2000-present); U.S. District Court, Southern District of Texas (1979); U.S. Court of Appeals, Fifth Circuit (1979); U.S. Supreme Court (1981)

Board Certified by the Texas Board of Legal Specialization
Family Law (1980), Civil Appellate Law (1987)

Organizations and Committees:

Chair, Family Law Section, State Bar of Texas (1999-2000)
Chair, Appellate Practice & Advocacy Section, State Bar of Texas (1996-97)
Chair, Continuing Legal Education Committee, State Bar of Texas (2000-02)
Vice-Chair, Continuing Legal Education Committee, State Bar of Texas (2002-03)
Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-present); Chair, Subcommittee on Rules 16-165a
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-present)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member 1994-2001) and Civil Appellate Law Exam Committee (1990-present; Chair 1991-1995)
Tx. Bd. of Legal Specialization, Family Law Advisory Commission (1987-1993)
Member, Supreme Court Task Force on Jury Charges (1992-93)
Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Associate, American Board of Trial Advocates
Fellow, American Academy of Matrimonial Lawyers
Director, San Antonio Bar Association (1997-1998)
Member, San Antonio, Dallas and Houston Bar Associations

Professional Activities and Honors:

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)
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1995, June 1996, & June 1997
Listed in the BEST LAWYERS IN AMERICA (1987-to date)

Continuing Legal Education and Administration:

Course Director, State Bar of Texas Practice Before the Supreme Court of Texas Course (June, 2002)
Co-Course Director, State Bar of Texas *Enron, The Legal Issues* (March, 2002)
Course Director, State Bar of Texas Advanced Expert Witness Course (2001, 2002, 2003)
Course Director, State Bar of Texas 1999 Impact of the New Rules of Discovery
Course Director, State Bar of Texas 1998 Advanced Civil Appellate Practice Course
Course Director, State Bar of Texas 1991 Advanced Evidence and Discovery Course
Director, Computer Workshop at Advanced Family Law Course (1990-94) and Advanced Civil Trial Course (1990-91)
Course Director, State Bar of Texas 1987 Advanced Family Law Course
Course Director, Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada (1987)

Books and Journal Articles:

---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)
---*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)
---Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)
---*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)
---*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage that Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

SELECTED CLE SPEECHES AND ARTICLES

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

State Bar's Marriage Dissolution Course: Property Problems Created by Crossing State Lines (1982); Child Snatching and Interfering with Possess'n: Remedies (1986); Family Law and the Family Business: Proprietorships, Partnerships and Corporations (1987); Appellate Practice (Family Law) (1990); Discovery in Custody and Property Cases (1991); Discovery (1993); Identifying and Dealing With Illegal, Unethical and Harassing Practices (1994); Gender Issues in the Everyday Practice of Family Law (1995); Dialogue on Common Evidence Problems (1995); Handling the Divorce Involving Trusts or Family Limited Partnerships (1998); The Expert Witness Manual (1999); Focus on Experts: Close-up Interviews on Procedure, Mental Health and Financial Experts (2000); Activities in the Trial Court During Appeal and After Remand (2002)

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

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

State Bar'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)

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

Various CLE Providers: State Bar of Texas Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991); State Bar of Texas Advanced Civil Trial Course: Offering and Excluding Evidence (1995); State Bar of Texas Advanced Civil Trial Course: New Appellate Rules (1997); State Bar of Texas Advanced Civil Trial Course: The Communications Revolution: Portability, The Internet and the Practice of Law (1998); State Bar of Texas Advanced Civil Trial Course: Daubert With Emphasis on Commercial Litigation, Damages, and the NonScientific Expert (2000); American Institute of Certified Public Accounts: Admissibility of Lay and Expert Testimony; General Acceptance Versus Daubert (2002); Texas and Louisiana Associations of Defense Counsel: Use of Fact Witnesses, Lay Opinion, and Expert Testimony; When and How to Raise a Daubert Challenge (2002); State Bar of Texas In-House Counsel Course: Marital Property Rights in Corporate Benefits for High-Level Employees (2002); College of Advanced Judicial Studies: Evidentiary Issues (2001); El Paso Family Law Bar Association: Proving It Up and Getting It In: Foreign Law and Foreign Evidence (2001)

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by

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I. INTRODUCTION. This article discusses the Texas rules of marital property, tracing of separate property, marital property reimbursement, and the new 2001 Family Code claim for economic contribution.

II. BASIC MARITAL PROPERTY RULES. You can handle most marital property disputes using twenty rules of Texas marital property.

A. RULE 1 SEPARATE AND COMMUNITY PROPERTY. Property owned by a spouse is marital property. Marital property is either separate[1] property or community property,[2] or a mixture[3] of the two. Property not owned by a spouse is not marital property, and is neither separate nor community property. *See Gutierrez v. Gutierrez*, 791 S.W.2d 659, 664 (Tex. App.--San Antonio 1990, no writ) (portion of rental payments belonging to husband's brother were not community property). Thus, assets of a corporation or partnership, or assets held by a trustee for the benefit of a spouse, are not marital property (absent some unusual theory like piercing the corporate veil, constructive receipt of property, etc.) See Section II.Q (regarding corporate assets); Section II.S (regarding trust holdings).

Rule 1 assumes that Texas marital property law applies to the property in question. Texas marital property law applies to property acquired by spouses while domiciled in Texas, regardless of where they married. TEX. FAM. CODE ANN. § 1.103. For non-domiciliaries, conflict of law rules will apply. *See Ossorio v. Leon*, 705 S.W.2d 219, 223 (Tex. App.--San Antonio 1985, no writ). In a Texas divorce or annulment, property is treated as if Texas marital property law controls, even where it doesn't under ordinary conflict of law principles. TEX. FAM. CODE ANN. § 7.002. In some instance, federal law preempts Texas marital property law. See Section II.I.

B. RULE 2 PROPERTY ACQUIRED BEFORE MARRIAGE. Property owed at the time of marriage is separate property. TEX. CONST. art. XVI, § 15; *Parnell v. Parnell*, 811 S.W.2d 267, 269 (Tex. App.--Houston [14th Dist.] 1991, no writ) (real estate owned by husband prior to marriage was his separate property); *Gutierrez v. Gutierrez*, 791 S.W.2d 659, 665 (Tex. App.--San Antonio 1990, no writ) (car purchased by husband prior to marriage was his separate property). Even if a premarital purchase money debt on property is paid during marriage using community property funds, the property is nonetheless separate property. *See Colden v. Alexander* , 171 S.W.2d 320, 333 (Tex. 1943); *Smith v. Buss*, 144 S.W.2d 529, 532 (Tex. 1940). The fact that land owned prior to marriage is improved using community funds or community credit does not affect its separate property character. *Dakan v. Dakan*, 83 S.W.2d 620, 627 (Tex. 1935); *Leighton v. Leighton*, 921 S.W.2d 365,367 (Tex. App. – Houston [1st Dist.] 1996, no writ).

C. RULE 3 INCEPTION OF TITLE. The character of marital property as separate or community or mixed 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. *Welder v. Lambert*, 91 Tex. 510, 22 S.W. 281, 284-86 (1898); *Henry S. Miller Co. v. Evans*, 452 S.W.2d 426, 430 (Tex. 1970); *Saldana v. Saldana*, 791 S.W.2d 316, 319 (Tex. App.--Corpus Christi 1990, no writ), citing *Strong v. Garrett*, 148 Tex. 265, 224 S.W.2d 471 (1949). If inception of title to property occurs prior to marriage, the property is separate even if title is acquired during marriage. For example, if a man puts a house under an earnest money contract prior to marriage, then marries, then closes on the house, the house is his separate property even if he signed a promissory note during the marriage, and even if his wife signs the promissory note. *Carter v. Carter*, 736 S.W.2d 775, 778 (Tex. App.–Houston [14th Dist.] 1987, no writ). Property that has its inception of title during marriage is community property, even if title is acquired after divorce. *Allen v. Allen*, 751 S.W.2d 567, 572 (Tex. App.--Houston [14th Dist.] 1988, writ denied) (mineral interest received by former husband after divorce was community property because his inception of title to the interest arose during marriage).

D. RULE 4 PROPERTY ACQUIRED DURING MARRIAGE. Property acquired during marriage is community property unless it is acquired in the following manner, in which event it is the separate property of the acquiring spouse:

(1) by gift;[4]
(2) by devise or descent;[5]
(3) by partition or exchange;[6]
(4) as income from separate property made separate by a spousal separate income agreement;[7]
(5) by survivorship;[8]
(6) in exchange for other separate property;[9]
(7) as recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.[10]

Family Code Section 3.002 provides that "[c]ommunity property consists of the property, other than separate property, acquired by either spouse during marriage."

E. RULE 5 PROPERTY ACQUIRED AFTER DISSOLUTION OF MARRIAGE. Property that is acquired after the marriage has ended is not community property. *Burgess v. Easley*, 893 S.W.2d 87, 90-91 (Tex. App.--Dallas 1994, no writ) (although deed was executed by husband's father during marriage, it was not delivered to husband until after divorce; since a conveyance is not effective until delivery, the property was not community property); *Snider v. Snider*, 613 S.W.2d 8, 11 (Tex. Civ. App.--El Paso 1981, no writ) (dividend declared after death of husband belonged to his heirs, not the community estate); *Echols v. Austron, Inc.* 529 S.W.2d 840 (Tex. Civ. App. – 1975, writ ref'd n.r.e.) (bonus paid to husband after granting of divorce was separate property); *see Berry v. Berry*, 647 S.W.2d 945, 948 (Tex. 1983) (increase in retirement benefits resulting from post-divorce employment was separate property). However, property acquired after dissolution of marriage but that had its inception of title during marriage is community property. *Allen v. Allen*, 751 S.W.2d 567, 572 (Tex. App.–Houston [14th Dist.] 1988, writ denied).

F. RULE 6 COMMUNITY PRESUMPTION; DEGREE OF PROOF NECESSARY TO PROVE SEPARATE. Property *possessed* by either spouse during or on dissolution of marriage is presumed to be community property, and the separate character of property must be proved by clear and convincing evidence. TEX. FAM. CODE ANN. § 3.003; *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965) (all property possessed at the time of dissolution of marriage is presumed to be community property). The uncorroborated testimony of a spouse is sufficient to support a finding of separate property, but is not binding on the fact finder. *Hilliard v. Hilliard*, 725 S.W.2d 722 (Tex. App.--Dallas 1985, no writ) ("Husband's uncorroborated testimony . . . is not conclusive as to whether the house was separate or community").

G. RULE 7 COMMINGLING. When separate and community property have become so commingled as to defy resegregation and identification, the burden of persuasion to overcome the presumption of community is not discharged, and the assets in question are treated as community property. *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973); *Jackson v. Jackson*, 524 S.W.2d 308, 311 (Tex. Civ. App.--Austin 1975, no writ). *See Martin v. Martin*, 759 S.W.2d 463, 466 (Tex. App.--Houston [1st Dist.] 1988, no writ) (of three lots, two were separate and one community; the lots were sold for a unified price; absent proof of the sales price for each lot, all proceeds were deemed to be community property; tracing failed).

H. RULE 8 TRACING. The character of separate property is not changed by the sale, exchange, or change in form of the separate property. If separate property can be definitely traced and identified, it remains separate property regardless of the fact that the separate property undergoes mutations or changes in form. State Bar of Texas Pattern Jury Charges PJC 202.4 (2002). As stated in *Celso v. Celso*, 864 S.W.2d 652, 654 (Tex. App.--Tyler 1993, no wri): "Separate property will retain its character through a series of exchanges so long as the party asserting separate ownership can overcome the presumption of community property by tracing the assets on hand during the marriage back to property that, because of its time and manner of acquisition, is separate in character." To overcome the presumption of community, the party asserting separate property must trace and clearly identify the property which (s)he claims to be separate. *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973); *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965). The court in *Faram v. Gervitz-Faram*, 895 S.W.2d 839 (Tex. App.--Fort Worth 1995, no writ) described tracing in the following way:

> [T]he party claiming separate property must trace and identify the property claimed as separate property by clear and convincing evidence. Tracing involves establishing the separate origin of the property through evidence showing the time and means by which the spouse originally obtained possession of the property. Hilliard v.

Hilliard, 725 S.W.2d 722, 723 (Tex. App.--Dallas 1985, no writ). Separate property will retain its character through a series of exchanges so long as the party asserting separate ownership can overcome the presumption of community property by tracing the assets on hand during the marriage back to property that, because of its time and manner of acquisition, is separate in character. Cockerham v. Cockerham, 527 S.W.2d 162, 167 (Tex. 1975).

I. RULE 9 CREDIT OBTAINED DURING MARRIAGE. Credit obtained by a spouse during marriage is community credit unless the lender agrees to look solely to the borrowing spouse's separate estate for repayment. *Cockerham v. Cockerham*, 527 S.W.2d 162, 171 (Tex. 1975); *Anderson v. Royce*, 624 S.W.2d 621, 623 (Tex. Civ. App.--Houston [14th Dist.] 1981, writ ref'd n.r.e.). Property acquired with community credit is community property, and property acquired with separate credit is separate property. *Glover v. Henry*, 749 S.W.2d 502, 503 (Tex. App.--Eastland 1988, no writ). Credit during marriage is presumptively community, and the burden is on the proponent to prove separate credit. *Cockerham v. Cockerham*, 527 S.W.2d 162, 171 (Tex. 1975). Even property acquired with community credit can become separate property by interspousal gift, partition, etc.

J. RULE 10 PRESUMPTION ARISING FROM DEED RECORDS. When a real estate deed recites that separate property was paid for the property, or that the property is taken as the receiving spouse's separate estate, a rebuttable presumption of separate property arises. *Kahn v. Kahn*, 94 Tex. 114, 58 S.W. 825, 826 (1900); *Kyles v. Kyles*, 832 S.W.2d 194, 196 (Tex. App.--Beaumont 1992, no writ). Where the other spouse is grantor or otherwise chargeable with causing or acquiescing in the recital, the presumption become irrebuttable, absent fraud. *Kahn v. Kahn*, 94 Tex. 114, 58 S.W. 825, 826 (1900); *Henry S. Miller Co. v. Evans*, 452 S.W.2d 426, 431 (Tex. 1970).

K. RULE 11 PRESUMPTION ARISING FROM INTERSPOUSAL CONVEYANCE. Where one spouse conveys property to the other spouse, there is a rebuttable presumption of gift, even absent a recital in the instrument of conveyance. *Kahn v. Kahn*, 94 Tex. 114, 58 S.W. 825, 826 (1900).

L. RULE 12 PRESUMPTION ARISING FROM INCLUDING THE OTHER SPOUSE'S NAME IN TITLE. Where one spouse uses separate property to acquire property during marriage and takes title to that property in the names of both spouses, a rebuttable presumption arises that the purchasing spouse intended to make a gift of a one-half separate property interest to the other spouse. *In re Marriage of Morris*, 12 S.W.3d 877, 881 (Tex. App. – Texarkana 2000, no pet.); *In re Marriage of Thurmond*, 888 S.W.2d 269, 273 (Tex. App.--Amarillo 1994, no writ), citing *Cockerham v. Cockerham*, 527 S.W.2d 162, 168 (Tex. 1975); *see Graham v. Graham*, 836 S.W.2d 308, 310 (Tex. App.--Tyler 1992, no writ) (recognizing rule but holding it was not applicable); *Peterson v. Peterson*, 595 S.W.2d 889, 892-93 (Tex. Civ. App.--Austin 1980, writ dism'd) (presumption overcome by husband's testimony that no gift was intended). In *Whorrall v. Whorrall*, 691 S.W.2d 32, 35 (Tex. App.--Austin 1985, writ dism'd), wife's testimony that she did not intend a gift was sufficient to support the trial court's finding of separate property.

M. RULE 13 PRESUMPTION REGARDING INCOME FROM INTERSPOUSAL GIFT. When one spouse makes a gift of property to the other spouse, that gift is presumed to include all the income or property which might arise from the property given. TEX. CONST. art XVI, § 15, TEX. FAM. CODE ANN. § 3.005.

N. RULE 14 PRESUMPTION REGARDING WITHDRAWAL OF COMMINGLED FUNDS. Where an account contains both community and separate moneys, it is presumed that community moneys are withdrawn first. *Horlock v. Horlock*, 533 S.W.2d 52, 59 (Tex. Civ. App.--Houston [14th Dist.] 1976, writ dism'd). *Accord*, *Harris v. Ventura*, 582 S.W.2d 853, 855-56 (Tex. Civ. App.--Beaumont 1979, no writ). See the discussion in Section III of this article.

O. RULE 15 PUTTING SEPARATE PROPERTY MONEY IN JOINT ACCOUNT. The act of placing separate property funds into an account under the control of both spouses does not make the funds community property. *Celso v. Celso*, 864 S.W.2d 652, 655 (Tex. App.--Tyler 1993, no writ) ("The mere fact that the proceeds of the sale were placed in a joint account does not change the characterization of the separate property assets. The spouse that makes a deposit to a joint bank account of his or her separate property does not make a gift to the other spouse.") *See Higgins v. Higgins*, 458 S.W.2d 498, 500 (Tex. Civ. App.--Eastland 1970, no writ).

P. RULE 16 FIXTURES. Since, 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)), improvements to realty take the character of the land, regardless of the character of the funds or credit used to make the improvements. *Lindsay v. Clayman*, 254 S.W.2d 777 (Tex.1952). A "fixture" is something that is personal but has been annexed to the realty so as to become part of it. *Fenlon v. Jaffe*, 553 S.W.2d 422, 428 (Tex. Civ. App.--Tyler 1977, writ ref'd n.r.e.). The three-pronged test for fixtures is:

(i) has there been a real or constructive annexation of the personalty to the realty; (ii) was there a fitness or adaptation of the item to the uses or purposes of the realty; (iii) was it the intention of the party annexing the personalty that it would become a permanent accession to the realty? *O'Neill v. Quiltes*, 111 Tex. 345, 234 S.W. 528, 529 (1921). Intention is controlling; the first two prongs 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.).

Q. RULE 17 CORPORATE ASSETS. Since a shareholder owns shares in the corporation and not the assets of the corporation, corporate assets are neither separate nor community property. See *Snider v. Snider*, 613 S.W.2d 8, 11 (Tex. Civ. App.--El Paso 1981, no writ) ("Prior to the actual declaration of a dividend, all the accumulation of surplus in the corporation merely enhanced the value of the shares held by the husband as his separate property and the community had no claim thereto"). This rule does not apply where court pierces the corporate veil. *Parker v. Parker*, 997S.W.2d 833, (Tex. App. – Ft. Worth 1995, pet. denied)(where corporations found to be alter ego of husband, corporate assets could become part of community estate; assets owned by corporation at time of marriage were husband's separate property, but assets acquired by the corporation during marriage were community property, absent tracing). The increase during marriage in value of a separate property corporation belongs to the separate estate. *Jensen v. Jensen*, 665 S.W.2d 107, 109 (Tex. 1984).

R. RULE 18 PARTNERSHIP RIGHTS OF A SPOUSE. Under the Texas Revised Partnership Act, there are two property rights of a partner: the right to participate in management, and the partner's interest in the partnership. The right to participate in the management of the partnership cannot be community property. TEX. REV. CIV. STAT. ANN. art. 6132b § 4.01(d) (saying that a partner's right to participate in the management and conduct of the business "is not" community property). The partner's interest in the partnership can be community property. TEX. REV. CIV. STAT. ANN. art. 6132b § 5.02(a). *See* COMMENT OF BAR COMMITTEE--1993 [Westlaw cite: Vernon's Ann. Texas Civ. St. T. 105, Ch. ONE, Art. I, Refs & Annos] ("Community property aspects: partner interest may be community property; partnership property and management rights cannot, §§ 5.01, 5.02(a), 5.03(a)(4)"). The State Bar Committee's Comments to Art. 6132b-5.02 provides that "[a] partner's partnership interest does not include the partner's right to participate in management of the partnership. It follows that a partner's right to participate in management is not community property, the same as in TUPA § 28-A(3)." Regarding community property rights in partnership assets, the State Bar Committee Comment to Art. 6132b-5.01 provides: "A corollary of this section is that a partner's spouse has no community property right in partnership property, the same as in TUPA § 28-A(1)."

S. RULE 19 TRUST HOLDINGS AND DISTRIBUTIONS. Property held by a trustee for the benefit of a spouse is not owned by a spouse, and cannot be marital property. *In re Marriage of Burns*, 573 S.W.2d 555 (Tex. Civ. App.--Texarkana 1978, writ dism'd) (undistributed income in several trusts was not community property because it had been neither received nor constructively received by the husband during marriage). However, where the spouse/beneficiary has an unconditional right to have the property free of trust, then the property is treated as if it is owned by the spouse, even though still in the hands of the trustee. *In re Marriage of Long*, 542 S.W.2d 712 (Tex. Civ. App.--Texarkana 1976, no writ) (once the husband's right to receive half of the trust corpus matured, the income on such half began to belong to the community estate). Most estate planners agree that where the spouse is both settlor and beneficiary of the trust, the income of the trust property is likely community income. Where the trust is established by gift or will, case law is conflicting as to whether trust distributions are separate or community property. *Glover v. Henry*, 749 S.W.2d 502,503 (Tex. App. – Eastland 1988, no writ).

T. RULE 20 PREEMPTION OF TEXAS MARITAL PROPERTY LAW. Federal law sometimes preempts Texas marital property law.[11] In those circumstances, the federal law must be consulted to determine the rights of spouses in the property in question.

III. TRACING COMMINGLED BANK ACCOUNTS. When separate property funds are mixed with community property funds, the entire balance becomes commingled, the burden to overcome the community property presumption by clear and convincing evidence is not met, and the entire amount of cash is treated as community property. However, if a party can show what portion of the funds is separate property and what portion is community property, through a process called "tracing," then the community property presumption is overcome. There are a number of different concepts that apply to tracing.

A. UNCORROBORATED ASSERTION OF SPOUSE. Courts have held that a spouse's uncorroborated assertion that property is separate property will support a finding of separate property, in some situations. *See Holloway v. Holloway*, 671 S.W.2d 51, 56 (Tex. App.--Dallas 1983, writ dism'd) ("We know of no authority holding that a witness is

incompetent to testify concerning the source of funds in a bank account without producing bank records of the deposits). *Accord*, *Faram v. Gervitz-Faram*, 895 S.W.2d 839 (Tex. App.--Fort Worth, no writ) (testimony of wife that investment accounts and T-bill were either gifts from her father or proceeds from sale of separate real estate was, standing uncontradicted, at least some evidence of the character of the property); *Peterson v. Peterson*, 595 S.W.2d 889, 892 (Tex. Civ. App.--Austin 1980, writ ref'd n.r.e.) (Husband's testimony that he did not intend to make a gift to wife when putting her name on the deed taking title to land was sufficient to overcome presumption of gift). However, an uncorroborated assertion by a spouse as to separate property is not binding on the trial court. 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 a house acquired during marriage. She said that she got the money from a safety deposit box in an unnamed bank. The trial court nonetheless found that the house was community property. The appellate court affirmed, saying that the wife's testimony was not binding. *Id*. at 773.

B. SHOWING ONLY SEPARATE FUNDS IN ACCOUNT. In *Padon v. Padon*, 670 S.W.2d 354 (Tex. App.--San Antonio 1984, no writ), the husband successfully traced separate property funds into the parties' home. The parties agreed that husband received $160,000.00 by way of inheritance, which he deposited into an account in the name of husband and wife. The parties further agreed that they acquired a home in "early 1977," for $89,900.00. The March bank statement showed an initial deposit of $160,490.00, on February 25, 1977. The statement reflected no further deposits into the account until March 4, 1977. However, the statement reflects that a check for $89,900.00 cleared the account on March 1, 1977. The appellate court held that the husband had established that the house was his separate property, as a matter of law. *Id*. at 357.

C. SEPARATE FUNDS OUT FIRST. In *McKinley v. McKinley*, 496 S.W.2d 540 (Tex. 1973), the Supreme Court ruled on the tracing of funds in bank accounts. The husband had $9,500.00 of separate property money on deposit in a savings and loan account. By year end, it had earned $472.03 in interest. On January 5, the husband withdrew $472.03. The Supreme Court said that "[t]he $9,500.00 originally deposited remained in the account and continued to earn interest, until on December 31 of the following year [1967], the account balance was $10,453.81. There were no withdrawals after the one mentioned above. All deposits were deposits of interest. On January 2 of 1968, $10,400.00 was withdrawn and used to purchase a CD. The Supreme Court concluded that the $9,500.00 originally on deposit had been "traced in its entirety" into the CD. Thus, $9,500.00 of the $10,400.00 CD was separate property. No explanation is given as to why all of the separate was deemed withdrawn from the savings account to purchase the CD before the $953.81 in community funds were tapped. It appears that separate came out first. In *McKinley*, tracing failed as to another bank account for lack of evidence as to "the nature of funds deposited or withdrawn."

D. "COMMUNITY FUNDS OUT FIRST" RULE. The "community-out-first" rule actually started as a specific application of the anti-trustee presumption from trust law. In *Sibley v. Sibley*, 286 S.W.2d 657 (Tex. Civ. App.--Dallas 1955, writ dism'd), the husband mixed community funds in a bank account with $ 3,566.68 of wife's separate funds. There were a number of deposits and withdrawals to the account. However, the account never dropped below $ 3,566.68. The court of civil appeals invoked a 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. It was therefore presumed that the community moneys (i.e., 50% wife's) in the joint bank account were withdrawn first, before the wife's separate moneys (i.e., 100% wife's) 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.

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*). Hence the factual circumstances in *Sibley*, which happened to require the court to presume that the trustee's (i.e., husband's) money (i.e., community property) was drawn out first leaving the beneficiary's (i.e., wife's) separate funds behind, became the "community-out-first" rule.

E. MINIMUM BALANCE METHOD. The courts have applied the community-out-first rule to trace separate property in an account that never went below a certain balance. For example, in *Snider v. Snider*, 613 S.W.2d 8 (Tex. App.--Dallas 1981, no writ), 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, a deposit of $ 10,000.00 in separate property was made to the account, raising the balance to more than $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.

F. "BORROWING" BETWEEN SEPARATE AND COMMUNITY FUNDS. In *Newland v. Newland*, 529 S.W.2d 105 (Tex. Civ. App.--Fort Worth 1975, no writ), the husband maintained distinct bank accounts, the "general account" being for community deposits and expenditures, and the "separate account" being for business transactions relating to his separate estate. On occasion the balance of one account would run low, and Mr. Newland would "borrow" from the other account, for "short terms." The husband treated such transactions as loans, and repayed the borrowed funds "so that the two accounts were restored to the condition which would have obtained had there not been necessity for any transfer." *Id*. at 109. There was documentary proof of this type of activity for most of the 20-year plus period involved. The trial court found, and the appellate court affirmed, that the husband's methods avoided commingling of the funds, since "there was always ability to compute correct balances for purposes of resegregation." *Id*. at 109.

G. DEPOSIT CLOSELY FOLLOWED BY WITHDRAWAL. In *Higgins v. Higgins*, 458 S.W.2d 498 (Tex. Civ. App.--Eastland 1970, no writ), the jury found that, where the husband deposited $ 71,200.00 in a joint bank account and shortly thereafter drew out $ 70,000.00 to purchase a ranch, the ranch was the husband's separate property. That finding was affirmed by the appellate court.

In *Beeler v. Beeler*, 363 S.W.2d 305 (Tex. Civ. App.--Beaumont 1962, writ dism'd), the spouses purchased real property, partly with a separate property down payment made by the husband, and partly with a community loan. The collateral for the loan was a separate property promissory note of the husband. Payments on the community loan were made to coincide with payments received by the husband on the separate property note, in time and amount. During the marriage, the husband deposited his separate property note payments into a joint account, then wrote checks to make the payments on the community note. Husband sought reimbursement for his separate funds used to pay a community debt. Wife opposed the reimbursement claim, saying that the payments from the separate property note were commingled when they were deposited into the bank account. 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 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.

In *McKinley v. McKinley*, 496 S.W.2d 540 (Tex. 1973), as explained above, a savings account containing $ 9,500.00 of separate property earned $ 472.03 in interest at year end. On January 2, $472.03 was withdrawn. The Supreme Court held that the interest had been withdrawn, leaving the separate property balance of $ 9,500.00.

IV. THE FAMILY CODE AND REIMBURSEMENT. Marital property reimbursement is a court-created equitable remedy, and until 1999 the Texas Family Code did not mention it. In 1999, the Texas Legislature enacted a statue that approximated marital property reimbursement in some respects. Then in the 2001 amendments to the Family Code, the Legislature wiped out many of the 1999 provisions, enumerated types of claims for reimbursement (Tex. Fam. Code § 3.408), and listed certain types of expenditures that are not reimbursable (Tex. Fam. Code § 3.409). In this article, we will consider the common law remedy of marital property reimbursement, as limited by recent legislation. We will then consider the new statutory remedy of claims for economic contribution.

V. REIMBURSEMENT CLAIMS BETWEEN MARITAL ESTATES. The two principal issues involving traditional common law marital property reimbursement are: (1) when is reimbursement available; and (2) how is it measured? Secondary questions involve the role of offsetting benefits, and who has the burden of pleading, producing evidence, and persuasion. Overlaying the whole area is the idea that the decision to award reimbursement is addressed to the sound discretion of the trial court, and that error regarding reimbursement is reversible only if it renders the overall property division an abuse of discretion. *See* TEX. FAM. CODE § 7.007(b) (trial court in divorce must apply equitable principles to determine whether to recognize reimbursement claims "after taking into account all the relative

circumstances of the parties," and must order a division of reimbursement claims in a manner that is just and right). 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).

In *Vallone v. Vallone*, 644 S.W.2d 455, 458-59 (Tex. 1983), the Supreme Court defined marital property reimbursement in quite broad terms:

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

Notice the description "in some way improves." That is not a tightly-drawn description–it is broad and expansive.

The Supreme Court of Texas said of reimbursement in *Penick v. Penick*, 783 S.W.2d 194, 197 (Tex. 1988):

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

In the 21st century, we shouldn't be looking for a single formula. Lawyers should be pleading for, and proving up, and courts should be granting, equitable reimbursement whenever the law recognizes a reimbursable claim and the result dictated by applying legal principles would not be just and right.

Reimbursement has been recognized for building improvements on another marital estate. It has also been recognized for paying debts or expenses of another marital estate. It has been recognized where a spouse loses separate property through commingling with community property. It has been recognized where a separate property corporation made distributions to a spouse in excess of corporate profits and those distributions were used to buy community assets. It has been recognized where a spouse has unfairly dissipated community assets. These different types of reimbursement are discussed below. While the reimbursement award is usually in the form of money or a money judgment, the trial court can award specific community property in satisfaction of a separate property reimbursement claim. *Hilton v. Hilton*, 678 S.W.2d 645, 649 (Tex. App.--Houston [14th Dist.] 1984, no writ) (okay to award community shares of stock to husband to satisfy reimbursement claim in favor of husband's separate estate).

Many cases talk about a "right" of reimbursement. This suggests something that is guaranteed; something that a party is entitled to receive. However, the decision to grant or deny reimbursement is addressed to the trial court's sound discretion. Appellate courts speak of a "right" of reimbursement when they are speaking in generalities, and that they speak of the broad equity powers of the trial court in deciding reimbursement when they are affirming a trial court's decision on reimbursement. *See Gutierrez v. Gutierrez*, 791 S.W.2d 659, 663 (Tex.App.--San Antonio 1990, no writ) (discussing "right" versus "claim").

Texas Family Code Section 3.409 eliminates marital property reimbursement for:

(1) the payment of child support, alimony, or spousal maintenance;
(2) the living expenses of a spouse or child of a spouse;
(3) contributions of property of a nominal value;
(4) the payment of a liability of a nominal amount; or
(5) a student loan owed by a spouse.

VI. IS THE MEASURE OF REIMBURSEMENT COST OR ENHANCEMENT? From one perspective, the measure of reimbursement boils down to a choice between two alternatives: the cost to the transferring estate versus the benefit to the benefitted estate. For payment of debts, insurance and taxes, we reimburse the cost; for improvements which increase the value of land we reimburse the enhancement. For the increase in value of a spouse's separate property ownership interest in a corporation due to the owning spouse's labor, we reimburse the cost (as measured by the value

of the uncompensated community labor expended to enhance the corporation), but (possibly) limited by the amount of enhancement of the spouse's interest in the business.

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

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

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

The case law is confusing as to whether: (1) the reimbursement claim is only for the excess of cost or enhancement over offsetting benefits; (2) offsetting benefits, when proved, are a dollar-for-dollar offset against a reimbursement claim; or (3) offsetting benefits are a factor for the court to consider in determining reimbursement, but the trial court is not bound to subtract the offsetting benefits from the cost or enhancement in measuring reimbursement. Do the offsetting benefits actually reduce the reimbursement claim, or are they merely a factor which the trial court can or must consider in making the equitable determination of whether or not to award reimbursement? The 1989 version of PJC 204.1 instructed the jury that a claim for reimbursement was measured by the amount of the reimbursement claim, "less the value of any related benefit received by the paying estate." 5 STATE BAR OF TEXAS PATTERN JURY CHARGES PJC 204.1 (1989) (first version of PJC). Under this first version of PJC 204.1, the jury was "netting" the related offsetting benefits against the reimbursement claim to come up with a final dollar figure. In 1996, the Pattern Jury Charge committee decided to treat offsetting benefits as a separately determinable number which the trial court might or might not offset against the reimbursement claim. 5 STATE BAR OF TEXAS PATTERN JURY CHARGES PJC 204.1 (1996). This version of PJC 204.1 asked the jury to determine the dollar amount of the reimbursement claim, and separately from that the dollar amount of the related offsets. It was then left to the trial court to decide how to handle these numbers in determining whether to award reimbursement, and if so then for how much. *See* 5 STATE BAR OF TEXAS PATTERN JURY CHARGES PJC 204.2 (1996) (whether to award reimbursement is an advisory jury question, not a binding one). The current version of the Pattern Jury Charges is the same. STATE BAR OF TEXAS PATTERN JURY CHARGES (FAMILY) PJC 204.2 (2002 ed.).

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

On this point, in *Beavers v. Beavers*, 675 S.W.2d 296, 298 (Tex. App.--Dallas 1984, no writ), the appellate court found no error in the trial court's determination that two reimbursement claims, one against each spouse's separate estate, should be offset and no reimbursement awarded in favor of the community against either spouse's separate estate. This demonstrates the use of offset at the broad, equitable level, as opposed to the more specific level of matching dollars flowing opposite directions in connection with a specific asset or debt. *Accord*, *Harris v. Holland*, 867 S.W.2d 86, 88 n. 2 (Tex. App.--Texarkana 1993, no writ) (trial court had discretion to award $ 90,000 reimbursement from community estate to separate estate, despite fact that community estate paid some debts of that separate estate); *Allen v. Allen*, 704 S.W.2d 600, 607 (Tex. App.--Fort Worth 1986, no writ) (permissible in denying reimbursement to consider multiple claims for reimbursement for spending community funds on children from prior marriages, and expenditures on one spouse's business). In *Allen*, the court said: "Where there are mutual claims for reimbursement between marital estates, one estate's claim can be offset against another's claim." *Id.* at 607. However, several cases have been reversed because the trial court did not recognize offsetting benefits in determining the amount of reimbursement.

Another question exists as to whether the offsetting benefits must relate to the property or debt giving rise to the reimbursement claim, or whether the offsetting benefits can be anything of value flowing the opposite direction between the two affected estates. The 2002 version of the PJC provides that the offsetting benefits must be a "related benefit," but no authority is given to support that position. *See* STATE BAR OF TEXAS PATTERN JURY CHARGES (FAMILY) 204.2 (2002 ed.).

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

VIII. PLEADING AND PROVING REIMBURSEMENT CLAIMS.

A. Duty to Plead for Reimbursement. As a general rule, reimbursement must be pled in order for it to be awarded. In the case of *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1983), the wife was deemed to have waived her claim for reimbursement for the value of uncompensated community time, talent and labor expended by the husband in enhancing his separate estate because she pled only for reimbursement for community *funds expended*, and not for the husband's toil. In the subsequent case of *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984), a wife who likewise failed to plead for reimbursement for uncompensated community time, talent and labor expended to enhance the husband's separate estate was given a remand, "in the interest of justice," to allow her to replead her case and seek such reimbursement upon retrial. In a concurring opinion, Justice Robertson observed that the majority of the Supreme Court in *Jensen* seemed to be relaxing the rigid pleading requirements indicated in *Vallone*. No other members of the Court joined in his concurrence, however. The Texarkana court of appeals has suggested that the strict language in *Vallone* may have been subsequently ameliorated, so that general allegations for reimbursement will suffice. *See Jones v. Jones*, 699 S.W.2d 583, 586 (Tex. App.--Texarkana 1985, no writ) ("the specificity of reimbursement pleadings as required in Vallone . . . is apparently no longer required"). Where there is no pleading whatsoever for reimbursement, a property division which includes reimbursement will be reversed. *See Gay v. Gay*, 737 S.W.2d 94, 96 (Tex. App.--El Paso 1987, writ denied). The Family Law Section's Texas Family Law Practice Manual divorce pleading contains allegations seeking reimbursement. The form divorce petition includes reimbursement as a factor to consider in making a disproportionate division. *See* Paragraph 13.C. The form divorce petition also contains a paragraph requesting reimbursement to the community estate from Respondent's separate estate, to Petitioner's separate estate from the community estate, from Respondent's separate estate to Petitioner's separate estate, and to the community estate for a *Jensen*-like claim. *See* Paragraph 15. If a party intends to claim an unconventional form of reimbursement, the form book pleadings should be tweaked or augmented.

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

The Texas Family Law Practice Manual divorce petition pleads for reimbursement for claims in excess of offsetting benefits in the reimbursement paragraph. *See* Paragraph 15.A - 15.D.

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

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

E. Burden of Proof on Party Seeking Reimbursement. The party who seeks reimbursement has the burden of proving that claim. *Vallone v. Vallone*, 644 S.W.2d 455, 459 (Tex. 1982). Not so clear is which party has the burden of proof on offsetting benefits: must the party seeking reimbursement show no offsetting benefits, or must the party opposing reimbursement prove the amount of offsetting benefits? *Colden v. Alexander*, 141 Tex. 134, 171 S.W.2d 328 (Tex. 1943), suggests that the burden is on the party seeking reimbursement, but that specific issue was not directly addressed. As mentioned in Paragraph VIII.H below, PJC 204.2 (2002 ed.) puts the burden of proving offsetting benefits on the party opposing reimbursement.

F. Burden to Secure Finding on Reimbursement. Not only does the party seeking reimbursement have the duty to plead it, and prove it, but they also have the duty to secure a finding as to their claim. Absent a finding, the claim is waived. *See Holloway v. Holloway*, 671 S.W.2d 51, 58 (Tex. App.--Dallas 1983, writ dism'd) (by failing to secure jury finding as to undercompensation of husband for his efforts contributed to his separate property corporation, wife waived her reimbursement claim). The same rule was applied in *McCann v. McCann*, 22 S.W. 3d 21 (Tex. App.–Houston [14th Dist.] 2000, pet. denied) (not for publication) [2000 WL 280301] (wife failed to get enhanced value finding from jury and thus waived her reimbursement claim).

G. Community Presumption; Clear and Convincing Evidence. Property *possessed* by either spouse during or on dissolution of marriage is presumed to be community property, and the separate character of property must be proved by clear and convincing evidence. TEX. FAM. CODE ANN. § 3.003; *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965) (all property possessed at the time of dissolution of marriage is presumed to be community property). The uncorroborated testimony of a spouse is sufficient to support a finding of separate property, but is not so strong as to provide claim, as a matter of law. *Hilliard v. Hilliard*, 725 S.W.2d 722 (Tex. App.--Dallas 1985, no writ) ("Husband's uncorroborated testimony . . . is not conclusive as to whether the house was separate or community"). To overcome the presumption of community, the party asserting separate property must trace and clearly identify the property which (s)he claims to be separate. *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973); *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965).

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

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

The same concept was stated in another way in *Younger v. Younger*, 315 S.W.2d 449, 452 (Tex. Civ. App.--Waco 1958, no writ):

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

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

The contrary position was taken in *Horlock v. Horlock*, 533 S.W.2d 52, 60 (Tex. Civ. App.--Houston [14th Dist.] 1975, writ dism'd) (party seeking reimbursement for funds expended for maintenance of separate estate was aided by presumption that money spent during marriage is community rather than separate). In *McCann v. McCann*, 22 S.W. 3d 21 (Tex. App.–Houston [14th Dist.] 2000, pet. denied) (not for publication) [2000 WL 280301], the Court applied the community presumption to funds spent improving the husband's separate property, but husband proved a portion of the expenditures were made with his separate property funds, thus rebutting the community presumption but only as to those payments.

The Pattern Jury Charge committee currently suggests instructing the jury that the spouse seeking reimbursement has the burden of proving each element of the reimbursement claim by a preponderance of the evidence, except that a claim that separate property was used in a manner that would give rise to a right of reimbursement must be established by clear and convincing evidence. STATE BAR OF TEXAS PATTERN JURY CHARGES (FAMILY) 204.1 (2000 ed.). This exception is consistent with the requirement of TEX. FAM. CODE ANN. § 3.003(b) that "the degree of proof necessary to establish that property is separate property is clear and convincing evidence."

H. Burden of Proof on Offsetting Benefits. The Pattern Jury Charge Committee treats offsetting benefits as an affirmative defense, which must be proved by the party opposing reimbursement. PJC 204.2A (2002 ed.) provides:

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

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

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

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

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

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

IX. WHEN MARITAL PROPERTY REIMBURSEMENT HAS BEEN HELD TO BE AVAILABLE.

A. For Cost of Paying Debts, Taxes, Interest or Insurance. When one marital estate reduces the principal balance of a debt secured by lien owned by another marital estate, a claim for economic contribution arises. TEX. FAM. CODE ANN. § 3.403. For discussion of claims for economic contribution, see Section XVIII below. When one marital estate pays the unsecured liabilities of another marital estate, then a claim for marital property reimbursement arises. The following principles are involved. TEX. FAM. CODE ANN. § 3.408(b)(1).

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

> Of course, where the husband purchases land on credit before marriage, and pays the purchase-money debt after marriage out of community funds, equity requires that the community estate be reim-

> bursed. . . . The rule of reimbursement, as above announced, is purely an equitable one. Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620. Such being the case, we think it would follow that interest paid during coverture out of community funds on the prenuptial debts of either the husband or the wife on land, and taxes, would not even create an equitable claim for reimbursement, unless it is shown that the expenditures by the community are greater than the benefits received.

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

2. The Pattern Jury Charge. STATE BAR OF TEXAS PATTERN JURY CHARGES (FAMILY) 204.2A (2002 ed.) gives the following instruction regarding reimbursement arising from one marital estate's payment of debts, taxes, interest or insurance of another marital estate. Remember that this instruction does not apply to payment of debts secured by a lien in marital property.

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

The 2002 PJC attributes this instruction to *Penick v. Penick*, 783 S.W.2d 194 (Tex. 1988), and *Colden v. Alexander*, 171 S.W.2d 329 (Tex. 1943). In *Penick*, the Supreme Court said that reimbursement is not a mathematically exact claim, and that the trial court can properly consider offsetting benefits received by the giving estate.

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

This is a "cost" measure of reimbursement.

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

> Separate property payment of a community debt creates a prima facie right to reimbursement. *Penick v. Penick*, 783 S.W.2d 194, 196 (Tex. 1988); *Jones v. Jones*, 804 S.W.2d 623, 626 (Tex. App.--Texarkana 1991, no writ). Reimbursement is an equitable right and its application lies within the broad discretion of the trial court. *Penick v. Penick*, 783 S.W.2d at 198; *Vallone v. Vallone*, 644 S.W.2d 455, 459 (Tex. 1982); *Jones v. Jones*, 804 S.W.2d at 626. Gifts, however, may not be the basis of a reimbursement claim. *Jones v. Jones*, 804 S.W.2d at 626.

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

4. Offsetting Benefits. As noted above, an important aspect of the right to reimbursement for payment of debts, taxes and insurance on property which belongs to another marital estate is that the claim for reimbursement exists only to the extent that the value given by the estate seeking reimbursement exceeds the value received from the benefitted estate. *Colden v. Alexander*, 171 S.W.2d at 334; *Trevino v. Trevino*, 555 S.W.2d 798, 799 (Tex. Civ. App.--Corpus Christi 1977,

no writ). "[R]eimbursement for [community funds spent for interest and taxes] ordinarily will not be allowed except to the extent that the amount of community funds expended exceed the benefits, if any, the community has received from the property." *Fyffe v. Fyffe*, 670 S.W.2d 360, 361-62 (Tex. App.--Texarkana 1984, writ dism'd). In *Fyffe*, since there was no evidence of the reasonable rental value of living in the separate property house, nor evidence of income tax deductions taken for interest and taxes paid, an award of reimbursement was reversed and remanded. *Accord*, *Rusk v. Rusk*, 5 S.W.3d 299, 310 (Tex. App.–Houston [14th Dist.] 1999, pet. denied) ("off-setting benefits to the paying estate must be considered"); *Gutierrez v. Gutierrez*, 791 S.W.2d 659, 662 (Tex. App.--San Antonio 1990, no writ) (property division reversed where trial court failed to consider value of living in condominium as offset to paying separate property debt on the condo). However, "an equitable claim for reimbursement is not merely a balancing of the ledgers between the marital estates." *Penick v. Penick*, 783 S.W.2d 194, 197 (Tex. 1988). Therefore, it not entirely clear that the measure of reimbursement is the difference between the amount expended and the amount of offsetting benefits. It may be more accurate to say that the trial court can consider offsetting benefits in deciding whether or not to award reimbursement.

a. Types of Offsetting Benefits. Offsetting benefits include, for example, the value to the community estate of living rent free in a home. *Fyffe v. Fyffe*, 670 S.W.2d 360, 362 (Tex. App.--Texarkana 1984, writ dism'd w.o.j.). They also include tax savings resulting from depreciation or the deductibility of the expenses paid. *Penick v. Penick*, 783 S.W.2d 194 (Tex. 1988). Rental income from the property in question would also be an offsetting benefit, although an argument could be made that the community estate was entitled to that income anyway and therefor should not suffer having its reimbursement claim reduced thereby. *See generally Trawick v. Trawick*, 671 S.W.2d 105, 108-09 (Tex. App.--El Paso 1984, no writ) (rental income from a business should be ignored in calculating a *Jensen* reimbursement claim, because the community estate was entitled to receive the income regardless of husband's employment).

b. Must the Benefits be Related? An issue arises as to whether the offsetting benefits must relate to the property whose expenses give rise to the reimbursement claim. The 2002 PJC 204.2 suggests that an offset is measured by "the value of any related benefit received by the paying estate." However, in *Schecter v. Schecter*, 579 S.W.2d 502, 505 (Tex. Civ. App.--Dallas 1978, no writ), the appellate court ruled that it was not error for the trial court to decline to award reimbursement for mortgage payments made on wife's separate real estate using community funds, where the wife's had "spent considerable amounts of her separate funds improving the community estate." Thus, the offsetting benefits in *Schecter* were not received from the property whose debt was paid. The PJC Committee's position on this issue is not free from doubt.

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

5. Enhancement Not An Issue. Enhancement of the value of the separate property in question has no bearing on reimbursement for payment of debt, taxes, interest and insurance. *Hawkins v. Hawkins*, 612 S.W.2d 683, 684 (Tex. Civ. App.--El Paso 1981, no writ); *Bazile v. Bazile*, 465 S.W.2d 181, 182 (Tex. Civ. App.--Houston [1st Dist.] 1971, writ dism'd). However, many courts say that the receiving estate is "enhanced" by having its debts or expenses paid, thus clouding this analysis. *See e.g. Rusk v. Rusk*, 5 S.W.3d 299, 309 (Tex. App.–Houston [14th Dist.] 1999, pet. denied).

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

B. For Enhancement Due to Improvements to Real Property. TEX. FAM. CODE ANN. § 3.408(a) provides a claim for economic contribution for improvements made to property belonging to another marital estate, which, when proven, supplants any marital property reimbursement claim. The reimbursement claim thus will exist only if the economic contribution claim is not proven, or if the statute is declared unconstitutional. When one marital estate provides or pays for improvements to real property belonging to another marital estate, the transferor estate has a claim for reimbursement measured by the enhancement in value to the property as a result of the improvement. *Anderson v. Gilliland*, 684 S.W.2d

673 (Tex. 1985). The equitable claim for reimbursement had been applied to enhancement of a spouse's separate property life estate in land. *See Carley v. Carley*, 705 S.W.2d 371 (Tex. App.--San Antonio 1986, writ dism'd). Evidence regarding the value of the property before the improvements and the value after the improvements fixed the amount of the claim. *Magill v. Magill*, 816 S.W.2d 530, 535 (Tex. App.--Houston [1st Dist.] 1991, writ denied); *Girard v. Girard*, 521 S.W.2d 714, 718 (Tex. Civ. App.--Houston [1st Dist.] 1975, no writ). The following principles were involved in a marital property reimbursement claim for improvements.

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

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

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

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

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

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

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

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

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

2. The Pattern Jury Charge. STATE BAR OF TEXAS PATTERN JURY CHARGES (FAMILY) 204.1 (2000 ed.) gives the following instruction regarding reimbursement arising from one marital estate's paying for improvements to real property belonging to a different marital estate:

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

See Anderson v. Gilliland, 684 S.W.2d 683 (Tex. 1985) (measure of reimbursement is enhancement); *Cook v. Cook*, 693 S.W.2d 785, 786 (Tex. App.--Fort Worth 1985, no writ) (measure of reimbursement is enhancement). As noted above, TEX. FAM. CODE ANN. § 3.409, when proven, supplants the claim for reimbursement for capital improvements by a claim for economic contribution.

3. Offsetting Benefits. A reimbursement claim for improvement to realty is subject to offset for benefits received by the transferring estate. *Penick v. Penick*, 783 S.W.2d 194, 197 (Tex. 1988); *Hernandez v. Hernandez*, 703 S.W.2d 250, 253 (Tex. App.--Corpus Christi 1985, no writ) (benefit to community estate of living in separate property house rent-free for 16 years offset any reimbursement claim). Note that PJC 204.2A says that offset is available only for a "related benefit received by the paying estate." "Related" means related to the property whose improvement gave rise to the reimbursement claim. In *Schecter v. Schecter*, 579 S.W.2d 502, 505 (Tex. Civ. App.--Dallas 1978, no writ), the appellate court ruled that it was not error for the trial court to decline to award reimbursement for improvements to wife's separate real estate using community funds, where the wife's had "spent considerable amounts of her separate funds improving the community estate." Thus, the offsetting benefits in *Schecter* were not received from the property that was improved.

4. Where Improvements are Financed. A question arose, under marital property reimbursement law, when improvements were made to real estate using community credit, and the loan involved is not entirely paid off as of the time of divorce. In that instance, if the unpaid portion of the improvement loan were to be awarded to the owner of the improved separate property, the reimbursement claim in favor of the community estate should be limited to the portion of the community debt that was paid off during marriage. *Allen v. Allen*, 704 S.W.2d 600, 607 (Tex. App.--Fort Worth 1986, no writ). A similar logic should apply to economic contribution claims.

Yet another anomaly arose in *Kamel v. Kamel*, 721 S.W.2d 450 (Tex. App.--El Paso 196, no writ), where the spouses borrowed to build improvements on husband's separate property lot, but then made no payments on the improvement loan. Among other things, Husband's father made payments on the improvement loan, which the appellate court treated as gifts ½ to husband and ½ to wife. Thus, since the community debt was paid by a gifts to the spouses, wife was entitled to reimbursement from husband's separate estate to the extent of ½ of the payments on the note that were made by husband's father. The appellate court wiped out the trial court's award of reimbursement to the community estate for the improvements that were financed with community credit. The appellate court appears to have ignored the fact that the improvement loan proceeds were community property, and focused instead on whether community or separate property funds were used to pay the improvement loan. On appeal after retrial, the appellate court used a better analysis of the issues. The entire amount of enhancement by building the improvements on husband's separate property lot using community credit was a reimbursement claim in favor of the community estate. However, the payments made by husband's father, which had been found by the trial court to be gifts only to the husband and not to the wife, created a right of reimbursement in favor of husband's separate estate. The case was remanded again to sort through the reimbursement claims.

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

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

C. For Enhancement Due to Community Time, Toil, Talent or Effort. The community estate has a claim for reimbursement for uncompensated or undercompensated time, toil and talent expended by a spouse for the benefit and enhancement of his or her separate property interests, beyond that necessary to maintain the separate asset. *Id.* at 805. *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984). The 2001 amendments to the Texas Family Code confirmed the availability

of this reimbursement claim. TEX. FAM. CODE ANN. § 3.4098(b)(2); An increase in the value of a separate property business "resulting from fortuitous circumstances and unrelated to an expenditure of community effort will not entitle the community estate to reimbursement." *Harris v. Harris*, 765 S.W.2d 798, 805 (Tex. App.--Houston [14th Dist.] 1989, writ denied).

1. The Pattern Jury Charge. STATE BAR OF TEXAS PATTERN JURY CHARGES (FAMILY) 204.2A (2002 ed.) gives the following instruction regarding reimbursement arising from the community estate's providing the time, toil, talent or effort of a spouse, beyond that necessary to maintain the working spouse's separate estate:

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

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

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

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

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

5. What Benefits are Considered? In *Jensen*, the Supreme Court said that in determining whether the owning spouse was undercompensated, you must determine the value of the time, toil and talent expended by the owner-spouse, and subtract from that compensation paid to him/her for such time, toil and talent, in the form of salary, bonuses, dividends and other fringe benefits. *Jensen v. Jensen*, 665 S.W.2d 107, 110 (Tex. 1984). One wonders why dividends would be considered compensation for time, toil and talent, when dividends are distributions of profits to owners, even those owners who contribute no effort to the profits. The Supreme Court was wrong to include dividends as a form of compensation for services rendered, although dividends arguably are an offsetting benefit received by the community estate. But then that raises the question of whether something the community is otherwise entitled to receive (to-wit: income from separate property) is a proper offset to a reimbursement claim. In determining undercompensation, the *Trawick* court said to exclude rental income received from the business for use of the husband's separate property real estate, since the community owned that rental income separate and apart from husband's labors. The court also said that money paid to wife should not be considered, unless her employment was a sham and she performed no labor. The court also said to exclude expense account reimbursements to husband, except to the extent they exceeded his true out-of-pocket expenses.

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

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

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

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

Id. at 58.

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

G. For Squandering Community Assets. Where a spouse has misspent community funds, the court can award a money judgment as recovery for such wrongdoing. It is unclear whether the award is a legal remedy which is part of the court's power to divide the estate, or whether the award is a form of reimbursement, since it has features of both. *See Grant v. Grant*, No. 01-98-00352-CV (Tex. App.–Houston [1st Dist.] 1999, no pet.) (not for publication) [1999 WL 1063433], which treated such an award as a reimbursement claim. The 2002 PJC does not recognize such an award as a form of

reimbursement. See PJC 204.2A. Under the 2002 PJC, such a claim would sound under actual fraud or constructive fraud, PJC 206.2 & 206.4. In *Schlueter v. Schlueter*, 975 S.W.2d 584, 589 (Tex. 1998), the Supreme Court held that such a recovery is not a tort recovery giving rise to the possibility of punitive damages. In *Rider v. Rider*, 887 S.W.2d 255, 261 (Tex. App.--Beaumont 1994, no writ), the appellate court said:

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

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

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

X. WHERE MARITAL PROPERTY REIMBURSEMENT IS NOT AVAILABLE.

A. For Payment of Child Support or Alimony. *Pelzig v. Berkebile*, 931 S.W.2d 398 (Tex. App.–Corpus Christi 1996, no writ), held that the community estate had no claim for reimbursement for use of community property funds to pay court-ordered child support for a child from a prior marriage. However, in *Butler v. Butler*, 975 S.W.2d 765 (Tex.App.--Corpus Christi 1998, no pet.), the court of appeals upheld an award of $30,000 in reimbursement for money spent on an illegitimate child born during the marriage. The Court distinguished its earlier opinion in this way:

> [T]he facts of Pelzig must be distinguished from the facts of this case. In Pelzig, the husband had pre-existing child support and alimony obligations when he married for a second time. The wife had full knowledge of these obligations and did not seek to prevent their satisfaction from community funds before or during the marriage. We held that the second wife was not entitled to reimbursement for money spent to meet the pre-existing support obligations. Pelzig, 931 S.W.2d at 400. In this case, the child support obligation did not materialize until after the marriage commenced, and Stan hid the existence of the child from his wife, satisfying his child support obligations out of community funds without his wife's knowledge.

Butler, 975 S.W.2d at 769.

Farish v. Farish, 982 S.W.2d 623 (Tex. App.–Houston [1st Dist.] 1998, no pet.), held that the community estate has no reimbursement claim for payment of court-ordered child support. In *Zieba v. Martin*, 928 S.W.2d 782, 787 (Tex.App.--Houston [14th Dist.] 1996, no writ), the court of appeals held that the trial court did not abuse its discretion in denying reimbursement for child support, college expenses, and alimony payments, as they were legal obligations the husband brought with him into the marriage. *Hunt v. Hunt*, 952 S.W.2d 564 (Tex.App.--Eastland 1997, no writ), held that the trial court did not abuse its discretion in failing to award reimbursement for payment during marriage of court-ordered child support or payment of alimony to a prior wife. No explanation was given, other than to cite *Pelzig* and *Zieba*.

However, in *In re Marriage of Moore*, 890 S.W.2d 821, 834 (Tex.App.--Amarillo 1994, no writ), the appellate court found that it was proper for the court to submit a jury question on the amount of reimbursement due as a result of husband using community funds to pay an obligation the husband owed to a former spouse under the property settlement agreement in their divorce.

TEX. FAM. CODE § 3.409(1), effective 9-1-2001, rules out reimbursement for payment of child support, alimony, or spousal maintenance.

B. For Paying Family Living Expenses. The separate estate is not entitled to reimbursement for paying community living expenses. *Norris v. Vaughan*, 152 Tex. 491, 260 S.W.2d 676 (1953); *In re Marriage of Case*, 28 S.W.3d 154 (Tex. App.--Texarkana 2000, no pet.) ("As a general rule, when separate funds are expended for normal community living expenses, such as rent, food, etc., there is no right to reimbursement because these merely extinguish the obligation of each spouse to support the family"). The rule was not applied where living expenses were incurred with community credit that was later paid using separate property funds–an exception that may swallow the rule. *Hilton v. Hilton*, 678 S.W.2d 645, 648 (Tex. App.--Houston [14th Dist.] 1984, no writ) (reimbursement is available for the use of separate property funds to pay community debts, even if these debts were incurred to pay community living expenses). *Accord*, *Oliver v. Oliver*, 741 S.W.2d 225, 228 (Tex.App.--Fort Worth 1987, no writ).

C. Contribution of Property of Nominal Value. TEX. FAM. CODE § 3.409(3) prohibits reimbursement for contributions of property of nominal value.

D. Payment of a Liability of Nominal Value. TEX. FAM. CODE § 3.409(4) prohibits reimbursement for paying liabilities of nominal value.

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

In *Halbert*, the appellate court said:

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

TEX. FAM. CODE ANN. § 3.409(5) effective September 1, 2001,rules out reimbursement for paying a student loan of a spouse.

F. 2002 PJC Instruction. The 2002 PJC proposes the following instruction on when reimbursement is not available:

> Texas law does not recognize a marital estate's claim for reimbursement for the payment of child support, alimony, or spousal maintenance; for living expenses of a spouse or child of a spouse; for contributions of property of nominal value; for the payment of a liability of a nominal amount; or for a student loan owed by a spouse.

XI. WHERE MARITAL PROPERTY REIMBURSEMENT MIGHT BE AVAILABLE.

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

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

> Neither the parties' research nor ours has revealed a Texas case deciding the question of whether the community has a right to reimbursement for the use of its credit to secure a loan to refinance the husband's separate property debts. However, I am not willing to state, at this time, that this new reimbursement theory is without merit. I would analogize this situation to cases where separate debts are discharged with

> community funds. See Villarreal v. Villarreal, 618 S.W.2d 99 (Tex. Civ. App.--Corpus Christi 1981, no writ); Hawkins v. Hawkins, 612 S.W.2d 683 (Tex. Civ. App.--El Paso 1981, no writ). However, there is an important difference between the case before us and cases involving the discharge of a separate debt with community funds. When a debt is discharged, the cost to the community is obvious, but when a separate property debt is refinanced with the community acting as a guarantor, the cost to the community is not so readily ascertainable. In the latter situation, expert testimony would be required on the percentage risk undertaken by the community, and a dollar value would have to be assigned to that risk.
>
> In the case before us, there is no testimony concerning the cost to the community resulting from the use of their credit to guarantee the refinancing of the separate property debt. Further, there is evidence in the record that even though the guarantee was for $2,200,000, and the net community assets were approximately $660,000, the appellant was nevertheless able to negotiate a loan from the River Oaks Bank & Trust Co. subsequent to the guarantee. The appellee has, therefore, failed to meet her burden of establishing the community's right to reimbursement for the use of the community credit.

Id. at 346.

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

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

XII. LIENS TO SECURE REIMBURSEMENT AWARDS. It appears that, where reimbursement is awarded as a money judgment to be paid after divorce, the trial court can impress a lien on the property as to which the reimbursement is awarded. However, it appears that a lien cannot be imposed in one separate property asset to secure a reimbursement judgment relating to another separate property asset. It is firmly established that the court cannot impose a lien on separate real estate to secure a money judgment which is used to balance the property division. *Rusk v. Rusk*, 5 S.W.3d 299, 308 (Tex. App.–Houston [14th Dist.] 1999, pet. denied) (citing to equitable lien cases in overturning a receivership imposed on separate property to secure an award of a money judgment as "owelty"); *Parker v. Parker*, 997 S.W.2d 833 (Tex. App.--Fort Worth 1995, pet. denied). In *Heggen v. Pemelton*, 836 S.W.2d 145, 146 (Tex. 1992), the Supreme Court said:

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

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

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

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

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

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

TEX. FAM. CODE § 3.406 requires the Court in a divorce to impose a lien to secure a claim for economic contribution. If the claim relates to the property in which the lien is imposed, the lien would be consistent with case law. If not, then such a lien may run afoul of the foregoing case law.

XIII. TRIAL COURT HAS BROAD DISCRETION. Although many cases speak of a "right" of reimbursement, reimbursement is not a right. Reimbursement is an equitable claim that is addressed to the trial court's discretion. TEX. FAM. CODE ANN. §3.408(c)("The Court shall resolve a claim for reimbursement by using equitable principles...") Therefore, it is difficult to reverse a trial court for a decision relating to reimbursement. *See Golias v. Golias*, 861 S.W.2d 401, 403 (Tex. App.--Beaumont 1993, no writ). An error regarding reimbursement is reversible only where it is of sufficient magnitude that it makes the overall property division an abuse of discretion. Reimbursement is part and parcel of the property division.

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

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

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

In contrast to marital property reimbursement, the trial court is required to award an economic contribution claim and secure it by a lien. TEX. FAM. CODE § 3.406.

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

The Texas Family Law Practice Manual [Vol. 5, Chapter 48, p. 61-62] suggests the following waiver language to be used in such agreements:

> No Reimbursement Claims
>
> [Name of party A] waives and releases all rights of reimbursement of any kind or nature (including time, toil, talent, and labor) that he might have in the future or claim on behalf of his separate estate or the community estate against the separate estate of [name of party B]. [Name of party B] waives and releases all rights of reimbursement of any kind or nature (including time, toil, talent, and labor) that she might have in the future or claim on behalf of her separate estate or the community estate against the separate estate of [name of party A]. Additionally, no reimbursement claims shall be allowed resulting from contributions made by a party from his or her separate estate for the living expenses of the parties, for the ordinary and customary maintenance of the separate property of the other party, or for any sums expended on or for the benefit of the other party. No reimbursement claims shall be allowed as a result of any contribution made by a party from his or her separate estate for the purchase of, improvement of, or discharge of any lien or encumbrance on the separate property of the other party.

The Texas Family Law Practice Manual [Vol. 5, Chapter 48] also contains suggested language relating to the waiver of equitable interests.

XV. REIMBURSEMENT CLAIMS ON APPEAL.

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

is rejected by the trial court must secure findings on that claim, or must have preserved error on the trial court's failure to grant findings on the claim; otherwise the claim is waived.

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

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

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

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

However, the Supreme Court in *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1983), found error relating to reimbursement and remanded the case for the sole purpose of determining a reimbursement claim. Following *Jensen*, the Dallas court of appeals remanded a divorce case for a new trial regarding reimbursement, with instructions for the trial court to redivide the property based on the jury verdict from the first trial, as corrected on appeal, subject to the new fact findings to be obtained regarding the reimbursement claims. *Holloway v. Holloway*, 671 S.W.2d 51, 63 (Tex. App.--Dallas 1983, writ dism'd).

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

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

However, when there is proof of the amount of reimbursable expenditures, but no proof of the amount of offsetting benefits, what should the appellate court do? Is that a failure to establish part of the right to recover, which means that the party seeking reimbursement has not shown an entitlement to reimbursement? Or is that a failure of the party resisting reimbursement to meet his/her burden to show that the reimbursement claim should be reduced by the amount

of offsetting benefits, meaning that the reimbursement claim has been established? The answer to that question depends entirely on who has the burden of proof to establish offsetting benefits. Either way, the appellate court can, and many have, remanded the question "in the interest of justice."

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

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

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

XVII. THE EQUITABLE INTEREST STATUTE. In 1999, the Legislature enacted Sections 3.401 through 3.406 of the Texas Family Code. Companion provisions were enacted as Section 3.006 and Section 7.002(3) of the Family Code. These sections were amended in the 2001 legislative session, so discussion of them is important only for cases on appeal under that version of the law, or as a historical background for current law. The operation of the equitable interest statute was so unclear that the Pattern Jury Charges Committee did not write instructions or questions for these provisions. *See* STATE BAR OF TEXAS PATTERN JURY CHARGES (FAMILY) 204.3 (2000 ed.).

These statutory provisions attempted to create an equitable interest, somewhat analogous to a reimbursement claim, to be determined upon divorce. Equitable interests arose in favor of the community estate under former Sections 3.401 & 3.402, and arose in favor of the separate estates under former Section 3.404. Equitable interests arose in two circumstances.

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

An equitable interest arose under former Section 3.402 when property of one marital estate was used to discharge debt on property of another marital estate. The equitable interest was calculated according to a formula that was probably intended to give an equitable interest in the whole property that was proportional to the portion of the purchase price paid by the transferring estate. In other words, former Section 3.402 was probably drafted with the intent that if 45% of the purchase money debt on separate property was paid with community funds, then the community estate would have an equitable interest in 45% of the property at its enhanced value at the time of divorce. However, the statute did not say this. Instead it said that the equitable interest was measured by the percentage of principal of the debt on the property (only principal, not interest) paid by the transferring estate multiplied times the enhanced value of the receiving estate's property. Probably the enhanced value due to financial contributions was the amount by which the value of the property net of debt was increased by paying down the purchase money indebtedness. For purposes of this calculation, payment of the cost of improvements was treated as payment of principal of the purchase money debt. *See* former Section 3.401(c). If, in addition to paying debt on property, the transferring estate paid for improvements to the property, that cost was treated as part of the principal of the debt.

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

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

Issues regarding the constitutionality of this new form of real or personal property, that was supposed not to be an ownership interest, as a violation of *Eggemeyer* have yet to be addressed by an appellate court. Another unresolved issue was whether the availability of the statutory remedy of equitable interest supplanted the traditional equitable reimbursement remedy.

XVIII. CLAIMS FOR ECONOMIC CONTRIBUTION. In 2001, the Legislature amended the Family Code by adding new Sections 3.401 through 3.410, eliminating "equitable interests" and creating in their stead a "claim for economic contribution" against a spouse's estate. The Legislature also added Family Code § 7.007, which requires the court in a divorce to determine claims for economic contribution, and then to divide community property claims in a manner that is just and right, and order a claim for economic contribution in favor of a separate estate to be awarded to the owner of that estate. It would be unconstitutional under *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977), for the Legislature to purport to empower a trial court to take separate property of one spouse and give it to the other upon divorce. The economic contribution statute attempts to circumvent this prohibition by reaffirming the inception of title rule on the one hand while on the other hand making inroads in the rule by creating a claim for economic contribution that is tantamount to an ownership interest in the property which the trial court must award, *Eggemeyer* notwithstanding. Whether the distinction between a legal "taking" and an "equitable" taking has sufficient substance to withstand constitutional attack remains to be seen.

The scheme of economic contribution claims replaces the cost or enhancement model of equitable reimbursement, and instead substitutes a monetary claim, to be secured by a lien upon dissolution of marriage, for what amounts to prorata "ownership" of the benefitted asset. This new approach is radical departure from marital property reimbursement concepts, and it requires close attention.

Some of the highlights of the new statutory provisions relating to claims for economic contribution are as follows.

1. Economic contribution claims exist only as to debts secured by liens in property of another marital estate, not unsecured debts of another estate. TFC § 3.402. Economic contribution claims also apply to property receiving capital improvements paid by another marital estate. *Id.*

2. The economic contribution claim is calculated as fraction of the equity in the property on the date of divorce, or date of disposition. Thus, the economic contribution concept makes the contributing estate a sort of "partner" in ownership of the property. TFC § 3.403(b)(1).

3. Economic contribution claims for paying debt includes only reduction in principal and not payment of interest. Economic contribution claims also do not include payment of property taxes or insurance. TFC § 3.402(b).

4. Making "capital improvements" can give rise to a claim for economic contribution, but the term "capital improvements" is not defined. TFC § 3.402(a)(6). Also, the measure of the economic contribution claim for making capital improvements is based on the cost of the improvements, and not any enhancement resulting from the improvements. TFC § 3.402(a)(6). If capital improvements are financed during marriage by a loan secured by lien in the property, only the reduction in principal of the improvement loan is included in the claim for economic contribution. TFC § 3.402(3). There appears to be a "gap" for capital improvements made to property by incurring debt that is not secured by lien in the property being improved. Those capital improvements do not fall under either TFC § 3.402(3) or (6). Presumably a traditional reimbursement claim could be made, based on enhancement.

5. "Use and enjoyment" of property is not an offsetting benefit to a claim for economic contribution. TFC § 3.403(e).

6. If the property giving rise to a claim for economic contribution is disposed of during marriage, the amount of the claim for economic contribution is fixed at the time the property is disposed of. TFC § 3.403(b)(1).

7. A divorce court is required to impose a lien on property of the benefitted estate to secure a claim for economic contribution. This is not discretionary with the court. TFC § 3.406(a). The lien is not restricted to the specific property benefitted, but can instead be placed on any other property of the benefitted estate, subject only to homestead protection of such assets. TFC § 3.406(c). This suggests that other exemption statutes in the Texas Property Code will not protect exempt property from such a lien.

8. The trial court must offset claims for economic contribution running between estates. TFC § 3.407.

9. Marital property reimbursement principles still apply to payment of unsecured debt, and whenever someone fails to prove up an economic contribution claim. TFC § 3.408(a). Economic contribution claims also do not apply to *Jensen* claims for undercompensation from a separate property corporation. TFC § 3.408(b)(2). *See* TFC § 3.402(b)(2) (economic contribution does not include time, toil, talent or effort).

10. The statute does not say who must plead and prove offsetting benefits.

XIX. APPENDIX.

A. TEX. FAM. CODE §§ 3.401-3.410.

§ 3.401. Definitions

In this subchapter:

(1) "Claim for economic contribution" means a claim made under this subchapter.
(2) "Economic contribution" means the contribution to a marital estate described by Section 3.402.
(3) "Equity" means, with respect to specific property owned by one or more marital estates, the amount computed by subtracting from the fair market value of the property as of a specific date the amount of a lawful lien specific to the property on that same date.
(4) "Marital estate" means one of three estates:
(A) the community property owned by the spouses together and referred to as the community marital estate;
(B) the separate property owned individually by the husband and referred to as a separate marital estate; or
(C) the separate property owned individually by the wife, also referred to as a separate marital estate.
(5) "Spouse" means a husband, who is a man, or a wife, who is a woman. A member of a civil union or similar relationship entered into in another state between persons of the same sex is not a spouse.

§ 3.402. Economic Contribution

(a) For purposes of this subchapter, "economic contribution" is the dollar amount of:

(1) the reduction of the principal amount of a debt secured by a lien on property owned before marriage, to the extent the debt existed at the time of marriage;
(2) the reduction of the principal amount of a debt secured by a lien on property received by a spouse by gift, devise, or descent during a marriage, to the extent the debt existed at the time the property was received;
(3) the reduction of the principal amount of that part of a debt, including a home equity loan:
(A) incurred during a marriage;
(B) secured by a lien on property; and
(C) incurred for the acquisition of, or for capital improvements to, property;
(4) the reduction of the principal amount of that part of a debt:
(A) incurred during a marriage;
(B) secured by a lien on property owned by a spouse;

(C) for which the creditor agreed to look for repayment solely to the separate marital estate of the spouse on whose property the lien attached; and

(D) incurred for the acquisition of, or for capital improvements to, property;

(5) the refinancing of the principal amount described by Subdivisions (1)- (4), to the extent the refinancing reduces that principal amount in a manner described by the appropriate subdivision; and

(6) capital improvements to property other than by incurring debt.

(b) "Economic contribution" does not include the dollar amount of:

(1) expenditures for ordinary maintenance and repair or for taxes, interest, or insurance; or

(2) the contribution by a spouse of time, toil, talent, or effort during the marriage.

§ 3.403. Claim Based on Economic Contribution

(a) A marital estate that makes an economic contribution to property owned by another marital estate has a claim for economic contribution with respect to the benefited estate.

(b) The amount of the claim under this section is equal to the product of:

(1) the equity in the benefited property on the date of dissolution of the marriage, the death of a spouse, or disposition of the property; multiplied by

(2) a fraction of which:

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

(B) the denominator is an amount equal to the sum of:

(i) the economic contribution to the property by the contributing estate;

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

(iii) the economic contribution to the property by the benefited estate during the marriage.

(c) The amount of a claim under this section may be less than the total of the economic contributions made by the contributing estate, but may not cause the contributing estate to owe funds to the benefited estate.

(d) The amount of a claim under this section may not exceed the equity in the property on the date of dissolution of the marriage, the death of a spouse, or disposition of the property.

(e) The use and enjoyment of property during a marriage for which a claim for economic contribution to the property exists does not create a claim of an offsetting benefit against the claim.

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

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

(b) The claim for economic contribution created under this subchapter does not create an ownership interest in property, but does create a claim against the property of the benefited estate by the contributing estate. The claim matures on dissolution of the marriage or the death of either spouse.

§ 3.405. Management Rights

This subchapter does not affect the right to manage, control, or dispose of marital property as provided by this chapter.

§ 3.406. Equitable Lien

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

(b) On the death of a spouse, a court shall, on application for a claim of economic contribution brought by the surviving spouse, the personal representative of the estate of the deceased spouse, or any other person interested in the estate, as defined by Section 3, Texas Probate Code, impose an equitable lien on the property of a benefited marital estate to secure a claim for economic contribution by a contributing marital estate.

(c) Subject to homestead restrictions, an equitable lien under this section may be imposed on the entirety of a spouse's property in the marital estate and is not limited to the item of property that benefited from an economic contribution.

§ 3.407. Offsetting Claims

The court shall offset a claim for one marital estate's economic contribution in a specific asset of a second marital estate against the second marital estate's claim for economic contribution in a specific asset of the first marital estate.

§ 3.408. Claim for Reimbursement

(a) A claim for economic contribution does not abrogate another claim for reimbursement in a factual circumstance not covered by this subchapter. In the case of a conflict between a claim for economic contribution under this subchapter and a claim for reimbursement, the claim for economic contribution, if proven, prevails.

(b) A claim for reimbursement includes:

(1) payment by one marital estate of the unsecured liabilities of another marital estate; and
(2) inadequate compensation for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse.

(c) The court shall resolve a claim for reimbursement by using equitable principles, including the principle that claims for reimbursement may be offset against each other if the court determines it to be appropriate.

(d) Benefits for the use and enjoyment of property may be offset against a claim for reimbursement for expenditures to benefit a marital estate on property that does not involve a claim for economic contribution to the property.

§ 3.409. Nonreimbursable Claims

The court may not recognize a marital estate's claim for reimbursement for:

(1) the payment of child support, alimony, or spousal maintenance;
(2) the living expenses of a spouse or child of a spouse;
(3) contributions of property of a nominal value;
(4) the payment of a liability of a nominal amount; or
(5) a student loan owed by a spouse.

§ 3.410. Effect of Marital Property Agreements

A premarital or marital property agreement, whether executed before, on, or after September 1, 1999, that satisfies the requirements of Chapter 4 is effective to waive, release, assign, or partition a claim for economic contribution under this subchapter to the same extent the agreement would have been effective to waive, release, assign, or partition a claim for reimbursement under the law as it existed immediately before September 1, 1999, unless the agreement provides otherwise.

§ 7.007. Disposition of Claim for Economic Contribution or Claim for Reimbursement

(a) In a decree of divorce or annulment, the court shall determine the rights of both spouses in a claim for economic contribution as provided by Subchapter E, Chapter 3, and in a manner that the court considers just and right, having due regard for the rights of each party and any children of the marriage, shall:

(1) order a division of a claim for economic contribution of the community marital estate to the separate marital estate of one of the spouses;

(2) order that a claim for an economic contribution by one separate marital estate of a spouse to the community marital estate of the spouses be awarded to the owner of the contributing separate marital estate; and

(3) order that a claim for economic contribution of one separate marital estate in the separate marital estate of the other spouse be awarded to the owner of the contributing marital estate.

(b) In a decree of divorce or annulment, the court shall determine the rights of both spouses in a claim for reimbursement as provided by Subchapter E, Chapter 3, and shall apply equitable principles to:

(1) determine whether to recognize the claim after taking into account all the relative circumstances of the spouses; and

(2) order a division of the claim for reimbursement, if appropriate, in a manner that the court considers just and right, having due regard for the rights of each party and any children of the marriage.

B. PJC 2002. Here is the latest version of the instructions and questions that are included in the 2002 PATTERN JURY CHARGES (FAMILY LAW), relating to claims for economic contribution.

PJC 204.1 Economic Contribution

PJC 204.1A Economic Contribution--Instructions

Texas law recognizes three marital estates: the community property owned by the spouses together, the separate property owned individually by the husband, and the separate property owned individually by the wife.

A spouse must prove by clear and convincing evidence that funds expended were the separate property of that spouse. "Clear and convincing evidence" is that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true.

"Fair market value" means the amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but is under no necessity of selling.

In answering Questions *3* through *10*, do not consider expenditures for ordinary maintenance and repair, expenditures for taxes, interest, or insurance, or the contribution by a spouse of time, toil, talent, or effort during the marriage.

The principal amount of a debt referred to in Questions *3*, *4*, *6*, and *9* may be reduced by payment on the principal of the debt and by refinancing, to the extent the refinancing reduces the principal amount in the manner described in the question.

PJC 204.1B Economic Contribution—Equity at Date of Dissolution of Marriage or Disposition of Property

QUESTION 1

With respect to *PROPERTY ITEM OF PARTY A*, state in dollars the amount of each of the following on *CURRENT DATE OR DATE OF PROPERTY DISPOSITION*:

1. the fair market value

   Answer: $_____

2. the principal amount of *LIENS ON CURRENT DATE OR DATE OF PROPERTY DISPOSITION*

Answer: $_____

If in answer to Question 1 you have found that the fair market value is less than or equal to the principal amount of debt, do not answer the following questions; otherwise, answer the following questions.

PJC 204.1C Economic Contribution—Equity at Date of Marriage or First Economic Contribution by Contributing Estate

QUESTION 2

With respect to *PROPERTY ITEM OF PARTY A*, state in dollars the amount of each of the following on *DATE OF MARRIAGE OR FIRST ECONOMIC CONTRIBUTION*:

1. the fair market value

Answer: $_____

2. the principal amount of *LIENS ON DATE OF MARRIAGE OR FIRST ECONOMIC CONTRIBUTION*

Answer: $_____

PJC 204.1D Economic Contribution—Reduction of Debt Secured by Property Owned before Marriage

QUESTION 3

With respect to *PROPERTY ITEM OF PARTY A*, state in dollars the amount, if any, of the reduction of the principal amount of *DEBT W*, to the extent the debt existed at the time of marriage--

1. by *the community estate*

Answer: $_____

2. by *PARTY B's separate estate*, as proved by clear and convincing evidence Answer: $_____

3. during the marriage by *PARTY A's separate estate*, as proved by clear and convincing evidence Answer: $_____

PJC 204.1E Economic Contribution—Reduction of Debt Secured by Property Received by Spouse after Marriage by Gift, Devise, or Descent

QUESTION 4

With respect to *PROPERTY ITEM OF PARTY A*, state in dollars the amount, if any, of the reduction of the principal amount of *DEBT X*, to the extent the debt existed at the time the property was received--

1. by *the community estate*

Answer: $_____

2. by *PARTY B's separate estate*, as proved by clear and convincing evidence Answer: $_____

3. during the marriage by *PARTY A's separate estate*, as proved by clear and convincing evidence Answer: $_____

PJC 204.1F Economic Contribution—Reduction of Debt Incurred during Marriage to Acquire or Improve Property

QUESTION 5

Was *DEBT Y* incurred during the marriage *for capital improvements to PROPERTY ITEM OF PARTY A?*

Answer: _____

If you have answered Question 5 "Yes," then answer Question 6; otherwise, do not answer Question 6.

QUESTION 6

State in dollars the amount, if any, of the reduction of the principal amount of *DEBT Y* --

1. by *the community estate* Answer: $_____

2. by *PARTY B's separate estate*, as proved by clear and convincing evidence Answer: $_____

3. during the marriage by *PARTY A's separate estate*, as proved by clear and convincing evidence Answer: $_____

PJC 204.1G Economic Contribution—Reduction of Debt Incurred during Marriage to Acquire or Improve Separate Property—Separate-Estate Debt

QUESTION 7

Did *CREDITOR FOR DEBT Z* agree to look for repayment solely to the separate estate of *PARTY A*?

Answer: _____

If you have answered Question 7 "Yes," then answer Question 8; otherwise, do not answer Question 8.

QUESTION 8

Was *DEBT Z* incurred during the marriage *to acquire PROPERTY ITEM OF PARTY A?*

Answer: _____

If you have answered Question 8 "Yes," then answer Question 9; otherwise, do not answer Question 9.

QUESTION 9

State in dollars the amount, if any, of the reduction of the principal amount of *DEBT Z*--

1. by *the community estate* Answer: $_____

2. by *PARTY B's separate estate*, as proved by clear and convincing evidence Answer: $_____

3. during the marriage by *PARTY A's separate estate*, as proved by clear and convincing evidence Answer: $_____

PJC 204.1H Economic Contribution—Capital Improvements—Other Than by Incurring Debt

QUESTION 10

State in dollars the amount, if any, expended for capital improvements to *PROPERTY ITEM OF PARTY A* other than by incurring debt—

1. by *the community estate* Answer: $_____

2. by *PARTY B's separate estate*, as proved by clear and convincing evidence Answer: $_____

3. during the marriage by *PARTY A's separate estate*, as proved by clear and convincing evidence Answer: $_____

COMMENT

When to use. The foregoing instructions and questions may be used to submit a claim for economic contribution by a contributing marital estate against a benefited marital estate. Only the portions of the instruction that are relevant in the particular case should be given. Likewise, only those of the questions in PJC 204.1D through PJC 204.1H that are relevant in the particular case should be given.

A separate series of relevant questions should be presented to the jury for each item of property in which a claim of economic contribution is made. The jury's answers are to be considered by the court in calculating the economic contribution of each estate in assets of another estate, as well as the effect of any offsets.

Characterization of property. Any instructions and questions necessary for establishing the characterization of relevant property should be given to the jury before these instructions and questions concerning economic contribution are given. See PJC 202.1 through PJC 202.15 regarding characterization of property.

Rewording for specific claims. The questions in PJC 204.1B through 204.1H should be reworded as appropriate to submit the particular claims that are in issue in the case. In each series, descriptions of the specific item of property and of the particular debt or debts should be included where indicated.

Burden of proof. Section 3.003(b) of the Texas Family Code provides that the degree of proof necessary to establish that property is separate property is clear and convincing evidence. Tex. Fam. Code Ann. § 3.003(b) (Vernon Supp. 2002). No other rule of law relevant to marital property appears to require a degree of proof greater than preponderance of the evidence, which is generally required for fact issues in civil litigation.

In the context of reimbursement other than economic contribution, the Committee has concluded that a spouse seeking reimbursement must prove each element of the claim by a preponderance of the evidence, but that a spouse seeking reimbursement to a separate estate must prove by clear and convincing evidence that the funds expended were separate property. See PJC 204.2 (reimbursement other than economic contribution). In the context of a separate estate's making a claim for economic contribution, it is less certain what degree of proof is required for elements of the claim other than the extent of separate funds expended.

The Committee has considered whether the establishment of a claim for economic contribution might be considered the establishment of property and, thus, be encompassed as to all elements of the claim by Code section 3.003(b). The Committee notes that Code section 3.404(b) provides that a claim for economic contribution does not create an ownership interest in property but instead creates a claim (which matures on dissolution of the marriage or the death of either spouse) against the property of the benefited estate by the contributing estate. *See* TFC § 3.404(b).

The Committee has concluded that, in a claim for economic contribution by either a separate or a community estate, the burden of proving that funds expended were separate property must be met by clear and convincing evidence; other elements of the claim must be proved by a preponderance of the evidence.

PJC 204.1A. The instruction on the three marital estates is based on Tex. Fam. Code Ann. § 3.401(4) (Supp. 2002). The instruction on burden of proof by clear and convincing evidence is based on TFC § 3.003 (Vernon 1998). (See comment entitled "Burden of proof" above.) The definition of "clear and convincing evidence" is based on TFC § 101.007 (1996). The definition of "fair market value" is based on *City of Pearland v. Alexander*, 483 S.W.2d 244 (Tex. 1972), and

Wendlandt v. Wendlandt, 596 S.W.2d 323, 325 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ). The instruction regarding expenditures and contributions that are not to be considered is based on TFC § 3.402(b) (Supp. 2002). The instruction regarding debt reduction through refinancing is based on TFC § 3.402(a)(5).

PJC 204.1B. The question in PJC 204.1B is based on TFC §§ 3.401(3), 3.403(b)(1), (d). The current date or the date of disposition of the item of property should be substituted for *CURRENT DATE OR DATE OF PROPERTY DISPOSITION*. A description of all lawful liens specific to the property on that date should be substituted for *LIENS ON CURRENT DATE OR DATE OF PROPERTY DISPOSITION*. Determination of the existence of a "lawful lien specific to the property" is a question of law for court determination.

PJC 204.1C. The question in PJC 204.1C is based on TFC §§ 3.401(3), 3.403(b)(2)(B)(ii). The date of the marriage or, if later, the date of the first economic contribution by the contributing estate should be substituted for *DATE OF MARRIAGE OR FIRST ECONOMIC CONTRIBUTION*. A description of all lawful liens specific to the property on that date should be substituted for *LIENS ON DATE OF MARRIAGE OR FIRST ECONOMIC CONTRIBUTION*. Determination of the existence of a "lawful lien specific to the property" is a question of law for court determination.

PJC 204.1D. The question in PJC 204.1D is based on TFC § 3.402(a)(1). A description of a debt secured by a lien on property owned before marriage should be substituted for *DEBT W*.

In Question 3, only the estate or estates alleged to have contributed should be listed in the answer portion.

PJC 204.1E. The question in PJC 204.1E is based on TFC § 3.402(a)(2). A description of a debt secured by a lien on property received by a spouse by gift, devise, or descent during marriage should be substituted for *DEBT X*.

In Question 4, only the estate or estates alleged to have contributed should be listed in the answer portion.

PJC 204.1F. The questions in PJC 204.1F are based on TFC § 3.402(a)(3). A description of that part of a debt secured by a lien on property, including a home equity loan, alleged to have been incurred during the marriage to acquire the property or make capital improvements to it should be substituted for *DEBT Y*.

In an appropriate case, the words *for capital improvements to* should be replaced with the words *to acquire*. (This substitution is not appropriate in the case of separate property. See PJC 202.5 (property acquired on credit).)

If it is uncontested that the debt was incurred during the marriage to acquire the property or make capital improvements to it, Question 5 and the instruction following it should be omitted. In Question 6, only the estate or estates alleged to have contributed should be listed in the answer portion.

PJC 204.1G. The questions in PJC 204.1G are based on TFC § 3.402(a)(4). A description of that part of a debt secured by a lien on property alleged to have been incurred during the marriage to acquire the property or make capital improvements to it, and for which the creditor agreed to look for repayment solely to the separate estate of the spouse on whose property the lien attached, should be substituted for *DEBT Z*.

In an appropriate case, the words *to acquire* should be replaced with the words *for capital improvements to*.

If it is uncontested that the creditor agreed to look for repayment solely to the benefited estate, Question 7 and the instruction following it should be omitted. If it is uncontested that the debt was incurred during the marriage to acquire the property or make capital improvements to it, Question 8 and the instruction following it should be omitted. In Question 9, only the estate or estates alleged to have contributed should be listed in the answer portion.

PJC 204.1H The question in PJC 204.1H is based on TFC § 3.402(a)(6).

PJC 204.2 Reimbursement Other Than Economic Contribution

PJC 204.2A Reimbursement Other Than Economic Contribution—Instruction

Texas law recognizes three marital estates: the community property owned by the spouses together and referred to as the community estate; the separate property owned individually by the husband and referred to as a separate estate; and the separate property owned individually by the wife, also referred to as a separate estate.

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

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

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

Texas law does not recognize a marital estate's claim for reimbursement for the payment of child support, alimony, or spousal maintenance; for living expenses of a spouse or child of a spouse; for contributions of property of nominal value; for the payment of a liability of a nominal amount; or for a student loan owed by a spouse.

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

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

PJC 204.2B Reimbursement Other Than Economic Contribution—Questions—Estate by Estate

QUESTION 1

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

1. *the community estate* against

   PARTY A's separate estate Answer: $_____

2. *PARTY A's separate estate* against

   PARTY B's separate estate Answer: $_____

QUESTION 2

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

1. *PARTY A's separate estate* Answer: $_____

2. *PARTY B's separate estate* Answer: $_____

PJC 204.2C Reimbursement Other Than Economic Contribution—Questions—Claim by Claim

QUESTION 1

State in dollars the amount of the reimbursement claim, if any, *arising from the repayment of XYZ LOAN*, proved in favor of—

1. *the community estate* against

PARTY A's separate estate Answer: $_____

2.PARTY A's separate estate against

PARTY B's separate estate Answer: $_____

QUESTION 2

State in dollars the amount of the offset against such reimbursement claim, if any, *arising from the tax benefits resulting from the repayment of XYZ LOAN* proved to benefit—

1. *PARTY A's separate estate* Answer: $_____

2. *PARTY B's separate estate* Answer: $_____

COMMENT

Source. In *Penick v. Penick*, 783 S.W.2d 194, 197-98 (Tex. 1988), the Supreme Court of Texas set forth its position on offsetting benefits to claims for reimbursement and emphasized the equitable nature of reimbursement. The court stated that it was "difficult to announce a single formula which will balance the equities between each marital estate in every situation and for every kind of property and contribution." The supreme court concluded that a court should use the same discretion in evaluating a claim for reimbursement as in making a "just and right" division of the community property.

Therefore, the foregoing jury instructions, which are based on cases decided before *Penick*, 783 S.W.2d 194, are in no way exclusive; rather, they should serve as a guide. For example, in the area of life insurance, opinions conflict about whether the measure of reimbursement is the cost incurred by the contributing estate or the benefit to the other estate. One such situation involves the community estate's payment of premiums on a separate–property whole life insurance policy, where the measure of reimbursement may be either the amount of premiums paid or the increase in the cash surrender value resulting from those payments.

The instruction on the three marital estates is based on Tex. Fam. Code Ann. § 3.401(4) (Vernon Supp. 2002).

The instruction on debts, taxes, interest, and insurance is derived from *Penick*, 783 S.W.2d 194, and *Colden v. Alexander*, 171 S.W.2d 328 (Tex. 1943).

The instruction on improvements to real property is derived from *Anderson v. Gilliland*, 684 S.W.2d 673 (Tex. 1985). The instruction on offsetting benefits is based on *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984); *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982); and *Hernandez v. Hernandez*, 703 S.W.2d 250 (Tex. App.—Corpus Christi 1985, no writ).

The instruction on the spouses' time, toil, talent, or effort is based on *Jensen*, 665 S.W.2d 107. The words *salary, bonuses, dividends, and other fringe benefits* should be replaced with terms appropriate to the particular case. The instruction does not contain all the elements stated in TFC § 3.408(b)(2), which provides that a claim for reimbursement includes "inadequate compensation for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse." Because use of the term "includes" in section 3.408(b) indicates that other types of claims may also be cognizable as claims for reimbursement other than economic contribution (Tex. Gov't Code Ann. § 311.005(13) (Vernon 1998)), the Committee has concluded that section 3.408(b)(2) does not alter the requirements for a *Jensen* claim as set forth in the instruction in PJC 2.402A.

The instruction on claims that may not be recognized is based on TFC § 3.409.

The instruction on burden of proof by clear and convincing evidence for reimbursement to a separate estate is based on TFC § 3.003 (Vernon 1998). The definition of "clear and convincing evidence" is based on TFC § 101.007 (1996).

Effect of claim for economic contribution on claim for reimbursement. A claim for economic contribution does not abrogate another claim for reimbursement in a factual circumstance not covered by TFC chapter 3, subchapter E. In the case of a conflict between a claim for economic contribution under TFC chapter 3, subchapter E, and a claim for reimbursement, the claim for economic contribution prevails if it is proved. TFC § 3.408(a).

When facts potentially give rise to claims for both reimbursement and economic contribution. There may be circumstances in which a particular economic expenditure combined with other facts may give rise to both a claim for reimbursement and a claim for economic contribution. As stated in the preceding paragraph, the claim for economic contribution, if proved, prevails. However, because it is unknown when the charge is submitted whether the jury will find that all elements necessary to establish a claim for economic contribution have been proved, it may be appropriate to submit instructions and questions on reimbursement with respect to the same expenditures.

When to use. The foregoing instruction and questions may be used to submit the claim for reimbursement of one estate against another. Only the portions of the instruction that are relevant in the particular case should be given.

The questions in PJC 204.2B should be used if no claim of economic contribution is submitted in the charge with respect to an economic expenditure that could be a subject of the reimbursement claim. In such a case it is feasible to submit the reimbursement issue in broad form. However, if a claim of economic contribution is submitted in the charge with respect to a particular economic expenditure that could also be the subject of a reimbursement claim, the questions in PJC 204.2C should be used. In such a case, obtaining answers with respect to each claim will allow the court, in fashioning appropriate relief, to ensure that amounts determined by the jury in response to the economic contribution issues are not also included in any award for other reimbursement.

Rewording question for specific claims. The itemized listing given as an example in the questions above should be reworded as appropriate to submit the particular claims that are in issue in the case. The list can be worded to resolve claims of reimbursement in any of the following situations:

1. The wife is seeking reimbursement to the community estate from the husband's separate estate.
2. The husband is seeking reimbursement to the community estate from the wife's separate estate.
3. The wife is seeking reimbursement to her separate estate from the community estate.
4. The husband is seeking reimbursement to his separate estate from the community estate
5. The wife is seeking reimbursement to her separate estate from the husband's separate estate.

11. The husband is seeking reimbursement to his separate estate from the wife's separate estate.

In the questions in PJC 204.2C, appropriate descriptions of the claim and offset should be substituted for the phrases *arising from the repayment of XYZ LOAN* and *arising from the tax benefits resulting from the repayment of XYZ LOAN*.

If no separate–property reimbursement is asserted. If no claim for reimbursement to a separate estate is asserted, the second and third sentences of the fifth paragraph of the instruction should be omitted.

If only one claim is asserted. If only one reimbursement claim is asserted, the questions in PJC 204.2B may be worded as follows:

> State in dollars the amount of the reimbursement claim, if any, proved in favor of *the community estate* against *PARTY A's separate estate*.
>
> State in dollars the amount of the offset against such reimbursement claim, if any, proved in favor of *PARTY A's separate estate*.

PJC 204.3 Reimbursement Other Than Economic Contribution—Advisory Questions (Comment)

The Committee believes the submission of advisory jury questions, which may unduly lengthen the court's charge, is generally inappropriate. For this reason, the Committee has formulated neither instructions nor jury questions seeking advisory opinions on whether reimbursement other than economic contribution should actually be awarded and, if so, the manner and method by which this result should be accomplished.

[1.] The controlling definition of separate property is contained in the Texas Constitution, art. 15, § 15, which reads as follows:

> Sec. 15. Separate and community property of husband and wife
>
> Sec. 15. All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property; provided that persons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse or future spouse in other community property then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse; spouses also may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned or which thereafter might be acquired by only one of them, shall be the separate property of that spouse; if one spouse makes a gift of property to the other that gift is presumed to include all the income or property which might arise from that gift of property; and spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse.

The Family Code definition of separate property comports with the constitutional definition, except that Section 3.001(3) says that "the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage" is separate property. TEX. FAM. CODE ANN. § 3.001(3). This personal-injury related category of separate property, which is not in the Constitution, was validated in *Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972). Section 4.102 provides that "[p]roperty or a property interest transferred to a spouse by a partition or exchange agreement becomes his or her separate property." TEX. FAM. CODE ANN. § 4.102 (Vernon 1993).

[2.] Community property consists of the property, other than separate property, acquired by either spouse during marriage. TEX. FAM. CODE ANN. § 3.002.

[3.] Property may be partly separate and partly community property, in proportion to the portion of the purchase price paid with separate and community property. *Gleich v. Bongio*, 99 S.W.2d 881, 883 (Tex. 1937). See State Bar of Texas Pattern Jury Charges PJC 202.6 (2002). In the case of *In re Marriage of Thurmond*, 888 S.W.2d 269, 272-73 (Tex. App.--Amarillo 1994, writ denied), the court reviewed various descriptions of "mixed" ownership as being "pro tanto ownership," "equitable title," and "separate interest." The court felt that the most viable characterization of the interest of the spouse's separate estate in a mixed asset is one of "equitable title." *Id*. at 273. *See* TEX. FAM. CODE § 3.006 (Proportional Ownership of Property by Marital Estates.)

[4] TEX. CONST. art. XVI, § 15; TEX. FAM. CODE ANN. § 3.001. One consequence of this rule is that there can be no gift to the community estate. *Tittle v. Tittle*, 148 Tex. 102, 220 S.W.2d 637, 642 (1949); *Celso v. Celso*, 864 S.W.2d 652, 655 (Tex. App.--Tyler 1993, no writ). Note that when one spouse gives property to the other spouse a presumption arises that the gift includes all income or property arising from the property transferred. TEX. CONST. art. XVI, § 15; TEX. FAM. CODE ANN. § 3.005. "Gift" means a voluntary and gratuitous transfer of property coupled with delivery, acceptance, and the intent to make a gift." State Bar of Texas Pattern Jury Charges PJC 202.3 (2002). *See Hilley v. Hilley*, 161 Tex. 569, 342 S.W.2d 565, 569 (1961) ("When an inter vivos transfer is made to either or both of the spouses during marriage, the separate or community character of the property is determined by looking to the consideration given in exchange for it. Any right, title or interest acquired for a valuable consideration paid out of the community necessarily becomes community property . . . .").

[5] TEX. CONST. art. XVI, § 15; Tex. Fam. Code Ann. § 3.001(2). "Devise" means acquisition of property by last will and testament. State Bar of Texas Pattern Jury Charges PJC 202.3 (2002). "Descent" means acquisition of property by inheritance without a will. State Bar of Texas Pattern Jury Charges PJC 202.3 (2002).

[6] TEX. CONST. art. XVI, § 15. Family Code § 4.102 provides that "[p]roperty or a property interest transferred to a spouse by a partition or exchange agreement becomes his or her separate property." TEX. FAM. CODE § 4.102.

[7] TEX. CONST. art. XVI, § 15. *See* TEX. FAM. CODE ANN. § 4.103.

[8] TEX. CONST. art. XVI, § 15; TEX. PROB. CODE ANN. § 451 (Vernon Supp. 1995). *See Banks v. Browning*, 873 S.W.2d 763 (Tex. App.--Fort Worth 1994, writ denied) (signature card indicating survivorship by "X" in a box was sufficient to establish survivorship agreement as to community property); *Haynes v. Stripling*, 812 S.W.2d 397 (Tex. App.--Austin 1991, no writ) (constitutional amendment retroactively validated survivorship agreement, signed prior to effective date, that was invalid under prior law).

[9] *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973); *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965).

[10] "[T]he recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage" is separate property. TEX. FAM. CODE ANN. § 3.001(3). *See Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972). However, in *Graham v. Franco* 488 S.W.2d 390, 396 (Tex. 1972), the Supreme Court said that a recovery for medical and related expenses incurred during marriage belongs to the community, since the community is responsible for these expenses.

[11] For a good discussion of preemption, see *Ex parte Hovermale*, 636 S.W.2d 828, 837 (Tex. App.--San Antonio 1982, orig. proceeding) (Cadena, C.J., dissenting). *See also Ridgway v. Ridgway*, 454 U.S. 46, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981) (provisions of the Servicemen's Group Life Insurance Act of 1965, giving an insured service member the right to freely designate and alter the beneficiaries named under the contract, prevail over and displace a constructive trust for the benefit of the service member's children imposed upon the policy proceeds by a state-court divorce decree); *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981) (federal law preempted power of state court to divide military retirement benefits in a divorce); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979) (federal law preempted power of state court to divide railroad retirement benefits on divorce); *Yiatchos v. Yiatchos*, 376 U.S. 306, 84 S.Ct. 742, 11 L.Ed.2d 724 (1964); *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962) (savings bond survivorship provisions in treasury regulations preempted inconsistent Texas community property law); *Wissner v. Wissner*, 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424 (1950) (National Service Life Policy benefits are the sole property of the beneficiary, and are not community property); *McCune v. Essig*, 199 U.S. 382, 26 S.Ct. 78, 50 L.Ed. 237 (1905) (veteran's right, under federal statute, to designate beneficiary of life insurance could not be controlled by state court); *Ex parte Burson*, 615 S.W.2d 192 (Tex. 1981) (Veterans Administration disability payments are not property and cannot be divided upon divorce); *Eichelberger v. Eichelberger*, 582 S.W.2d 395 (Tex. 1979) (railroad retirement preempted); *Perez v. Perez*, 587 S.W.2d 671 (Tex. 1979) (military readjustment benefits held to be separate property due to gratuitous nature under federal statute); *United States v. Stelter*, 567 S.W.2d 797 (Tex. 1978) (ex-wife could not garnish ex-husband's retired pay, under federal statute); *Valdez v. Ramirez*, 574 S.W.2d 748 (Tex. 1978) (joint survivor annuity permitted by Civil Service Retirement Act preempted contrary state law); *Ex parte Johnson*, 591 S.W.2d 453 (Tex. 1979) (federal statute precluded division of V.A. disability benefits upon divorce); *Arrambide v. Arrambide*, 601 S.W.2d 197 (Tex. Civ. App.--El Paso 1980, no writ) (federal law prohibits division of VA disability payments upon divorce).