

**FIDUCIARY DUTIES OF SPOUSES, EFFECTIVE USE OF
THE REMEDY OF THE CONSTRUCTIVE TRUST,
RECOVERIES FOR VIOLATIONS OF THESE DUTIES, AND
ISSUES PRESENTED WHEN SPOUSES ARE UNDER
MULTIPLE AND/OR CONFLICTING DUTIES**

**TED TERRY
KRISTIN PROCTOR
JIMMY VAUGHT**
Law Offices of Edwin J. (Ted) Terry, Jr.
805 W. 10th, Suite 300
Austin, Texas 78701
(512) 476-9797

JAMES LARUE
2703 Rae Dell
Austin, Texas 78701
(512) 707-9144
email: 102236.502@compuserve.com

NEW FRONTIERS IN MARITAL PROPERTY LAW
STATE BAR OF TEXAS
October 8-9, 1998
Sante Fe, New Mexico

EDWIN J. (TED) TERRY, JR.
805 W. 10TH STREET, SUITE 300
AUSTIN, TEXAS 78701
(512) 476-9597
Fax (512) 476-6106

EDUCATION

University of Texas, B.A. in History, 1972
St. Mary's University, J.D., 1975

PROFESSIONAL ASSOCIATIONS

Board Certified Family Law - Texas Board of Legal Specialization 1981
American Board of Trial Advocates
Treasurer, American Academy of Matrimonial Lawyers - Texas Chapter
Fellow - American Academy of Matrimonial Lawyers
Fellow - International Academy of Matrimonial Lawyers
Texas Academy of Family Law Specialists
American Bar Association - Family Law Section
State Bar of Texas - Family Law Section
Travis County Bar Association - Family Law Section
Texas Trial Lawyers Association
Martindale-Hubbell - "AV" rating

PROFESSIONAL ACTIVITIES

Speaker

"Breach of Fiduciary Duty and Nonphysical Tort Claims," Annual Advanced Family Law Course, San Antonio, Texas, August, 1998;

"How Much Is Your Law Practice Worth? Valuing Personal Injury Law Practices for Purposes of Divorce," Texas Trial Lawyers Association, Dynamic Advocacy Seminar, Whitefish Montana, July, 1998;

"Handling the Divorce Involving a Medical Practice," Marriage Dissolution Conference, Austin, Texas, May, 1998;

"Dealing With Special Problems Relevant to Evaluation & Division of Professional Practices," Second Annual New Frontiers in Marital Property Law, San Diego, California, October, 1997;

"Domestic Tort Liability and Characterization of Damages," First Annual Texas Marital Property Institute, Austin, Texas, October, 1997;

"The Ab(use) of the Rules of Evidence and Privileges," Advanced Family Law Course, San Antonio, Texas, August, 1997;

"Reporting Child Abuse: Counterpoint - A Lawyer has a Duty to Report Child Abuse," State Bar of Texas Annual Meeting, Houston, Texas, June, 1997 and Advanced Family Law Course, San Antonio, Texas, August, 1997;

"Parental Relocation Disputes: An Interdisciplinary Approach to Resolution," Second World Congress on Family Law and the Rights of Children and Youth held in association with the 1997

Annual Conference of the Association of Family and Conciliation Courts, San Francisco, California, June, 1997;

“Scratches on the Heart: Non-Physical Tort Claims,” Marriage Dissolution Conference, Dallas Texas, May, 1997;

“Emerging Issues in Custody Litigation,” 1997 Legal Assistant Division Advanced Family Law Seminar, Austin, Texas, March, 1997;

“Relocation: Moving Forward, or Moving Backward?,” American Academy of Matrimonial Lawyers Annual Conference, Chicago, Illinois, November, 1996;

“Trying Jury Cases Under the Amendments to the Texas Family Code and the New Texas Pattern Jury Charge,” Travis County Family Law Section Meeting, April 1996;

“What Attorneys Expect from an Appraiser in a Divorce Situation,” American Society of Appraisers, Austin, Texas, November 1995;

“Gender Issues in Domestic Torts,” Association of Family and Conciliation Courts, Montreal, Canada, May 1995;

“The Social Worker: Learning from Your Expert What to Ask,” The Ultimate Trial Notebook - Family Law, 1994;

“Piercing Claims of Immunity in Family Law Litigation,” Advanced Family Law Course, San Antonio, Texas, 1994;

“Themes and Tactics for Winning Tort Issues and Punitive Damages in Family Law Litigation”; Advanced Family Law Course, San Antonio, Texas, 1994;

“The Effective Use of the New Conservator Rights Responsibilities and Duties in a Custody Case,” Marriage Dissolution Conference, South Padre Island, Texas, 1994;

“Discussion of Texas Supreme Court Cases Involving Tort Claims of Emotional Distress,” joint meeting of Travis County Trial Lawyers and Travis County Women’s Bar, Austin, Texas, 1994;

“Changes in Texas Family Law,” The College of the State Bar of Texas, Austin, Texas, 1994;

“Complex Family Law Litigation, Interspousal Tort Claims,” Texas College of Advanced Judicial Studies, 1993;

“Changes in the Family Code,” Travis County Family Law Section Meeting, Austin, Texas, 1993;

Travis County Bar Association Third Annual Jury Selection Seminar, Family Law Voir Dire Demonstration, 1993;

Travis County Bar Association Second Annual Jury Selection Seminar, Family Law Voir Dire Demonstration, 1992;

“Sharpening Negotiating Skills - Your Key to Success,” State Bar of Texas, Women’s Law Section, Austin, Texas, 1990;

Travis County Domestic Relations Division - Child Custody Litigation, 1990;

“Child Custody Litigation,” Tarrant County Bar Association, Fort Worth, Texas, 1990;

“Mothers Without Custody” San Francisco, California, 1987;

“Child Abuse - The Quiet Crime,” State Bar of Texas, San Antonio, Texas, 1985; and

“Post Divorce, Modification of Conservatorship and Support Orders” in Divorce 1984: Division of Property and Decisions on Children, 1984;

Speaker Various Years

Texas Travis County Family Law Seminars, Travis County, Texas; Child Custody Litigation, Marital Torts, Uniform Child Custody Judicial Act, Mental Health Professionals

Law Related Publications

“Breach of Fiduciary Duty and Nonphysical Tort Claims,” Annual Advanced Family Law Course, San Antonio, Texas, August, 1998;

“How Much Is Your Law Practice Worth? Valuing Personal Injury Law Practices for Purposes of Divorce,” Texas Trial Lawyers Association, Dynamic Advocacy Seming, Whitefish Montana, July 1998;

“Handling the Divorce Involving a Medical Practice,” Marriage Dissolution Conference, Austin, Texas, May, 1998;

“Dealing With Special Problems Relevant to Evaluation & Division of Professional Practices,” Second Annual New Frontiers in Marital Property Law, San Diego, California, October, 1997;

“Domestic Tort Liability and Characterization of Damages,” First Annual Texas Marital Property Institute, Austin, Texas, October, 1997;

“Whose Kids are They, Anyway? Reporting Child Abuse: Counterpoint - A Lawyer has a Duty to Report Child Abuse,” State Bar of Texas Annual Meeting, Houston, Texas, June, 1997 and Advanced Family Law Course, San Antonio, Texas, August, 1997;

“The Ab(use) of the Rules of Evidence and Privileges,” Advanced Family Law Course, San Antonio, Texas, August, 1997;

“Parental Relocation Disputes: An Interdisciplinary Approach to Resolution,” Second World Congress on Family Law and the Rights of Children and Youth held in association with the 1997 Annual Conference of the Association of Family and Conciliation Courts, San Francisco, California, June, 1997;

“Scratches on the Heart: Non-Physical Tort Claims,” Marriage Dissolution Conference, Dallas, Texas, May, 1997;

“Emerging Issues in Custody Litigation,” 1997 Legal Assistant Division Advanced Family Law Seminar, Austin, Texas, March, 1997;

“Relocation: Moving Forward, or Moving Backward?,” American Academy of Matrimonial Lawyers Annual Conference, Chicago, Illinois, November, 1996;

“Gender Issues in Domestic Torts,” May 1995 Association of Family and Conciliation Courts, Montreal, Canada;

The Ultimate Trial Notebook - Family Law, 1994, State Bar of Texas, Austin, Texas, “The Social Worker: Learning from Your Expert What to Ask”;

“Piercing Claims of Immunity in Family Law Litigation,” Advanced Family Law Course, San Antonio, Texas, 1994;

“The Effective Use of the New Conservator Rights, Responsibilities and Duties in a Custody Case” 1994 Marriage Dissolution Conference;

“Issues Particular to the Appeal of Family Law Cases in Texas” Civil Appellate Seminar, Austin, Texas, April, 1994;

“Torts in Texas the New Frontier” Texas Trial Lawyers Forum, 1992;

“Infliction of Emotional Distress: No Justice in the Middle Ground” Texas Trial Lawyers Forum, 1992;

“Evaluation and Division of Professional Goodwill and Professional Degrees During Marriage” Texas Trial Lawyers Forum, 1985;

Co-Author with Dan Price, “Post Divorce, Modification of Conservatorship and Support Orders” in Divorce 1984: Division of Property and Decisions on Children, 1984;

Co-Author with Thomas Oakland, Ph.D.: Divorced Fathers, 1984

COMMITTEES, ETC.

Planning Committee for 1994 Advanced Family Law Seminar; Planning Committee for 1998 Marriage Dissolution Seminar; Planning Committee for 1998 New Frontiers in Marital Property Law Seminar; Co-chairman of 1997 and 1998 American Academy of Matrimonial Lawyers Interdisciplinary Relations on Mental Health Committee

KRISTIN K. PROCTOR

**805 W. 10th Street, Suite 300
Austin, TX 78701
(512) 476-9597**

EDUCATION

The University of Texas School of Law, Austin, Texas
J.D. 1991 with Honors

The National Center for Paralegal Training, Atlanta, Georgia
Honor graduate, Litigation Specialty, 1981

Austin College, Sherman, Texas
B.A. in Psychology/Sociology (Honors) January 1980

PROFESSIONAL ASSOCIATIONS

Board Certified Family Law - Texas Board of Legal Specialization 1997
Texas Academy of Family Law Specialists (1997 to present)
National Order of Barristers
American Inns of Court (1992 - 1994)
American Bar Association (1991 - present); Family Law Section (1992 - present)
State Bar of Texas (1991 - present); Family Law Section (1992 - present)
Texas Young Lawyers Association (1992 - 1995)
Travis County Bar Association - Family Law Section (1992 - present)
Austin Young Lawyers Association (1992 - 1995)
Martindale-Hubbell (1996 - present) - "AV" rating

PROFESSIONAL ACTIVITIES AND PUBLICATIONS

Co-Author "Breach of Fiduciary Duty and Nonphysical Tort Claims," Advanced Family Law Course - State Bar of Texas, San Antonio, Texas, August 1998.

Co-Author "How Much Is Your Law Practice Worth? Valuing Personal Injury Law Practices for Purposes of Divorce," Texas Trial Lawyers Association, Dynamic Advocacy Seminar, Whitefish Montana, July 1998.

Co-Author "Handling the Divorce Involving a Medical Practice," Marriage Dissolution Seminar - State Bar of Texas, Austin, Texas, May 1998.

Co-Author "Dealing With Special Problems Relevant to Evaluation & Division of Professional Practices," Second Annual New Frontiers in Marital Property Law - State Bar of Texas, San Diego, California, October 1997.

Co-Author "Domestic Tort Liability and Characterization of Damages," First Annual Texas Marital Property Institute, University of Texas, School of Law, Austin, Texas, October 1997

Co-Author "The Ab(use) of the Rules of Evidence and Privileges," Advanced Family Law Course - State Bar of Texas, San Antonio, Texas, August 1997.

Co-Author "Reporting Child Abuse: Counterpoint - A Lawyer has a Duty to Report Child Abuse,"
Advanced Family Law Course - State Bar of Texas, San Antonio, Texas, August 1997

Speaker and Co-Author "Parental Relocation Disputes: An Interdisciplinary Approach to Resolution,"
Second World Congress on Family Law and the Rights of Children and Youth held in association with
the Annual Conference of the Association of Family and Conciliation Courts, San Francisco, California,
June 1997.

Co-Author "Scratches on the Heart: Non-Physical Tort Claims," Marriage Dissolution Conference -
State Bar of Texas, Dallas Texas, May 1997.

Speaker and Author "Discovery: Why You Do That Thing You Do," 1997 Legal Assistant Division
Advanced Family Law Seminar - State Bar of Texas, Austin, Texas, March 1997.

Co-Author "Relocation: Moving Forward, or Moving Backward?," American Academy of Matrimonial
Lawyers Annual Conference, Chicago, Illinois, November 1996.

Speaker and Co-Author "Gender Issues in Domestic Torts," Association of Family and Conciliation
Courts, Montreal, Canada, May 1995.

Co-Author "The Social Worker: Learning from Your Expert What to Ask" The Ultimate Trial Notebook
- Family Law, State Bar of Texas, December 1994

Speaker and Co-Author "Getting and Characterizing Punitive Damages in Family Law Litigation,"
Advanced Family Law Course - State Bar of Texas, San Antonio, Texas, August 1994.

Panelist/Speaker "Themes and Tactics for Winning Tort Issues and Punitive Damages in Family Law
Litigation," Advanced Family Law Course - State Bar of Texas, San Antonio, Texas, August 1994.

Co-Author "Piercing Claims of Immunity in Family Law Litigation" Advanced Family Law Course -
State Bar of Texas, San Antonio, August 1994.

Co-Author "The Effective Use of New Conservator Rights, Responsibilities and Duties in a Custody
Case," Marriage Dissolution Institute - State Bar of Texas, South Padre Island, May 1994.

Speaker and Author "Appeals in Family Law Cases," Civil Appellate Seminar, Travis County Bar
Association, Austin, Texas, April 1994.

Speaker "Texas Supreme Court Cases Involving Tort Claims of Emotional Distress," Capital Area Trial
Lawyers Association and Travis County Women's Bar, Austin, Texas, February 1994.

Speaker "Family Law Workshop, Nuts and Bolts Seminar for New Lawyers," Austin Young Lawyers
Association, February 1994.

Speaker "New Developments in Damages," Advanced Civil Trial Course - State Bar of Texas, Houston,
Texas, December 1993.

Speaker "New Developments in Damages," Advanced Civil Trial Course - State Bar of Texas, Dallas,
Texas, October 1993.

Co-Author "Divorce and Emotional Distress: Custer's Last Stand," Austin Lawyer, Spring 1993, Vol. 2,
No. 1, p. 2

Co-Author "Infliction of Emotional Distress: No Justice in the Middle Ground," Texas Trial Lawyers
Forum, Vol. 27, No. 2, 1993, p. 5

Co-Author "Marital Torts in Texas - The New Frontier," Texas Trial Lawyers Forum, Vol. 26, No. 4, 1992, p. 37

JAMES A. VAUGHT

Law Offices of Edwin J. (Ted) Terry, Jr.
805 West 10th Street
2nd Floor, Suite 300
Austin, Texas 78701
(512) 476-9597
(512) 476-6106 facsimile

PROFESSIONAL ACTIVITIES

Law Offices of Edwin J. (Ted) Terry, Jr.

Board Certified, Civil Appellate Law,
Texas Board of Legal Specialization 1988-present

LICENSED TO PRACTICE

The Supreme Court of Texas

The Supreme Court of the United States

The United States Courts of Appeals for the Fifth and Eighth Circuits

United States Federal District Court for the Western District of Texas

PROFESSIONAL MEMBERSHIPS & HONORS

Member, Planning Committee, Fifth, Sixth, Ninth, Tenth and Eleventh
Annual Advanced Civil Appellate Practice Courses (1991-92, 1995-97)

Member, Planning Committee, University of Texas School of Law,
First, Second and Third Annual Insurance Law Institutes (1996-98)

Member, Editorial Board, APPELLATE ADVOCATE, State Bar
Appellate Practice & Advocacy Section 1994-97

Member, Council, State Bar Appellate Practice &
Advocacy Section 1995-1998

Member, Task Force on Staff Diversity, Texas Commission
on Judicial Efficiency 1995-96

Chair, Civil Appellate Law Section, Travis County Bar
Association November 1991-1993, 1995-1997

Member, Travis County Bar Association Board of Directors
November 1991-1993, 1995-1997

Member, Planning Committee, Primer for Handling Civil Appeals,
Travis County Bar Association, Austin 1995, 1996

Staff Attorney, Hon. Jack Hightower, Justice
The Supreme Court of Texas 1989-1995

Briefing Attorney, Hon. Robert M. Campbell, Justice
The Supreme Court of Texas 1980-1981

EDUCATION

Baylor University School of Law J.D., *cum laude* 1980

University of Texas B.A. 1974

SELECTED LAW RELATED PUBLICATIONS & PRESENTATIONS

"Appeal of the Coverage Suit," Third Annual Insurance Law Institute (University of Texas School of Law, October 1998) (panelist/speaker and co-author);

"Bad Faith Litigation in a Post *Gandy* World: Where Does the Plaintiff Pitch his Tent?" Second Annual Insurance Law Institute (University of Texas School of Law, October 1997) (speaker, moderator and author);

"The New Appellate Rules -- At Last!" Eleventh Annual Advanced Civil Appellate Practice Course, Dallas September 1997 (speaker and author);

GUIDE TO THE NEW RULES OF APPELLATE PROCEDURE (State Bar of Texas 1997) (contributing author);

Motion Practice in the Texas Supreme Court, 59 TEX. B. J. 846 (October 1996)

"Factual and Legal Sufficiency in the Texas Supreme Court," Tenth Annual Advanced Civil Appellate Practice Course, Austin 1996 (co-author with Lori Meghan Gallagher)

"Laying the Groundwork After Trial for Appeal: Post-Verdict and Post-Judgment Motions in State Court," Primer for Handling Civil Appeals, Travis County Bar Association, Austin 1996 (speaker and co-author with Lori Meghan Gallagher)

"Inside the Texas Supreme Court," Ninth Annual Advanced Civil Appellate Practice Course, San Antonio 1995 (moderator and author)

"Practice Before the Supreme Court," Primer for Handling Civil Appeals in State Court, Travis County Bar Association, Austin 1995 (speaker and author)

Internal Procedures in the Texas Supreme Court, 26 TEX. TECH L. REV. 935 (1995)

Jurisdiction in the Supreme Court of Texas: "Amount in Controversy", 7 APPELLATE ADVOC. 3 (May 1994) (co-author with Lisa R. Miller)

"Internal Procedures and Motion Practice in the Supreme Court," Seventh Annual Advanced Civil Appellate Practice Course, Austin 1993 (speaker and author)

"Texas Supreme Court Update," Ninth Annual Advanced Personal Injury Law Course, July-August 1993 (co-author with Charles E. Hampton and Christopher J. Riley)

"Advanced Legal Research," Sixth Annual Advanced Civil Appellate Practice Course, Dallas 1992 (co-speaker with Hon. Michol O'Connor and Scott Rothenberg)

Demographics of a Successful Appeal to the Supreme Court of Texas, 5 APPELLATE ADVOC. 3 (Fall 1991)

"Getting Aggressive on Appeal: Making New Law, Changing Old Law, and Other Acts of Civil Disobedience -- Demographics of a Successful Appeal to the Supreme Court of Texas," Fifth Annual Advanced Civil Appellate Practice Course, San Antonio 1991 (author and co-speaker)

"Appellate Practice Update," Travis County Bar Association Legislative Update Seminar, Austin 1991 (speaker and author).

Table of Contents

I.	THE FIDUCIARY DUTY BETWEEN HUSBAND AND WIFE.....	D-1
A.	In General.....	D-1
B.	Inception of Fiduciary Duty.....	D-1
C.	Duration of Fiduciary Duty.....	D-1
D.	Fiduciary Duties Owed Between Spouses.....	D-1
	1. Sole Management Community Property.....	D-2
	2. Community Property.....	D-2
	3. Property Not Divided Upon Divorce.....	
II.	THE VARIETIES OF FRAUDULENT EXPERIENCE.....	D-3
A.	Actual Fraud.....	D-3
B.	Traditional Constructive Fraud.....	D-3
	1. In General.....	D-3
	2. Statute of Limitations.....	D-4
	3. Discovery Rule.....	D-4
	4. Interesting case: <i>Zieba v. Martin</i> , 928 S.W.2d 782 (Tex.App.-Houston [14th Dist.] 1996, no writ).....	D-4
III.	NO INDEPENDENT CAUSE OF ACTION BETWEEN SPOUSES FOR DAMAGES TO THE COMMUNITY ESTATE.....	D-5
A.	Historical Overview: Domestic Tort Law.....	D-5
	1. Interspousal immunity abolished.....	D-5
	2. <i>Twyman v. Twyman</i> , 855 S.W.2d 619 (Tex. 1993).....	D-5
	3. <i>Belz v. Belz</i> , 667 S.W.2d 240 (Tex.App.-Dallas 1984, writ ref'd n.r.e.).....	D-5
	4. <i>Mazique v. Mazique</i> , 742 S.W.2d 805 (Tex.App.-Houston [1st Dist.] 1987, no writ).....	D-6
	5. <i>Massey v. Massey</i> , 807 S.W.2d 391 (Tex.App.-Houston [1st Dist.] 1991), writ denied, 867 S.W.2d 766 (Tex. 1993) (<i>per curiam</i>).....	D-7
	6. <i>Matter of Marriage of DeVine</i> , 869 S.W.2d 415 (Tex.App.-Amarillo 1993, writ denied).....	D-7
	7. <i>In re Marriage of Moore</i> , 890 S.W.2d 821 (Tex. App.-Amarillo 1994, no writ).....	D-7
B.	<i>Schlueter v. Schlueter</i> , 41 Tex. Sup. Ct. J. 1064 (July 3, 1998).....	D-8
	1. Facts (from Third Court of Appeals' Opinion).....	D-8
	2. The Third Court of Appeals Opinion in <i>Schlueter</i>	D-8
	3. The Texas Supreme Court's Opinion in <i>Schlueter</i>	D-9
	4. The Dissents in <i>Schlueter</i>	D-10
	(a) Justice Hecht and Chief Justice Phillips.....	D-10
	(b) Justice Spector.....	D-11
C.	<i>Vickery v. Vickery</i> , No. 01-94-01004-CV, 1997 Tex.App. LEXIS 6275 (Tex.App.-Houston [1st Dist.], December 4, 1997, petition for review requested).....	D-11
	1. Facts.....	D-11
	2. Breach of fiduciary duty.....	D-12
	3. Fraud.....	D-13
	4. The dissent in <i>Vickery</i>	D-13
D.	The Impact of <i>Schlueter</i>	D-14
	1. Generally.....	D-14
	2. Food for Thought.....	D-14
IV.	BREACH OF FIDUCIARY DUTY: LET ME COUNT THE WAYS.....	D-15
A.	Waste.....	D-15
B.	Gifts to Paramours.....	D-16
C.	Excessive Gifts.....	D-16
D.	Inflicting Duress.....	D-16
D.	Concealing Material Facts.....	D-16
E.	Diversion of Community Opportunity.....	D-16
V.	AVAILABLE REMEDIES FOR FRAUDULENT CONDUCT.....	D-16
A.	Disproportionate Division of the Marital Estate.....	D-16
B.	Money Judgment Against Wrongdoer Spouse.....	D-17
C.	Constructive Trust and Its Effective Use.....	D-17
	1. Nature of the Remedy.....	D-17
	2. Requirements of Constructive Trust.....	D-17
	3. Confidential vs. Fiduciary.....	D-18
	4. Applications of the Constructive Trust.....	D-19
	(a) Breach of Fiduciary Duty.....	D-19
	(b) Bad Conduct.....	D-19

(c)	Insurance Beneficiary designations.	D-19
(d)	Unfulfilled Promise to Convey Property.	D-19
(e)	By Operation of Law (Family Code).	D-20
(f)	By Implication.	D-20
5.	A Liberal Remedy, But Not Necessarily a Sure Thing.	D-21
6.	Enforcement of Constructive Trust.	D-21
D.	Resulting Trust.	D-21
E.	Judgment Against Third-Party.	D-22
1.	Conspiracy in General.	D-22
2.	<i>Schlueter</i>	D-22
3.	<i>Connell v. Connell</i> , 889 S.W.2d 534 (Tex.App.-San Antonio 1994, writ denied).	D-23
4.	<i>Vickery</i> : Points of Error by Wife's Attorney.	D-23
5.	Aiding and Abetting A Breach of Fiduciary Duty.	D-24
F.	Rescission.	D-24
G.	Punitive Damages Against Spouse Unavailable for Damages to Community Estate.	D-25
1.	Punitive Damages in General.	D-25
2.	<i>Schlueter</i>	D-25
3.	Non-Fraud Punitive Damages.	D-25
H.	Uniform Fraudulent Transfer Act.	D-25
I.	Reimbursement Distinguished.	D-26
VI.	MULTIPLE AND/OR CONFLICTING DUTIES.	D-26
A.	Fiduciary Duties/Duties of Loyalty.	D-26
1.	Husband/Wife.	D-26
2.	Agent/Principal.	D-26
3.	Attorney/Client.	D-26
4.	Corporate Directors/Officers.	D-26
5.	Partner/Partnership.	D-27
6.	Executor/Representative.	D-27
B.	Examples.	D-27
1.	Duty of Spouse and Attorney/Physician.	D-27
2.	Duty Owed to Spouse vs. Duty Owed to Professional Association.	D-28
3.	Duty of Executor and Duty of Spouse.	D-29
4.	Duty of Corporate Director Officer and Duty as Spouse.	D-29
VII.	CONCLUSION.	D-29

Table of Authorities

<i>Adickes v. Andreoli</i> , 600 S.W.2d 939, 946 (Tex.Civ.App.-Houston [1st Dist.] 1980, no writ).	1
<i>Andrews v. Andrews</i> , 677 S.W.2d 171, 174, (Tex.App.-Austin 1984, no writ)....	1, 3, 17, 18, 21
<i>Arce v. Burrow</i> 958 S.W.2d 239, 246, no.8 (Tex.App.-Houston [14th Dist.] 1997, pet. requested)..	24
<i>Archer v. Griffith</i> , 390 S.W.2d 735, 740 (Tex.1964).....	3, 17
<i>Associated Indem Corp. v. Cat Contracting</i> , 964 S.W.2d 276, 287 (Tex. 1998).	1
<i>Bass v. Bass</i> 790 S.W.2d 113, 119 (Tex.App.-Fort Worth 1990, no writ).....	2
<i>Belz v. Belz</i> , 667 S.W.2d 240 (Tex.App.-Dallas 1984, writ ref'd n.r.e.).	5, 6, 8, 13
<i>Bocanegra v. Aetna Life Ins. Co.</i> , 605 S.W.2d 848, 851 (Tex.1980).....	17
<i>Bohn v. Bohn</i> , 455 S.W.2d 401, 412 (Tex.Civ.App.-Houston [1st Dist.] 1970, writ dismiss'd). ...	12, 27
<i>Bounds v. Caudle</i> , 560 S.W.2d 925, 927 (Tex. 1977).....	5, 8, 9
<i>Boyles v. Kerr</i> , 855 S.W.2d 593, 600 (Tex. 1993).....	23
<i>Burgess v. Easley</i> , 893 S.W.2d 87, 90 (Tex.App.-Dallas 1994, no writ).	2
<i>Cameron v. Cameron</i> , 641 S.W.2d 210, 223 (Tex.1982).	9
<i>Camp v. Camp</i> , No. 13-97-092-CV, 1998 WL 385446 (Tex.App.-Corpus Christi, July 9, 1998, n.w.h).....	25, 26
<i>Carnes v. Meador</i> , 533 S.W.2d 365, 370 (Tex.Civ.App.-Dallas 1975, writ ref'd n.r.e.). ...	2-4, 6
<i>Chien v. Chen</i> , 759 S.W.2d 484, 495 (Tex.App.-Austin 1988, no writ).....	17, 18, 23, 26
<i>Clade v. Larsen</i> , 838 S.W.2d 277, 281 (Tex.App.-Dallas 1992, writ denied).	4
<i>Connell v. Connell</i> , 889 S.W.2d 534, 543 (Tex.App.-San Antonio 1994, writ denied). ...	3, 15, 22, 23
<i>Deaton v. United Mobile Networks, L.P.</i> , 926 S.W.2d 756, 760 (Tex.App.-Texarkana 1995), <i>reversed in part on other grounds</i> , 939 S.W.2d 146, 146 (Tex. 1997) (<i>per curiam</i>).	22
<i>DeSantis v. Wackenhut Corp.</i> , 793 S.W.2d 670, 688 (Tex.1990).....	3
<i>Donnan v. Atlantic Richfield</i> , 732 S.W.2d 715, 717 (Tex.App.-Corpus Christi 1987, writ denied)...	2
<i>Earthman's, Inc. v. Earthman</i> , 526 S.W.2d 192, 201 (Tex.Civ.App.-Houston [1st Dist.] 1975, no writ)	28
<i>El Paso Associates, Ltd. v. J.R. Thurman & Co</i> , 786 S.W.2d 17, 20 (Tex.App.-El Paso 1990, no writ)	4
<i>Estate of Bridges v. Mosebrook</i> , 662 S.W.2d 116, 122 (Tex.App.-Fort Worth 1983, no writ). 3	
<i>Exploration Co. v. Vega Oil & Gas Co.</i> , 843 S.W.2d 123, 127 (Tex.App.-Houston [14th Dist.] 1992, writ denied).....	17
<i>Falor v. Falor</i> , 840 S.W.2d 683, 688 (Tex.App.-San Antonio 1992, no writ).....	15
<i>Fanning v. Fanning</i> , 828 S.W.2d 135, 148 (Tex.App.-Waco 1992), <i>aff'd in part, rev'd in part on other grounds</i> , 847 S.W.2d 225 (Tex.1993).....	15
<i>Faram v. Gervitz-Faram</i> , 895 S.W.2d 839, 844 (Tex.App.-Fort Worth 1995, no writ).....	15

<i>Fitz-Gerald v. Hull</i> , 237 S.W.2d 256, 261 (Tex. 1951).	18
<i>Ford v. Long</i> , 713 S.W.2d 798, 798-99 (Tex.App.-Tyler 1986, writ ref'd n.r.e.).	18, 19
<i>Gaines v. First State Bank</i> , 28 S.W.2d 297, 299-300 (Tex.Civ.App.-Fort Worth 1930), <i>aff'd</i> , 50 S.W.2d 774 (Tex. 1932).	23
<i>Ginther v. Taub</i> , 675 S.W.2d 724, 728 (Tex.1984)..	17
<i>Givens v. Girard Life Ins. Co. of Am.</i> , 480 S.W.2d 421, 423 (Tex.Civ.App.-Dallas 1972, writ ref'd n.r.e.).. . . .	3
<i>Grossnickle v. Grossnickle</i> , 935 S.W.2d 830, 846 (Tex.App.-Texarkana 1996, writ denied)..	1
<i>Hamblet v. Coveney</i> , 714 S.W.2d 126, 128 (Tex.App.-Houston [1st Dist.] 1986, writ ref'd n.r.e.).. . . .	17
<i>Hartman v. Crain</i> , 398 S.W.2d 387, 389-90 (Tex.Civ.App.-Houston 1966, no writ).	15
<i>Hendricks v. Thorton</i> , No. 09-96-163 CV, 1998 WL 336634, *1 (Tex.App.-Beaumont (Tex.App.-Beaumont, June 25, 1998, no pet.).	23, 24
<i>Holloway v. Holloway</i> , 671 S.W.2d 51, 59-60 (Tex.App.-Dallas 1983, no writ)..	16, 21
<i>Horlock v. Horlock</i> , 614 S.W.2d 478 (Tex. Civ. App. Houston [14th Dist.] 1981, writ ref'd n.r.e.).. . . .	2
<i>Horton v. Robinson</i> , 776 S.W.2d 260, 266 (Tex.App.-El Paso 1989, no writ).	23
<i>Hudspeth v. Stoker</i> , 644 S.W.2d 92 (Tex.App.-San Antonio 1982, writ ref'd)..	19
<i>Humane Society v. Austin Nat'l bank</i> , 531 S.W. 2d 574, 577 (Tex. 1975)..	26
<i>In re Estate of Herring.</i> , 970 S.W. 2d 583, 587 (Tex.App.-Corpus Christi, 1998, no writ).	4
<i>In re Marriage of Moore</i> , 890 S.W.2d 821, 827 (Tex. App.-Amarillo 1994, no writ).	1, 7, 8, 13, 26
<i>International Bankers Life Insurance Co. v. Holloway</i> , 368 S.W.2d 567, 581 (Tex. 1963).	22, 26
<i>J. Michael Putman, M.D.P.A. Money Purchase Pension Plan v. Stephenson</i> , 805 S.W.2d 16 (Tex.App.-Dallas 1991, no writ).	25
<i>Jackson v. Timmins</i> , 733 S.W.2d 355, 357 (Tex.App.-Texarkana 1987, no writ)..	18, 19
<i>Jeffcoat v. Jeffcoat</i> , 886 S.W.2d 567, (Tex.App.-Beaumont 1994, no writ).	20
<i>Jim Walter Homes, Inc. v. Reed</i> , 711 S.W.2d 617, 618 (Tex. 1986).	12
<i>Johnson & Johnson Medical, Inc. v. Sanchez</i> , 924 S.W.2d 925, 929-930 (Tex. 1996)..	3
<i>Jonhston v. Mabrey</i> , 677 S.W.2d 236 (Tex.App.-Corpus Christi 1984, no writ)..	18, 21
<i>Keith v. Keith</i> , 763 S.W.2d 950, 952 (Tex.App.-Fort Worth 1989, no writ)..	28
<i>Kinzbach Tool Co., Inc. v. Corbett-Wallace Corporation</i> , 160 S.W.2d 509 (Tex. 1942)..	23
<i>Kirby v. Cruce</i> , 688 S.W.2d 161, 166 (Tex.App.-Dallas 1985, writ ref'd n.r.e.).	23, 24
<i>Kline v. O'Quinn</i> , 874 S.W.2d 776, 783 (Tex.App.-Houston [14th Dist.] 1994, writ denied), <i>cert. denied</i> , 115 S.Ct. 2579 (1995).	23
<i>Krishnan v. Sepulveda</i> , 916 S.W.2d 478, 482 (Tex. 1995)..	23
<i>Kruegar v. Williams</i> , 359 S.W.2d 48, 50 (Tex. 1962)..	2
<i>Leighton v. Leighton</i> , 921 S.W.2d 365, 368 (Tex.App.-Houston [1st Dist.] 1996, no writ)..	21
<i>Little v. Smith</i> , 943 S.W.2d 414 (Tex. 1997).	4
<i>Magallanez v. Magallanez</i> , 911 S.W.2d 91, 94 (Tex.App.-El Paso 1995, no writ)..	20

<i>Marsh v. Marsh</i> , 949 S.W.2d 734, 745, n. 4 (Tex.App.-Houston [14th Dist.] 1997, no writ).	1
<i>Massey v. Massey</i> , 807 S.W.2d 391 (Tex.App.-Houston [1st Dist.] 1991), writ denied, 867 S.W.2d 766 (Tex. 1993) (<i>per curiam</i>).. . . .	7
<i>Matter of Marriage of DeVine</i> , 869 S.W.2d 415, 428 (Tex.App.-Amarillo 1993, writ denied), 7	
<i>Matthews v. Matthews</i> , 725 S.W.2d 275, 279 (Tex.App.-Houston [1st Dist.] 1986, writ ref'd n.r.e.)	3, 12, 16
<i>Mazique v. Mazique</i> , 742 S.W.2d 805 (Tex.App.-Houston [1st Dist.] 1987, no writ). . . .	2, 6, 7, 13, 15
<i>McAlpin v. Sanchez</i> , 858 S.W.2d 501, 507 (Tex.App.-Corpus Christi 1993, writ denied).	17
<i>McGoodwin v. McGoodwin</i> , 671 S.W.2d 880 (Tex.1984).	20
<i>McLendon v. McClendon</i> , 862 S.W. 2d 662, 676 (Tex. App. Dallas 1993, writ denied).	26
<i>Meadows v. Bierschwale</i> , 516 S.W.2d 125, 128 (Tex. 1974).. . . .	17
<i>Miller v. Miller</i> , 700 S.W.2d 941, 945 (Tex.App.-Dallas 1985, writ ref'd n.r.e.).	2, 16, 24
<i>Mills v. Gray</i> , 210 S.W.2d 985, 987-88 (1948).. . . .	21
<i>Mogford v. Mogford</i> , 616 S.W.2d 936 (Tex.Civ.App.-San Antonio 1981, writ ref'd n.r.e.).	8
<i>Murff v. Murff</i> , 615 S.W.2d 696, 699 (Tex. 1981).. . . .	16
<i>New Process Steel Corp., Inc. v. Steel Corp. of Texas, Inc.</i> , 703 S.W.2d 209, 214 (Tex.App.-Houston [1st Dist.] 1985, writ ref'd n.r.e.).	3
<i>Nolana Development Ass'n v. Corsi</i> , 682 S.W.2d 246, 250 (Tex. 1984).. . . .	21
<i>Omohundro v. Matthews</i> , 341 S.W.2d 401, 405 (Tex. 1960).. . . .	17
<i>Parker v. Parker</i> , 897 S.W.2d 917, 924 (Tex.App.-Fort Worth 1995, writ denied). . . .	1, 12, 25
<i>Pelzig v. Berkebile</i> , 931 S.W.2d 398, 400 (Tex.App.-Corpus Christi 1996, no writ).	2
<i>Perez v. Kirk & Carrigan</i> , 822 S.W. 2d 261, 265 (Tex. App. Corpus Christie 1991, writ denied).. . .	26
<i>Poe v. Hutchins</i> , 737 S.W. 2d 574,584 (Tex. App. - Dallas 1987, writ ref'd n.r.e.).	26
<i>Price v. Burrow</i> , 958 S.W. 2d 239, 245 (Tex. App.-Houston [14th District] 1997, pet. requested).. .	26
<i>Price v. Price</i> , 732 S.W.2d 316, 319 (Tex. 1987).	5, 8, 9
<i>Pride v. Pride</i> , 318 S.W.2d 715, 718 (Tex.Civ.App.-Dallas 1958, no writ).	15
<i>Rampel v. Wascher</i> , 845 S.W.2d 918 (Tex. App.-San Antonio 1993, writ denied).. . . .	27
<i>Rankin v. Naftalis</i> , 557 S.W.2d 940, 944 (Tex.1977).. . . .	17
<i>Reaney v. Reaney</i> , 505 S.W.2d 338, 340 (Tex.Civ.App.-Dallas 1974, no writ).. . . .	15
<i>Redman Industries, Inc. v. Couch</i> , 613 S.W.2d 787 (Tex.Civ.App.-Houston [14th Dist.] 1981, writ ref'd n.r.e.).	4
<i>Schleuter v. Schleuter</i> , 41 Tex. Sup. Ct. J. 1064 (July 3, 1998).. . . .	5, 8-11, 13-16, 21, 22, 24, 29
<i>Schlueter v. Schlueter</i> , 929 S.W.2d 94 (Tex. App.-Austin 1996), <i>rev'd in part and aff'd in part</i> , <i>Schleuter v. Schleuter</i> , 41 Tex. Sup. Ct. J. 1064 (July 3, 1998).	5, 8
<i>Schoellkopf v. Pledger</i> , 778 S.W.2d 897, 900 (Tex.App.-Dallas 1989, writ denied).. . . .	22
<i>Scott v. Scruggs</i> , 836 S.W.2d 278, 282 (Tex.App.-Texarkana 1992, writ denied).	2

<i>Sever v. Massachusetts Mut. Life Ins. Co.</i> , 944 S.W.2d 486, 492 (Tex.App.-Amarillo 1997, writ denied)	17, 19
<i>Slay v. Burnett Trust</i> , 187 S.W.2d 377, 394 (Tex.1945).	4
<i>Southwestern Bell Tel. Co. v. DeLanney</i> , 809 S.W.2d 493, 494-95 (Tex. 1991).....	12
<i>Spruill v. Spruill</i> , 624 S.W.2d 694, 697-698 (Tex.Civ.App.-El Paso 1981, writ dismiss'd).	3, 4, 15
<i>State v. Baker</i> , 539 S.W.2d 367, 374 (Tex.Civ.App.-Austin 1976, writ ref'd n.r.e.).....	23
<i>Talley v. Howsley</i> , 176 S.W.2d 158, 160 (Tex. 1943).....	17
<i>Tex. Processed Plastics v. Gray Enterprises</i> , 592 S.W. 2d 412, 417 (Tex. Civ. App.-Tyler 1979, no writ.)	26
<i>Thigpen v. Locke</i> , 363 S.W.2d 247, 253 (Tex.1962).	18
<i>Thompson v. Vinson & Elkins</i> , 859 S.W.2d 617, 627, n. 5 (Tex.App.-Houston [1st Dist.] 1993, writ denied).....	23
<i>Tilton v. Marshall</i> , 925 S.W.2d 672, 681 (Tex. 1996).	22
<i>Towne v. Towne</i> , 707 S.W.2d 745, 748-49 (Tex.App.-Fort Worth 1986, no writ).	19
<i>Trenholm v. Ratcliff</i> , 646 S.W.2d 927, 933 (Tex. 1983).....	24
<i>Tricentral Oil Trading, Inc. v. Annesley</i> , 809 S.W.2d 218, 220 (Tex. 1991).	21
<i>Turner v. Miller</i> , 618 S.W.2d 85, 87 (Tex.Civ.App.-El Paso 1981, writ ref'd n.r.e.)	1
<i>Twyman v. Twyman</i> , 855 S.W.2d 619 (Tex. 1993).....	5, 9, 10
<i>Vallone v. Vallone</i> , 644 S.W.2d 455, 458-59 (Tex.1982).	25
<i>Vannerson v. Vannerson</i> , 857 S.W.2d 659, 669 (Tex.App.-Houston [1st Dist.] 1993, writ denied).	15
<i>Velchhoff v. Campbell</i> , 710 S.W.2d 613, 615 (Tex.App.-Dallas 1986, no writ).....	17
<i>Vickery v. Vickery</i> , No. 01-94-01004-CV, 1997 Tex.App. LEXIS 6275 (Tex.App.-Houston [1st Dist.], December 4, 1997, petition for review requested).....	5, 11-14, 23, 26, 27
<i>Votzmeyer v. Votzmeyer</i> , 964 S.W.2d 315, 325 (Tex.App.-Corpus Christi 1998, no writ).....	20, 21
<i>Warner Communications, Inc. v. Keller</i> , 888 S.W.2d 586, 598 (Tex.App.-El Paso 1995), reversed on other grounds, 928 S.W.2d 479, 480 (Tex. 1996) (per curiam).	17, 20
<i>Weaver v. Stewart</i> , 825 S.W.2d 183, 185 (Tex.App.-Houston [14th Dist.] 1992, writ denied).....	17
<i>Willis v. Maverick</i> , 760 S.W. 2d 642, 645 (Tex. 1988).....	26
<i>Winchester Oil Co. v. Glass</i> , 683 S.W.2d 35, 39 (Tex.App.-Texarkana, 1984, no writ).....	17
<i>Zieba v. Martin</i> , 928 S.W.2d 782 (Tex.App.-Houston [14th Dist.] 1996, no writ).....	4, 5, 26

FIDUCIARY DUTIES OF SPOUSES, EFFECTIVE USE OF THE REMEDY OF THE CONSTRUCTIVE TRUST, RECOVERIES FOR VIOLATIONS OF THESE DUTIES, AND ISSUES PRESENTED WHEN SPOUSES ARE UNDER MULTIPLE AND/OR CONFLICTING DUTIES

I. THE FIDUCIARY DUTY BETWEEN HUSBAND AND WIFE

A. In General

The relationship that exists between a husband and a wife has been held to create a fiduciary duty requiring the duty of utmost good faith. *In re Marriage of Moore*, 890 S.W.2d 821, 827 (Tex. App.-Amarillo 1994, no writ); *Matter of Marriage of DeVine*, 869 S.W.2d 415, 428 (Tex.App.-Amarillo 1993, writ denied); *see also*, *Associated Indem Corp. v. Cat Contracting*, 964 S.W.2d 276, 287 (Tex. 1998) (an informal fiduciary duty may arise from a moral, social, domestic or purely personal relationship of trust and confidence). As expressed by Texas Pattern Jury Charge - Family, PJC 206.1 (1996):

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

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

B. Inception of Fiduciary Duty

Upon marriage, a fiduciary duty arises between spouses. Accordingly, in *Marsh v. Marsh*, 949 S.W.2d 734, 745, n. 4 (Tex.App.-Houston [14th Dist.] 1997, no writ), the Houston Fourteenth Court of Appeals stated that in

post-marital agreements a fiduciary duty exists that is not present in premarital agreements between prospective spouses.

However, a fiduciary duty may arise even before marriage. In *Andrews v. Andrews*, 677 S.W.2d 171, 174, (Tex.App.-Austin 1984, no writ), the Austin appellate court held that a fiduciary duty existed between a couple who had been seeing each other for approximately seven years, were living together and engaged to be married, and who had agreed to purchase a house jointly for use as their marital residence. Interestingly, in support of its holding, the Third Court of Appeals cited two non-marriage cases: *Turner v. Miller*, 618 S.W.2d 85, 87 (Tex.Civ.App.-El Paso 1981, writ ref'd n.r.e.) (close, family-like relationship between elderly woman and a younger couple was a fiduciary relationship under the facts of the case); and *Adickes v. Andreoli*, 600 S.W.2d 939, 946 (Tex.Civ.App.-Houston [1st Dist.] 1980, no writ) (where the parties were close personal friends and one agreed to assist the other in locating suitable real estate, and knew that the other relied on his knowledge and experience in real estate matters, a fiduciary relationship existed).

Andrews, and the fact-dependent nature of a fiduciary or confidential relationship, call into question the categorical statement in *Marsh* that fiduciary duties do not exist in the context of premarital agreements.

C. Duration of Fiduciary Duty

Texas law is unclear as to the duration of the fiduciary duty between spouses. On the one hand, according to the Texarkana Court of Appeals, the fiduciary relationship between husband and wife terminates upon divorce. *Grossnickle v. Grossnickle*, 935 S.W.2d 830,

846 (Tex.App.-Texarkana 1996, writ denied). On the other, the Fort Worth Court of Appeals has stated that the fiduciary duty between husband and wife ceases to exist when a suit for divorce is filed and both sides are represented by counsel. *Parker v. Parker*, 897 S.W.2d 917, 924 (Tex.App.-Fort Worth 1995, writ denied); *Bass v. Bass* 790 S.W.2d 113, 119 (Tex.App.-Fort Worth 1990, no writ).

In *Miller v. Miller*, 700 S.W.2d 941, 945 (Tex.App.-Dallas 1985, writ ref'd n.r.e.), the jury found, and the Dallas appellate court affirmed, that a husband and wife had a confidential relationship after the husband had filed for divorce. However, at the time during which the jury found the confidential relationship to exist, the wife apparently had not yet engaged the services of any professionals for the purposes of the pending divorce. On this basis, the Fort Worth Court of Appeals, in *Bass*, stated that if the jury in *Miller* found a pre-divorce confidential relationship, and the reviewing appellate court in *Miller* considered the jury's finding supported by the evidence, then, under different factual circumstances, the opposite might well be true, *i.e.*, no confidential relationship. *Bass*, 790 S.W.2d at 119. As mentioned above, in *Bass* the Fort Worth Court of Appeals considered such different factual circumstances to be present when the husband and wife each hired numerous independent professional counsel to represent them in the contested divorce proceeding.

D. Fiduciary Duties Owed Between Spouses

1. Sole Management Community Property

During marriage, each spouse has the sole management, control and disposition of the community property that he or she would have owned if single, including but not limited to (1) personal earnings; (2) revenue from separate property; (3) recoveries for personal injuries; and (4) the increase and mutations of, and the revenue from, all property subject to his or her sole management, control and disposition. TEX. FAM. CODE ANN. §3.102(a) This property is generally referred to as the "special community property" of a spouse.

In the *absence of fraud upon the other spouse*, the managing spouse has the sole right of control and disposition of that spouse's special community property. *See, e.g., Kruegar v. Williams*, 359 S.W.2d 48, 50 (Tex. 1962). In other words, there is a fiduciary duty owed by one spouse to the other in the reasonable management and control of his or her special community property. *See, e.g., Carnes v. Meador*, 533 S.W.2d 365, 370 (Tex.Civ.App.-Dallas 1975, writ ref'd n.r.e.).

2. Community Property

Spouses are also burdened with reciprocal fiduciary duties in the management, control and disposition of community property. *See, e.g., Id.* Of course, spouses are free to make expenditures of community property, *absent* some deception or objection by the other spouse. *Pelzig v. Berkebile*, 931 S.W.2d 398, 400 (Tex.App.-Corpus Christi 1996, no writ); *Mazique v. Mazique*, 742 S.W.2d 805, 808 (Tex.App.-Houston [1st Dist.] 1987, no writ).

3. Property Not Divided Upon Divorce

Texas Family Code §9.203 provides that if a Texas court fails to dispose of property subject to division in its final decree, it shall thereafter, upon request, divide the property in a just and right manner. When it develops after divorce that the trial court did not dispose of all community property, the former husband and wife become co-tenants or joint owners of the property. *Burgess v. Easley*, 893 S.W.2d 87, 90 (Tex.App.-Dallas 1994, no writ).

The Houston Fourteenth Court of Appeals has held that a former husband, as cotenant with his former wife of a limited partnership interest not divided upon divorce, had a relationship in the nature of trust, and was under the obligation to act as to that property in such a manner as to not effect detriment to the former wife in her ownership and enjoyment thereof. *Horlock v. Horlock*, 614 S.W.2d 478 (Tex. Civ. App. Houston [14th Dist.] 1981, writ ref'd n.r.e.).

In other contexts, *Horlock* has been cited as authority for the proposition that, absent a special relationship, there is no fiduciary obligation owed

by one cotenant to the others. *See, e.g., Scott v. Scruggs*, 836 S.W.2d 278, 282 (Tex.App.-Texarkana 1992, writ denied) (also stating that there is an obligation to act in a manner that is not detrimental to the other cotenant's ownership and enjoyment of the property); *but c.f., Donnan v. Atlantic Richfield*, 732 S.W.2d 715, 717 (Tex.App.-Corpus Christi 1987, writ denied) (there exists no fiduciary or agency relationship between cotenants, or tenants in common, in the absence of an agreement or contract providing for such). Under *Horlock*, a prior marriage appears to constitute the "special relationship" required to impose a fiduciary obligation between a former husband and wife, as to property held by them as cotenants pursuant to Texas Family Code §9.203.

II. THE VARIETIES OF FRAUDULENT EXPERIENCE

Normally, a fiduciary duty between spouses is breached by some sort of fraudulent act, normally relating to the property of the parties. As a result, the practitioner often deals with the issue of a breach of fiduciary duty in that context. However, as will be discussed below, there are other ways for one spouse to breach the fiduciary duty owed to the other.

A. Actual Fraud

To recover for actual fraud, the plaintiff bears the burden to prove the existence of the following: "a material misrepresentation, which was false, and which was either known to be false when made or was asserted without knowledge of the truth, which was intended to be acted upon, which was relied upon, and which caused injury." *Johnson & Johnson Medical, Inc. v. Sanchez*, 924 S.W.2d 925, 929-930 (Tex. 1996), quoting, *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex.1990), cert. denied, 498 U.S. 1048 (1991). Further, a "misrepresentation" may consist of the concealment of a material fact when there is a duty to speak; a duty to speak or to disclose arises when one party knows that the other party is ignorant of the material fact and does not have an equal opportunity to discover the truth. *See, e.g., New Process Steel Corp., Inc. v. Steel Corp. of Texas, Inc.*, 703 S.W.2d 209, 214

(Tex.App.-Houston [1st Dist.] 1985, writ ref'd n.r.e.).

B. Constructive Fraud

1. In General

"Constructive fraud" is the breach of a legal or equitable duty that the law declares fraudulent because it violates a fiduciary relationship; constructive fraud does not require an intent to deceive. *Carnes*, 533 S.W.2d at 370. Thus, put another way, constructive fraud is a breach of some legal or equitable duty which, *irrespective of moral guilt*, the law declares fraudulent because of its tendency to deceive others and to violate confidence or to injure public interest. *Matthews v. Matthews*, 725 S.W.2d 275 (Tex.App.-Houston [1st Dist.] 1986, writ ref'd n.r.e.). The intent to deceive, therefore, distinguishes actual fraud from constructive fraud. *See, Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex.1964).

Normally, in the context of a divorce, constructive fraud involves a breach of fiduciary duty by one spouse with respect to the community estate, for example, as in the case of an unfair or undisclosed transfer of community assets to a third party.

In other words, a breach of fiduciary duty, occurs where one spouse exercises power over his or her special community property, or over the community estate, in an excessive, capricious, or arbitrary manner. *See, e.g., Spruill v. Spruill*, 624 S.W.2d 694, 697-698 (Tex.Civ.App.-El Paso 1981, writ dismiss'd). A presumption of constructive fraud arises when one spouse unfairly disposes of the other spouse's one-half interest in the community property. *Carnes*, 533 S.W.2d at 370.

The right of one spouse to dispose of community property requires an absence of fraud, either actual or constructive. *See, e.g., Givens v. Girard Life Ins. Co. of Am.*, 480 S.W.2d 421, 423 (Tex.Civ.App.-Dallas 1972, writ ref'd n.r.e.). The burden is on the managing spouse to

prove the disposition was not unfair to the rights of the other spouse. It should be noted that, in this regard, a spouse's good faith, but unwise, investment of community funds, with loss to the community estate, does *not* amount to a breach of fiduciary duty that would justify an unequal distribution of the remaining community property at divorce. *Andrews*, 677 S.W.2d at 175; *see also*, *Connell v. Connell*, 889 S.W.2d 534, 543 (Tex.App.-San Antonio 1994, writ denied) (while some of the husband's business decisions could be questioned in hindsight, and some even looked upon with suspicion, there was no probative evidence to show the husband acted in such a manner as to constitute a breach of fiduciary duty regarding the community interests).

Factors considered by the court in a claim for constructive fraud against the community estate, based on a gift of community property by one of the spouses, include (1) the size of the gift in relation to the total size of the community property; (2) the adequacy of the remaining estate to support the complaining spouse in spite of the gift; and, (3) the relationship of donor and donee. *Estate of Bridges v. Mosebrook*, 662 S.W.2d 116, 122 (Tex.App.-Fort Worth 1983, no writ).

Fraud on the community allows for recovery of specific property wrongfully conveyed absent a bona fide purchaser; recovery of the value of *inter vivos* gifts made by the spouse prior to death; or the award of a greater share of the community property in a divorce as compensation. *Carnes*, 533 S.W.2d at 371. Additionally, the trial court can award a money judgment to replenish the community and thereby compensate the wronged spouse for depleted property. *See, e.g., Spruill*, 624 S.W.2d at 697-98.

2. Statute of Limitations

Several Texas appellate courts have affirmed that an action for breach of fiduciary duty is controlled by a two-year statute of limitations. *Clade v. Larsen*, 838 S.W.2d 277, 281 (Tex.App.-Dallas 1992, writ denied); *El Paso Associates, Ltd. v. J.R. Thurman & Co.*, 786 S.W.2d 17, 20 (Tex.App.-El Paso 1990, no writ); *Redman*

Industries, Inc. v. Couch, 613 S.W.2d 787 (Tex.Civ.App.-Houston [14th Dist.] 1981, writ ref'd n.r.e.). However, the Corpus Christi Court recently held that since a claim of fraud or misrepresentation ordinarily is a claim for a debt and, as such, is governed by a four-year statute of limitations; because a breach of fiduciary duty subsumes a claim of constructive fraud, a breach of fiduciary duty claim also is governed by a four-year statute of limitations. *In re Estate of Herring*, 970 S.W. 2d 583, 587 (Tex.App.-Corpus Christi, 1998, no writ).

The Texas Supreme Court has not yet settled the issue of the applicable statute of limitations for breach of fiduciary claims. In *Little v. Smith*, 943 S.W.2d 414 (Tex. 1997), the high court addressed a case in which the decedant's biological grandchild attempted to assert rights to her grandmother's estate eight years after the estate was closed in probate. The biological grandchild had asserted breach of fiduciary claims against the administrator of the estate. Although the Texas Supreme Court did not rule specifically on the issue, the Court's opinion recounted that, at trial, the defendants moved for summary judgment, asserting limitations in reliance on the general four-year statute, because it had the longest period of limitations among the statutes *that were arguably applicable*. *Little*, 943 S.W.2d at 416 (emphasis added). In his concurring opinion, Justice Enoch, joined by Justices Cornyn and Baker, stated that the grandchild's breach of fiduciary claim was subject to *either* the two-year or the four-year statute of limitations, but noted that she did not sue until almost eight years after the accrual date. *Id.* at 423. Thus, the issue remains unresolved.

Apparently, there is no Texas case that addresses the issue of whether marriage tolls the statute of limitations for breach of fiduciary. It would seem logical to assume that marriage does toll the statute of limitations. Otherwise, an act that constitutes a breach of fiduciary duty, occurring early in a long marriage, would then escape redress by the court.

3. Discovery Rule

Breach of fiduciary duty is also subject to the discovery rule. *Little v. Smith*, 943 S.W.2d 414, 420 (Tex. 1997) (when there has been a breach of fiduciary duty, the statute of limitations does not begin to run until the claimant knew or should have known of facts that in the exercise of reasonable diligence would have led to the discovery of the

wrongful act); *see also*, *Slay v. Burnett Trust*, 187 S.W.2d 377, 394 (Tex.1945).

4. Interesting case: *Zieba v. Martin*, 928 S.W.2d 782 (Tex.App.-Houston [14th Dist.] 1996, no writ).

While the primary issues before the Houston Court of Appeals concerned reimbursement, constructive fraud was the basis of the reimbursement claims. At the time of divorce, the trial court found that the husband owed a fiduciary duty to the wife and to the community estate, but the court failed to find that he breached that duty by not properly accounting for the withdrawal of community funds, wasting community funds, or spending community funds without the wife's knowledge or consent. The trial court failed to reimburse the community estate for the husband's payment of separate debts and obligations arising from his prior marriage and certain personal items: a \$100,000 cash withdrawal from the corporate bank account; and two \$92,000 CD's, one in the husband's name and the other in his name as "trustee" for the parties' daughter. *Zieba*, 928 S.W.2d at 789.

While the Houston Fourteenth Court of Appeals found no fault with the trial court's refusal to reimburse the community for \$147,517 in community funds expended on the husband's obligations arising from his prior marriage, the Court sustained the wife's points of error relating to the remainder of the reimbursement claims. *Id.* at 790. The Court then reversed the portion of the judgment dividing the marital estate, and remanded that portion of the judgment to the trial court for redivision of the marital estate. *Id.* at 791.

The Houston appellate court made several statements that characterized the nature of "fraud on the community." First, the Fourteenth Court of Appeals recognized that a fiduciary relationship exists between a husband and wife as to the community property controlled by each spouse. The appellate court then noted that a breach of a legal or equitable duty which violates this fiduciary relationship existing between spouses is termed "fraud on the community," and that such was a judicially created concept based on constructive fraud. *Id.* at 789. Although not actually fraudulent, according to the Fourteenth Court of Appeals, fraud on the community "has all the consequences and legal effects of actual fraud in that such conduct tends to deceive the other spouse or violate

confidences that exist as a result of the marriage." *Id.* at 789.

III. NO INDEPENDENT CAUSE OF ACTION BETWEEN SPOUSES FOR DAMAGES TO THE COMMUNITY ESTATE

A. Historical Overview: Domestic Tort Law

Traditionally, the law in Texas was fairly settled that one spouse could not sue the other for actual fraud. While logically the distinction between economic torts and personal injury torts made little sense, recovery for financial injuries was limited to the manner in which the community estate could be replenished, and the injured spouse was compensated by receiving a larger portion of the replenished estate. At times, the replenishment included a money judgment against the other spouse, which created confusion among legal scholars and practitioners alike as to the true nature of economic domestic torts. However, in many contexts, it seemed inappropriate not to award actual and punitive damages for a spouse's financial wrongs that caused harm to the other spouse.

In 1996, both the Austin Third Court of Appeals, in *Schlueter v. Schlueter*, 929 S.W.2d 94 (Tex. App.-Austin 1996), *rev'd in part and aff'd in part*, *Schleuter v. Schleuter*, 41 Tex. Sup. Ct. J. 1064 (July 3, 1998), and the Houston First Court of Appeals, in *Vickery v. Vickery*, No. 01-94-01004-CV, 1997 Tex.App. LEXIS 6275 (Tex.App.-Houston [1st Dist.], December 4, 1997, petition for review requested), allowed recovery in tort for a spouse's fraudulent behavior. Very recently, the Texas Supreme Court reversed the Third Court of Appeals in *Schlueter*, holding that in Texas there is no independent cause of action between spouses for damages to the community estate. 41 Tex. Sup. Ct. J. at 1064.

Before examining *Schleuter* and *Vickery* in detail, it is helpful to recap the development of domestic tort law, and to examine several key decisions that have influenced the law of nonphysical or economic domestic torts.

1. Interspousal immunity abolished

In 1987, the Texas Supreme Court abolished interspousal immunity in the case of *Price v. Price*, 732 S.W.2d 316, 319 (Tex. 1987), "as to any cause of action, including negligence claims." Ten years

earlier, the Texas Supreme Court had abolished the doctrine of interspousal immunity for intentional or willful torts. *Bounds v. Caudle*, 560 S.W.2d 925, 927 (Tex. 1977).

2. *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993)

The Texas Supreme Court held that joinder of tort claims with divorce was not only permissible but was also encouraged where feasible, because both the tort and divorce actions could be resolved in the same proceeding, thereby avoiding two trials based upon the same facts, and resolving all matters existing between the parties. *Twyman*, 655 S.W.2d at 625.

3. *Belz v. Belz*, 667 S.W.2d 240 (Tex.App.-Dallas 1984, writ ref'd n.r.e.)

In *Belz*, the wife in a divorce action sued the husband in tort for fraud on her community interest in the marital estate, seeking actual and punitive damages. Additionally, she sued the husband and his brother for conspiracy to defraud in a consolidated case. The jury found that the husband, his brother, and a third person had conspired to defraud the wife, but also found zero damages as a result of the conspiracy. The jury found for the wife on four of her issues of fraud by the husband, and awarded her \$17,200 in actual damages and \$2,000 in punitive damages. The trial court then rendered judgment against the husband, and his co-conspirators, jointly, and severally, including a \$10,000 award for attorneys fees.

Because the damages awarded by the jury were only for the husband's fraud, the Dallas appellate court reversed the joint and several liability portion of the judgment. Even though the wife recovered both actual and exemplary damages from the jury, the Dallas Court of Appeals held that the trial court committed error in submission of the wife's claim of fraud as a separate common law action in tort. *Belz*, 667 S.W.2d at 246. Rather, the Dallas court reasoned, the basis of the wife's claim was the husband's fraud on the community, which could be asserted in the context of a divorce for the trial court to consider in the division of the community estate. *Id.* The Dallas appellate court held that the wife had a right to recover the value of her community interest in the property which was found to be depleted wrongfully from the estate, but only as part of the property division. *Id.* at 247. The opinion in *Belz* is frequently cited, wherein the court stated:

[A] claim of fraud on the community is a means to an end, either to recover specific property wrongfully conveyed, or to obtain a greater share of the community estate upon divorce, in order to compensate the wronged spouse for his or her lost interest in the community estate. In the context of a divorce and property division, fraud on the community is a wrong by one spouse which the court may consider in its division of the estate of the parties which may justify an unequal division of the property...A judgment for fraud on the community is not one which may stand alone in the absence of a property division pursuant to a termination of a marriage by divorce.

Id. at 246-47.

4. *Mazique v. Mazique*, 742 S.W.2d 805 (Tex.App.-Houston [1st Dist.] 1987, no writ)

The wife sued the husband for divorce, alleging that the husband had fraudulently deprived the wife of a portion of the community estate. After trial to the court, judgment was awarded to the wife in the amount of \$30,000 in actual damages and \$5,000 in punitive damages. The husband appealed on the basis that the evidence did not support the court's finding that he had committed fraud on the community.

The husband admitted to having sexual relationships with at least 5 other women during the 25 year marriage, with the relationships lasting from a few weeks to several years. He also admitted that he spent money to pay for trips out of town, meals, gifts, dresses and hotel rooms with these women. He could not recall the number of affairs he had, or how much money he had spent on the women involved. He also admitted to taking cash from the business, that he never accounted to his wife for the money he had taken, and that he told his wife she would never know how much he had taken.

After recognizing the special relationship of trust between a husband and wife as to community property within one spouse's management or control, the Houston First Court of Appeals stated that a presumption of fraud arises when a spouse unfairly disposes of the other spouse's one-half interest in the community. *Mazique*, 742 S.W.2d at 807-08, *citing*, *Carnes*, 533 S.W.2d at 370. The

Houston appellate court also cited *Belz, supra*, for the proposition that “[i]f the managing spouse violates his or her duty to the other spouse, a personal judgment for damages may provide a means for recoupment of the value lost to the community as a result of constructive fraud.” *Id.* at 808, citing *Belz*, 667 S.W.2d at 247.

The First Court of Appeals then established the general rules of constructive fraud: the burden is on the managing spouse to prove that a gift or disposition of community funds was not unfair to the rights of the other spouse, and if that burden is not met then constructive fraud will be presumed. Further, the non-managing spouse does not have to prove that the gift to a third party was motivated by actual fraudulent intent, or that the gift was otherwise unfair. *Id.* at 808. In determining the fairness of the disposition, the courts look to the relationship between the managing spouse and the person to whom the gift was made, whether there were any special circumstances to justify the gift, and whether the community funds used for the gift were reasonable in proportion to the community estate remaining. *Id.*

The *Mazique* court then held that because there was sufficient evidence to support the trial court’s award of actual damages, the husband’s complaint as to the award of exemplary damages was also overruled. Because there was an award of punitive damages that was upheld on appeal, many practitioners believed that fraud could be an independent cause of action brought by one spouse against the other. *Id.*

5. *Massey v. Massey*, 807 S.W.2d 391 (Tex.App.-Houston [1st Dist.] 1991), writ denied, 867 S.W.2d 766 (Tex. 1993) (*per curiam*)

Husband and wife were divorced, and the jury found that the husband had committed constructive fraud with respect to the wife’s community property rights. The jury awarded \$55,000 in favor of the wife; therefore, the trial court ordered an “owelty” judgment against the husband for that amount. Evidence supporting the judgment included the husband’s purchase of \$55,000 worth of antique maps and investments made by the husband in his own name, and in their daughter’s name with the husband as trustee, which created over \$400,000 as community debt, collateralized with community property, with no accounting for the disposition of the profits from such investments. Additional

transactions were shown that encumbered community property, and the purpose of the transactions, as well as the profits, were unclear to the court and not disclosed to the wife. The Houston First Court of Appeals found that the husband failed to account for funds earned in 1987 and 1988, and claimed that he was “busted” at time of trial, even though cash flow for those years was \$575,000 and \$650,000 respectively. *Massey*, 807 S.W.2d at 403.

6. *Matter of Marriage of DeVine*, 869 S.W.2d 415 (Tex.App.-Amarillo 1993, writ denied)

In *DeVine*, the Amarillo Court of Appeals found that the trial court had followed *Belz* in awarding \$500,000 that the wife had depleted from the parties’ estate to her as part of the division of the community property. *DeVine*, 869 S.W.2d at 428. The Amarillo appellate court also found that there was sufficient evidence to support the jury’s findings that the wife committed **actual** fraud with respect to the husband’s community property rights, and that \$100,000 would fairly compensate the community estate for the wife’s actual fraud. The jury further found that the wife committed **constructive** fraud with respect to the husband’s community property rights, and found that \$400,000 would fairly compensate the community estate for her constructive fraud. Both fraud claims were on the community estate, although the jury made separate findings with respect to actual fraud (transfer of community property or expenditure of funds to deprive the other spouse of the use and enjoyment of the assets involved in the transaction), as well as constructive fraud (one spouse disposes of the other spouse’s interest in community property without the other’s knowledge or consent).

In making the property division, the trial court in *DeVine* treated the following as community assets: the \$400,000 it found necessary to compensate the community estate, the \$100,000 the jury found necessary to compensate the estate for the wife’s actual fraud, the award of \$3,000 in punitive damages against the wife, and \$12,000 the jury found necessary to compensate the community estate for the husband’s fraud. The trial court then awarded to each party the amounts of depleted assets caused by that party, together with other remaining assets, for a property division that was 59.69% in favor of the husband, and 40.31% for the wife; however, the wife only received 11.5% of the remaining actual assets.

7. *In re Marriage of Moore*, 890 S.W.2d 821 (Tex. App.-Amarillo 1994, no writ)

Several years ago, the Amarillo Court of Appeals concluded that an allegation of breach of fiduciary duty was “the same creature” as an action for fraud on the community. *Moore*, 890 S.W.2d at 827. In *Moore*, a jury awarded the wife a \$40,000 judgment for the husband’s breach of fiduciary duty and also granted her request for reimbursement to the community estate for “funds, assets, time, labor and talent expended by the community estate to benefit or enhance the husband’s separate estate.” *Id.* at 825. While the factual allegations supporting the wife’s claims are not detailed in the Amarillo appellate court’s opinion, the grounds for claiming a violation of fiduciary duty owed by the husband to the wife included, among others, the organization and operation of a separate property corporation, transferring and issuing stock to third party family members without receiving compensation, devoting community assets for the benefit of the corporation for the purpose of depriving the wife of community property rights, and concealing community assets and income so as to deprive the wife of a just and right division of the community estate. *Id.* at 827.

The Amarillo Court of Appeals stated that breach of fiduciary duty between spouses is termed “fraud on the community because, although not actually fraudulent, it has all the consequences and legal effects of actual fraud, in that such conduct tends to deceive the other spouse, or violate confidences that exist as a result of the marriage.” *Id.*

The Amarillo appellate court then determined that no new and independent cause of action for fraud on the community, with separate damages, could be brought in a divorce action, and that an award of damages for mental anguish would, therefore, also be precluded. *Id.* at 830.

B. *Schlueter v. Schlueter*, 41 Tex. Sup. Ct. J. 1064 (July 3, 1998)

1. Facts (from Third Court of Appeals’ Opinion)

After a 24 year marriage, the parties decided to get divorced. During the marriage, the husband had invested approximately \$3,250 in a partnership to raise and sell emus. Before the parties decided to divorce, however, the husband conveyed his interest in the emu partnership to his father for only \$1,000. The wife was not aware of the extent of the

husband’s investment in the partnership. The business was allegedly worth \$10,000. *Schlueter*, 929 S.W.2d at 96.

Before he filed for divorce, the husband also accepted an incentive bonus in exchange for early retirement, in the amount of \$30,360. The husband’s father picked up the check while the husband was still at work and deposited it into the father’s own bank account. The husband told his father to hold the incentive bonus funds until the husband “figured out what was going to happen here.” *Id.* at 96.

One week before the husband filed for divorce, the husband’s father wrote himself a check from the account in the amount of \$12,565, which amount purportedly represented money borrowed by the husband from his father over the years, both before and after the marriage. At trial, the wife testified that she had no knowledge of these debts, and further testified that the husband had previously bragged about the fact that he was the only one in his family who did not owe his father any money. Further, the husband, the husband’s father, and the husband’s mother all had earlier testified by deposition that the husband had signed each of the notes that reflected the husband’s debt to his father at the time when he borrowed the funds. However, after the testimony of the wife’s forensic documents examiner, they changed their testimony to indicate that the husband actually signed the notes in the late seventies at the suggestion of the estate attorney for the husband’s father. *Id.*

In the divorce suit originally brought by the husband, the wife joined the husband’s father as a third party and sued both the husband and his father for fraud, breach of fiduciary duty, and conspiracy. Judgment was granted on a jury verdict against the husband and his father for actual and punitive damages. The trial court awarded \$12,850 to the community estate for the fraud against the community to be assessed against the husband and his father, jointly and severally, and further awarded the wife judgment for punitive damages in the amount of \$30,000 against the husband and \$15,000 against the husband’s father. *Id.* at 95-96.

2. The Third Court of Appeals’ Opinion in *Schlueter*

On appeal to the Austin Court of Appeals, the husband claimed that the trial court erred in awarding \$30,000 to the wife in exemplary damages

based upon the husband's fraud, because fraud was not a separate cause of action in a divorce case that will support a personal judgment. Because both the judgment and the verdict were in the wife's favor, and because the trial court did not include the award as part of the division of the parties' assets and liabilities, the husband argued the \$30,000 exemplary damages judgment was fatally flawed. *Id.* at 99. In his argument, the husband relied primarily on the Dallas appellate court's opinion in *Belz*, 667 S.W.2d 240.

However, in upholding the wife's judgment received for punitive damages in *Schlueter*, the Austin Court of Appeals stated that the Texas Supreme Court abolished interspousal immunity as to any cause of action, including negligence claims, in *Price*, 732 S.W.2d at 319, the year after *Belz* was decided. The Austin appellate court also observed that fraud is an intentional tort, and the doctrine of interspousal immunity for intentional torts was abolished in *Bounds v. Caudle*, 560 S.W.2d at 927.

The Third Court of Appeals in *Schlueter* then criticized the *Belz* opinion for creating "an exception to *Bounds*, thus breathing new life into an abolished doctrine." *Schlueter*, 929 S.W.2d at 100. The "exception," made by *Belz* was whether the party's separate estate or the community estate benefitted by receipt of the damage award. *Belz* agreed that fraud was an intentional tort, but unlike the recoveries for interspousal torts resulting in personal injuries such as in *Bounds*, 560 S.W.2d at 925, or in *Mogford v. Mogford*, 616 S.W.2d 936 (Tex.Civ.App.-San Antonio 1981, writ ref'd n.r.e.), where the damage award was *separate* property by Texas statute, the fraud in *Belz* was perpetrated upon the wife to the detriment of her interest in the *community* estate.

3. The Texas Supreme Court's Opinion in *Schlueter*

In an opinion authored by Justice Gonzalez, joined by Justices Enoch, Owen, Baker, Abbott and Hankinson, the Texas Supreme Court reversed the Third Court of Appeals, stating: "because a wronged spouse has an adequate remedy for fraud on the community through the 'just and right' property division upon divorce, we hold that there is no independent tort cause of action between spouses for damages to the community estate." *Schlueter*; 41 Tex. Sup. Ct. J. 1064.

In its opinion, the majority initially noted that Mrs. Schlueter's claims against her husband and father-in-law involved their depriving the Schlueters' community estate of assets and that Mrs. Schlueter made no claim that she was deprived of her separate property. *Id.* The majority then stated that the Austin Court of Appeals read *Twyman*, *Price*, and *Bounds* "too broadly." *Id.* at 1065. According to the majority, the salient characteristic distinguishing *Bounds*, *Price*, and *Twyman* from *Schlueter* was that all three of the earlier Texas Supreme Court cases involved personal injury tort claims. *Id.* Of apparent significance to the majority was that, in discussing the potential for double recovery in *Twyman*, the The Texas Supreme Court had pointed out that recovery for personal injuries of a spouse, including pain and suffering, was the separate property of the injured spouse, and therefore did not add to the marital estate. *Id.* at 1066.

Justice Gonzalez, writing for the Court, then turned to that sticky language in *Price*, that the Texas Supreme Court was abolishing interspousal immunity, "completely as to *any* cause of action." *Id.*, citing, *Price*, 732 S.W.2d at 318-319. In what appears to be a headlong retreat from the plain language of *Price* (that is, if we all did not have the benefit of years of training in precise legal analysis), the majority stated that, "...despite its broad language stating that the Court was abolishing the interspousal immunity doctrine 'completely as to any cause of action,' the action in *Price* was one for personal injury, for which any recovery would be separate property of the injured spouse." *Id.* (citations omitted). In this manner, the majority summarily dispatched the "abolition" of interspousal immunity "as to any cause of action." (Justice Gonzalez does not mention in *Schleuter* that he was a member of the Texas Supreme Court when the Texas Supreme Court decided *Price*.)

Continuing his analysis, Justice Gonzalez pointed out that, in *Price*, a factor that weighed heavily toward abolishing interspousal immunity "as to any cause of action" was the need to remedy the problem of denying a litigant a forum for the redress of a wrong and that, indeed, the result in *Price* was "compelled by the fundamental proposition of public policy that the courts should afford [such] redress." *Id.*, citing, *Price*, 732 S.W.2d at 320. But, under the facts of *Schlueter*; the majority determined that redress was available for Mrs. Schlueter without the creation of a separate tort cause of action between spouses. *Id.*

Such redress, according to the majority, existed in the trial court's duty and ability to divide a marital estate in "just and right" manner. Texas law holds that community property owes its existence to the legal fact of marriage, and upon divorce, property acquired during marriage is and should be divided among them in a just and right manner. *Id.* Community property is therefore distinguishable from the recovery of separate property through an independent tort, since separate property owes its existence to wholly extramarital factors, things unrelated to the marriage. *Id.* Justice Gonzalez thus declared that "[w]ith these differences in mind, we hold that the well-developed 'just and right' standard should continue to be the sole method used to account for and divide community property upon divorce." *Id.*, citing, *Cameron v. Cameron*, 641 S.W.2d 210, 223 (Tex.1982).

As additional support for its holding, the majority stated that the Texas community property system provides additional remedies against a spouse for improper conduct involving the community estate, including, for example, the concept of fraud on the community, which is a wrong by one spouse that the court may consider in its division of the estate of the parties and that may justify an unequal division of the property. *Id.*

Further, the majority noted, a trial court may award a money judgment to one spouse against the other in order to achieve an equitable division of the community estate. *Id.* at 1066-67. However, Justice Gonzalez added, a money judgment can only be used as a means for the wronged spouse to recoup the value of his or her share of the community estate lost through the wrongdoer spouse's actions, and because the amount of the judgment is directly referable to a specific value of lost community property, it will never exceed the total value of the community estate. *Id.* at 1067.

The majority also acknowledged that trial courts have wide discretion and are allowed to take many factors into consideration in making a just and right division, including wasting of community assets. *Id.* Consequently, according to the majority, injured spouses like Mrs. Schlueter may recover their appropriate share of not only that property existing in the community at the time of divorce, but also that which was improperly depleted from the community estate. *Id.* Ultimately, Mr. Schlueter's depletion of community was akin to "waste" of community assets, and such behavior, stated Justice

Gonzalez, is properly considered when dividing a community estate. *Id.*

With no independent tort cause of action for wrongful disposition by a spouse of community assets, the majority held that the wronged spouse may not recover punitive damages from the other spouse. *Id.* at 1068. Even so, continued the majority, although an independent tort action for actual fraud and accompanying exemplary damages against one's spouse do not exist in the context of a deprivation of community assets, if the wronged spouse can prove the heightened culpability of actual fraud, the trial court may consider such culpability in its property division. *Id.*

4. The Dissents in *Schleuter*

(a) Justice Hecht and Chief Justice Phillips

The understated, yet compelling dissent of Justice Hecht, joined by Chief Justice Phillips, deserves attention. Justice Hecht immediately scrutinized the distinction apparently drawn by the majority between intentional torts involving personal injuries and intentional torts involving economic injuries. According to Justice Hecht, Texas law is settled that if one spouse assaults the other, intentionally inflicts emotional distress on the other, or negligently injures the other, the wronged spouse can obtain not only a disproportionate share of the estate in a divorce proceeding, but, also a judgment for actual damages and, on the requisite showing, punitive damages against the wrongdoer. *Id.* at 1068. After *Schlueter*, however, stated Justice Hecht, if one spouse defrauds the other of an interest in community property, the wronged spouse's sole redress is a disproportionate share of the estate in a divorce proceeding. *Id.* at 1068-69.

The majority's only rationale for treating fraud on a spouse differently from other intentional torts, Justice Hecht noted, is that fraud does not involve personal injuries. *Id.* at 1069. Justice Hecht wondered why recovery should depend on whether damages are personal or economic, and finds the majority's statement that redress was available to Mrs. Schlueter without the creation of a separate tort cause of action between spouses to be unpersuasive, since the redress of a disproportionate division of the community is equally available for torts causing personal injuries. *Id.* Justice Hecht is unable to find an adequate explanation in the majority opinion for why an uneven division of the community estate is

inadequate relief for personal injuries but adequate for fraud. *Id.*

Equally unpersuasive to Justice Hecht is the majority's concern about creating a new and separate tort cause of action in *Schlueter*. According to Justice Hecht, the creation of a separate tort cause of action for fraud was simply unnecessary in *Schlueter*. *Id.* On the other hand, wrote Justice Hecht, it *was* necessary for the Court to create a tort cause of action for intentional infliction of emotional distress [in *Twyman*] because one had never existed in Texas. *Id.* Justice Hecht then remarked, almost caustically, that a cause of action for fraud has existed for centuries. *Id.* As a result, Justice Hecht characterized the majority's holding as resurrecting the bar of interspousal immunity for one kind of claim, *i.e.*, fraud, without sufficient reason why spouses should be allowed to sue each other for assault, intentional infliction of emotional distress, and negligence, but not for fraud. *Id.*

Justice Hecht also noted that nothing in the nature of joint interest in property precludes a fraud action. Thus a partner can sue another partner for fraud that injures the partnership. The fact that recovery in a divorce would go to the community, in which the wrongdoer-spouse has an interest, still should not preclude a fraud action, as in the case of a partnership. *Id.* According to Justice Hecht, the easy solution is that the wrongdoer is simply denied any benefit from the recovery. *Id.* Consequently, in Justice Hecht's view, any justification for the majority's holding must therefore lie in the nature of the spousal relationship, but ultimately, if spouses are able to sue each at all, then it is difficult to see the logic of permitting spouses to sue each for some causes of action, but not for others. *Id.*

In concluding his dissent, Justice Hecht discussed what he perceived to be the continuing possibility that one spouse can still sue the other for fraud relating to separate property and recover damages as in any other case, and, to the extent that such fraud inflicts emotional distress, still recover for mental anguish and punitive damages, in amounts exceeding the community estate, directly against the wrongdoer. *Id.* Yet the wronged spouse's economic damages must be satisfied from the community estate, which, to Justice Hecht, seemed exactly backwards: under *Schlueter*, the majority will allow full recovery of mental anguish and punitive damages that have no definite measure,

but only limited recovery of economic damages that can be determined to the penny. *Id.*

Finally, Justice Hecht commented that, under *Schlueter*, the Texas Supreme Court would be forced to reverse *Vickery v. Vickery* [to be discussed hereinbelow].

(b) Justice Spector

In her separate dissent, Justice Spector found the majority's decision to be a retreat from its abrogation of the interspousal immunity doctrine, and stated that although a disproportionate share of the community estate may serve as an appropriate remedy, the wronged spouse should be able to recover punitive damages from the wrongdoer spouse. *Id.* at 1070.

Justice Spector's main point is that in cases such as *Schlueter*, the wronged spouse should be able to reach the defrauding spouse's separate property to recover punitive damages, in addition to a share of the community, for actual fraud on the community. *Id.* Punitive damages punish wrongdoers and serve as an example to others. *Id.* The imposition of punitive damages in *Schlueter*, states Justice Spector, would serve the very purposes for which they were designed: to punish the wrongdoer and deter others from similar conduct. *Id.*

Looking again to the similarity between a marriage and a partnership, Justice Spector wrote that a partner in a partnership may recover punitive damages from other partners for breach of their fiduciary duty, a duty analogous to that owed between spouses. *Id.* at 1070-71. Accordingly, Justice Spector could find no cogent reason to treat spouses so differently than partners. *Id.* at 1071.

C. *Vickery v. Vickery*, No. 01-94-01004-CV, 1997 Tex.App. LEXIS 6275 (Tex.App.-Houston [1st Dist.], December 4, 1997, petition for review requested, briefing requested by Supreme Court). (slip opinion attached)

As already noted in the discussion of Justice Hecht's dissent in *Schlueter*, the majority's holding in *Schlueter* casts great doubt on the viability of the current opinion in *Vickery*. It should be highlighted that the Court of Appeal's majority opinion in *Vickery* was withdrawn once and reissued; there is sufficient reason to expect that a new opinion--at

least on some issues--may be forthcoming from the Texas Supreme Court, now that the Texas Supreme Court has decided *Schlueter*.

1. Facts

After thirteen years of marriage, the husband, a lawyer, told the wife that they needed to divorce in order to protect their assets from a pending legal malpractice claim against the husband. At the husband's request, Richards, an old law school friend of the husband, filed suit for divorce *on behalf of the wife*. Richards did not speak to the wife before filing the suit. The husband represented himself *pro se*, but Richards prepared the husband's original answer and counterclaim, and someone in her office signed the husband's name to the documents, prior to Richards filing the documents on behalf of the husband. The husband and the wife signed the divorce decree, which gave the husband his separate property real estate that he had owned prior to the 13 year marriage. Because the decree did not contain the metes and bounds description of the property, a nunc pro tunc decree was prepared and signed, whereupon the husband then sought enforcement to require the wife to vacate the property awarded him in the decree.

Both parties retained lawyers, and entered into settlement discussions concerning all matters associated with the divorce, including the division of previously undivided assets. The husband and the wife then signed a handwritten document that divided previously undivided assets, but contained a provision that it did not apply to undisclosed assets. The document was not ever filed with the trial court.

Two days later, the husband married a woman who previously had been the wife's best friend. The lawyers continued to negotiate regarding the division of property. Because the husband did not want the final order to include language regarding undisclosed assets, the wife withdrew from the settlement discussions and filed suit. While the suit was pending, the trial court enforced the decree and required the wife to vacate the husband's separate real estate property.

The wife claimed that the husband, a lawyer, fraudulently tricked her into getting an uncontested divorce on the pretext that they would reunite after the threat of the potentially costly malpractice suit against him had been resolved. The wife did not know that the plaintiff in the malpractice case

against the husband had offered to settle within the limits of the husband's malpractice insurance policy the month prior to the divorce, or that the malpractice case had actually settled subsequent to the divorce, but prior to the parties signing the nunc pro tunc order concerning the division of their assets. The wife also claimed that her own lawyer, Richards, breached the fiduciary duty that she owed to the wife when she represented the wife in the divorce.

The wife sued both the husband and Richards for fraud, conspiracy, and breach of fiduciary duty. The wife sued the husband alone for duress, and intentional infliction of emotional distress, and sued Richards alone for negligence, gross negligence, and violations of the Texas Deceptive Trade Practices Act. She also sought a post-divorce division of property. In the alternative, the wife requested a bill of review to set aside that portion of the divorce decree that divided the community estate.

Following a jury trial, the trial court granted the bill of review and divided the marital estate. The wife was awarded judgment against the husband in the amount of \$1,300,000 for mental anguish, \$1,000,000 in exemplary damages, and \$1,521,371 in prejudgment interest on damages for loss of marital property found by the jury to be in the amount of \$6,700,371, and was awarded judgment for \$350,000 against Richards. The jury found that the husband breached his fiduciary duty owed to the wife, and committed fraud with respect to the division of marital property, and that Richards breached her fiduciary duty owed to the wife. Additional findings were made to support the granting of the bill of review.

The Houston First Court of Appeals issued its original opinion affirming the trial court on December 5, 1996. After both the husband and the wife filed Motions for Rehearing, one year later, on December 4, 1997, in an unpublished opinion, the appellate court substituted a new opinion, and again affirmed the trial court.

2. Breach of fiduciary duty

On appeal, the husband complained that the trial court committed error in allowing the jury to answer whether he had breached his fiduciary duty to the wife because no predicated question was asked to determine the existence of such a duty. In overruling the husband's point of error, the Houston appellate court noted that a husband and wife owe

each other special fiduciary duties as a matter of law. Majority opinion at 25, *citing, Matthews v. Matthews*, 725 S.W.2d 275, 279 (Tex.App.-Houston [1st Dist.] 1986, writ ref'd n.r.e.). The First Court of Appeals also found it was significant that the husband was an attorney, and “to the extent that he advised the wife of the legal aspects of a transaction by which he would benefit, the husband assumed the ‘high duty of an attorney to his client.’” Majority opinion at 25, *citing, Bohn v. Bohn*, 455 S.W.2d 401, 412 (Tex.Civ.App.-Houston [1st Dist.] 1970, writ dismissed).

Notably, the Houston appellate court did not refer to *Parker*, 897 S.W.2d at 924, in which the Fort Worth Court of Appeals held that the fiduciary duty owed to a spouse ceases to exist when an action for divorce has been filed, and both sides are represented by counsel. Of course, the underlying suit against attorney Richards in the *Vickery* case was premised on the fact that the attorney conspired with the husband, and wholly failed to represent the wife at all.

Of additional interest is the distinction that the Fort Worth court made in *Parker* between fraud and breach of contract, holding that the wife’s claim of fraud against the husband for failure to keep his promise to settle the terms of the property division in their divorce constituted nothing more than a claim for breach of contract. The Fort Worth appellate court in *Parker* cited *Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494-95 (Tex. 1991), and *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986), as follows:

[When the] acts of a party may breach duties in tort or contract alone, or simultaneously in both, [t]he nature of the injury most often determines which duty or duties are breached. When the injury is only the economic loss to the subject of a contract itself the action sounds in contract alone.

Parker, 897 S.W.2d at 924. Because the settlement agreement was invalid, the wife had no claim for breach of contract or fraud.

3. Fraud

The husband in *Vickery* claimed that the trial court committed error in submitting a separate question concerning fraud, on the basis that the question was the same as the first question

concerning breach of fiduciary duty, which results in a fraud on the community, Majority opinion at 26-27, relying on *Moore, supra*. Given the Texas Supreme Court’s holding in *Schlueter*, the husband in *Vickery* will reurge--or already has reurged--his arguments to the Texas Supreme Court.

In its December 7, 1997 opinion, the *Vickery* court distinguished the the husband’s fraudulent acts from fraud on the community. The Houston appellate court noted that “fraud on the community” arises out of a claim by one spouse against the other for improper depletion of the community estate prior to the dissolution of the community, and is not permitted as an independent cause of action in a suit for divorce. Majority opinion at 27, *citing, Belz* 667 S.W.2d at 246-47.

The majority in *Vickery*, however, distinguished the case from *Belz* on the premise that the fraud question in *Vickery* asked whether the husband had committed actual fraud rather than constructive fraud. Majority opinion at 27-28. The Court agreed that, had the wife alleged that the husband committed constructive fraud by improperly concealing or depleting community assets, she would not have had an independent tort claim against the husband. Instead, however, the wife alleged that the husband committed actual fraud against her individually by fraudulently inducing her into agreeing to a divorce and a contractual division of property; she would not have agreed to the divorce, or signed the subsequent property agreement, but for the misrepresentations made to her by the husband. Therefore, the Houston appellate court held that the wife’s “claim was not one of constructive fraud, but of actual fraud perpetrated against her individually.” Majority opinion at 28.

The facts of *Vickery* may distinguish *Vickery* from *Schlueter* in some significant manner. According to the Houston First Court of Appeals, *Vickery* did not present a simple case of fraud on the community, but rather, to the extent of the fraudulent inducement in the divorce, actual fraud against the wife individually. However, the claims in *Vickery*, as in *Schlueter*, related to the improper depletion of the community estate, and such fact, in and of itself, may well bring *Vickery* within the holding of *Schlueter*.

4. The dissent in *Vickery*

In a dissent from denial of consideration *en banc*, Justice Eric Andell found that no jury question was submitted with respect to *actual* fraud committed by the husband. Justice Andell observed the jury questions asked (1) whether the husband breached his fiduciary duty to the wife concerning the division of the marital property, and (2) whether the husband committed fraud against the wife *in the division of the marital property* of the wife and the husband. Dissenting opinion at 1-2 (emphasis added). However, only one damages question for both the breach of fiduciary duty and the fraud causes of action was submitted. Dissenting Opinion at 1-2. The dissent asserted that the majority failed to recognize that the “fraud” question was the husband’s *constructive* fraud in the division of the community estate. Dissenting opinion at 2. The dissent further agreed with the husband’s contentions that there is no independent tort for fraud or breach of fiduciary duty committed by one spouse against the other. Rather, the proper remedy is to take those actions into account during a redivision of the couple’s community estate. Dissenting opinion at 3.

The dissent relied on *Belz*, *supra*, and *Mazique*, *supra*, to support its position. *Belz* defined fraud on the community as “a wrong by one spouse which the court may consider in its division of the estate of the parties and which may justify an unequal division of the property.” Dissenting opinion at 3-4. *Belz*, 667 S.W.2d at 246. In reliance on *Mazique*, the dissent also noted that, while a judgment may be awarded to one spouse for damages as a result of the other spouse’s fraud, this measure provides only the means by which the injured spouse may recoup the share of community property that was lost as a result of the other spouse’s fraud or breach of fiduciary duty. Dissenting opinion at 3, *citing*, *Mazique*, 742 S.W.2d at 808.

D. The Impact of *Schlueter*

1. Generally

The ultimate impact of *Schlueter* will be determined in the future. At this time, however, it is safe to say that in simple “depletion of the community estate” cases, one spouse will not be suing the other for actual fraud and recovering punitive damages. To the extent that *Mazique* allowed punitive damages (for reasons not altogether clear), *Mazique* is probably overruled by *Schlueter*.

On the other hand, as Justice Hecht observes, *Schlueter* apparently leaves room for one spouse to sue another for actual fraud concerning the defrauded spouses’s separate estate. *Schlueter*, 41 Tex. Sup. Ct. J. at 1069. In such a case, punitive damages should still be available.

Do any of the fraud claims in *Vickery* survive *Schlueter*? Justice Hecht certainly thinks not. Yet, in the context of a divorce, actual fraud has been characterized as “fraud perpetrated against a spouse individually and not solely an economic tort against the community.” *See*, Fullenweider & Hinds, *Persuasive Trial Tactics & Presentation of a Marital Fraud Case*, ADVANCED FAMILY LAW COURSE, p. S-2 (August 1997). As may be recalled, in *Vickery*, the Houston appellate court cast the tort committed against the wife (the fraudulent inducement into the divorce in the first place) in precisely such terms: fraud perpetrated against the wife individually, and not merely an economic tort against the marital estate. *Vickery* is clearly distinguishable from *Schlueter*, but whether the distinction makes any difference has yet to be ascertained.

Schlueter will engender changes in Texas family law. For example, the current Texas Pattern Jury Charges-Family, PJC 206.2A (1996), provides the following instruction for “Actual Fraud”:

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

Under *Schlueter*, the wrongful transfer of community property will not support an action for actual fraud. Although in the Comment to PJC 206.2A, the Committee on Pattern Jury Charges of the State Bar of Texas noted that “[t]he foregoing submission reflects only one of many theories of actual fraud that might be presented in a case involving spouses,” and recognized that actual fraud might occur with

respect to a spouse's separate estate, *Id.* at 74-75, the pattern jury charge will need to be amended.

2. Food for Thought

Consider the following hypothetical.

Couple marries. Both work. After two years, they have saved enough for a minimum down payment on a house, and begin making note payments from their incomes. During this period, the wife also saves money each month from her income and places it in a savings account. She never puts any money in the savings account but her own income. The income from the account is transferred to the couple's joint checking account.

In several years, the wife takes the \$5,000 she has saved and invests it in a small cut-flower business. She continues her regular job, but devotes enormous time to her business. During this period, the husband inherits \$100,000 and becomes involved in the stock market.

Times are good. The stock market booms. The husband's \$100,000 becomes \$175,000. The wife's small business blossoms. In several more years, she sells it for \$60,000. Since the husband has done so well in the stock market, she cuts him a check from her savings account (into which the \$60,000 had been deposited) so that he, with his keen market savy, can invest it for her.

But, alas, they have been married a while and the husband begins to look elsewhere. The wife asks him where her money is, and he tells her he has invested it in Dell. What he doesn't tell her is that he is investing the money in Mary Dell, a stripper at a local topless bar, as well as in various other dancers at the club. After all, the husband knows well that diversification is the rule for every small investor.

The wife has ideas for a future flower business on a much larger scale. She subscribes to the Wall Street Journal and watches the steady upward progress of Dell stock. Meanwhile, the husband continues to squander her money.

When her "Dell" stock has doubled in value, she asks the husband about cashing out so that she can fund her new business venture. He agrees that her business idea is a good one, bound to succeed, but regretfully informs her that he has made a

terrible error in judgment and that her money is gone.

The wife storms off to a lawyer. The lawyer discovers that the parties have lived a comfortable life, abounding in pretty flowers, but that, apart from the equity in the house, estimated at \$25,000 after several years of appreciation, they have accumulated no significant community estate.

On the other hand, the husband's separate estate has further increased to \$250,000 in the unrestrained bull market.

The lawyer discusses *Schlueter* with the wife. The wife asks for Justice Gonzalez's home phone number, but, sadly, is informed that it is unlisted.

Under these facts, Justice Spector might well wonder why the wife is unable to reach any of the husband's separate estate to mitigate the damages she has suffered vis-a-vis the depletion of the community estate. Yet, *Schlueter* mandates that her recovery must be from the community estate, and the community estate alone, even though in this hypothetical the community estate is worth less than damages the wife has clearly suffered.

IV. BREACH OF FIDUCIARY DUTY: LET ME COUNT THE WAYS

A. Waste

According to Justice Gonzalez, writing for the Court in *Schlueter*, "waste of community assets" is similar to the claims brought by Mrs. Schlueter against her husband. 41 Tex. Sup. Ct. J. at 1067. In its division of the marital estate, the trial court may take into account a spouse's dissipation of the estate. *Vannerson v. Vannerson*, 857 S.W.2d 659, 669 (Tex.App.-Houston [1st Dist.] 1993, writ denied); *sse also, Reaney v. Reaney*, 505 S.W.2d 338, 340 (Tex.Civ.App.-Dallas 1974, no writ) (court took into account the husband's dissipation of approximately \$53,000 of community assets when dividing the estate); *Pride v. Pride*, 318 S.W.2d 715, 718 (Tex.Civ.App.-Dallas 1958, no writ) (trial court rendered a money judgment against the husband for the wife's share of \$3,000 he concealed).

Waste often occurs after the spouses have separated. *See, e.g., Falor v. Falor*, 840 S.W.2d

683, 688 (Tex.App.-San Antonio 1992, no writ) (evidence supported the trial court's finding that the husband's payment of debt was a waste of community assets, where (1) husband disbursed community funds to his father, brother, and long time friend; (2) the funds were disbursed three days after the wife left the husband; (3) the wife had no knowledge of and did not consent to the disbursement of community funds; (4) some of the debts were not legitimate since the husband, with his friend and family members, typically bartered services without demanding cash payment; and (5) some of the debts were separate property debts since they were acquired before marriage); *Faram v. Gervitz-Faram*, 895 S.W.2d 839, 844 (Tex.App.-Fort Worth 1995, no writ) (husband committed waste of the community estate by acquiring property, incurring debt, and escalating attorneys' fees after separation).

However, simply spending money, or losing money in business or investments, is not waste. *See, e.g., Connell*, 889 S.W.2d at 543-44 (no evidence that husband wasted community assets, although there was evidence that his business ventures lost money and he filed bankruptcy).

B. Gifts to Paramours

The courts have taken a dim view toward gifts by the husband to "strangers" of the marriage, "particularly of the female variety." *Spruill*, 624 S.W.2d at 697. Of course, reported cases on gifts to paramours abound. *See, e.g., Mazique*, 742 S.W.2d 805.

C. Excessive Gifts

In *Fanning v. Fanning*, 828 S.W.2d 135, 148 (Tex.App.-Waco 1992), *aff'd in part, rev'd in part on other grounds*, 847 S.W.2d 225 (Tex.1993), the husband admitted that he contributed \$40,000 to charitable organizations several months prior to trial. According to the Waco Court of Appeals, although one spouse may make moderate gifts of community property for just causes, excessive or capricious gifts made with intent to defraud the other spouse may be set aside as a constructive fraud. *Id., citing Hartman v. Crain*, 398 S.W.2d 387, 389-90 (Tex.Civ.App.-Houston 1966, no writ) (there is no consistency in saying that the wife is entitled to one-half of the community property and at the same time that the husband may give away such property without restriction; consequently, in all community property jurisdictions, some

restrictions are imposed on the power of the husband to give away the common property). Thus, the Waco appellate court held that the trial court rightfully could have considered the circumstances and timing of the charitable contributions in finding that such a disposition of community funds was unfair to the rights of wife. *Fanning*, 828 S.W.2d at 148.

D. Inflicting Duress

One spouse's bad conduct can result in a breach of fiduciary duty. *See, e.g., Matthews*, 725 S.W.2d at 279 (considering fiduciary duty between husband and wife, among other things, threatening to permanently deprive spouse of custody of the children constituted duress in the execution of a partition agreement).

E. Concealing Material Facts

The fiduciary duty between spouses creates a duty to disclose material facts, a duty which often arises in the context of marital property agreements. *See, e.g., Miller*, 700 S.W.2d at 945-46 (among the factors to be considered in deciding whether the transactions were fair are whether the fiduciary made a full disclosure of material facts).

F. Diversion of Community Opportunity

In *Holloway v. Holloway*, 671 S.W.2d 51, 59-60 (Tex.App.-Dallas 1983, no writ), the wife accused the husband, as manager of the community estate, of unjustly enriching his separate estate by diverting community funds into separate corporations. Specifically, the wife argued that the husband breached a fiduciary duty owed to the community estate by using separate funds to capitalize the corporations when there were adequate funds in the community estate. *Id.* at 59.

However, the Dallas Court of Appeals refused to agree with the wife, stating that in engaging in a new and speculative venture and borrowing funds for that purpose, a married entrepreneur may well consider whether the risk is one that should properly be undertaken by himself alone without jeopardizing the assets of the community estate. *Id.* If the venture turns out to be successful, as it did in *Holloway*, the Dallas appellate court determined that the husband could not be held guilty of breach of a fiduciary duty in the absence of evidence of an intent to defraud the wife. *Id.* at 59-60.

Holloway has been criticized as contrary to the basic principles of the community property system. See, Donald R. Smith, *Diversion of Community Opportunity*, ADVANCED FAMILY LAW COURSE (1986). Further, it has been suggested that the theory of “diversion of community opportunity” is meritorious, and should be investigated by the practitioner in the proper case. Cheryl L. Wilson, *Breach of Fiduciary Duty*, p. M-7, 16TH ANNUAL MARRIAGE DISSOLUTION INSTITUTE (1993). It should be noted, however, that there appears to be no reported Texas case recognizing the diversion of community property theory.

V. REMEDIES AVAILABLE FOR FRAUDULENT CONDUCT

A. Disproportionate Division of the Marital Estate

As already discussed, *Schlueter* recognizes that trial courts have wide discretion in dividing a marital estate, and are empowered to take many factors into consideration in making a just and right division, including wasting of community assets. *Schlueter*, 41 Tex. Sup. Ct. J. at 1067. An injured spouse may recover her appropriate share of not only that property existing in the community at the time of divorce, but also that which was improperly depleted from the community estate. *Id.* “Fraud on the community,” to some extent similar to “waste” of community assets, is properly considered by the trial court when dividing the community estate. *Id.*

B. Money Judgment Against Wrongdoer Spouse

A trial court may award a money judgment to one spouse against the other in order to achieve an equitable division of the community estate. *Id.* at 1066-67; see also, *Murff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981) (allowing money judgment against husband in division of marital estate where the husband had substantial sums in savings before separation that had disappeared by the time of trial). One commentator has written that the money judgment is the most common remedy for fraud in the context of divorce, particularly with respect waste or dissipation and transfers to paramours. Wilson, at p. M-8.

A money judgment, however, can only be used as a means for the wronged spouse to recoup the value of his or her share of the community estate lost through the wrongdoer spouse’s actions, and

because the amount of the judgment is directly referable to a specific value of lost community property, it will never exceed the total value of the community estate. *Schlueter*, 41 Tex. Sup. Ct. J. at 1067.

It should be noted that a money judgment awarded to one spouse in division of the community estate constitutes an award of community property. See, *Id.* at 1069 (J. Hecht, dissenting) (“[b]ut the wronged spouse’s economic damages must be satisfied from the community estate); *Id.* at 1070 (J. Spector, dissenting) (“[t]hese reimbursed funds are community property, in which the tortfeasor-spouse retains a property interest”).

C. Constructive Trusts, and Its Effective Use

1. Nature of the Remedy

A constructive trust is an equitable remedy created by the courts to prevent unjust enrichment. *Exploration Co. v. Vega Oil & Gas Co.*, 843 S.W.2d 123, 127 (Tex.App.-Houston [14th Dist.] 1992, writ denied). A constructive trust is a legal fiction--a creation of equity to prevent a wrongdoer from profiting from his wrongful acts. *McAlpin v. Sanchez*, 858 S.W.2d 501, 507 (Tex.App.-Corpus Christi 1993, writ denied). Equity provides the idea of a constructive trust to frustrate skullduggery. *Andrews v. Andrews*, 677 S.W.2d 171, 174 (Tex.App.-Austin 1984, no writ). It is the formula through which the conscience of equity finds expression. *Id.* Patently, it is also the formula through which Texas appellate courts frequently wax philosophical.

An express agreement between the parties is not needed to create a constructive trust; rather, the constructive trust is imposed by law by because the person holding the title to property would profit by a wrong or would be unjustly enriched if he or she were permitted to keep the property. *Omohundro v. Matthews*, 341 S.W.2d 401, 405 (Tex. 1960).

Constructive trusts have a very broad function of redressing wrong in keeping with the basic principles of equity and justice. *Ginther v. Taub*, 675 S.W.2d 724, 728 (Tex.1984). The form of a constructive trust, a creature purely of equity, is “practically without limit, and its existence depends upon the circumstances.” *Bocanegra v. Aetna Life Ins. Co.*, 605 S.W.2d 848, 851 (Tex.1980); see also, *Andrews*, 677 S.W.2d at 174; *Sever v.*

Massachusetts Mut. Life Ins. Co., 944 S.W.2d 486, 492 (Tex.App.-Amarillo 1997, writ denied) (the constructive trust remedy is flexible and broad).

2. Requirements of Constructive Trust

Before a constructive trust can be imposed, there generally must be a prior confidential relationship. *Rankin v. Naftalis*, 557 S.W.2d 940, 944 (Tex.1977). Equally, before a constructive trust can be imposed, there must be proof of fraud, either actual or constructive. *Talley v. Howsley*, 176 S.W.2d 158, 160 (Tex. 1943).

As already discussed hereinabove, actual fraud involves dishonesty of purpose or intent to deceive, while constructive fraud usually involves a breach of trust or confidential relationship which equity deems worthy of protection. *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964). Actual fraud may justify the imposition of a constructive trust even in the absence of a confidential relationship. *Meadows v. Bierschwale*, 516 S.W.2d 125, 128 (Tex. 1974).

On the other hand, in the presence of a confidential relationship, in order to obtain a constructive trust, it is not necessary to show fraud or intent not to perform. *Hamblet v. Coveney*, 714 S.W.2d 126, 128 (Tex.App.-Houston [1st Dist.] 1986, writ ref'd n.r.e.). Instead, a constructive trust may result from acts that the law condemns as "fraudulent" merely because they tend to deceive others or violate confidence, *i.e.*, constructive fraud. *Chien v. Chen*, 759 S.W.2d 484, 495 (Tex.App.-Austin 1988, no writ). Since the courts are careful not to limit the scope of the remedy, the requisite confidential relationship may arise from moral, social, or purely personal relationships. *Weaver v. Stewart*, 825 S.W.2d 183, 185 (Tex.App.-Houston [14th Dist.] 1992, writ denied).

The Texas Supreme Court has stated that "strict proof" of the elements of the constructive trust is required for the successful imposition of the remedy. *Ginther*, 675 S.W.2d at 725 ("strict proof of a prior confidential relationship and unfair conduct or unjust enrichment on the part of the wrongdoer"); *Rankin*, 557 S.W.2d at 944; *see also*, *Winchester Oil Co. v. Glass*, 683 S.W.2d 35, 39 (Tex.App.-Texarkana, 1984, no writ). Authority also exists for the proposition that, absent sufficient pleading, a constructive trust may not be imposed. *See, e.g.*, *Warner Communications, Inc. v. Keller*, 888 S.W.2d 586, 598 (Tex.App.-El Paso 1995),

reversed on other grounds, 928 S.W.2d 479, 480 (Tex. 1996) (*per curiam*).

Interestingly, it has also been stated that, since the constructive trust is an equitable remedy, a litigant seeking the remedy must show himself or herself "willing to do equity." *Velchoff v. Campbell*, 710 S.W.2d 613, 615 (Tex.App.-Dallas 1986, no writ).

3. Confidential vs. Fiduciary

In constructive fraud cases, the central controversy often centers upon the proper characterization of the relationship between the parties. The confidential relationship required for a constructive trust need not be necessarily a fiduciary one, and it may result from purely moral, social, domestic or family relationships. *Jackson v. Timmins*, 733 S.W.2d 355, 357 (Tex.App.-Texarkana 1987, no writ); *see also*, *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex.1962).

According to the Texas Supreme Court, an abuse of confidence rendering the acquisition or retention of property by one person unconscionable against another generally suffices to ground equitable relief in the form of the declaration and enforcement of a constructive trust, and the courts are careful not to limit this equitable rule or the scope of its application by a narrow definition of fiduciary or confidential relationship protected by it. *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 261 (Tex. 1951). Accordingly, an abuse of confidence within the constructive trust rule may be an abuse of either a technical fiduciary relationship or of an informal relationship, where one person trusts in and relies upon another, whether the relation is moral, social, domestic or merely personal. *Id.*

Johnston v. Mabrey, 677 S.W.2d 236 (Tex.App.-Corpus Christi 1984, no writ) illustrates disagreements about the existence of confidential or fiduciary relationships frequently reported in Texas appellate cases. In *Johnston*, the husband and wife divorced, and after the divorce, "continued being intimate with one another." The former husband purchased a house on Ocean Drive in Corpus Christi, whereupon the former wife moved in with him. The husband then deeded the property to the former wife, at that time his live-in. The former wife paid the former husband for the downpayment he made earlier on the property, and such monies were deposited in a joint checking account and used

to renovate the house. The parties also engaged in several business ventures together, and ultimately, remarried.

Not surprisingly, six months after the marriage, the wife filed for divorce, claiming the house to be her separate property. At trial of the divorce, however, the trial court imposed a constructive trust on the house and ordered it to be sold and the proceeds split between the parties. *Id.* at 238.

On appeal, the wife argued that the constructive trust was improper because there was no confidential relationship between the parties at the time the house was deeded to her. Rather, she asserted, the evidence showed only a “meretricious” relationship, and at best, their relationship was restricted to their prior business dealings and “perhaps the budoir.” *Id.* at 240.

The Corpus Christi Court of Appeals opined that the meretricious relationship and a confidential relationship were not mutually exclusive. *Id.* While the dispensation of sexual favors alone will not support the imposition of a constructive trust, according to the Corpus Christi appellate court, the sexual relationship may be a factor to be considered, since the existence of a fiduciary relationship is to be determined from the actualities of the relationship of the persons involved. *Id.* Because well established Texas law held that the terms “confidential” and “fiduciary” were to be liberally construed, the Thirteenth Court of Appeals found that the evidence before the trial court sufficiently supported the imposition of the constructive trust. *Id.*; *see also, Id.* at n. 2.

Further, as has already been discussed, in *Andrews*, the Austin Court of Appeals found the relationship between a couple who had been engaged to be married and had agreed to jointly purchase a house to be fiduciary in nature. *Andrews*, 677 S.W.2d at 174. In *Jackson*, equally, the “close and confidential personal and business relationship” between a father and son, involving many business dealings together, sufficed for the imposition of a constructive trust over property they had allegedly purchased together, in derogation of rights asserted by the father’s other children. *Jackson*, 733 S.W.2d at 356-57.

4. Applications of the Constructive Trust

(a) Breach of Fiduciary Duty

Texas recognizes the constructive trust as an equitable remedy for a breach of fiduciary duty. *Chien*, 759 S.W.2d at 497. Indeed, it might be argued that the constructive trust is the most frequent remedy for a breach of fiduciary duty.

(b) Bad Conduct

A constructive trust may be imposed to prevent a wrongdoer from profiting by his wrongful act. For example, in *Ford v. Long*, 713 S.W.2d 798, 798-99 (Tex.App.-Tyler 1986, writ ref’d n.r.e.), the husband killed his wife and then claimed a homestead right in community real property that the wife had left to her sister in the wife’s will. Both the trial court and the appellate court had little trouble in imposing a constructive trust in favor of the sister and ordering partition of the property. *Id.*

(c) Insurance Beneficiary Designations

Constructive trusts have been implemented where a party changes, in some manner deemed inappropriate, the beneficiary designation of an insurance policy. For example, in *Towne v. Towne*, 707 S.W.2d 745, 748-49 (Tex.App.-Fort Worth 1986, no writ), although under federal law the husband had an absolute right to change the beneficiary designation of his Veterans Administration life insurance policy, he did not have the right to conceal the fact that he had already done so from the divorce court and from the wife.

In *Hudspeth v. Stoker*, 644 S.W.2d 92 (Tex.App.-San Antonio 1982, writ ref’d), the trial court ordered a life insurance policy be made payable to the wife as trustee for the children. Later, the wife discovered that the policy was no longer in effect and that her former husband, although still insured, had named his new wife as the beneficiary. The San Antonio appellate court held that it was manifestly unfair to permit the husband to avoid his obligations and defeat the equitable right of his children by altering his life insurance policy after divorce. Since the former husband’s actions directly conflicted with the divorce court’s earlier decree, the appellate court affirmed the trial court’s imposition of a constructive trust on the proceeds of the policy. *Id.* at 95-96; *see also, Sever*, 944 S.W.2d at 492 (the trial court properly imposed a constructive trust, rather than a legal trust, on the life insurance proceeds of an insured who had failed to obtain a \$50,000 policy of life insurance naming his child as beneficiary as required by the divorce decree).

(d) Unfulfilled Promise to Convey Property

In *Jackson*, 733 S.W.2d 355, the son testified that he and his father agreed to purchase a property together as partners, and further agreed that his father would hold the legal title in order to strengthen the father's financial statement. The son also testified that the purchase price of the tract was \$750.00; a check for \$325.00 written by the son to his father dated two days after the land was purchased, was introduced into evidence. The son testified that the check and an additional \$50.00 in cash he paid to his father represented payment for his half interest in the tract. However, the father never conveyed the half interest in the land to his son. After the father died intestate, the son's siblings filed suit to establish their interest in the tract, asserting that the tract passed to the three surviving children in equal portions. The son claimed that he and his father purchased the land as partners so that he owned one-half of the tract plus a portion of his father's one-half by inheritance. After a trial, the trial court imposed a constructive trust upon the son's one-half interest in the tract.

According to the Texarkana Court of Appeals, if accepted as true, the son's testimony showed that a confidential relationship existed between the son and his father, and in reliance on that relationship, they agreed that title to the property would be taken in the father's name. *Id.* at 357.

Further, noted the Texarkana appellate court, as the father died without conveying the son's interest to him, equity would protect the son's interest by a constructive trust. *Id.* The Texarkana Court of Appeals stated that the constructive trust was an appropriate remedy even though the father was guilty of no fraud in acquiring the property, and sincerely intended to perform his promise. *Id.* The abuse of the confidential relationship consisted in the father's failure to perform the promise to convey the son's interest to the son. *Id.*

The Texarkana appellate court recognized that the son's siblings were innocent title holders, but nevertheless their title, which would be subjected to the implied trust, was held by them as a result of their father's failure to fulfill his trust, and the principle of unjust enrichment thus applied with equal force to them as to their father. *Id.*

(e) By Operation of Law (Family Code)

TEX.FAM.CODE ANN. §9.011(b) provides that

[t]he subsequent actual receipt by the non-owning party of property awarded to the owner in a decree of divorce or annulment creates a fiduciary obligation in favor of the owner and imposes a constructive trust on the property for the benefit of the owner.

In *Jeffcoat v. Jeffcoat*, 886 S.W.2d 567, (Tex.App.-Beaumont 1994, no writ), the former wife filed a post-divorce suit seeking an equitable share in the former husband's pension plan. In her suit, the wife alleged that the plan had not been addressed or dealt with in the parties' original decree of divorce. After the trial court appointed the husband a constructive trustee of \$94 per month in favor of the wife, the husband argued on appeal that the trial court's judgment was not supported by the wife's pleadings, trial amendment, or by the trial court's findings of fact and conclusions of law. *Id.* at 569.

The Beaumont Court of Appeals overruled the husband's point of error regarding the constructive trust, holding that the trial court did not commit error in discharging its duty to partition the future payments from the husband's pension plan. *Id.* at 570. Rather, the Beaumont appellate court stated that the constructive trustee provision was a correct means or manner in which the divorce judge sought properly to insure a just and right partition, and further that former Texas Family Code §3.75 (repealed; now §9.011) specifically provided that subsequent, later receipt by a party of property that has been awarded to the rightful owner creates a fiduciary obligation in favor of the owner (the husband) and imposes a constructive trust on the said property for the benefit of the owner (the wife). *Id.*

Consequently, *Jeffcoat* may constitute authority for the proposition that the automatic imposition of a constructive trust mandated by §9.011(b) may alleviate the necessity of a specific request for the equitable remedy in pleadings. In *Jeffcoat*, the wife apparently did not include a request for a constructive trust in her pleadings. Although the issue is not explicitly addressed in Beaumont appellate court's opinion in *Jeffcoat*, the issue does seem to have been before the appellate court. *Cf.*, e.g., *Warner Communications, Inc.*, 888 S.W.2d at

598 (absent sufficient pleading, a constructive trust may not be imposed).

(f) By Implication

In *McGoodwin v. McGoodwin*, 671 S.W.2d 880 (Tex.1984), the parties entered into a property settlement agreement where the ex-husband received his ex-wife's one-half interest in their twenty-two acres of land. In exchange for the conveyance, the ex-wife was to receive \$22,500. *Id.* at 881. The ex-husband did not pay her and claimed the land as his homestead. The ex-wife filed suit and the Texas Supreme Court eventually heard the case. In ruling in favor of the ex-wife, the Texas Supreme Court held that where there is no express lien in a deed and when purchase money is not paid, an enforceable vendor's lien arises. *Id.* at 882. The Texas Supreme Court also noted that "[the vendor's] lien arose by implication, as a natural equity creating a constructive trust in the vendee, that he should not keep the estate of another without paying for it." *Id.*

In *Votzmeyer v. Votzmeyer*, 964 S.W.2d 315, 325 (Tex.App.-Corpus Christi 1998, no writ), the divorce decree provided that the wife was to receive \$175,000 from the husband as fair compensation for her share of the parties' community property. The wife's interest was secured by an equitable lien on the property. *Id.* According to the Corpus Christi Court of Appeals, the effect of the decree was to make the husband a constructive trustee for the wife of property valued at \$175,000 for which he was to pay the wife the equivalent cash value. *Id.*

Similarly, in *Magallanez v. Magallanez*, 911 S.W.2d 91, 94 (Tex.App.-El Paso 1995, no writ), the husband was ordered to convey his interest in the community property in exchange for a \$14,000 note. The wife secured the note by signing a deed of trust. *Id.*

The note had a condition that made it payable when the parties' child reached eighteen years of age. *Id.* at 95. However, when the child turned eighteen, and the \$14,000 note became due, the wife could not pay. *Id.* The El Paso Court of Appeals noted that the \$14,000 in purchase money was not paid at the time of the divorce decree and was not paid at the time that the purchase money became due. *Id.* citing *McGoodwin*, 671 S.W.2d at 882, the El Paso appellate court held that a vendor's lien, in favor of the husband, arose by implication, as well

as a constructive trust. *Magallanez*, 911 S.W.2d at 95.

Because the wife failed to pay the note when it became due, the El Paso Court of Appeals held, the husband was entitled to foreclosure pursuant to the equitable vendor's lien. *Id.*

McGoodwin, *Votzmeyer*, *Magallanez* all present slightly different circumstances required to invoke the automatic imposition of a constructive trust mandated by Texas Family Code §9.011. Whereas §9.011 deals with the subsequent actual receipt by the non-owning party of property awarded to the owner in a decree of divorce, *McGoodwin* and its progeny deal with the present receipt of property, by the owner thereof, pursuant to a divorce decree, under such circumstances as result in an implied equitable lien and constructive trust.

5. A Liberal Remedy, But Not Necessarily a Sure Thing

Despite the liberal and equitable approach courts take with respect to constructive trusts, such trusts are not always imposed. For instance, in *Holloway*, 671 S.W.2d 51, as already discussed, the wife argued that the husband had wrongfully diverted community opportunities by using separate funds to incorporate and manage separate property corporations. However, the appellate court held that the evidence did not support a finding that the husband unjustly enriched his separate estate with an intent to defraud the community, noting that in engaging in new and speculative business ventures and borrowing funds for those purposes, a married entrepreneur might well consider whether the risk would be one that should properly be undertaken by himself alone without jeopardizing the assets of the community estate. *Id.* at 59-60.

6. Enforcement of Constructive Trust

Ultimately, the ability to enforce a constructive trust lies in the trial court's ability to enforce its orders. A trustee, including a constructive trustee, may be held in contempt for willfully refusing to obey an order to pay over funds held in his hands to the one rightfully entitled thereto. *Votzmeyer*, 964 S.W.2d at 325.

D. Resulting Trust

In her dissent in *Schlueter*, Justice Spector specifically noted that fraudulently transferred, converted, or wasted community property can be rightly returned to the community estate through the implementation of a resulting trust. *Schlueter*, 41 Tex. Sup. Ct. J. at 1070.

Like the constructive trust, the doctrine of resulting trust is invoked to prevent unjust enrichment. *Nolana Development Ass'n v. Corsi*, 682 S.W.2d 246, 250 (Tex. 1984). A resulting trust is implied in law when someone other than the person in whose name title is taken pays the purchase price for an asset. *Tricentral Oil Trading, Inc. v. Annesley*, 809 S.W.2d 218, 220 (Tex. 1991); but cf., *Leighton v. Leighton*, 921 S.W.2d 365, 368 (Tex.App.-Houston [1st Dist.] 1996, no writ) (mortgage loan secured by deed of trust, obtained to improve husband's separate property, and for which both husband and wife applied and were liable, did not create resulting trust for benefit of wife, who did not own the property); *Andrews*, 677 S.W.2d at 174 (applicant not required to prove monetary contribution to the down-payment for the purchase of the house as a condition for the imposition of a constructive trust, as distinguished from a resulting trust).

The resulting trust is an "intent trust," employed when trust property has been used for a special purpose which has terminated or become frustrated so that the law implied a trust for the equitable owner of the property. *Tricentral Oil Trading, Inc.*, 809 S.W.2d at 220. The trustee of a resulting trust stands in a fiduciary relationship with the beneficiary insofar as the trust property is concerned. *Id.* However, the trustee generally is responsible only for conveying the property to the beneficiary or in accordance with his directions. *Nolana Development Ass'n*, 682 S.W.2d at 250.

Texas Courts have admitted that there is some confusion as to the distinction between the constructive trust and the resulting trust. See, e.g., *Johnston*, 677 S.W.2d at 240. However, the two remedies are distinguishable. From a practical point of view, the resulting trust primarily involves the operation of the equitable doctrine of consideration, i.e., the doctrine that valuable consideration and not legal title determines the equitable title or interest resulting from a transaction, whereas the constructive trust primarily involves the presence of fraud, in view of which equitable title or interest should be recognized in some person other than the taker or holder of the legal title. *Id.* It is this

difference that explains that statement in *Andrews* that a litigant was not required to prove a contribution to the down-payment for the joint purchase of a house as a condition for the imposition of a constructive trust, as distinguished from a resulting trust.

The Texas Supreme Court has stated that, from the perspective of the creative force bringing them into existence, trusts may be classified as "express trusts" and "trusts by operation of law," the latter being either resulting or constructive trusts. *Mills v. Gray*, 210 S.W.2d 985, 987-88 (1948). An express trust comes into existence only by the execution of an intention to create it by the one having legal and equitable dominion over the property made subject to it. *Id.*

A trust by operation of law, frequently called an "implied trust," on the other hand, comes into existence either through an implication of an intention to create a trust as a matter of law or through the imposition of the trust irrespective of, and even contrary to any, such intention. *Id.* In other words, a trust intentional in fact is an express trust; one intentional in law is a resulting trust; and one imposed irrespective of intention is a constructive trust. *Id.*

E. Judgment Against Third Party

1. Conspiracy in General

In Texas, there is no independent cause of action for civil conspiracy. *Deaton v. United Mobile Networks, L.P.*, 926 S.W.2d 756, 760 (Tex.App.-Texarkana 1995), *reversed in part on other grounds*, 939 S.W.2d 146, 146 (Tex. 1997) (*per curiam*). According to the Texas Supreme Court, civil conspiracy is a "derivative tort," generally defined as a combination of two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). In other words, an actionable conspiracy must consist of wrongs that would have been actionable against the conspirators individually. *International Bankers Life Insurance Co. v. Holloway*, 368 S.W.2d 567, 581 (Tex. 1963). Therefore, an act by one person, which cannot give rise to an independent cause of action against that person, cannot give rise to a cause of action for conspiracy, even if such act was accomplished pursuant to an agreement between several persons. *Schoellkopf v. Pledger*, 778 S.W.2d 897, 900

(Tex.App.-Dallas 1989, writ denied). Consequently, although not explicitly addressed in the Texas Supreme Court's opinion in *Schlueter*, the conspiracy claim against the husband and his father must have dissappeared (there was no independent tort committed by the husband).

2. *Schleuter*

In *Schlueter*, Mrs. Schlueter was awarded a joint and several judgment for \$12,850.00 against her husband and his father for funds fraudulently transferred from the husband to his father in a conspiracy to injure Mrs. Schleuter. 41 Tex. Sup. Ct. J. at 1068. On appeal to the Texas Supreme Court, Mr. Schlueter's father did not argue that the separate and independent fraud claims against him as a third-party should be abolished (as they were against his son, the husband), and therefore the Texas Supreme Court did not reach the issue. Nonetheless, Judge Spector, dissenting, noted that fraudulently transferred property could be restored to the community by means of a judgment against a third-party.

Although in *Schlueter* the Texas Supreme Court did not specifically address the issue, a judgment against a third-party will belong to the community estate. In *Schlueter*, the trial court's \$12,850.00 judgment against the father-in-law was awarded to the community estate, and Justice Gonzalez wrote that it represented "an asset returned to the community estate, making it monetarily whole." 41 Tex. Sup. Ct. J. at 1068.

3. *Connell v. Connell*, 889 S.W.2d 534 (Tex.App.-San Antonio 1994, writ denied)

The San Antonio Court of Appeals has stated that a third person who knowingly participates in the breach of a fiduciary duty *may* be liable, in addition to the wrongful spouse. *Connell*, 889 S.W.2d at 541 (emphasis added). The underlying "constructive fraud" upon which Wife relied to establish her claims concerned the transfer of certain property by Husband, who was involved in numerous business entities, following Wife's agreement to dismiss the original divorce suit she had filed. She alleged that Husband misled her and instructed her to sign various documents involving "the family business." The documents she signed included those necessary to secure a loan to the community that was collateralized with the 349 acre community property ranch. When the loan was not paid, the lender

foreclosed on the ranch. Wife asserted that the lender agreed in advance to sell the foreclosed property at less than its value to another rancher, who also received various other assets. *Id.* at 536-37.

Wife sought to prove that Husband transferred assets to his girlfriend and to others, in order to fraudulently deplete the community estate before filing for bankruptcy on behalf of himself and the family business. *Id.* at 537. In the divorce action, Wife also sued husband, his girlfriend, and the family business corporation under various theories of conversion, actual fraud, constructive fraud, and civil conspiracy.

However, the evidence established that the assets transferred to the third parties were by bill of sale, and were partnership or corporate property, rather than personally owned assets. *Id.* at 542. The only property owned individually by the community was the real estate which had been foreclosed. Wife's accountant expert testified that the difference in value between the assets transferred to another rancher, and the amount actually paid by the rancher for those assets, was \$800,000. The appellate court acknowledged that some of the transactions were business decisions that could be questioned in hindsight, and some could be looked upon with suspicion. *Id.* at 543. Nevertheless, the appellate court concluded that the record contained no proof of fraudulent conveyances. *Id.* at 542. Additionally, Husband's girlfriend was not the beneficiary of the conveyances, so there could be no third party liability where she was concerned. *Id.*

4. *Vickery*: Points of Error by Wife's Attorney

In *Vickery*, Richards raised several complaints on appeal that related solely to her, as Wife's former counsel. Included among those was the issue of whether a trial court can award mental anguish for the attorney's breach of fiduciary duty owed to the client. Majority opinion at 63. Richards asserted that the trial court erred in entering judgment against her for mental anguish damages on the basis that "as a matter of law, mental anguish is not recoverable for constructive fraud." *Id.* The Court was first required to assume that Richards' argument was that breach of fiduciary duty constitutes constructive fraud, and that one cannot recover mental anguish damages for fraud. *Id.*

The Court observed that constructive fraud is most frequently found in the breach of a fiduciary or confidential relationship, and that damages are ordinarily limited to the actual loss incurred. *Id.* However, the Court cited the holding in *Boyles v. Kerr*, 855 S.W.2d 593, 600 (Tex. 1993), wherein the Texas Supreme Court stated that “certain relationships may give rise to a duty which, if breached would support an emotional distress award.” Majority opinion at 64. Further, the *Vickery* Court also cited the Texas Supreme Court’s finding that the physician-patient relationship is one that, if breached, would support an emotional distress award. Majority opinion at 64, *citing*, *Krishnan v. Sepulveda*, 916 S.W.2d 478, 482 (Tex. 1995).

Comparing the attorney-client relationship to that of a physician-patient, the Court stated that the attorney-client relationship “has been held to be one of *uberrima fides*--in other words, a relationship of the most abundant good faith, absolute and perfect candor or openness and honesty, and the absence of any concealment or deception, however slight.” Majority opinion at 64, *citing*, *State v. Baker*, 539 S.W.2d 367, 374 (Tex.Civ.App.-Austin 1976, writ ref’d n.r.e.).

5. Aiding and Abetting A Breach of Fiduciary Duty

As previously discussed, in *Connell* the San Antonio Court of Appeals stated that a third person who knowingly participates in the breach of a fiduciary duty may be liable, in addition to the wrongful spouse. *Connell*, 889 S.W.2d at 541. In its opinion, the San Antonio appellate court cited no authority for its statement.

However, there is substantial authority in Texas that when a third party knowingly participates in the breach of a fiduciary duty, such third party becomes a joint tortfeasor and is liable as such. *Kinzbach Tool Co., Inc. v. Corbett-Wallace Corporation*, 160 S.W.2d 509 (Tex. 1942); *see also* *Kline v. O’Quinn*, 874 S.W.2d 776, 783 (Tex.App.-Houston [14th Dist.] 1994, writ denied), *cert. denied*, 115 S.Ct. 2579 (1995); *Horton v. Robinson*, 776 S.W.2d 260, 266 (Tex.App.-El Paso 1989, no writ); *Thompson v. Vinson & Elkins*, 859 S.W.2d 617, 627, n. 5 (Tex.App.-Houston [1st Dist.] 1993, writ denied); *Chien*, 759 S.W.2d at 498, n. 2; *Kirby v. Cruce*, 688 S.W.2d 161, 166 (Tex.App.-Dallas 1985, writ ref’d n.r.e.); *Gaines v. First State Bank*, 28 S.W.2d 297,

299-300 (Tex.Civ.App.-Fort Worth 1930), *aff’d*, 50 S.W.2d 774 (Tex. 1932).

Hendricks v. Thorton, No. 09-96-163 CV, 1998 WL 336634, *1 (Tex.App.-Beaumont, June 25, 1998, no pet.), concerned a suit by 127 investors against the entity offering several government securities trading programs in which the investors had participated, and ultimately lost thousands of dollars, as well as the accounting firm purportedly responsible for reviewing and verifying the securities programs for authenticity. Among many other claims, the investors sued the accounting firm for breach of fiduciary duty and aiding and abetting breach of fiduciary duty. In the course of years of litigation, the accounting firm was awarded summary judgment on the investors’ claims against it for breach of fiduciary duty. The trial court also granted the accounting firm summary judgment on the investors’ cause of action for aiding and abetting a breach of fiduciary duty of another.

On appeal, the accounting firm alleged that the investors cause of action for aiding and abetting a breach of fiduciary duty of another was disposed of by the trial court’s earlier granting of summary judgment on the breach of fiduciary duty claim. *Id.* at *22. According to the accounting firm, the aiding and abetting breach of a fiduciary duty was simply a “tag-along” claim to the investors’ breach of fiduciary duty claim against the accounting firm. *Id.*

However, the Beaumont Court of Appeals disagreed, holding that the summary judgment on the breach of fiduciary duty claim is not tantamount to a ruling on the aiding and abetting claim because the claims were distinct. *Id.* Similarly, the Beaumont appellate court rejected the accounting firm’s assertion that Texas law did not recognize a cause of action for aiding and abetting a breach of fiduciary duty of another, stating that “[i]t is settled as the law of this State that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such.” *Id.*

Of course, after *Schlueter*, in a divorce there can be no independent cause of action for improper depletion of the community estate. Nonetheless, as already discussed, it appears that there still exists the possibility of an independent cause of action between spouses for damages to one spouse’s separate estate. In such a context, therefore, there would also be the possibility of an “aiding and

abetting” claim, under the appropriate factual circumstances.

F. Rescission

Texas recognizes the equitable remedy of rescission for breaches of fiduciary duty. *Arce v. Burrow* 958 S.W.2d 239, 246, n.8 (Tex.App.-Houston [14th Dist.] 1997, pet. requested).

In *Miller*, 700 S.W.2d at 945, the wife brought suit against her former husband to rescind a shareholders' agreement regarding corporate stock acquired by the husband before the parties' divorce and allegedly not disposed of by the parties' divorce decree. According to the Dallas Court of Appeals, the husband, who was a founder, officer and director of the corporation, had a fiduciary duty to deal fairly with his wife, from whom he was separated, in acquiring from her any rights in the corporation's stock. *Id.* at 945. Further, the husband failed to establish that shareholders' agreement was fair since he failed to prove that he did not gain any benefit from it at his wife's expense; thus, trial court erred in denying wife rescission of the agreement following the parties' divorce. *Id.* at 947-948.

G. Punitive Damages Against Spouse Unavailable for Damages to the Community Estate

1. Punitive Damages In General

Generally, punitive damages can be obtained when the plaintiff proves actual damages incurred as the result of fraud. Fraud is defined by the punitive damages statute as "fraud other than constructive fraud." TEX. CIV. PRAC. & REM. CODE §41.001(4) (Vernon Supp. 1996). Under Texas law, for a plaintiff to recover exemplary damages, the defendant must know of the falsity of the statement and the statement must have been made maliciously with intent to deceive or injure, or with needless and reckless disregard of its consequences. *Trenholm v. Ratcliff*, 646 S.W.2d 927, 933 (Tex. 1983). In cases involving fiduciaries, exemplary damages can be obtained where the fiduciary intended to gain an additional benefit or profit for himself. *Kirby v. Cruce*, 688 S.W.2d 161, 167 (Tex.App.-Dallas 1985, writ ref'd n.r.e.).

2. *Schlueter*

In *Schlueter*, the Texas Supreme Court concluded that since there was no independent tort cause of action for a spouse's wrongful disposition of community assets, the wronged spouse may not recover punitive damages from the other spouse. *Schlueter*, 41 Tex. Sup. Ct. J. at 1064. However, Justice Hecht and Chief Justice Phillips both believe that one spouse can still sue another for fraud relating to separate property and recover damages, including mental anguish damages and punitive damages, as in any other case. *Id.* at 1069. Of course, as already discussed, Justice Spector would allow recover to a defrauded spouse of both an appropriate share of the community property and punitive damages from the defrauding spouse's separate estate. *Id.* at 1070.

Because the Texas Supreme Court did not reach the issue of whether there was an independent cause of action for fraud against Mr. Schlueter's father, the punitive damages against the father-in-law were not disturbed by the majority's opinion. *Id.* at 1068.

3. Non-Fraud Punitive Damages

Schlueter notwithstanding, punitive damages against a spouse have been awarded in contexts other than "wrongful disposition of community assets" cases. For example, the Fort Worth Court of Appeals upheld an award and judgment of \$1,000,000 in punitive damages awarded to the wife for the husband's wiretapping of the wife's attorneys' offices. *Parker*, 897 S.W.2d at 929. While the award was based on a statute allowing for such recovery, it was also based upon alleged harm to the attorney-client privilege and the attorney work product privilege. The Fort Worth appellate court found that the husband "showed constant and flagrant disregard" for the law and for the rights of the wife, and such indifference toward the law and the rights of the wife justified the trial court's award of punitive damages. *Parker*, 897 S.W.2d at 930.

H. Uniform Fraudulent Transfer Act

TEX.BUS.& COM.CODE ANN.§24.002(4) (Vernon 1997) defines "creditor" as a person, including a spouse, who has a claim against the debtor. Under TEX.BUS.& COM.CODE ANN. §24.002(1)(B)(3) (Vernon 1997), a "claim" means a right to payment or property, whether or not the right is reduced to judgment, liquidated,

unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured. Further, under TEX.BUS.& COM.CODE ANN.§24.005(a) (Vernon 1997), a transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or within a reasonable time after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation, among other things, with actual intent to hinder, delay, or defraud any creditor of the debtor.

In *J. Michael Putman, M.D.P.A. Money Purchase Pension Plan v. Stephenson*, 805 S.W.2d 16 (Tex.App.-Dallas 1991, no writ), the wife sought a divorce and named a pension plan lender as a third-party respondent in order to set aside the husband-borrower's quitclaim deed to the lender. Putman, the plan administrator, was a close friend of both the husband and wife, and was the wife's personal physician. Because of financial difficulties, the husband borrowed money from the plan and secured the debt with real estate owned partially by the community. None of these transactions were disclosed to the wife. When the husband could not repay the debts, he quitclaimed the real estate to the pension plan.

During the divorce, the wife finally learned of the loans from the pension plan to the husband, and joined the plan as a third party respondent, seeking to have the quitclaim deed set aside. *Id.* at 18. The trial court found that the conveyance of the property was fraudulent as to the wife and set aside the quitclaim deed as void. *Id.*

On appeal, the Dallas Court of Appeals held that, in light of his personal knowledge of the business, financial, and personal affairs between the husband and the wife, Putman was an insider under UFTA with respect to the conveyance of the property. *Id.* at 19. Further, the Dallas appellate court held that if an action taken in the name of a pension plan is fraudulent as to a creditor and the pension plan's administrator is an insider, then the action may be set aside under UFTA. *Id.*

For good measure, the Fifth Court of Appeals also held that the trial court did not abuse its discretion when it awarded the entire property to the wife, but assigned the entire debt to the husband. *Id.* at 20.

I. Reimbursement Distinguished

“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.” *Vallone v. Vallone*, 644 S.W.2d 455, 458-59 (Tex.1982). A right of reimbursement may exist in the absence of a breach of fiduciary duty, and although the principles are similar, a claim for breach of fiduciary duty may be described as “that escalation of remedies beyond a claim of reimbursement.” Angeline L. Bain and William A. Dudley, *Breach of Fiduciary Duty*, p. H-3, 19TH ANNUAL MARRIAGE DISSOLUTION INSTITUTE (1996).

A recent case, *Camp v. Camp*, No. 13-97-092-CV, 1998 WL 385446 (Tex.App.-Corpus Christi, July 9, 1998, n.w.h), highlights the difference between claims for reimbursement and for breach of fiduciary duty. In *Camp*, the wife argued that the husband's designation, during marriage, of his mother as beneficiary of a term life insurance policy was constructive fraud. However, the Corpus Christi Court of Appeals stated that it was undisputed that the husband acquired title to the insurance policy through his employment compensation prior to his marriage. *Id.* at *2. Thus, the policy was his separate property with his wife entitled to reimbursement for her share of the premiums paid with community funds. *Id.*

Further, because the insurance policy was the husband's separate property, the Corpus Christi appellate court held that constructive fraud against the community could not be presumed in relation to the proceeds of the policy (the \$35,000), since fraud against the community arises only from a spouse disposing of the other spouse's interest in community property. *Id.* at *3, citing, *Zieba*, 928 S.W.2d at 789. The Thirteenth Court of Appeals acknowledged that community funds were expended toward the insurance policy premiums, but noted that the trial court acted properly in awarding the wife reimbursement for her community interest in the policy premiums. *Id.*

VI. MULTIPLE AND/OR CONFLICTING DUTIES

A. Fiduciary Duties/Duties of Loyalty

1. Husband/Wife

A fiduciary duty exists between a husband and wife concerning the community property controlled

by each spouse. *In re Marriage of Moore*, 890 S.W. 2d 821, 827 (Tex. App. - Amarillo 1994, no writ)

2. Agent/Principal

“Inherent in any agency relationship is the fiduciary duty an agent owes to his or her principal.” *Price v. Burrow*, 958 S.W. 2d 239, 245 (Tex. App.-Houston [14th District] 1997, pet. requested.) See *Tex. Processed Plastics v. Gray Enterprises*, 592 S.W. 2d 412, 417 (Tex. Civ. App.-Tyler 1979, no writ.) This includes the relationship between a real estate agent/broker and his or her principal. *Chien v. Chen*, 759 S.W. 2d 484, 495 n.7 (Tex. App.-Austin 1988, no writ.)

3. Attorney/Client

A fiduciary duty exists between attorney and client. *Willis v. Maverick*, 760 S.W. 2d 642, 645 (Tex. 1988); *Perez v. Kirk & Carrigan*, 822 S.W. 2d 261, 265 (Tex. App. Corpus Christie 1991, writ denied). The relationship requires absolute and complete candor, openness and honesty, and the absence of any concealment or deception. *Perez*, 822 S.W. 2d at 265.

4. Corporate Directors/Officers

Directors and officers of a corporation are fiduciaries and they owe a duty of loyalty to the corporation. *Poe v. Hutchins*, 737 S.W. 2d 574, 584 (Tex. App. - Dallas 1987, writ ref'd n.r.e.). *International Bankers Life Ins. Co. v. Holloway*, 368 S.W. 2d 567, 577 (Tex. 1963).

Corporate fiduciaries may not usurp corporate opportunities for personal gain and transactions in which a corporate fiduciary receives personal profit are subject to the closest examination. *International Banker's Life*, 368 S.W. 2d at 577; *Poe*, 737 S.W. 2d at 584.

5. Partner/Partnership

For partnerships governed by the statutory scheme effective before January 1, 1994, partners owe fiduciary duties to the partnership and the other partners. In other words, partners must deal with each other honestly and fairly in conducting the partnership business. See *McLendon v. McClendon*, 862 S.W. 2d 662, 676 (Tex. App. Dallas 1993, writ denied). For partnerships governed by the statutory scheme effective January 1, 1994, partners do not owe fiduciary duties to the partnership and the other

partners, but owe a duty of “loyalty.” However, Article 6132b-4.04(f) of the Texas Revised Civil Statutes states that [a] partner in that capacity, is not a trustee and is not held to the same standards as a trustee.”

6. Executor / Representative

An executor or representative of an estate has a fiduciary duty to the persons entitled to the assets of the estate. *Humane Society v. Austin Nat'l bank*, 531 S.W. 2d 574, 577 (Tex. 1975). “As a fiduciary, an executor has a duty to protect the beneficiaries’ interest by fair dealing in good faith with fidelity and integrity.” *McLendon v. McLendon*, 862 S.W. 2d 662, 670 (Tex. App. Dallas 1993, writ denied).

B. EXAMPLES

1. Duty of Spouse and Attorney/Physician

The profession of one spouse may create impact multiple duties owed to the other spouse. For example, if one spouse is an attorney and giving legal advice, that spouse may owe a fiduciary duty to the other that arises from the attorney-client relationship as well as a fiduciary duty that arises from the marriage. These types of “dual duties” are more apt to increase the amount of care and good faith owed by one spouse to the other, rather than create a conflict of duties.

In *Vickery*, majority opinion at p. 25, the Houston Court of Appeals found the husband’s role as an attorney to be significant. The appellate court observed that “to the extent that [the husband] was advising [the wife] of the legal aspects of a transaction by which he would benefit, [he] assumed the ‘high duty of an attorney to his client.’” *Id.* at 25, citing *Bohn v. Bohn*, 455 S.W.2d 401, 412 (Tex. Civ. App.-Houston [1st Dist.] 1970, writ dismissed). The duty breached may have been both one of an attorney to a client, and a spouse to the other.

In another case, the San Antonio Court of Appeals failed to find a physician husband liable for the wrongful death of his wife, in a suit brought by the wife’s wrongful death beneficiaries. *Rampel v. Wascher*, 845 S.W.2d 918 (Tex. App.-San Antonio 1993, writ denied). In *Rampel*, the wife died near her hot tub after consuming alcohol and pills she allegedly received from her husband, an osteopath.

The plaintiffs tried to assert that a physician-patient relationship existed between the spouses, and that as an osteopath, the husband owed a fiduciary duty to the wife. The evidence at the trial court established that the husband had treated the wife for stress and anxiety beginning in 1984, and had prescribed medications for her, including tranquilizers a day or so before her death.

However, the jury failed to find that a physician-patient relationship existed on the night of the wife's death, as the husband was not acting as her physician and did not see her take any medications. He testified that whatever medications she ingested were on her own, with no input from him. He also testified that he did not give her the medication she took that night, which had actually been prescribed by the husband to himself to relieve his back pain, rather than for the wife. *Id.* at 921.

The husband's experts testified that the physician-patient relationship does not exist 24 hours a day, and that when a wife has taken her doctor-husband's personal medicine, he did not "prescribe" the medication for the wife. Thus, the jury's finding that the husband was not acting as the wife's physician the night of her death was supported by the evidence. *Id.* at 922. Under different facts, however, a totally different result might occur.

However, it should also be noted that the appellate court further held that spouses and other family members have no legal right of action against each other arising from the failure to take affirmative action to prevent injury. *Id.* at 925. The plaintiffs asserted that a family relationship is a special relationship that imposes a duty of care on the other family members, and that the trial court committed error by refusing to submit their requested instructions that the marital contract between husband and wife, as well as the family relationship, imposed a duty of ordinary care for the other. *Id.* at 924.

The plaintiffs "sought to establish that one spouse has a duty to intervene in the other's conduct to rescue him or her from taking foolish action." *Id.* However, the San Antonio appellate court distinguished misfeasance from nonfeasance, where the law has been more reluctant to impose liability for failure to act than for acting carelessly, and declined to impose upon spouses and family members an affirmative legal duty to act, which

would produce a right to bring an action for money damages. *Id.*

2. Duty Owed to Spouse vs. Duty Owed to a Professional Association

In other instances, there may be created multiple duties owed by a spouse to third parties that create conflict with duties owed to the other spouse.

For example, it is well established that, as a matter of law, a non-physician cannot own an interest in a professional medical association. TEX.REV.CIV.STAT.ANN., art.1528f, §10 (Vernon 1997). What happens, then if the physician spouse grants a security interest in the professional association (such as by signing a stock trust agreement or granting an irrevocable stock power to the non-physician spouse), thereby "conveying" an interest in the professional medical association to the non-physician? Has the physician violated Texas law pertaining to professional medical associations? Is the professional medical association automatically dissolved, rendering the spouse's security interest worthless? If the association has lost its status as a professional medical association by the physician's execution of security interests in favor of his non-physician spouse, has the physician breached a duty owed to the other members of the association?

The authors of this paper believe the answers to those questions are "yes," and they will likely be answered in an appellate court during the next year, since they recently arose in a case destined to be appealed. Whether the physician's breach to his associates is "excused" when the physician acted only on the order of the Court in executing the documents pursuant to a written decree of divorce is less clear. Should the marital status or divorce of a member of a professional association or a corporate officer alter the duties that such a person owes to third parties who are "outsiders" to the marriage?

A physician may also have written agreements with his or her professional associates/partners that govern the manner in which the professional association business matters will be conducted. It is not uncommon for such an agreement to provide for a dissolution of the professional association or for a "buy out" of the partner's interest in the event one of the members wants to convey his or her interest in the association to another person, or may restrict such a transfer.

Whether these restrictions will be upheld by the Courts, however, is also uncertain and will likely depend upon the facts of the case. For example, one appellate court declined to uphold a transfer restriction that had been placed upon corporate stock. In *Earthman's, Inc. v. Earthman*, 526 S.W.2d 192, 201 (Tex.Civ.App.-Houston [1st Dist.] 1975, no writ), the trial court awarded the wife shares in a corporation which carried the following restriction:

The shares of stock of the corporation are to be held by each shareholder upon the condition that he will not sell, assign, transfer, pledge or in any way dispose of or encumber any of such shares without first offering (in writing, mailed to the Corporation's office) the same for sale to the Corporation which shall have the right to purchase all or any portion of such shares within sixty (60) days from the date of the offer.

After the divorce, the corporation refused to transfer the shares to the wife, alleging that the transfer from the husband to the wife violated the Articles of Incorporation, and declared that it exercised its option to purchase the stock pursuant to the terms of the stock transfer restriction contained in the Articles. *Id.* at 201-202. On appeal of the jury's finding that the corporation had wrongfully converted the shares of the wife, the Houston appellate court noted that a provision which restricts a stockholder's right to sell or transfer his stock, particularly one which affords a prior right of purchase to the corporation or to another stockholder, is not looked upon with favor in the law, is strictly construed, and generally is inapplicable to a transfer occurring as a result of an involuntary sale or by operation of law unless it is made applicable by specific provision in the restriction. *Id.* at 202. Consequently, the First Court of Appeals found the stock restriction inapplicable to the transfer of stock mandated by the decree of divorce, since the restriction did not specifically address an involuntary transfer pursuant to divorce. *Id.*

Although cited with some regularity in conversion cases, *Earthman's* has apparently never been cited in a subsequent Texas divorce case. Clearly, there is a distinction between a restriction on common stock, and a statutory prohibition against a non-physician owning an interest in a professional medical corporation. However, it is easy to see that certain acts by an individual, either

as a corporate officer or as a professional, may create a conflict of duties owed to third parties and to the spouse.

Other agreements will allocate the manner in which the ownership interest of the individual members should be valued in the event of a divorce. There is some question as to whether such an agreement might be considered a breach of a duty owed to a spouse, in the event the Court should uphold the agreement. For example, in *Keith v. Keith*, 763 S.W.2d 950, 952 (Tex.App.-Fort Worth 1989, no writ), the Fort Worth Court of Appeals held that a spouse was not bound by a partnership agreement between the husband and his son, where the agreement provided for a formula to determine the value of the business in the event it was terminated due to the withdrawal, other act, or death of one of the partners, and was signed by the wife. Is there any "breach of loyalty" from the husband to the son by virtue of the manner in which the court valued the partnership? Probably not in this case, but one can see how the husband's duties owed to the spouse, his partner, and his son might run afoul of each other.

3. Duty of Executor and Duty of Spouse

(a) A conflict of duties may also arise when a spouse serves as the executor of an estate. Consider the following possible scenarios. Wife's mother executed a will leaving her estate to her daughter and son and names her daughter's husband as the executor. The will left cash to the daughter and land to the son. After the mother died, the daughter's husband was appointed executor of the estate. When expenses (including taxes) become due, the executor husband is faced with payment of the estate's expenses from his wife's cash inheritance since he is unable to liquidate his brother-in-law's land to pay expenses. Does executor/husband's fiduciary duties to the beneficiaries of his mother-in-law's estate (his wife and brother-in-law) conflict with his fiduciary duty to his wife?

(b) Same example, but after executing her will, the mother, with her son's encouragement, spends most of her cash improving the land. After the mother's death, the daughter's husband is appointed executor of the estate. When the daughter discovers that her mother spent most of her cash inheritance on the land that was left to her brother, she files a will

contest. Does the executor/husband's fiduciary duties to the beneficiaries of his mother-in-law's estate (his wife and brother-in-law) conflict with his fiduciary duty to his wife?

4. Duty of Corporate Director Officer and Duty as Spouse

One can imagine situations in which a spouse encounters conflicting duties owed as a result of serving as an officer or director of a corporation. For example, problems such as diversion of a community opportunity to a corporation or executing restrictions on stock transfers that could defraud the spouse.

VII. CONCLUSION

Schlueter has "cleared up," or at least disposed of, many of the troublesome issues surrounding the available relief for a breach of fiduciary duty in the context of a divorce in Texas. Whether *Schlueter* does so satisfactorily is open to question.

However, given the existence of recognized fiduciary duties between husband and wife, and given the continuing proclivities of men and women to abuse confidences reposed in them by others, the issues of fiduciary obligations will always be significant to practitioners of family law, in Texas, and everywhere else.

SOURCES

Angeline L. Bain and William A Dudley, *Breach of Fiduciary Duty*, 19TH ANNUAL MARRIAGE DISSOLUTION INSTITUTE (1996)

Fullenweider & Hinds, *Persuasive Trial Tactics & Presentation of a Marital Fraud Case*, ADVANCED FAMILY LAW COURSE (August 1997).

Donald R. Smith, *Diversion of Community Opportunity*, ADVANCED FAMILY LAW COURSE (1986)

Ted Terry, Kristin Proctor, and James LaRue, *Scratches on the Heart: Nonphysical Tort Claims*, 20TH ANNUAL MARRIAGE DISSOLUTION INSTITUTE (1997)

Ted Terry, Kristin Proctor, and James LaRue, *Breach of Fiduciary Duty and Nonphysical Tort Claims*, ADVANCED FAMILY LAW COURSE (1998)

Cheryl L. Wilson, *Breach of Fiduciary Duty*, 16TH ANNUAL MARRIAGE DISSOLUTION INSTITUTE (1993)