FIDUCIARY DUTIES OF SPOUSES AND NON-PHYSICAL TORTS

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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 (1998):

> A relationship of confidence and trust exists between a husband and wife with regard to that portion of the community property that each controls. This relationship requires that the spouses use the utmost good faith and frankness in their dealings with each other.
>
> Because of the nature of the spousal relationship, conduct of a spouse affecting the property rights of the other spouse may be fraudulent even though identical conduct would not be fraudulent between nonspouses.

See RESTATEMENT (SECOND) OF TORTS §551 (In most states, a marriage creates a relationship of trust and confidence between the spouses, requiring the utmost good faith in their dealings with each other).

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 exists 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.

Some courts in other states have held the fiduciary duty continues while the parties contemplate dissolution of their marriage as long as the confidential relationship remains intact, and the parties are not dealing at arms length through separate agents or attorneys. *See Matter of Marriage of Eltzroth*, 679 P.2d 1369, 1372 (Or. App. 1984) ("Because the fiduciary duty is imposed as a result of the confidential relationship between the parties, it continues while the parties contemplate divorce, as long as the confidential relationship remains intact and the parties are not dealing at arms' length through separate agents or attorneys."); *Avriett v. Avriett*, 363 S.E.2d 875, 877 (N.C. App.1988) (holding that the "confidential relationship that usually exists between husband and wife" terminated when they "become adversaries" in the course of negotiating a divorce settlement); *Gabbert v. Johnson*, 632 P.2d 443, 446 (Okla. App.1981) ("Both parties were represented by able counsel. Once she filed her action, the woman no longer enjoyed a confidential relationship with her husband. He did not have to voluntarily disclose anything."); *Jeffries v. Jeffries*, 434 N.W.2d 585, 587-88 (S.D.1989) ("While it is generally true that a husband and wife do enjoy a confidential relationship, ... we do not believe that such a relationship existed here. When the parties to a marriage are negotiating a property settlement, recognizing that their interests are adverse to one another and that they are dealing at arms [sic] length, neither spouse owes to the other the duty of disclosure which he or she would normally owe if their relationship remained, in fact, a confidential one."); *McDonald v. Barlow*, 705 P.2d 1056, 1060 (Idaho App.1985) ("Throughout the property settlement negotiations, the relationship between McDonald and Barlow was that of husband and wife. The fiduciary duty arising from that relationship was not affected by the parties' separation.").

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.

4. Other Jurisdictions

In *Gerow v. Covill*, 960 P.2d 55 (Ariz. App. 1998), Wife filed a petition for dissolution after a twenty year marriage. Throughout the marriage, Husband was self-employed as a consultant. In an attempt to remove husband's business from the community, shortly after the wife's filing, husband started a corporation and was responsible for the day-to-day management of the company; however, the sole shareholder was Husband's sister-in-law. The corporation's key clients were previous clients of husband's or derived from his prior business contacts. Court found that husband breached his fiduciary duty to wife by removing a community asset, the goodwill, from the marital community and gifting it to a third party without notice to wife.

In *Smith v. Smith*, 438 S.E.2d 457 (N.C. App. 1994), review denied, 445 S.E.2d 37 (N.C. 1994), the court affirmed the dismissal of a man's action against his wife arising from her alleged breach of her spousal fiduciary duty, unjust enrichment, and intentional marital destruction. The basis of the man's claim was that his ex-wife committed numerous acts of adultery, consciously schemed to destroy the marriage to benefit from the Equitable Distribution Act, and used marital funds for her adulterous affairs. The court recognized the tort of breach of fiduciary duty to a spouse but found

that it could only occur within the context of a distinct agreement or transaction.

In *Nederlander v. Nederlander*, 517 N.W.2d 768 (Mich. App. 1994), even though a fiduciary relationship may exist between husband and wife, the breach in this case was not actionable because at the time of the divorce proceedings, the wife did not repose faith, confidence, and trust or place reliance upon the judgment and advice of her husband.

In *Beers v. Beers*, 724 So.2d 109 (Fla. Dist. Ct. App. 1998), review denied, 735 So.2d 1283 (Fla. 1998), the court recognized that fraud can consist of taking an improper advantage of this fiduciary relationship which results in a loss of marital property. Despite this recognition, the court held that one spouse may not be sued by the other in tort in the absence of a distinct agreement or transaction between the spouses because the exclusive remedy based upon Florida's dissolution statutes is within the province of the divorce court.

In *Dale v. Dale*, 66 Cal.App.4th 1172, 78 Cal.Rptr.2d 513 (1998), the court held that a woman may sue her former husband, a doctor, for fraudulently concealing assets in the divorce suit which resulted in an unfair settlement five years earlier. In this case, wife claimed that after her husband was served with notice of the divorce proceeding, he and his bookkeeper withheld from billing patients, withheld monies received as payments to the accounts receivable of the medical practice, and otherwise acted so as to artificially reduce the value of the practice. The bookkeeper prepared false ledgers, financial statements, income tax returns and other business records to conceal the withheld billings and payments. The husband affirmatively represented that his practice was experiencing financial difficulties and was near insolvency. As a result, the wife was induced to forego spousal support and to stipulate that her husband be awarded the practice as his sole and separate property. The wife's complaint consisted of a variety of legal theories, including breach of fiduciary duty, fraud, constructive fraud, intentional and negligent misrepresentation, conversion, conspiracy, fraudulent conveyance, constructive trust, and declaratory relief.

In *Swain v. Swain*, 576 N.E.2d 1281 (Ind. Ct. App. 1991), the court allowed a woman $52,000 in punitive damages plus attorney's fees and compensatory damages to stand against her ex-husband for fraudulently inducing her to take out a large bank loan for his benefit secured by her property. After the loan was secured, the parties separated and the ex-husband stopped payment on the loan. The parties were divorced when the fraud occurred, but the ex-husband had prevailed upon the woman to allow him to move in with her and attempt reconciliation. As soon as the loan was secured, ex-husband began seeing other women and moved out of the residence. The court found that a confidential relationship existed at the time the secured loan was procured and that the husband abused it.

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 dism'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 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 intervivos 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 decedent'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).

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*, 975 S.W.2d 584 (Tex. !998), and the Houston First Court of Appeals, in *Vickery v. Vickery*, 999 S.W.2d 342 (Tex. 1999) (the Court of Appeals' opinion is attached as an appendix to Justice Hecht's dissenting opinion from the denial of the petition for review), allowed recovery in tort for a spouse's fraudulent behavior. In 1998, 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. 975 S.W.2d at 585.

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.

8. *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.

B. *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 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*

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,* 975 S.W.2d at 585.

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 587. 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 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.*

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."

The Court 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. Schleuter without the creation of a separate tort cause of action between spouses. *Id.* at 587-88.

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.* at 588. 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.* The majority 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.* However, the majority 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.*

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.* at 589. 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.* 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.* at 589-90.

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 590. 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.*

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.* 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. Schleuter 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.* at 591.

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 592.

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 592-93. Accordingly, Justice Spector could find no cogent reason to treat spouses so differently than partners. *Id.* at 593.

C. *Vickery v. Vickery*, 999 S.W.2d 342 (Tex. 1999) (the Court of Appeals' opinion is attached as an appendix to Justice Hecht's dissenting opinion from the denial of the petition for review)

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 predicating 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. 999 S.W.2d at 357, *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.'" *Id.* , *citing, Bohn v. Bohn*, 455 S.W.2d 401, 412 (Tex.Civ.App.-Houston [1st Dist.] 1970, writ dism'd).

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, *Id.* at 358, relying on *Moore*, *supra*.

The *Vickery* court distinguished 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. *Id.*, *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. *Id.* at 359. 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." *Id.*

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.

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. *Id.* at 381 (emphasis added). However, only one damages question for both the breach of fiduciary duty and the fraud causes of action was submitted. *Id.* at 382. 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. *Id.* 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. *Id.*

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." *Id. 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. *Id.*, *citing, Mazique*, 742 S.W.2d at 808.

D. The Impact of *Schleuter*

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,* 975 S.W.2d at 591. 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. *See Vickery*, 999 S.W.2d at 342-45. 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.

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 savvy, 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.

Under these facts, one 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 the majority opinion in *Schlueter,* "waste of community assets" is similar to the claims brought by Mrs. Schlueter against her husband. 975 S.w.2d at 589. 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); *see 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. her. *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. *See Sprick v. Sprick*, 1999 WL 420987 at *6 n. 3 (Tex. App. – El Paso, no pet.) ("The community opportunity doctrine derives from the corporate opportunity doctrine and stands for the proposition that a spouse has an obligation to maximize the community estate by taking advantage of an opportunity to invest in a lucrative venture using community, rather than separate, funds.").

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. *Schleuter,* 975 S.W.2d at 589. 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 588*; 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. Cheryl L. Wilson, *Breach of Fiduciary Duty,* p. M-8, 16TH ANNUAL MARRIAGE DISSOLUTION INSTITUTE (1993).

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. *Schleuter,* 975 S.W.2d at 588.

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 591 (J. Hecht, dissenting) ("[b]ut the wronged spouse's economic damages must be satisfied from the community estate); *Id.* at 592 (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 decrees 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.*

Jonhston 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 down payment 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 boudoir." *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 though the implementation of a resulting trust. *Schlueter,* 975 S.W.2d at 592.

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 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. Recission

Texas recognizes the equitable remedy of recission for breaches of fiduciary duty. *Miller v. Miller*, 700 S.W.2d 941, 945 (Tex. App. – Dallas, 1985, writ ref'd n.r.e.); *Arce v. Burrow* 958 S.W.2d 239, 246, n.8 (Tex.App.-Houston [14th Dist.] 1997), *aff'd as modified*, 997 S.W.2d 229 (Tex. 1999).

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.

F. 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,* 975 S.W.2d at 589. 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 591. 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 592.

Because the Texas Supreme Court did not reach the issue of whether there was an independent cause of action for fraud against Mr. Schleuter's father, the punitive damages against the father-in-law were not disturbed by the majority's opinion. *Id.* at 590.

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.

VI. THIRD PARTY LIABILITY

Increasingly in domestic litigation, third-parties find themselves staring down the barrel of a loaded gun held, with some conviction, by a lawyer representing a party to a divorce or child-related action. Indeed, family law practitioners in Texas often involve third parties in family law matters, whether such third-parties are individuals or business entities. Consequently, the realities of third party liability have become increasingly pertinent to family law lawyers, because, as made evident hereinbelow, even family law lawyers are increasingly involved in family law cases as "third party defendants."

A. The Nature of Third Party Liability

"Liability" means legal responsibility for the event upon which a plaintiff bases suit. *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 732 (Tex. 1984). A person who suffers an indivisible injury as a result of the tortious acts of two wrongdoers has the option of proceeding to judgment against any one defendant separately, or against all in one suit. *Id.; see also, Landers v. East Texas Salt Water Disposal Co*., 151 Tex. 251, 248 S.W.2d 731 (1952). However, when there is no concert or unity of design, and two people are acting independently and tortiously causing distinct harm for which there is reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused. *Century 21 Page One Realty v. Naghad*, 760 S.W.2d 305, 310 (Tex. App.-Texarkana 1988, no writ)*; see also,* RESTATEMENT (SECOND) OF TORTS §881 (1979). Naturally, joint and several liability does not authorize payment of the same judgment twice. *Reyna v. State Nat. Bank of Iowa Park*, 911 S.W.2d 851, 856 (Tex. App.-Fort Worth 1995, writ denied).

B. Establishing Third Party Liability: Conspiracy

In *Carroll v. Timmers Chevrolet*, 592 S.W.2d 922, 925 (Tex.1979), the Texas Supreme Court noted that the concept of "civil conspiracy" is sometimes used by an injured plaintiff as a basis for establishing "joint and several tort liability" among several parties. To be distinguished from the concept of vicarious liability for concerted action (to be discussed below), civil conspiracy "came to be used to extend liability in tort...beyond the active wrongdoer to those who have merely planned, assisted, or encouraged his acts." *Id.* at 925-926, *quoting,* W. Prosser, HANDBOOK OF THE LAW OF TORTS, §46, at 293 (1971). Therefore, once a conspiracy is proven, each co-conspirator is responsible for all acts done by any of the conspirators in furtherance of the unlawful combination. *Id.* at 926.

1. The Elements of Civil Conspiracy

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*). Rather, according to the Texas Supreme Court, civil conspiracy is a "derivative tort." *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996).

To prevail on a conspiracy claim, a plaintiff must establish the following elements: (1) a combination of two or more persons; (2) an object to be accomplished (an unlawful purpose or a lawful purpose by unlawful means); (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. *Insurance Co. of North America. v. Morris*, 981 S.W.2d 667, 675 (Tex. 1998). *See Mayes v. Stewart*, 2000 WL 64038 at * 8 (Tex. App. – Houston [14th Dist.] Jan. 27, 2000, no pet.).

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 does not 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).

Further, a "meeting of the minds" is crucial to any conspiracy claim. As stated by the Texas Supreme Court, "[t]here must be an agreement or understanding between the conspirators to inflict a wrong against, or injury on, another, a meeting of minds on the object or course of action, and some mutual mental action coupled with an intent to commit the act which results in injury; in short, there must be a preconceived plan and unity of design and purpose, for the common design is of the essence of the conspiracy. *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp*., 435 S.W.2d 854, 857 (Tex. 1968). In other words, civil conspiracy requires a specific intent to agree to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996). Thus, merely proving a joint intent to engage in the conduct that results in injury is not sufficient to establish a claim for civil conspiracy. *Id.*

2. Damages in Civil Conspiracy

Damages are not presumed from the existence of a conspiracy because the gist of a civil conspiracy action is the damage resulting from the commission of a wrong which injures another, not the conspiracy itself. *Schlumberger Well Surveying Corp.*, 435 S.W.2d at 856. Several Texas courts of appeals therefore have characterized civil conspiracy as a basis for imposing exemplary damages predicated upon the existence of actual damages, rather than a cause of action complete within itself. *See, e.g, Hart v. Moore*, 952 S.W.2d 90, 98 (Tex. App.-Amarillo 1997, writ denied)*; Phillips v. Latham*, 523 S.W.2d 19, 26-28 (Tex. Civ. App.-Dallas 1975, writ ref'd n.r.e.) (holding that where no damages are found to exist, exemplary damages based upon a claim for conspiracy will not stand). However, it should be recognized that the general rule is that there is no joint and several liability for punitive damages. *Burlington Northern R. Co. v. Taylor*, 916 S.W.2d 12, 14 (Tex. App.-Houston [1st Dist.] 1995, no writ); *see also,* TEX.CIV.PRAC. & REM.CODE ANN. §41.005 (Vernon 1986). On the other hand, as already discussed, if actual damages are proven, a showing of civil conspiracy imposes joint and several liability on all co-conspirators for any actual damages resulting from acts in furtherance of the conspiracy. *Carroll,* 592 S.W.2d at 926.

3. Proving Conspiracy

Because civil conspiracies are conceived in secrecy and executed in such a manner as to avoid detection and exposure, a civil conspiracy need not be shown by direct evidence and is ordinarily established by circumstantial evidence. *See, e.g., International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d at 581-82. Such a rule follows from the nature of a civil conspiracy, for, as noted by the Texas Supreme Court:

> When men enter into conspiracies, they are not likely to call in a witness....In such cases the injured party must necessarily have recourse to circumstantial evidence. For it is only by the inferences and deductions which men properly and naturally draw from the acts of others in such cases, that their intentions can be ascertained. They are not likely to proclaim them in the hearing of witnesses.

Id. at 581.

The statute of limitations for civil conspiracy is two years. TEX.CIV.PRAC. & REM.CODE ANN. §16.003 (Vernon 1986); *see also, Stevenson v. Koutzarov*, 795 S.W.2d 313, 318 (Tex. App.-Houston [1st Dist.] 1990, writ denied).

4. *Schleuter v. Schleuter*

Richard and Karen Schlueter married in 1969. *Schlueter v. Schlueter*, 975 S.W.2d 584, 586 (Tex. 1998) (all factual recitations herein are taken from the same page of the Texas Supreme Court's opinion). In December 1992, Mr. Schlueter began investing in emus. He contributed $3,250 of community funds toward two pairs of the birds, but eventually sold his interest to his father for $1,000. The emu business was worth at least $10,000 when the sale occurred. Mrs. Schlueter did not know the details of the business and did not find out that her husband had sold his interest to his own father until after Mr. Schlueter filed for divorce.

Shortly before he filed for divorce (after a twenty-four year marriage), Mr. Schlueter accepted a $30,360.41 check from his employer as an incentive for early retirement. Mr. Schlueter turned the check over to his father for deposit in his father's account. Mr. Schleuter's father then wrote himself a check for $12,565, to reimburse "past loans" allegedly made to his son. About a week later, Mr. Schlueter filed for divorce.

Mrs. Schlueter counterclaimed for divorce and added independent tort claims against her husband and father-in-law for fraud, breach of fiduciary duty, and conspiracy. In a bifurcated trial, a jury heard the fraud and conspiracy claims, and found that Mr. Schlueter committed actual and constructive fraud in dealing with the parties' community assets, that he and his father had fraudulently transferred assets between them, and that they had engaged in a civil conspiracy to injure Mrs. Schlueter. The jury found that (1) $12,850 would compensate the community for Mr. Schlueter's and his father's actions, (2) $35,000 would compensate the community for damage caused by the conspiracy, and (3) Mr. Schlueter should pay $50,000, and his father $15,000, in exemplary damages.

Later, the trial court heard the divorce action without a jury, divided the marital assets, and rendered judgment on the jury verdict against Mr. Schlueter and his father jointly and severally for $12,850. The trial court also awarded Mrs. Schlueter $30,000 in exemplary damages against her husband, $15,000 in exemplary damages against her father-in-law.

The Austin court of appeals affirmed. The Austin court held that a spouse may bring an independent tort claim against the other spouse for fraud for which exemplary damages may be awarded, even when the fraud resulted only in a depletion of community assets and not the wronged spouse's separate estate.

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. *Id.* at 590. However, the Texas Supreme Court noted that the trial court's $12,850 judgment of actual damages against Mrs. Schlueter's father-in-law was awarded to the community estate, and, as such, represented an asset returned to the community estate, thereby making it monetarily whole. *Id.*

In her dissent, Judge Spector stated that property fraudulently transferred (in derogation of the community's interest therein) could be restored to the community by means of a judgment against a third-party. *Id.* at 592 ("[t]he fraudulently transferred, converted, or wasted community property is rightly returned to the community through a resulting trust, a money judgment against the tortfeasor-spouse, or, as here, a judgment against a third party").

The conspiracy claim against Mr. Schlueter and his father was not addressed by the Supreme Court in its opinion. Given the fact that the Texas Supreme Court held that there was no independent tort committed by Mr. Schleuter, it would appear that, had the issue been presented, the Texas Supreme Court would have held that the conspiracy claim necessarily failed. *See, Id.* at 589 ("a separate and 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").

C. Establishing Third Party Liability: Concert of Action

In *Juhl v. Airington*, 936 S.W.2d 640, 643 (Tex. 1996), the Texas Supreme "left open" the question whether Texas recognizes the "concert of action" theory of liability. In *Juhl,* a police officer brought suit against a dozen protesters for an injury he allegedly sustained to his back while trying to remove one of their group from an abortion clinic. *Id.* at 641. The trial court granted summary judgment in favor of all but two of the defendants (the protestor whom the police officer had attempted to remove did not move for summary judgment). *Id.* at 641-642. On appeal, the court of appeals reversed the trial court, holding that there was a fact issue concerning whether the defendants were acting in concert with each other and with the two defendants for whom summary judgment had not been granted. *Id.* On appeal, the Texas Supreme Court reversed the court of appeals, holding that there was no theory under which any of the participants involved in the protest could be held liable for an injury sustained by an officer in removing ***another*** demonstrator. *Id.* at 641.

In its opinion, Texas Supreme Court first stated that Prosser and Keeton had earlier articulated one version of the "concert of action" theory as follows:

> All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit, are equally liable.

Id. at 643*, quoting,* W. Page Keeton, et al., PROSSER AND KEETON ON THE LAW OF TORTS § 46, at 323 (5th ed. 1984) (hereinafter referred to as PROSSER AND KEETON ON TORTS). Further, noted the Texas Supreme Court, The Restatement of Torts also incorporated the concert of action theory, imposing liability on a person for the conduct of another which causes harm, if the defendant:

> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Id., quoting, RESTATEMENT (SECOND) OF TORTS §876 (1977) (hereinafter referred to as RESTATEMENT §876).

The Texas Supreme Court next stated that subsection (a) of RESTATEMENT §876 required at least a tacit agreement to participate in some tortious act, done in furtherance of a common goal or plan, and which caused injury. *Id.* Consequently, according to the Texas Supreme Court, the concert in action theory shared common elements with the Texas common law theory of civil conspiracy, long a recognized tort in Texas. *Id.* at 643-644. However, the Texas Supreme Court in *Juhl* remarked that it had recently held that merely proving a joint "intent to engage in the conduct that resulted in the injury" was not sufficient to establish a cause of action for civil conspiracy. *Id.* at 644, *citing, Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995). Instead, as discussed above, civil conspiracy requires a specific intent to agree to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. Thus, according to the Texas Supreme Court, because negligence by definition is not an intentional wrong, one cannot agree or conspire to be negligent, and a finding that the parties "intended to accomplish an unlawful or negligent purpose or to

accomplish a lawful purpose by unlawful or negligent means" would not support liability. *Id*., *citing*, *Triplex Communications, Inc.*, 900 S.W.2d at 720. In *Juhl,* therefore, the Texas Supreme Court stated that ***if*** it were to adopt §876(a) (note that the Texas Supreme Court does not explicitly adopt §876(a)), such section would require allegations of specific intent, or perhaps at least gross negligence, to state a cause of action. *Id.* (emphasis added.) Since in *Juhl* the plaintiff's pleadings alleged only that defendants were negligent, civil conspiracy and §876(a) were not theories upon which he could have relied to support summary judgment. *Id.*

Turning then to subsection (b) of RESTATEMENT §876, the Texas Supreme Court acknowledged that, under such section, liability could be imposed not for an agreement, but for substantially assisting and encouraging a wrongdoer in a tortious act. *Id.* In order to impose liability, §876(b) requires that the defendant have an unlawful intent, *i.e.*, knowledge that the other party is breaching a duty and the intent to assist that party's actions. *Id*. The Texas Supreme Court also acknowledged that many other states have recognized liability in at least some circumstances for such substantial assistance, though not all have formally adopted subsection (b). *Id.*

As with subsection (a), the Texas Supreme Court stated that even ***if*** it were to adopt subsection (b) in Texas, the plaintiff in *Juhl* could not recover under the terms of subsection (b), because the defendants did not provide the protester, during whose removal the plaintiff was injured, the substantial assistance necessary for liability. *Id.* According to the Texas Supreme Court, five factors can be relevant to whether the defendant substantially assisted the wrongdoer (1) the nature of the wrongful act; (2) the kind and amount of the assistance; (3) the relation of the defendant and the actor; (4) the presence or absence of the defendant at the occurrence of the wrongful act; and (5) the defendant's state of mind. *Id., citing,* RESTATEMENT §876, comment d. Fatally for the plaintiff in *Juhl,* except for the defendant's "presence or absence at the occurrence," all of such factors cut against liability (the Texas Supreme did not address §876(c) in its opinion). *Id.*

Ultimately, the purpose of the concert of action theory is to deter antisocial or dangerous behavior, such as drag racing on public streets or assisting a driver in becoming intoxicated. *Id.* at 644-645. In *Juhl,* however, the defendants' conduct was simply not the type of highly dangerous, deviant, or anti-social group activity which was likely to cause serious injury or death to a person or certain harm to a large number of people. *Id.* at 645. The nature of the defendants' conduct, combined with the facts that no defendant physically or verbally assisted any other, that the defendants had no significant relationships to each other, and that it appeared that no defendant actually intending to harm anyone by his or her passive resistance to removal by the police, did not support the imposition of liability in *Juhl. Id.*

Much in the manner of the Texas Supreme Court in *Juhl,* the Houston First Court of Appeals held that, even if the concert of action theory were recognized in Texas, the wife of a motorist who was killed in a motor vehicle collision could not recover from the passenger of the other vehicle involved in the fatal accident for negligence under the concert of action theory of liability (based on allegations that the passenger substantially assisted or encouraged the intoxicated driver of other vehicle to drive on public roads). *Shinn v. Allen*, 984 S.W.2d 308, 308 (Tex.App.-Houston [1st Dist.] 1998, no writ). In *Shinn,* the Houston appellate court first noted that the Texas Supreme Court had stated that whether Texas recognized the concert of action theory was an "open question." *Id.* at 310, *citing, Juhl,* 936 S.W.2d at 643. Nonetheless, the First Court of Appeals discussed the concert of action theory in its opinion, and indeed conducted a factual examination concerning the five factors listed in comment d to §876 that are relevant to an allegation of substantial assistance or encouragement under §876(b).

In its analysis under §876, the Houston First Court of Appeals first stated that it is commonly recognized that driving while intoxicated is an antisocial and dangerous behavior, likely to cause serious injury or death to a person (nature of the wrongful act). *Shinn,* 984 S.W.2d at 311. Next, the Houston appellate court found that there was no evidence that the passenger purchased the beer, ordered the beer, paid for the beer, encouraged the driver to consume the beer, or encouraged the driver to drive recklessly, and that there was no evidence that driver's decision to drive in an intoxicated condition was more than his alone (the kind and amount of the assistance). *Id.* According to the First Court of Appeals, there was no special relationship between the passenger and the driver, such as an employee/employer relationship, that would place one party in a position of control over the other, but rather the two were just acquaintances who decided to "hang out" one afternoon (relation of the parties). *Id.* The appellate court acknowledged that the passenger was riding in the car when the accident occurred, but stated that the mere presence of the particular defendant at the commission of the wrong, or his failure to object to it, was not enough to charge him with responsibility (presence or absence of defendant). *Id.* at 312. Finally, the Houston First Court of Appeals held that while a fact issue existed as to whether the passenger had knowledge that the driver was intoxicated, that issue alone did not create a fact issue as to whether the passenger substantially assisted or encouraged the driver; instead, the passenger's state of mind was merely one of five factors that can be relevant to whether the passenger had provided substantial assistance (defendant's state of mind). *Id.*

D. Establishing Third Party Liability: Is the Concert of Action Theory Actually an "Open Question?" (Aiding and Abetting a Breach of Fiduciary Duty)

The Texas Supreme Court has stated that it is ***settled*** as the law of Texas that where a third party knowingly participates in the breach of duty owed as a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such. *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942) (emphasis added). Texas courts of appeals have repeatedly followed *Kinzbach Tool Co. See, e.g., Hendricks v. Thornton*, 973 S.W.2d 348, 372 (Tex.App.-Beaumont 1998, writ denied) (cause of action for aiding and abetting a breach of fiduciary duty was not merely a "tag-along" claim, but was recognized in Texas as an independent cause of action); *see also, Kline v. O'Quinn*, 874 S.W.2d 776, 786 (Tex.App.-Houston [14th Dist.] 1994, writ denied); *Horton v. Robinson*, 776 S.W.2d 260, 266 (Tex.App.-El Paso 1989, no writ); *Herider Farms-El Paso, Inc. v. Criswell*, 519 S.W.2d 473, 477 (Tex.Civ.App.-El Paso 1975, writ ref'd n.r.e.).

Further, in Texas, a breach of a fiduciary duty is considered a tort. *See, e.g., Hawthorne v. Guenther*, 917 S.W.2d 924, 936 (Tex.App.-Beaumont 1996, writ denied); *CPS Intern., Inc. v. Dresser Industries, Inc.*, 911 S.W.2d 18, 28-29 (Tex.App.-El Paso 1995, writ denied) (Saudi Arabian law applied to tort claims of tortious interference, civil conspiracy, misappropriation of trade secrets, and breach of fiduciary duty). Thus, under RESTATEMENT §876, a breach of fiduciary duty is properly treated as a "tortious act," for which, if a person has aided and abetted or substantially assisted another person in committing, such person could be held liable under the concert of action theory. Since aiding and abetting a breach of fiduciary duty is fully recognized as an actionable tort in Texas, is the concert of action theory really an "open question?"

In the context of divorce litigation, 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 v. Connell*, 889 S.W.2d 534, 541 (Tex.App.-San Antonio 1994, writ denied) (emphasis added). The underlying "constructive fraud" upon which the wife in *Connell* relied to establish her claims concerned

the transfer of certain property by the husband, who was involved in numerous business entities, following the wife's agreement to dismiss an original divorce suit she had filed. In *Connell,* the wife alleged that the 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 a 349 acre community property ranch. When the loan was not paid, the lender foreclosed on the ranch. The 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.

At trial, the wife also sought to prove that the 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, the wife sued her husband, his girlfriend, and the family business corporation under various theories of conversion, actual fraud, constructive fraud, and civil conspiracy.

However, the evidence adduced at trial 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. The wife's expert accountant 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 San Antonio 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 Fourth Court of Appeals concluded that the record contained no proof of fraudulent conveyances. *Id.* at 542. Additionally, the husband's girlfriend was not the actual beneficiary of the conveyances, so there could be no third party liability where she was concerned. *Id.*

E. Establishing Third Party Liability: Independent Tort

1. *Vickery v. Vickery*

After thirteen years of marriage, the husband, a lawyer, told his wife that they needed to divorce in order to protect their assets from a pending legal malpractice claim against the husband. *Vickery v. Vickery,* 999 S.W.2d 342 (Tex. 1999) (Justice Hecht dissenting from the denial of the petition for review) (additional facts are taken from the Houston First Court of Appeals unpublished opinion, attached as an appendix to Justice Hecht's dissent). 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, among other things, gave the husband over ninety percent (90%) of the community estate, as well as 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 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 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 wife filed motions for rehearing, one year later, on December 4, 1997, the Houston appellate substituted a new opinion, unpublished, and again affirmed the trial court.

The Texas Supreme Court recently denied the petition for review filed by the husband. *See* 999 S.W.2d 342. Justice Hecht filed a blistering dissent in which he declared that *Schlueter* and the recent opinion in *Douglas v. Delp,* 987 S.W.2d 879, 884-885 (Tex. 1999) (mental anguish damages cannot be recovered for legal malpractice if the plaintiff's loss is entirely economic) required reversal of the court of appeals' holding in *Vickery. Vickery,* 999 S.W.2d at 345. Significantly, Justice Hecht included the unpublished Houston First Court of Appeals' opinion in *Vickery* as an appendix to his dissent. From such opinion, certain third party liability issues emerge.

On appeal to the court of appeals, attorney Richards raised several complaints that related solely to her, as the wife's former counsel. Included among those was the issue of whether she had breached a fiduciary duty owed to the wife and whether a trial court can award mental anguish for the attorney's breach of fiduciary duty owed to her client.

With regard to attorney Richard's argument that the evidence was legally and factually insufficient to support the jury's finding that she had breached a fiduciary duty owed to the wife, the Houston appellate court noted it was uncontroverted that Richards filed a petition for divorce in the wife's name without ever consulting the wife or obtaining her permission; that Richards prepared the husband's answer

and counterclaim; that someone in Richards' office signed the husband's answer for him; that Richards' office filed the husband's answer; and, that Richards never informed the wife that the husband filed a counterclaim. Richards testified she never informed the wife of her legal rights in the divorce, and the wife testified she never spoke to Richards about the divorce until the day the husband persuaded her to sign the divorce decree. According to the wife's testimony, she told Richards she did not want the divorce, and that Richards told her that she was doing the right thing because she was protecting the family's assets by signing the decree. Richards, on the other hand, testified she had discussed the divorce with the wife and that the wife wanted the divorce. According to the First Court of Appeals, the jury believed the wife, and sufficient evidence supported the jury's finding.

Richards also 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. The Houston appellate court was first required to assume that Richards' argument was that breach of fiduciary duty constitutes constructive fraud, and that a party cannot recover mental anguish damages for fraud. 999 S.W.2d at 377.

In response, the Houston First Court of Appeals first 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 First Court of Appeals 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." *Id.* Further, the Houston appellate court in *Vickery* also cited the Texas Supreme Court's finding that the physician-patient relationship is one that, if breached, would support an emotional distress award. *Id.*, *citing, Krishnan v. Sepulveda*, 916 S.W.2d 478, 482 (Tex. 1995).

Comparing the attorney-client relationship to that of a physician-patient, the First Court of Appeals 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." 999 S.W.2d at 377-78, *citing, State v. Baker*, 539 S.W.2d 367, 374 (Tex.Civ.App.-Austin 1976, writ ref'd n.r.e.). The Houston appellate court also found that Richard's relationship to the wife constituted a "special relationship," in that there was a contractual relationship between the two, the wife was particularly susceptible to emotional distress, and Richards knew of the wife's susceptibility. *Id.* at 378. Thus, the facts of the case, according to the Houston First Court of Appeals, supported the award of mental anguish damages. *Id.*

2. *Mayes v. Stewart*

In May 1993, Bill Stewart purchased a lottery ticket and won $3.5 million. At the time, Bill Stewart and his wife, Louella Stewart, were separated. Not wanting to share the lottery proceeds with his wife, Mr. Stewart entered into an agreement with Betty Lou Mayes, in which Ms. Mayes would claim the lottery ticket as hers and recover the twenty years of installments. Although the winnings would be in Ms. Mayes's name, Mr. Stewart would be able to spend the proceeds as he pleased. 2000 WL 64038 at *1 (Tex. App. – Houston [14th Dist.] Jan. 27, 2000, no pet.).

In November 1993, the Stewarts were divorced. At the Stewarts' divorce hearing, Mr. Stewart and Ms. Mayes both testified that that Ms. Mayes had purchased the lottery ticket and that Mr. Stewart had no claim to it. As a result, the trial court determined that the lottery proceeds were not an issue in the divorce. A final decree of divorce was signed in November 1993. *Id.*

Before long. Ms. Mayes begin selling future installments. When Ms. Mayes attempted to sell

the last ten years' installments in 1996, Mr. Stewart intervened by admitting the fraud to the buyer. Mr. Stewart also told Mrs. Stewart the truth about the lottery winnings. Subsequently, Mrs. Stewart sued Mr. Stewart and Ms. Mayes for, among other things, fraud and conspiracy. After a jury trial, the jury found that Mr. Stewart had purchased the lottery ticket, and found in favor of Mrs. Stewart on her claims against Mr. Stewart and Ms. Mayes for fraud and conspiracy. The jury awarded Mrs. Stewart $1,785,714 for the value of her community interest in the lottery winnings. The trial court entered judgment based on the jury's findings. Ms. Mayes appealed; Mr. Stewart did not. *Id.*

On appeal, Ms. Mayes argued that Mrs. Stewart's fraud and conspiracy claims against her must flow from Mrs. Stewart's causes of action against Mr. Stewart, which constitute an action for fraud on the community, not fraud and conspiracy. The Fourteenth Court of Appeals acknowledged that fraud on the community in the wrongful disposition of community assets is "the breach of a legal duty or equitable duty which violates the fiduciary relationship existing between spouses." *Id.* at *2 (quoting *In re Marriage of Moore*, 890 S.W.2d 821, 827 (Tex. App. – Amarillo 1994, no writ)). However, the appellate court stated that "Texas courts long ago found that an aggrieved spouse may maintain causes of action against third parties for the fraudulent conveyance of community property." *Id.* The court held that Mrs. Stewart's claims for fraud and conspiracy against Ms. Mayes are independent of any tort claims against Mr. Stewart.

F. Establishing Third Party Liability: Constructive Fraud

A spouse may make moderate gifts for just causes to persons outside the community. *See, e.g., Hartman v. Crain*, 398 S.W.2d 387, 390 (Tex.Civ.App.-Houston 1966, no writ). But a gift of community funds that is capricious, excessive, or arbitrary may be set aside as a constructive fraud on the other spouse. *See, e.g., Horlock v. Horlock*, 533 S.W.2d 52, 55 (Tex.Civ.App.-Houston [14th Dist.] 1976, writ dism'd w.o.j.).

1. *Osuna v. Quintana*

In *Osuna v. Quintana,* 993 S.W.2d 201 (Tex.App. -- Corpus Christi 1999, no writ), the husband and wife were married in Mexico in 1958 (citations to all further factual references from the same page of the opinion are omitted). In 1971, the husband met another woman and commenced an affair with her that continued to the time of trial. In 1983, while still married to his wife, the husband participated in a ceremonial marriage in Mexico with his girlfriend. In 1984, a child was born to the husband and his girlfriend. After that time, the husband supported his girlfriend and the child, plus two more children he had with her.

In September 1985, the husband purchased a house for the mistress and their children, providing a down payment $164,465.32 taken from one his of business accounts, as well as $20,992.51 to furnish the house, also taken from the business account. Over the next seven years, the husband made the monthly $1800 mortgage payment on the house. Sometime after 1994, the house was foreclosed upon, resulting in a surplus of $26,400, which the Chicago Title Company interpleaded into the registry of the court.

In 1985, the husband purchased two Mercedes Benz automobiles for $12,500 each, and approximately five years later, sold one of the automobiles to his girlfriend for $5,000, although he continued to drive the car. In 1994, shortly before the wife filed for divorce, the husband purchased the mistress a new Dodge minivan for which he paid approximately $17,000 in cash.

The court granted the divorce, and awarded to the wife the house in which she resided, the $26,400 in the court's registry, the 1985 Mercedes Benz, and the 1994 Dodge minivan. The court also awarded the wife a joint and several liability judgment in the amount of $460,000, representing money that the husband

had allegedly given his mistress during 1994 in fraud of the community estate.

On appeal, the girlfriend (the husband failed to file an appellate brief and therefore was dismissed from the appeal) complained that the trial court erred in awarding a $460,000 judgment against her in favor of the wife, arguing, among other things, that the wife did not prove as a matter of law the transfers were a fraud on the community; and that the girlfriend should be liable for only one-half of the amount of the alleged transfers. *Id.* at 205. The Corpus Christi Court of Appeals disagreed, stating the wife's cause of action for fraudulent transfer was based on the fiduciary relationship that exists between a husband and a wife as to the community property controlled by each spouse, and that the breach of a legal or equitable duty which violates the fiduciary relationship existing between spouses is termed "fraud on the community." *Id.* at 207. Relying on *Roberson v. Roberson*, 420 S.W.2d 495 (Tex.Civ.App.-Houston [14th Dist.] 1967, no writ), the Corpus Christi appellate court found the facts uncontroverted that the husband had provided the girlfriend $355,000.00 of community funds, and held that the transfer of these monies by the husband to his mistress constituted a fraud on the community. *Id.* at 207-08; *see also Edgington v. Maddison,* 870 S.W.2d 187 (Tex.App.-Houston [14th Dist.] 1994, no writ) (husband's creditor, as a result of a default judgment, was joined as co-respondent in divorce for fraudulent transfer of community assets and held liable for such damages). However, in *Osuna,* the Corpus Christi Court of Appeals also found that $105,000.00 of the trial court's award of $465,000.00 was ***not*** proven to be community property. *Id.* at 206.

The girlfriend additionally claimed on appeal that there was no evidence that she committed a fraud on the community. *Id.* at 208. Again, the Corpus Christi appellate court disagreed, stating that a third person who knowingly participates in the breach of a fiduciary duty may also be liable for that fraud, and noting that the mistress testified at trial that she knew as early as 1984 that the husband was married, yet she continued to accept money and gifts from him after that date. *Id.* Moreover, according to the Thirteenth Court of Appeals, a conveyance or disposition of the community may be a legal fraud even though there is an absence of intent. *Id.*

Relying on *Carnes v. Meador*, 533 S.W.2d 365 (Tex.Civ.App.-Dallas 1975, writ ref'd n.r.e.), the girlfriend also contended that the court erred in entering a joint and several judgment against her because the wife had to look first to the husband to satisfy any judgment. *Id.* In *Carnes*, the Dallas Court of Appeals held that if a spouse disposes of community property in fraud of the other spouse's rights, the aggrieved spouse has a right of recourse first against the property or estate of the disposing spouse; and, if that proves to be of no avail, then the aggrieved spouse may pursue the proceeds, to the extent of her community interest, into the hands of the party to whom the funds have been conveyed. *Carnes*, 533 S.W.2d at 371. Even though the Corpus Christi Court of Appeals itself had just recently agreed with *Carnes,* in *In re Estate of Herring*, 970 S.W.2d 583, (Tex.App.-Corpus Christi 1998, no writ), in *Osuna,* the Thirteenth Court of Appeals found that the girlfriend had waived her point of error because she did not request findings of fact or conclusions of law. 993 S.W.2d at 208. The mistress failed to present any evidence to challenge the trial court's implied finding the husband would not be able to satisfy any judgment the wife obtained against him. *Id.*

Finally, with regard to her point of error complaining of the joint and several judgment, the girlfriend argued she should only be liable for one-half of the transferred funds. In her argument, the mistress relied upon a probate case, but the Corpus Christi Court of Appeals dismissed her contention, stating that she confused the division of a community estate in a probate action with the trial court's wide discretion to divide the marital estate upon divorce. *Id.* at 208-09. In contrast to a probate case, where only the decedent spouse's one-half interest in the community estate is at issue, in a divorce action, according to the appellate court,

the entire community estate is "up for grabs," with the trial court empowered to make any division of the community property that is just and right, having due regard for the rights of each party. *Id.* The Thirteenth Court of Appeals did not otherwise explain the logical nexus between the property to be divided by the trial court and the trial court's ability to award a judgment against a third party.

In her second point of error, the girlfriend claimed that the trial court erred in awarding to the wife the $26,400 held in the court's registry, the 1985 Mercedes Benz automobile, and the 1994 Dodge minivan because: (1) the property belonged to her; (2) the wife had no claim to the property under a theory of constructive or resulting trust; and (3) with respect to the girlfriend's house, the wife's claim was barred by limitations and laches. *Id.*

The Corpus Christi appellate court disposed of the girlfriend's argument that the Mercedes was hers, despite the husband's testimony that the girlfriend had purchased the vehicle from him, on the grounds that the trial court was not required to believe this testimony, particularly in light of the girlfriend's testimony that she did not have a job and had no independent means of support, as well the husband's testimony that he still drove the car. *Id.*

The Corpus Christi Court of Appeals then relied on the settled Texas law that while 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, s*ee, e.g.*, *Horlock,* 533 S.W.2d at 55, and held that the money held in escrow after the foreclosure of the her house and the minivan both resulted from the husband's constructive fraud on the wife. *Id.* According to court's opinion, it was the husband's burden as the disposing spouse, or the girlfriend's burden as the donee, to prove at trial that the gifts were not capricious, excessive, or arbitrary. *Id.* at 209-10. Since no evidence had been presented at trial to meet such burden, the Corpus Christi Court of Appeals set aside the transfers. *Id.*

The Thirteenth Court of Appeals agreed with the wife that the property at issue was impressed with a resulting trust (implied in law when someone, other than the person in whose name title is taken, pays the purchase price of the property) for the benefit of the community estate. *Id.* Even though a resulting trust does not arise when the transferee is a wife, child, or other natural object of bounty of the person by whom the purchase price was paid, the Corpus Christi appellate court escaped this dilemma by finding that the putative Mexican marriage between the husband and the girlfriend had terminated before any of the property was purchased (on account of the girlfriend's eventual knowledge that the husband was already married), that the children of the husband and his girlfriend were not were not actual transferees of the property, that neither piece of property was titled in such a way as to implicate title in the minor children, and that no authority supported the proposition that a mistress or a lover is the natural object of a person's bounty. *Id.* at 210-11.

Finally, the Corpus Christi Court of Appeals held that the girlfriend waived her argument that the statute of limitations barred the wife's recovery because, again, she did not request findings of fact or conclusions of law regarding the issue. *Id.* at 211.

2. Statute of Limitations

In the case of *In re Estate of Herring,* 970 S.W.2d 583 (Tex.App.-Corpus Christi 1998, no writ), the Corpus Christi Court of Appeals addressed the issue of the applicable statute of limitations to claims of breach of fiduciary duty and constructive fraud. In *Herring,* 970 S.W.2d at 585, just over four years after his wife's death, the husband filed a suit incident to the administration of the deceased wife's estate, bringing claims against both his daughter, who was the administrator of the estate, and the wife's son. *Id.* The husband alleged that his wife and her son conspired secretly to transfer community property to the son, that he had been defrauded of his interest in the transferred community property, and that he did not

discover the fraudulent transfers until after his wife died. *Id.* Specifically, the husband complained of a promissory note for $15,000 to an attorney for legal services rendered to the wife's son in connection with criminal charges against the son, $8,000 in lease payments and a $15,000 judgment on default of payment on a 1985 vehicle lease for the son, and additional payments to the son exceeding $8,000 from the proceeds of the sale of a community property silver coin collection and the cash surrender value of insurance policies. *Id.* The husband asked for damages, including the value of his interest in the wrongfully transferred community property, and for damages to his credit rating which resulted from these transfers. *Id.* In other words, the husband not only sued his late wife's estate, but also attempted to pursue the proceeds of community property transferred to the son in breach of the fiduciary duty owed to him by his late wife, and as a constructive fraud on his interest in the community estate (he sued his daughter, as the administrator of the estate, for conspiracy to defraud his interest in the community estate). *Id.* at 587. The daughter filed a motion for summary judgment on the ground that the applicable statutes of limitations barred all of the husband's (her father's) claims, and the trial court granted a take-nothing summary judgment against the husband on all claims. *Id.* at 585-586.

The Corpus Christi appellate court stated that, ordinarily, a claim of fraud or misrepresentation is a claim for a debt and, as such, is governed by a four-year statute of limitations. *Id., citing,* TEX.CIV.PRAC. & REM.CODE ANN. §16.004(a)(3) (Vernon 1986). According to the Corpus Christi Court of Appeals, since a breach of fiduciary duty subsumes a claim of constructive fraud, it also is governed by a four-year statute of limitations. *Id., citing,* TEX.CIV.PRAC. & REM.CODE ANN. §16.051 (Vernon 1997). Further, as a general rule, the statute of limitations does not commence to run until the fraud is discovered or until it might have been discovered by the exercise of reasonable diligence. *Id.* Similarly, stated the Thirteenth Court of Appeals, 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. *Id.*

The Corpus Christi appellate court then analogized a cause of action to set aside a transfer of community property to a third party based on constructive fraud to a cause of action to set aside a conveyance by a debtor to a third party in fraud of his creditors, which is also regulated by the four-year residual statute of limitations. Such cause of action neither accrues, nor will limitations begin to run, until the fraud is discovered, or should have been discovered by the exercise of reasonable diligence. *Id.* Accordingly, in *Herring,* the Corpus Christi Court of Appeals concluded that the statute of limitations would bar the husband's claims for fraudulent transfer to the extent that the wife's son could prove that the husband knew or should have known of such claims prior to four years before the husband filed his petition. *Id.* Thus, the Corpus Christi appellate court reversed and remanded the trial court's summary judgment on the husband's claims for fraudulent transfer, but affirmed the summary judgment on the husband's claims for conspiracy. *Id.* at 590.

G. Establishing Third Party Liability: Transfers Pending Divorce

TEX.FAM.CODE ANN. §6.707 (Vernon 1998) provides:

> (a) A transfer of real or personal community property or a debt incurred by a spouse while a suit for divorce or annulment is pending that subjects the other spouse or the community property to liability is void with respect to the other spouse if the transfer was made or the debt incurred with the intent to injure the rights of the other spouse;
>
> (b) A transfer or debt is not void if the person dealing with the transferor or

> debtor spouse did not have notice of the intent to injure the rights of the other spouse; and
>
> (c) The spouse seeking to void a transfer or debt incurred while a suit for divorce or annulment is pending has the burden of proving that the person dealing with the transferor or debtor

In *Thomas v. Casale*, 924 S.W.2d 433, 434-435 (Tex.App.-Fort Worth 1996, no writ), the wife filed for divorce and named as co-respondents both the husband's paramour and the husband's alleged alter ego corporation. During the parties' separation, while the divorce was pending, the husband began an intimate relationship with the girlfriend. *Id.* While the divorce was pending, and shortly after the girlfriend herself had divorced, the husband moved into the girlfriend's home, agreeing to share living expenses. *Id.* At that time, the girlfriend owned a savings account with approximately $68,000 of her own money on deposit. *Id.* The husband's name was added to the account (although it was removed almost eight months before the trial of the parties' divorce). *Id.*

During a fourteen-month period, while his divorce was pending, the husband deposited a total of $68,752.93 into the savings account, but also withdrew a total of approximately $68,000 and used portions to defray some living expenses, to buy a bedroom suite for the girlfriend's home, and to pay the girlfriend $250 per month for using her car (although the husband owned a Cadillac that both he and his girlfriend drove). *Id.* at 436. Ultimately, the husband bought the car from his girlfriend with $10,000 he withdrew from the account; he also used money he withdrew from the account to pay twenty-four months' worth of his own living expenses. *Id.* Further, the husband and his girlfriend also took twelve trips while the divorce was pending, many of which were out of the country. *Id.*

The wife's suit alleged that husband devised a conspiracy to defraud her and that his girlfriend had notice of the husband's intent to injure the wife' s community property rights. *Id.* at 435. The husband's girlfriend answered that she was not a party to fraud, denied that she had ever known of the husband's alleged intent to injure the wife's rights, and alleged that the money the husband had transferred into her account was presumed to be subject to his sole management control and disposition and that she had no notice to the contrary. *Id.* In its judgment, the trial court ordered the girlfriend to surrender $61,753.00 of the money in her bank account.

The court made findings of fact and conclusions of law supporting its judgment, but the findings did not mention either the Uniform Fraudulent Transfer Act [*see,* the discussion below], or Texas Family Code §3.57 (recodified at §6.707).

On appeal, the girlfriend argued that the evidence showed no more than conjecture that she ever knew that the husband intended to defraud and injure the wife' s rights. *Id.* At trial, the wife testified that she believed the girlfriend had "complete knowledge" that the husband was acting to defraud the marital estate by putting the money into the savings account, but conceded, however, that aside from her "belief," she had no personal knowledge of what the husband may have told the girlfriend about the deposits made in the account. *Id.* Indeed, the wife only became convinced of the husband's scheme when she looked through some trash and found a four-word note written by the husband that said "Deposit in savings, please." *Id.* at 438.

According to the Fort Worth Court of Appeals, it was uncontroverted that the husband defrauded the community estate. *Id.* The girlfriend's appeal was based on a contention that the evidence was legally and factually insufficient to prove that she knew about the husband' s fraudulent intent or that the money deposited was community property. *Id.* Although the wife testified that she knew of no

savings account in the husband's name at the time she discovered the note in the trash, the Fort Worth appellate court stated that none of her testimony was sufficient to prove her vital factual allegations that the girlfriend knew that the money deposited was community property or knew that the deposits were made to defraud the wife. *Id.* Specifically, the Fort Worth Court of Appeals found no evidence that, while she shared the bank account with the husband, the girlfriend had notice of the husband's intent to defraud the wife or injure her rights to community assets, and refused to permit the trial court to infer such proof merely by weighing the credibility of those who testified. *Id.*

The evidence revealed that the husband put community funds into his girlfriend's account, but also showed that he withdrew about the same amount and spent it. *Id.* Thus, the Fort Worth appellate court concluded that the evidence left the trial court with nothing more than speculation about the extent of the girlfriend's knowledge as to whether the deposits made were community property and about the husband's possible motives for placing the money into her bank account when he had accounts of his own. *Id.* Although, according to the Fort Worth Court of Appeals, the trial court easily may have speculated that the girlfriend, living with the wife's husband and having just gone through her own divorce, was a willing participant in a plan to defraud the wife of a share of community funds, neither suspicion nor conjecture equated to proof by a preponderance of the evidence. *Id.* Consequently, the Fort Worth appellate court reversed the trial court's order that the girlfriend surrender the money in her savings account, and ordered it returned to her. *Id.* at 439.

VII. FRAUDULENT TRANSFERS

A. Texas

The Texas Uniform Fraudulent Transfer Act., TEX.BUS. & COM.CODE ANN. §24.001 *et. seq*. (Vernon 1987 & Supp. Pamphlet 2000) (hereinafter referred to as the UFTA), is generally designed to prevent transfers of property made with the intent to defraud creditors. *Connell v. Connell*, 889 S.W.2d 534, 542 (Tex.App.-San Antonio 1994, writ denied).

TEX.BUS.& COM.CODE ANN. §24.002(4) (Vernon Supp. Pamphlet 2000) 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 Supp. Pamphlet 2000), 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.

TEX.BUS.& COM.CODE ANN.§24.005(a) (Vernon Supp. Pamphlet 2000) ("Transfers Fraudulent as to Present and Future Creditors") provides:

> 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:
>
> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (B) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond

> the debtor's ability to pay as they became due.

TEX.BUS.& COM.CODE ANN.§24.006(a) (Vernon 1987) ("Transfers Fraudulent as to Present Creditors") provides:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

In *Connell,* in addition to other theories, the wife relied upon the UFTA to attack several business transactions conducted by the husband after the parties' separation. *Connell,* 889 S.W.2d at 542. On appeal, after the trial court had refused to find that such transfers were fraudulent as to the wife, the San Antonio Court of Appeals stated that, ordinarily, whether a conveyance was made with the intent to defraud creditors, or whether the grantee had knowledge or notice of such intent, were fact questions, but, where the evidence indisputably shows that the conveyance was not so made, and there is no evidence tending to connect the grantee with any intent to defraud, the issue becomes one of law. *Id.* In *Connell,* the Fourth Court of Appeals could find no evidence to show that any grantee had knowledge or notice that the husband had conveyed community property with the intent to defraud any creditor. *Id.* Therefore, since the wife proved no intent to defraud, the UFTA did not apply. *Id.*

Another recent case also determined that the UFTA did not apply to an all too common scenario in divorce actions. In *Thomas*, 924 S.W.2d at 435, the wife obtained a divorce from her husband and an order for the husband's paramour to surrender $61,753.00 held in the paramour's bank account which, the wife alleged, represented money fraudulently transferred by the husband to the wanton hussy. The husband's girlfriend appealed the order. Among other things, as discussed above, the girlfriend alleged on appeal the legal and factual sufficiency of the evidence supporting the trial court's finding that the girlfriend was liable to the wife under the UFTA. *Id.*

The San Antonio appellate court immediately concluded that the UFTA did not apply. *Id.* at 437. According to the Fourth Court of Appeals, although the term "creditor" is defined by §24.002(4) to include a spouse who has a claim for property fraudulently transferred by the other spouse, the appellate court presumed that the trial court's conclusions of law did not specifically mention the Act because there was no evidence in the record that the husband was insolvent during the time he shared an account with his girlfriend or that the sharing of the account left the husband with "unreasonably small" assets or debts beyond his ability to pay. *Id.* In this manner, the San Antonio Court of Appeals negated both §24.005 and §24.006 as grounds for liability under the UFTA.

On the other hand, parties in divorce actions sometimes may successfully invoke the protections of the UFTA. For example, 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 defendant 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, made from the pension plan to the

husband, and joined the plan as a third party defendant, 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.

B. Other Jurisdictions

All states have some form of fraudulent conveyance statutes. *See, e.g.* ARIZ. REV. STAT. § 44-1001 et seq (1987). The requirements of fraudulent conveyance statutes vary in some aspects from state to state, but most of the provisions are basically similar. The most common statute is the Uniform Fraudulent Conveyance Act (UFCA), 7A U.L.A. 430 (1985). Often, these statutes provide for civil penalties as well as criminal sanctions and have been applied in divorce cases in other jurisdictions.

In *Gerow v. Covill*, 960 P.2d 55 (Ariz. App. 1998), Wife filed a petition for dissolution after a twenty year marriage. Throughout the marriage, Husband was self-employed as a consultant. In an attempt to remove husband's business from the community, shortly after the wife's filing, husband started a corporation and was responsible for the day-to-day management of the company; however, the sole shareholder was Husband's sister-in-law. The court found that Husband had fraudulently conveyed community property to the corporation because he transferred the goodwill of the sole proprietorship to an insider (a family member), he retained control of the "sole proprietorship asset" by retaining control of the corporation, the transfer was concealed until Wife discovered the incorporation papers, Husband had already become a party to a legal action (the divorce) when the transfer occurred, Husband transferred all or substantially all of his sole proprietorship's assets, no further assets of the sole proprietorship remained when it ceased operations and no payment was ever made for the goodwill Husband brought to the corporation.

In *Clayton v Clayton*, 569 A.2d 1077 (Vt. 1989), Husband transferred his stock in a closely held family business to his father months after the divorce petition had been filed. The conveyance was made without any consideration and was found to be a voidable fraudulent transfer.

In *Nevitt v Nevitt*, 584 A2d 1134 (Vt. 1990), Husband conveyed the marital house to his mother during marriage, the court found the transfer to be without consideration and for the purpose of defrauding the wife

In *Leathem v. Leathem*, 640 N.E.2d 1210 (Ohio App. 1994), Husband conveyed the marital home to the parties' son as trustee at a time when the wife had suffered several strokes and was incapacitated and in need of funds to pay for her medical care. The court found the transfer to be intentionally fraudulent and therefore invalid.

In *In re Marriage of Frederick*, 578 N.E.2d 612 (Ill. App. 1991), Husband misrepresented information to wife about a conveyance they jointly made to a trust. The conveyance was made without consideration. The court determined the transaction was fraudulent and subject to rescission by the wife.

In *Davis v Davis*, 391 S.E.2d 255 (Va. 1990), Husband's conveyance to a girlfriend without consideration was invalid because the conveyance defrauded the wife of her right to alimony, even though equitable distribution had been waived by a premarital agreement.

In *Gaudio v Gaudio*, 580 A2d 1212 (Conn. App. 1990), Husband turned down an offer of $625,000 for the purchase of a building owned by a company in which he was the prime shareholder. Shortly thereafter, he transferred his stock for $250,000 but continued to exercise substantial control over the company. The court found that the transfer was of stock was not made for fair value and that constructive fraud existed. The appellee court determined that insolvency of the conveyor is not an appropriate requirement where the fraudulent conveyance claim is joined with a divorce action even though it might otherwise be required.

VIII. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS: POST-*TWYMAN*

A. The Elements of Intentional Infliction of Emotional Distress

The elements of the tort of intentional infliction of emotional distress are: (1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the actions of the defendant caused the plaintiff emotional distress; and (4) the emotional distress was severe. *See, Twyman*, 855 S.W.2d at 621.

B. Post-*Twyman* Fallout, or Lack Thereof

While many predicted that the decision in *Twyman* would yield massive domestic tort litigation, those predictions have not been fulfilled. In fact, there are few reported cases that address the tort of intentional infliction of emotional distress within a divorce or domestic context.

As was anticipated after the Texas Supreme Court issued its opinion in *Twyman*, the fundamental issue that sparked debate amongst the judiciary concerns the level of misconduct required to be considered "so outrageous ...and extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community." RESTATEMENT (SECOND) OF TORTS § 46 (1965), comment d. Further, the courts often disagree as to how much distress is required for that distress to be severe.

C. Texas Supreme Court: Post-*Twyman*

1. *GTE Southwest, Inc. v. Bruce,* 998 S.W.2d 605 (Tex. 1999)

In *GTE Southwest, Inc. v. Bruce,* 998 S.W.2d 605 (Tex. 1999), the Texas Supreme Court addressed the question of whether there was any evidence that the supervisor at a GTE facility intentionally inflicted emotional distress upon three of employees. The employees complained to GTE of their supervisor's conduct, alleging that he constantly harassed and intimidated them, that he repeatedly yelled, screamed, cursed, and even "charged" at them, that he intentionally humiliated and embarrassed them, and about his daily use of profanity, short temper, and his abusive and vulgar dictatorial manner. After GTE failed to take any substantive corrective action against the supervisor, the employees filed suit, alleging that GTE intentionally inflicted emotional distress on them through the supervisor. The employees asserted no causes of action other than intentional infliction of emotional distress. The jury awarded approximately $100,000.00 plus prejudgment interest to each employee. *Id.* at 609.

The Supreme Court acknowledged that an employee may recover damages for intentional infliction of emotional distress in an employment context as long as the employee establishes the elements of the cause of action.

The Supreme Court reiterated the elements of intentional infliction of emotional distress, as established in *Twyman*. The Court also cautioned that "[a] claim for intentional infliction of emotional distress cannot be maintained when the risk that emotional distress will result is merely incidental to the commission of some other tort." *Id.* at 611 (quoting *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 65 (Tex.1998)). Thus, a claim for intentional infliction of emotional distress will not lie if emotional distress is not the intended or primary consequence of the defendant's conduct.

The Supreme Court stated that Texas courts have adopted a strict approach to intentional infliction of emotional distress claims arising in the workplace. To establish a cause of action for intentional infliction of emotional distress in the workplace, an employee must prove the existence of some conduct that brings the dispute outside the scope of an ordinary employment dispute and into the realm of extreme and outrageous conduct. Such extreme conduct exists only in the most unusual of circumstances. Id. at 612-13.

The Supreme Court then considered the particular factual allegations in the case, agreeing with the overwhelming weight of authority in Texas and around the country that when repeated or ongoing severe harassment is shown, the conduct should be evaluated as a whole in determining whether it is extreme and outrageous. *Id.* at 616. The evidence showed that, over a period of more than two years, the supervisor engaged in a pattern of grossly abusive, threatening, and degrading conduct. He began regularly using the harshest vulgarity shortly after his arrival at the facility. Despite objections from the employees, the supervisor continued to use exceedingly vulgar language on a daily basis including obscene jokes, vulgar cursing, and sexual innuendo. Several witnesses testified that the supervisor used the word "f---" as part of his normal pattern of conversation, and that he regularly heaped abusive profanity on the employees. There was also evidence that the supervisor's harsh and vulgar language was not merely accidental, but seemed intended to abuse the employees. More importantly, the employees testified that the supervisor repeatedly physically and verbally threatened and terrorized them. There was evidence that he was continuously in a rage, and that would frequently assault each of the employees by physically charging at them. The employees were exceedingly frightened by this behavior, afraid that might hit them. A number of witnesses testified that the supervisor frequently yelled and screamed at the top of his voice, and pounded his fists when requesting the employees to do things. Further, the incidents usually occurred in the open rather than in private. One employee also testified that the supervisor called her into his office every day and would have her stand in front of him, sometimes for as long as thirty minutes, while simply stared at her. The employee was not allowed to leave 's office until she was dismissed, even though would periodically talk on the phone or read papers. This often occurred several times a day.

The Supreme Court recognized that, even when an employer or supervisor abuses a position of power over an employee, the employer will not be liable for mere insults, indignities, or annoyances that are not extreme and outrageous. However, the supervisor’s ongoing acts of harassment, intimidation, and humiliation and his daily obscene and vulgar behavior, which GTE defends as his "management style," went beyond the bounds of tolerable workplace conduct. The Court stated that the picture painted by the evidence at trial was unmistakable: the supervisor greatly exceeded the necessary leeway to supervise, criticize, demote, transfer, and discipline, and created a workplace that was a den of terror for the employees. The Court further noted that the evidence showed that all of the supervisor's abusive conduct was common, not rare. Being purposefully humiliated and intimidated, and being repeatedly put in fear of one's physical well-

being at the hands of a supervisor is more than a mere triviality or annoyance. *Id.* at 617.

The Supreme Court acknowledged that occasional malicious and abusive incidents should not be condoned, but must often be tolerated in our society. But once conduct such as that shown here becomes a regular pattern of behavior and continues despite the victim's objection and attempts to remedy the situation, it can no longer be tolerated. It is the severity and regularity of the supervisor' abusive and threatening conduct that brings his behavior into the realm of extreme and outrageous conduct. Conduct such as being regularly assaulted, intimidated, and threatened is not typically encountered nor expected in the course of one's employment, nor should it be accepted in a civilized society. An employer certainly has much leeway in its chosen methods of supervising and disciplining employees, but terrorizing them is simply not acceptable. If GTE or the supervisor was dissatisfied with the employees' performance, GTE could have terminated them, disciplined them, or taken some other more appropriate approach to the problem instead of fostering the abuse, humiliation, and intimidation that was heaped on the employees. Accordingly, the Supreme Court held that there was some evidence to support the jury's conclusion that the supervisor's conduct was extreme and outrageous. *Id.*

2. *Brewerton v. Dalrymple*, 997 S.W.2d 212 (Tex. 1999)

In *Brewerton v. Dalrymple*, 997 S.W.2d 212 (Tex. 1999), the Texas Supreme Court addressed the question of whether there was a fact issue concerning the defendants' conduct (i.e., whether the conduct was extreme and outrageous). Brent Dalrymple, a tenure-track professor at the University of Texas – Pan American, sued three of his colleagues and the University for, among other things, intentional infliction of emotional distress after he was terminated. The trial court granted summary judgment for the individual defendants. The Austin Court of Appeals reversed and remanded the intentional infliction of emotional distress claim, holding that a fact issue existed as to whether the defendants' conduct was extreme and outrageous.

The Texas Supreme Court disagreed, stating that the conduct about which Dalrymple complained did not rise to the level of extreme and outrageous conduct contemplated by section 46 of the RESTATEMENT (SECOND) OF TORTS and opinions of this Court applying it. The Court noted that the individual defendants made negative comments that were reflected in Dalrymple's tenure file, repeatedly recommended that Dalrymple should not be allowed to continue on tenure track, restricted his speech regarding the contents of his tenure folder, and allegedly assigned him an excessive case load. Even assuming that the defendants had retaliatory motives, the Supreme Court held that their conduct as a matter of law does not go beyond all possible bounds of decency and is not utterly intolerable in a civilized community. *Id.* at 216.

3. *Mattix-Hill v. Reck*, 923 S.W.2d 596 (Tex. 1996)

In *Mattix-Hill v. Reck*, 923 S.W.2d 596, 596 (Tex. 1996) , the Texas Supreme Court addressed the issue of whether there was any evidence that a Texas Department of Human Services ("DHS") caseworker intentionally inflicted emotional distress upon the mother of a child placed in DHS custody. The Beaumont Court of Appeals had reversed the trial court's judgment notwithstanding the verdict, holding that there was some evidence to support the jury's finding of intentional infliction of emotional distress, and reinstated the jury's award of $400,000 in actual damages. *Id.*

The facts of the case are decidedly unpleasant. The caseworker removed a minor girl from the home of her mother and stepfather after the girl accused her stepfather

of sexual molestation, the mother refused to believe the child's allegations, and also refused to require that the stepfather leave the parties' home. *Id*. At one point, the caseworker informed the mother that the girl would not be returned to her. *Id*. at 597. When the girl ran away from the foster home, the caseworker telephoned the mother to inform her of the girl's actions and during the same conversation asked the mother to come to the DHS office to sign a plan of permanent placement. *Id.* The mother testified that she was extremely upset by that conversation, became hysterical, and had to be driven home from work. *Id*. During the three days she was missing, the girl was allegedly raped by more than one man while she was under the influence of alcohol, drugs, or both. *Id*. After the stepfather confessed that he had molested the girl, the wife separated from him and instituted divorce proceedings. *Id.* The girl was ultimately returned to the mother's custody. *Id.*

The mother filed suit on her own behalf and as next friend of the girl against DHS, the caseworker, and four of her colleagues for intentional infliction of emotional distress, among other claims. *Id.* The jury awarded $3.5 million in damages to the mother and daughter from DHS and three of the individual defendants, but the trial court granted judgment notwithstanding the verdict in favor of all defendants. *Id.* The Beaumont appellate court reversed the judgment notwithstanding the verdict on the claim of intentional infliction of emotional distress, finding some evidence of intentional infliction of emotional distress by the caseworker because she asked if the mother would sign the placement plan during the same telephone conversation in which the mother was informed that the child was missing. *Id.*

In its opinion, the Texas Supreme Court reiterated the elements of intentional infliction of emotional distress, as established in *Twyman,* as well as the usual caution that liability for outrageous conduct should be found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *Id.* The court further noted that insensitive or even rude behavior does not amount to outrageous behavior. *Id.*

The Texas Supreme Court then turned to the particular factual allegation in the case, and agreed with the Beaumont Court of Appeals that the caseworker's discussion of the child's sexual activity and recommendation of birth control pills was not extreme or outrageous behavior sufficient to constitute intentional infliction of emotional distress. *Id.* at 958. However, the Texas Supreme Court could not agree with the lower court that the caseworker's telephone conversation with the mother when the child had run away was some evidence of intentional infliction of emotional distress. *Id.* Rather than being "extreme and outrageous" conduct, both telephoning the mother about the child's disappearance and requesting the mother to sign the placement papers were part of the caseworker's job. *Id.* Consequently, given the emotionally charged situations in which DHS caseworkers exists, and the conflicting interests and duties with which they may be confronted, contacting the mother about the child's disappearance was appropriate under the circumstances; similarly, the request that the mother sign the placement papers or the timing of that request was not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." *Id.* Thus, held the Texas Supreme Court, the telephone conversation between the caseworker and mother could not constitute intentional infliction of emotional distress. *Id.*

4. *Massey v. Massey*, 867 S.W.2d 766 (Tex. 1993)

Immediately after the Texas Supreme Court issued its opinion in *Twyman*, it also denied writ in *Massey*. The Texas Supreme Court upheld the Court of Appeals'

affirmation of the trial court's judgment for $362,000 based on intentional infliction of emotional distress, although the *per curiam* opinion disapproved the language and holding by the Court of Appeals that negligent infliction of emotional distress was a viable theory of recovery. *Massey,* 867 S.W.2d at 766. The dissenting opinion, however, asserted that Husband's conduct was not outrageous. The Texas Supreme Court referred to the evidence summarized by the appellate court that Husband was an angry and threatening individual who was prone to explosive behavior, and often berated his wife in public and in private, although he never physically abused her. Husband once threw a towel at Wife, sprayed beer on her, screamed at her because she could not drive a boat, slammed a door so hard it gouged a hold in the wall, threw coffee at the wall, and pulled food from the refrigerator to the floor. Husband also strictly limited the money he allowed Wife to spend, angrily confronted his Wife and her lover, and went through her garbage looking for evidence that she was drinking too much alcohol. *Id.* at 766-67.

While the dissent found that it was "certainly possible" to view Husband's conduct as outrageous, it was also possible to view his conduct as "reprehensible, demeaning, and intimidating to [Wife,] but not necessarily outrageous." *Id.* Because the result depends entirely on the personal opinions of the person asked to decide, the dissent in *Massey* determined that the case was yet another example that demonstrates the impossibility of deriving any rule that could determine what conduct was "outrageous." *Id.*

D. Courts of Appeals, Post-*Twyman*

1. *Zaremba v. Cliburn*, 949 S.W.2d 822, 827 (Tex.App.-Fort Worth 1997, writ denied)

In *Zaremba v. Cliburn*, 949 S.W.2d 822, 827 (Tex.App.-Fort Worth 1997, writ denied), the plaintiff sued the person with whom he had allegedly lived and been sexual partners, asserting, among others, a claim for intentional infliction of emotional distress "as a result of [the defendant]'s exposing [the plaintiff] to the HIV virus without any warning." The defendant filed a special exception that asserted that the plaintiff's allegations that the defendant may have exposed the plaintiff to HIV were insufficient to support a cause of action for intentional infliction of emotional distress because the plaintiff did not allege he had tested positive for HIV or that the defendant had contracted HIV, which the trial court granted. *Id.* at 827-828.

Although the defendant argued on appeal that emotional distress resulting from fear of contracting HIV, like similar claims for mental anguish damages, should be reasonably based on circumstances showing actual exposure to the disease causing agent, and therefore such a claim must necessarily allege either that the plaintiff had tested positive for HIV or that the defendant had contracted HIV, the Fort Worth Court of Appeals held that the plaintiff's pleading failed to state a claim because it failed to allege that the defendant's actions were intentional or reckless and that his conduct was extreme and outrageous. *Id.* at 828. The plaintiff's pleading alleged that he suffered "severe mental anguish" "[a]s a direct and proximate result of [the defendant]'s acts and willful or negligent disregard for [their] relationship," adding that the wrong was "aggravated " by "wilfulness and wantonness," but wholly failed to allege that the defendant's conduct was extreme or outrageous. *Id.* The Fort Worth appellate court found fatal the deficiency in the plaintiff's pleading, since, under *Twyman,* liability for outrageous conduct should be found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *Id.*

Moreover, according to the Fort Worth Court of Appeals, the plaintiff's pleading failed to specifically allege facts sufficient to

determine whether the plaintiff's emotional distress rose to the level of severity necessary to sustain a claim for intentional infliction of emotional distress. *Id.* The plaintiff alleged that he suffered emotional distress, including but not limited to nervousness, distractibility, weight loss, difficulty sleeping, humiliation, disgrace, grief, sorrow and mental suffering. *Id.* In Texas, "emotional distress" includes all highly unpleasant mental reactions such as fright, humiliation, embarrassment, anger, worry, and nausea, but, stated the Fort Worth appellate court, Texas law intervenes only where the emotional distress is so severe that no reasonable person should be expected to endure it. *Id.*

Ultimately, therefore, although the defendant's special exception may not have stated precisely the reason why the plaintiff's petition failed to state a claim for intentional infliction of emotional distress, the Fort Worth Court of Appeals held that the trial court acted properly in sustaining the special exception. *Id.*

2. *C.M. and L.M. v. Tomball Regional Hospital*, 961 S.W.2d 236 (Tex.App.- Houston [1st Dist.] 1997, no writ)

In *C.M. and L.M. v. Tomball Regional Hospital*, 961 S.W.2d 236, 244 (Tex.App.-Houston [1st Dist.] 1997, no writ), the mother of a 15-year-old rape victim brought action on the child's behalf against the hospital where she had initially gone for care following rape, including the hospital nurse who had performed the initial screening, alleging that the nurse's conduct and statements with regard to the minor were so "extreme and atrocious" that they rose to the level of intentional infliction of emotional distress. Specifically, the mother testified that nurse treated them like dirt and told them, "[w]e do not like to deal with rape victims." *Id.* She also testified about remarks made by the nurse implying that the minor could have lost her virginity by falling, or riding a bike or a horse, rather than by being a victim of rape. *Id.* The evidence showed that the nurse interviewed the plaintiffs in the hospital's public waiting room, rather than in a private room. *Id.* As a result, the plaintiffs argue that the nurse's behavior, coming from a health-care provider in the context of an admittance interview with a sexually assaulted minor, rises to the level of intentional infliction of emotional distress. *Id.* The nurse filed a motion for summary judgment on the grounds that her conduct did not constitute intentional infliction of emotional distress as a matter of law, which the trial court granted. *Id.*

In the appeal brought by the mother, the Houston Court of Appeals bluntly stated that the Texas Supreme Court meant exactly what it said in *Twyman* and the alleged conduct of the nurse did not meet the standards for intentional infliction of emotional distress as a matter of law. *Id.* The Houston appellate court noted that the nurse's conduct was an isolated contact with the plaintiffs, taking place while she was doing her job, and although she was doing her job badly, and was rude, insensitive, and uncaring, the nurse's conduct did not rise to the level of intentional infliction of emotional distress under prevailing standards. *Id.* at 245.

3. *Villasenor v. Villasenor*, 911 S.W.2d 411 (Tex.App.-San Antonio 1995, no writ)

The San Antonio Court of Appeals reversed a judgment for intentional infliction of emotional distress in the amount of $30,000 on the basis that a former Husband failed to prove that he suffered severe emotional distress. *Villasenor*, 911 S.W.2d at 416. In *Villasenor*, Husband testified that it "hurt" him when he did not see his kids for a period of a week, that he was "emotionally upset and hurt" by his former wife's behavior, and that he "cried" after certain events. As the Court correctly noted, a plaintiff must show that the distress was so severe that no reasonable person should be expected to endure it, and that he or she suffered more than mere worry, anxiety, vexation, embarrassment or anger.

Id. at 416-17, *citing, Regan v. Lee*, 879 S.W.2d 133, 136 (Tex.App.-Houston [14th Dist.] 1994, no writ). In *Villasenor*, there was no evidence that Husband experienced nauseousness, loss of appetite, sleeplessness, depression, fear or rage, or that he sought professional help or suffered any pecuniary losses from his former Wife's conduct. *Id.* The Court accurately stated that proof of physical injury is not required in order to recover for emotional distress under *St. Elizabeth Hospital v. Garrard*, 730 S.W.2d 649, 654 (Tex. 1987); yet, the former Husband in this case failed to offer evidence of severe pain, and did not show how the distress was unendurable. *Id*.

4. *Metzger v. Sebek*, 892 S.W.2d 20 (Tex.App.-Houston [1st Dist.] 1994, writ denied)

The Houston First Court of Appeals held that a plaintiff could not recover damages for intentional infliction of emotional distress from defendants who had "falsely branded him as a child abuser." *Metzger*, 892 S.W.2d at 48. The Court found that the issue was not the truth or falsity of those allegations. Based upon the record, when there was support for the determination of abuse made by the defendants, such conduct could not be considered "outrageous." *Id.*

5. *Behringer v. Behringer,* 884 S.W.2d 839 (Tex.App.-Fort Worth 1994, writ denied)

In *Behringer*, the Fort Worth Court of Appeals affirmed a $13,000 judgment based on a finding that Wife intentionally and recklessly engaged in extreme and outrageous conduct that caused husband severe emotional distress. The appellate court examined the evidence of Wife's conduct to determine that it was both intentional and reckless, as well as extreme and outrageous.

Among other incidents, the evidence established that Wife told husband that she could make one telephone call and he would be gone; that he needed to keep his head over his shoulder; that someone might beat him like he had never been beaten before; that she pointed a pistol, which was a toy but resembled Husband's gun that had recently been taken, at Husband and pulled the trigger several times; that, at the same time she was making death threats, she also hired private investigators to follow Husband; and that she continuously accused him of having girlfriends, although she offered no basis for that belief. She also implicated their friends in various plots to uncover Husband's extramarital activities which had no basis, and accused Husband of trying to poison her. *Behringer,* 884 S.W.2d at 842-844. Noting that the Court would question whether reasonable minds would differ in their assessment of the Wife's conduct, at the very least, it was sufficiently extreme and outrageous to support the trial court's finding on the issue. *Id.* at 844.

Additionally, the Fort Worth appellate court determined that the evidence supported the trial court's finding that Husband suffered severe emotional distress. Husband testified that, after Wife threatened him with death and serious bodily injury, he cried in front of other people many times when discussing the situation, that he was in fear of his life every day, that he often slept on the couch to have access to both the front and back doors, that he always slept with a pistol beside his bed every night, and that he did not leave his house at night for 2 ½ years because he was so afraid. Other friends testified that he was much thinner than before, that he cried all of the time, and that he would not go out for a cup of coffee. *Id.* at 844-45.

E. No Expert Testimony on Outrageousness of Conduct

In *GTE Southwest, Inc. v. Bruce,* 998 S.W.2d 605 (Tex. 1999), several employees brought an intentional infliction of emotional distress claim against their employer, based on the extreme and outrageous conduct of a supervisor**,** who continually and intentionally intimidated, humiliated, frightened and

embarrassed the employees, including incidents in which the supervisor went into rages, charged employees, got in their faces and cursed at them, as well as other acts.

Over the employer's objection, the trial court permitted the testimony of three different expert witnesses that the supervisor's conduct was "extreme and outrageous." *Id.* at 619. The Supreme Court stated that the question of the outrageousness of the supervisor's conduct was a mixed question of law and fact. *Id.* at 619-20. But to be admissible, expert testimony must generally involve scientific, technical, or other specialized knowledge as to which a witness could be qualified as an expert by knowledge, skill, experience, training, or education, and it must assist the trier of fact. *Id.* at 620. The Court noted that except in highly unusual circumstances, expert testimony concerning extreme and outrageous conduct could not moot this standard. *Id.* The Court concluded that the admission of expert testimony in this case was error, but the error was harmless because it was cumulative of other evidence. *Id.*

F. Venue

One reported intentional infliction of emotional distress case was actually a dispute over the proper venue for a former Wife to bring suit against her ex-husband and his paramour, who allegedly berated her and caused her severe emotional distress during three separate instances when both parties were present in the county where suit was brought. *Newton v. Newton*, 895 S.W.2d 503 (Tex.App.-Fort Worth 1995, no writ). The appellate court held that venue for a cause of action for intentional infliction of emotional distress brought against the Plaintiff's husband and his paramour for acts occurring during the marriage was not limited to the county in which the divorce was granted; like any other suit in tort, venue is proper in any county in which all or part of the cause of action accrued. *Id*. at 506-07.

G. Duty Not to Intentionally Cause Emotional Distress

Texas appellate courts have also been required to gauge other parameters involved in the new tort. The Austin Court of Appeals addressed the issue of a duty owed by one person not to intentionally cause severe emotional distress to another. In *Kanetzky v. Murphy*, 862 S.W.2d 653, 657 (Tex.App.-Austin 1993, no writ), the appellate court held that the maternal grandparents/possessory conservators of a child owed no affirmative duty to the father/possessory conservator and his new wife not to intentionally cause them emotional distress.

At the time of divorce, the mother was appointed as sole managing conservator of the parties' two children, and her parents and the children's father were appointed as possessory conservators. The youngest child began exhibiting behavior that indicated the child may have been sexually abused. Psychological testing and therapy of the child, as well as of the parents and an older stepbrother, indicated that the older stepbrother may have been sexually abusing the youngest child. After an agreed modification order was entered, the father sued the maternal grandparents, the day care center, and its various employees, alleging tortious interference with the father's relationship with his children, emotional distress, and civil conspiracy. At the heart of all of these claims was whether the maternal grandparents owed any duty to their former son-in-law.

In determining that there was no affirmative duty owed, the Third Court of Appeals observed that common law, as well as the Texas Family Code, provides only for duties owed to the child, and not to other conservators. *Id.* at 657. Under the facts of the case, the Austin appellate court did not find that the grandparents owed the father an affirmative duty of non-interference "when such conduct would clearly conflict with their duty as possessory conservators to protect

their grandchildren." *Id.* Because the father could not establish an affirmative duty owed to him by the grandparents, his claim for emotional distress also failed. The Austin appellate court reiterated the language from the Texas Supreme Court's opinion in *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993), stating "a claimant may recover mental anguish damages only in connection with defendant's breach of some other legal duty." *Kanetzky*, 862 S.W.2d at 657.

H. No Affirmative Duty to Intervene

It is clear after *Boyles v. Kerr* that there is no cause of action in Texas for negligent infliction of emotional distress, but there are also other contexts in which negligence is not sufficient to establish tort liability among spouses. For example, in the case of *Rampel v. Wascher*, 845 S.W.2d 918 (Tex. App.-San Antonio 1993, writ denied), the San Antonio Court of Appeals 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. However, the appellate court further noted that its decision did not preclude liability for intentional or negligent infliction of injury by an affirmative act. *Id.* In *Rampel*, the plaintiffs were comprised of the wrongful death beneficiaries of Wife, who died near her hot tub after consuming alcohol and pills she allegedly received from her osteopath Husband.

The plaintiffs tried to assert that a physician-patient relationship existed between Husband and Wife. Husband had treated 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 Wife's death, as 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 Husband to himself to relieve his back pain, rather than for Wife. *Id*. at 921.

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 Husband was not acting as Wife's physician the night of her death was supported by the evidence. *Id.* at 922.

Further, the plaintiffs asserted that a family relationship is a special relationship that imposes a duty of care on the other family members. Thus, the plaintiffs complained 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. As the Court of Appeals stated, 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.*

In short, plaintiffs desired to expand the moral obligation that spouses and family members owe each other into a legal obligation. *Id.* Plaintiffs sought to establish Husband's negligence on the basis that he had "a duty to take affirmative action to aid and protect [Wife] which [Husband] violated by allowing or encouraging [Wife] to drink alcoholic beverages and by leaving her alone and unsupervised in a hot tub after he knew or should have known that she ingested central nervous system depressant drugs and alcohol, and by failing to assist [Wife] out of the hot tub." *Id.* at 925.

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. *Id.* Hence, the Fourth Court of Appeals declined to impose upon spouses

and family members a legally redressable affirmative duty to act, which would produce a right to bring an action for money damages. *Id.* Thus, spouses and family members have no legal right of action against each other arising from failure to take affirmative action to prevent injury. *Id.;see also, Jamar v. Patterson*, 910 S.W.2d 118, 121 (Tex.App.-Houston [14th Dist.] 1995, writ denied) (it is generally true that a person is generally under no duty to protect another from his own negligence); *Childers v. A.S.,* 909 S.W.2d 282, 289 (Tex.App.-Fort Worth 1995, no writ) (mother of minor child owed no duty to the child's friend or the friend's parents to prevent her minor child from harming the friend by inappropriate sexual contacts, where all such sexual acts between the minor child and the friend took place in the friend's home, outside presence and supervision of the minor's parents and without their knowledge).

IX. INVASION OF PRIVACY

A. Texas Recognizes a Cause of Action for Invasion of Privacy

Texas did not recognize a cause of action for any type of invasion of privacy until the Texas Supreme Court's decision in *Billings v. Atkinson,* 489 S.W.2d 858 (Tex. 1973). In *Billings,* a telephone company employee had placed a wiretap on the plaintiff's residential phone line and had apparently listened to private conversations. The Texas Supreme Court noted that the majority of jurisdictions in the United States recognized an independent cause of action for the invasion of privacy, and held that an invasion of the right of privacy--*i.e.,* a person's right to be left alone in his or her own affairs--constitutes a legal injury for which a remedy will be granted. *Id.* at 860.

Texas also recognizes another privacy right, that of the right to freedom from disclosure of embarrassing private facts. *Industrial Found. of the South v. Texas Indus. Accident Board,* 544 S.W.2d. 668, 682 (Tex. 1976), *cert. denied,* 430 U.S. 931, 97 S.Ct. 1550, 51 L.Ed.2d 774 (1977). The tort of public disclosure of private facts has three elements: (1) publicity was given to matters concerning one's personal life; (2) publication would be highly offensive to a reasonable person of ordinary sensibilities; and (3) the matter publicized is not of legitimate public concern. *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473-474 (Tex. 1995).

However, the State may not protect an individual's privacy interests by recognizing a cause of action in tort for giving publicity to highly private facts if those facts are a matter of public record. *Industrial Found. of the South,* 540 S.W.2d at 682. Once information is made a matter of public record, the protection accorded freedom of speech and press by the First Amendment may prohibit recovery for injuries caused by any further disclosure of and publicity given such information. *Id.* at 684. For example, police offense and arrest records are public records, subject to certain limitations such as when the release of the particular information may impede an on-going investigation or may raise safety concerns for confidential informants. *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex.Civ.App.-Houston [14th Dist.] 1975), writ ref'd n.r.e., 536 S.W.2d 559 (Tex.1976) (*per curiam*). Thus, summary judgment was proper against the claims for invasion of privacy of the family members of an individual who had committed suicide after a newspaper had published a report which listed his name and fact that he had been arrested for indecent exposure in city park. *See, Hogan v. Hearst Corp.,* 945 S.W.2d 246, 251 (Tex.App.-San Antonio 1997, no writ).

Furthermore, Texas does not recognize the "false light invasion of privacy" tort**,** which is defined by the RESTATEMENT (SECOND) OF TORTS, Section 652E, as giving "publicity to a matter concerning another that places the other before the public in a false light... if (a) the false light in which the other was placed would be highly

offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." *See, Cain v. Hearst Corp*, 878 S.W.2d 577, 578 (Tex. 1994). In *Cain,* the Texas Supreme Court refuse to adopt the "false light invasion of privacy" tort because (1) it largely duplicates other rights of recovery, particularly defamation; and (2) it lacks many of the procedural limitations that accompany actions for defamation, thus unacceptably increasing the tension that already exists between free speech constitutional guarantees and tort law. *Id.* at 579-580; *see also, KTRK Television v. Felder,* 950 S.W.2d 100, 108 (Tex.App.-Houston [14th Dist.] 1997, no writ) (the tort of false light invasion of privacy is not recognized in Texas, where teacher sued television station and two reporters for, among other things, false light invasion of privacy, based on broadcast concerning allegations by parents that teacher had physically threatened and verbally abused kids).

B. Tension?: Family Law Is About Private Facts

In a child custody case, a lawyer files an affidavit on behalf of his client, the former wife, that alleges, apparently truthfully, that the former husband's current live-in girlfriend has AIDS. *See*, Robert Elder, "Just What We Don't Need: HIV Disclosure As Trial Strategy," TEXAS LAWYER, Vol. 13, No. 1, p. 2 (March 17, 1997). The girlfriend sued the lawyer, alleging that the lawyer violated the HIV and AIDS confidentiality provisions of the Texas Health and Safety Code. She sought actual damages, costs and attorney's fees. The case raises interesting questions about the balance between the best interests of the children and the privacy interests of other persons involved.

Does disclosure that a person has AIDS, or is diagnosed as HIV-positive, fall within the elements of an actionable invasion of privacy as set out in *Star Telegram*?

Invariably, mental health records appear in custody cases. Is there an identifiable outer limit concerning the persons to whom such information may be disclosed? Given that opposing lawyers are increasingly becoming the targets of disgruntled family law litigants, privacy issues may deserve some attention. As yet, the cases offer little or no guidance.

C. Selected Wiretapping Issues

Recent advances in technology have challenged traditional wiretap laws beyond the "mere" recording of telephone conversations. Wiretap laws must now address such issues as eavesdropping on children's conversations, inadvertent wiretaps and voicemail, and access to a person's rental and sale of video tapes. *See* TEX. CIV. PRAC. & REM. CODE §§ 123.001-123.004 (the Texas wiretap statute); 18 U.S.C. §§ 2510-2520 (the federal wiretap statute); 18 U.S.C. §§ 2701-2711 (the federal stored communications statute). Several Texas authorities have addressed more traditional wiretap situations, but few have addressed the more unusual situations. *See Collins v. Collins*, 904 S.W.2d 792 (Tex. App. -- Houston [1st Dist.] 1995), writ denied per curiam, 923 S.W.2d 569 (Tex. 1996); *Turner v. PV International Corp.*, 765 S.W.2d 455 (Tex. App. -- Dallas 1988), writ denied per curiam, 778 S.W.2d 865 (Tex. 1989).

1. Overview of Wiretap Laws

(a) TEX. CIV. PRAC. & REM. CODE §§ 123.001-123.004: Interception of Communication

The Texas wiretap statute provides a cause of action against anyone who (1) intercepts, attempts to intercept, or employs or obtains another to intercept or attempt to intercept a "communication," (2) uses or divulges information that he or she knows or reasonably should know was obtained by interception of a "communication," or (3) as a landlord, building operator, or communication common carrier, either personally or through an agent or employee, aids or knowingly

permits interception or attempted interception of a "communication." TEX. CIV. PRAC. & REM. CODE § 123.002. Section 123.001(1) defines "communication" as speech uttered by a person or information including speech that is transmitted in whole or in part with the aid of a wire or cable. TEX. CIV. PRAC. & REM. CODE § 123.001(1). It also defines "interception" as the aural acquisition of the contents of a communication through the use of an electronic, mechanical, or other device that is made without the consent of a party to the communication. TEX. CIV. PRAC. & REM. CODE § 123.001(2). In addition, section 123.004 provides relief, among other things, in the form of an injunction prohibiting a further interception, attempted interception, or divulgence or use of information obtained by an interception. TEX. CIV. PRAC. & REM. CODE § 123.004(1). Thus, the Texas wiretap statute is limited to speech uttered by a person or information including speech and the aural acquisition of the contents of a communication. It does not include "non-speech" communication such as data, signals, images or sounds.

(b) The Federal Wiretap Statute: 18 U.S.C. §§ 2510-2520

The federal wiretap statute is more complex and sophisticated than the Texas wiretap statute. Section 2510 provides the following definitions:

> (1) "wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception ... and such term includes any electronic storage of such communication;
>
> (2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;
>
> * * * *
>
> (4) "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device;
>
> (5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication....
>
> * * * *
>
> (8) "contents", when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication;
>
> * * * *
>
> (12) "electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include--
>
> (A) any wire or oral communication;
>
> (B) any communication made through a tone-only paging device;
>
> (C) any communication from a tracking device (as defined in section 3117 of this title); or

> (D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds;
>
> * * * *
>
> (18) "aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception.

18 U.S.C. § 2510.

Section 2511(1) provides civil and criminal penalties for any person who

> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
>
> (b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when--
>
> (i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or
>
> (ii) such device transmits communications by radio, or interferes with the transmission of such communication ....
>
> * * * *
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection....

Section 2511 prohibits the use of information others have obtained by wiretapping as well as the wiretapping itself. 18 U.S.C. §§ 2511(1)(c), (d). *See Chandler v. United States Army*, 125 F.3d 1296, 1298 (9th Cir. 1997). However, it is not illegal for a person to intercept a wire, oral, or electronic communication when that person is a party to the communication or when one of the parties to the communication has given prior consent, or to use a pen register or a trap and trace device (such as Caller ID). 18 U.S.C. § 2511(2)(d), (h)(i). Section 2515 excludes any part of the contents of any wire or oral communication, including any evidence derived from any wire or oral communication, from admission in any trial, hearing, or other proceeding in or before any court when the wire or oral communication was intercepted in violation of the federal wiretap statute. The limitation on use of information is based upon improper interception regardless of whether the interception was governmental or private. *See Chandler v. United States Army*, 125 F.3d at 1298.

(c) The Federal Stored Communications Statute -- 18 U.S.C. §§ 2701-2711

Section 2701 provides criminal penalties for any person who

> (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or

> (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system ....

18 U.S.C. § 2701.

A violation of the federal stored communications statute is punishable by criminal penalties and civil penalties including equitable or declaratory relief and damages. However, the remedies and sanctions described in the federal stored communication statute are the only judicial remedies and sanctions for nonconstitutional violations. 18 U.S.C. § 2708. *See United States v. Smith*, 155 F.3d 1051, 1056 (9th Cir. 1998). Section 2710 of the federal stored communications statute prohibits a video tape service provider (i.e., a video store) from knowingly disclosing information which identifies whether a person has requested or obtained specific video materials or services.

2. Eavesdropping on Children's Conversations With a Parent

Husband is worried about his young daughter because she is upset every time she talks to her mother on the telephone. Husband records several telephone conversations between his estranged Wife and their daughter without their knowledge or consent. Does this violate any wiretap statutes?

(a) Texas

Husband's conduct violates the Texas wiretap statute. In *Collins v. Collins*, the Court of Appeals considered the admissibility of tapes in which the husband recorded telephone conversations between the wife and the minor child. The Court held that the tape recordings were not admissible because they were illegally obtained under state and federal wiretap statutes. 904 S.W.2d at 799. The Court explained:

> Although the Texas wiretap statute does not specifically provide for the exclusion of illegally obtained "communications," the provisions for a cause of action for divulging wiretap information and the injunctive remedies provided in section 123.004 are sufficient to rebut the presumption of admissibility under rule 402 [of the Rules of Evidence]. Because the tapes were illegally obtained under the federal and state statutes, the trial court should not have admitted them into evidence on the issue of custody.

904 S.W.2d at 799.

(b) Federal wiretap statute

Husband's conduct probably does not violate the federal wiretap statute. Some federal courts have acknowledged that recording a spouse's conversations with a non-consenting, third-party adult is qualitatively different from a custodial parent's recording a minor child's phone conversation within the home. *See Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991). This is reflected in the federal wiretap statute which includes two exceptions that may be applicable when a parent listens in on a child's conversation with the other parent -- the consent exception, 18 U.S.C. § 2511(2)(d), and the extension phone exception, 18 U.S.C. § 2510(5)(a)(i).

(i) The consent exception

Section 2511(2)(d) provides that it is not unlawful to intercept a communication when one of the parties has given prior consent to the interception. In *Campbell v. Price*, 2 F.Supp.2d 1186 (E.D. Arkansas 1998), the husband and wife were involved in a custody dispute over their minor daughter. The husband recorded several telephone conversations between the daughter and her mother without first obtaining either's consent. The wife sued the husband and others for violation of the federal wiretap statute.

Relying on *Pollock v. Pollock*, 975 F.Supp. 974 (W.D. Ky. 1997) and *Silas v. Silas*, 680 So.2d 368 (Ala. Civ. App. 1996), the Court held that a custodial parent may intercept a child's telephone conversations when based upon a good faith belief that, to advance the child's best interests, it is necessary to consent on behalf of the minor child. 2 F.Supp.2d at 1191. The Court granted summary judgment in favor of the husband.

(ii) The extension phone exception

Section 2510(5)(a)(i) defines "electronic, mechanical, or other device," which is necessary to "intercept" any communication, to allow a party to record a conversation from an extension phone. In *Campbell v. Price*, the Court held that the extension phone exception applies to a situation in which a parent records his or her child's phone conversation from a phone extension within the parent's home. 2 F.Supp.2d at 1191. The Court granted summary judgment in favor of the husband.

3. Inadvertent Wiretaps

Husband calls wife and the wife's telephone or answering machine malfunctions so that the husband can hear what is going on in the wife's home without the wife's knowledge. Husband listens for awhile and hangs up. He then realizes that his answering machine has recorded the "conversation." Does this violate any wiretap statutes?

(a) Texas

Husband's conduct may violate the Texas wiretap statute. The Texas wiretap statute is a "strict liability" wiretap statute. It provides a cause of action against a anyone who (1) intercepts, attempts to intercept, or employs or obtains another to intercept or attempt to intercept a "communication," or (2) uses or divulges information that he or she knows or reasonably should know was obtained by interception of a "communication." The statute is violated even if the interception is accidental and not intentional. Thus, even an unintentional interception of a conversation is a violation of the statute. However, interception does not include the ordinary use of telephone or telephone equipment which may apply in this situation.

Normally, if a spouse recorded a telephone conversation with another spouse, the recording spouse had consented to the recording and the wiretap statute did not apply. *See Kotrla v. Kotrla*, 718 S.W.2d 853 (Tex. App. -- Corpus Christi 1986, writ ref'd n.r.e.). But in this situation, the husband did not intend to record the "communication" and in fact did not realize that it had been recorded until later. As a result, he could not have consented to the recording. Thus, it is not clear whether he violated the wiretap statute. However, if the husband called the wife with the intent to record their conversation, he probably did not violate the wiretap statute.

(b) Federal wiretap statute

Husband's conduct probably did not violate the federal wiretap statute. The federal wiretap statute requires that interceptions be intentional before liability attaches, thereby excluding inadvertent interceptions. *See Thompson v. Dulaney*, 970 F.2d 744, 748 (10th Cir. 1992); *Sanders v. Robert Bosch Corp.*, 38 F.3d 736, 742-43 (4th Cir. 1994). In *Sanders*, the Bosch Company had installed a tape recording device which recorded all telephone conversations on some telephone lines. After some controversy arose about the recordings, the Company discontinued recording telephone conversations. However, due to a design defect in a communications console, a handset microphone remained able to pick up ambient noise in the guards' office and transmitted it to the Company's security control room. The ambient noise could be audited by turning up the volume control. However, the Company's officials did not know of the open microphone until a security supervisor brought it to their attention. Apparently no Company employee ever listened to, recorded, or otherwise ever acquired any conversations by means of the open microphone. A security guard sued the

Company alleging, among other things, that the open microphone transmitting ambient noise from the guards' office violated the federal wiretap statute. The district court found that there was no interception of any oral communications concerning the open microphone. The Court of Appeals agreed, holding that the interception must be intentional. Since no one knew that the microphone was open, any interception was unintentional.

4. Voicemail

Wife suspects Husband of adultery. She surreptitiously obtains the access code to the husband's voicemail and begins to access the husband's voicemail. After a few days, the wife begins recording the messages on the voicemail. Does this violate any wiretap statutes?

(a) Texas

Wife's conduct violates the Texas wiretap statute. The Texas wiretap statute does not distinguish between a communication which is intercepted while in transit such as a telephone conversation or while in storage such as a voicemail message. However, it is clear that the husband did not consent to the recording of his voicemail messages.

(b) Federal wiretap statute

Wife's conduct probably violates the federal stored communications statute but probably does not violate the federal wiretap statute. The federal wiretap statute prohibits the interception of wire, oral or electronic communications. The federal stored communications statute prohibits intentionally accessing information in electronic storage. As a result, there is a temporal difference between interception of a communication at the time of transmission and retrieving or accessing a communication after it has been put in electronic storage. *See United States v. Moriarty*, 962 F.Supp. 217, 220-21 (D. Mass. 1997). *See also Payne v. Norwest Corp.*, 911 F.Supp. 1299, 1303 (D. Montana 1995). *But see United States v. Smith*, 155 F.3d at 1055-59. The federal wiretap statute governs the interception of a communication at the time of transmission while the federal stored communications statute governs retrieving or accessing a communication after it has been put in electronic storage. In *Moriarty*, the defendant was accused of listening to and obtaining the contents of voice mail messages while they were in electronic storage. The Court held that the federal stored communications statute applied: "Listening to a stored voice mail message does not make the act an 'intercept' in violation of Section 2511 [the federal wiretap statute]. Only the interception of voice mail while in transmission, like a wiretap on a telephone in use, can amount to a violation of Section 2511." 962 F.Supp. at 221. But the remedies and sanctions described in the federal stored communication statute -- criminal penalties and civil penalties including equitable or declaratory relief and damages -- are the only judicial remedies and sanctions for nonconstitutional violations. 18 U.S.C. § 2708. *See United States v. Smith*, 155 F.3d at 1056.

In *United States v. Smith*, the Court of Appeals acknowledged that both the federal wiretap statute and the federal stored communication statute appeared to apply to the recording of a voice mail message. 155 F.3d at 1056. However, the Court concluded that "the act of retrieving and recording [the] voicemail message constituted an 'intercep[tion],' and is therefore governed, not by the Stored Communications Act but, instead, by the Wiretap Act...." 155 F.3d at 1059.

5. Discovery of Specific Video Materials or Services From a Video Tape Service Provider: Section 2710 of the Federal Stored Communications Statute

Husband suspects Wife of certain deviate sexual propensities but cannot find any

evidence. Husband's attorney subpoenas all of the local "adult" video stores hoping to discover some evidence. Can the Husband discover this evidence?

Husband probably cannot discover this evidence. Section 2710 of the federal stored communications statute prohibits a video tape service provider from knowingly disclosing personally identifiable information, which identifies a person as having requested or obtained specific video materials or services. A video tape service provider may disclose a person's personally identifiable information pursuant to a court order in a civil proceeding upon a showing of compelling need for the information that cannot be accommodated by any other means, if (1) the person is given reasonable notice of the court proceeding by the person seeking the disclosure, and (2) the person is afforded the opportunity to appear and contest the claim of the person seeking the disclosure. However, personally identifiable information obtained in any manner other than as provided in section 2710 shall not be received in evidence in any trial, hearing, arbitration, or other proceeding in or before any court.

6. Videotaping

Boyles v. Kerr, 855 S.W.2d 593, the notorious "sex, cries, and videotape" case, involved an extreme invasion of privacy. However, the plaintiff prosecuted only a negligent infliction of mental distress claim, which, of course, in due appellate time the Texas Supreme Court declared did not exist as a viable cause of action. However, the Supreme Court did not reverse and render judgment; rather, the Supreme Court reversed and remanded the case, "in the interests of justice." *Id.* at 594.

Originally, the Texarkana Court of Appeals had held, among other things, that the Defendant's conduct could be classified as an intrusion into the Plaintiff's personal affairs and disclosure of embarrassing private matters to the public. *Boyles v. Kerr,* 806 S.W.2d 255, 258-259 (Tex.App.-Texarkana 1991), *rev'd on other grounds,* 855 S.W.2d 593 (Tex. 1993). The Texarkana Court of Appeals also pointed out that the fundamental difference between a negligence injury and an intentional injury is the specific intent to inflict injury, stating that although there was no dispute that the act of videotaping the sexual activity and the acts of showing the videotape to others were intentional, there was no evidence to suggest that the Defendants set out intentionally to injure the plaintiff. 806 S.W.2d at 260.

D. E-MAIL ISSUES

Recent changes in behavior and advances in technology have out paced statutes and case law when considering e-mail. The courts are now seeing more issues concerning e-mail including e-mail privacy and security, illegal interception and disclosure of e-mail, invasion of privacy, and attorney-client confidentiality.

1. Overview of E-Mail

(a) Chat Rooms

The first form of e-mail is termed "real time" or a "chat room." In a "chat room," people participate by communicating with each other in what has been termed "instantaneous cyber-conversation." *See,* Janice L. Green, *Unusual Evidence Issues,* 22ND MARRIAGE DISSOLUTION INSTITUTE at Q-4 (San Antonio 1999) (hereinafter "GREEN"), *citing,* David K. McGraw, *Sexual Harassment in Cyberspace: The Problem of Unwelcome E-mail,* 21 RUTGERS COMPUTER AND TECH. L.J. 491, 494 (1995). Chat rooms are normally open to an unlimited number of correspondents, and recently have been much in the news as the effective tool of many undesirable social elements such as pedophiles.

(b) Bulletin Boards

The second type of e-mail is termed a "computer bulletin board." A bulletin board is

an Internet site designed for, and geared to, a particular interest or topic shared by people who visit the site. A person interested in the bulletin board topic may leave a message for others, who have "hit" that particular bulletin board, to read.

(c) Direct E-Mail

Finally, there is "direct e-mail," sent from one individual to another, which is not intended to be read by anyone other than the recipient. Although the sender of direct e-mail may have some expectation of privacy and anonymity, the e-mail server has the capability of identifying the sender of the message. Several different types of "direct e-mail" exist.

(i) E-mail "Post Office"

To send e-mail, the sender must direct his or her message through an internet or systems "server," such as AOL, Prodigy, or CompuServe. The sender, an internet or service subscriber, is assigned an e-mail "address" and can also gain access to chat rooms or bulletin boards by means of the service provider.

(ii) Inter-office E-mail

It is common for a business or office to have an inter-office server that connects employees with each other.

(iii) Encrypted Messages

Encryption is a "lock and key" technology. In an effort to maintain confidentiality, the participants use two "keys," one to encrypt the message, and the other to decrypt the message upon receipt.

(d) Expectations of Privacy and Security

The degree to which e-mail carries with it an expectation of privacy is very much in doubt. It is frequently said that e-mail is simply not private or secure. *See, e.g.,* Michael Swaine, *Protecting Your Privacy Online,"* MACUSER, 135 (November 1996) ("[e]-mail is about as private as a conversation on a bus"). One of the serious considerations concerning the privacy of e-mail stems from the fact that most users treat e-mail very informally; e-mail often contains sentiments and opinions that would never have been expressed in so direct a fashion in a traditional document like a personal or business letter. *See* Michael Overly, *Finding the Needle in the Haystack: Discovering Electronic Evidence,* LAN Magazine (February 17, 1997); *see also,* McGraw, 21 RUTGERS COMPUTER AND TECH. L.J. at 496 (a perceived anonymity causes e-mail messages to be more blunt and direct than traditional communication methods, and the language used may be more harsh and crude than that normally used in face-to-face conversation or letters).

In contrast, other commentators state that ***encrypted*** e-mail does carry an expectation of privacy:

> ...if a person who transmits an encrypted message reasonably believes that only the intended recipient will have a key to decode the message, it would seem that encrypted messages over the Internet would be made with a reasonable expectation of confidentiality. If an unauthorized person decoded the message, it would seem no different than, for example, had a Federal Express employee opened a sealed envelope containing a confidential document. Encrypted e-mail messages are confidential.

David Hricik, *Confidentiality & Privilege in High-Tech Communications,"* 60 TEX. BAR J. 114 (1997).

Issues of confidentiality abound in the use of e-mail. Does a person who uses a laptop or personal computer for personal or business use have a reasonable expectation that the communication will be protected from the curious, such as a spouse? Does it matter

whether that person transmits an e-mail message from home, as opposed to his or her place of employment? At least one Texas judge has stated that "if the communication is posted to a chat room or bulletin board, then any argument of privacy or confidentiality has been waived." Marilea W. Lewis, *Invasion of Privacy--Illegally Obtained Evidence,* 22ND MARRIAGE DISSOLUTION INSTITUTE at G-9 (San Antonio 1999).

On the other hand, if the communication is a personal message to a family member or a friend, it is reasonable to believe that only the intended recipient will have access to the communication? Does it matter if the sender uses his or her real name in the message, instead of an alias? What is the effect of one spouse accidently sending to his or her estranged spouse an e-mail intended for the sending spouse's paramour?

The Austin American-Statesman recently ran front-page article entitled, "When marriages are deleted, e-mail can become evidence," which addressed and illustrated the use of e-mail messages in the context of a divorce. The article discussed a pending divorce case (including issues of child custody) in which a Washington-area lawyer, in words that "flowed without inhibition," sent e-mail messages to his friends and even strangers that described his homosexual trysts, "gushed about his partners and agonized over cheating on his wife." *When Marriages Are Deleted, E-mail Can Become Evidence*, AUSTIN AMERICAN-STATESMAN, May 10, 1999, at A-1. As might be expected, his wife discovered and produced such messages in the divorce. *Id.* The wife contends that she found the messages on a computer disk stuffed in a drawer; the husband argues that the wife forged the messages. *Id.* The article notes that when spouses share a computer, messages can be written under the other spouse's name, and existing files (containing saved messages) can be altered.

The article continues by quoting one lawyer who said: "You're going to say things to your e-mail that you wouldn't say to your priest in confession." *Id.* at A-8. Another lawyer was quoted as saying that even the most sophisticated husbands and wives let their guard down when they sit at their keyboards: "[t]here are people who wouldn't think about leaving an envelope open on their desk, yet they leave a computer that has their love letters or pornography or chat room talk." *Id.*

According to the article, the now commonplace hunt through e-mail records "is sort of replacing the old looking through the trash can for discarded notes." *Id.* The article concludes with the statement by a Fordham University communications professor: "I think we need to look at e-mail as something that has to be protected....[h]istorically, the law has always been limping behind the technology." *Id.*

Other commentators agree with the thrust of the American-Statesman article. For example, one Texas commentator has written that "[o]rdinarily canon and case law provide the answers to problems in the legal arena, but case law is playing catch up in a field that is charging swiftly through uncharted waters." Patricia J. Lasher, *Internet and E-mail Matters Relevant in the Divorce Practice,* 21ST MARRIAGE DISSOLUTION INSTITUTE at U-9 (Austin 1998) (hereinafter "LASHER").

2. Unlawful Interception or Disclosure of E-mail

"As a practical matter, the interception of e-mail seems more likely to occur in the home or office setting than through the intervention of cybersleuths. Like its telephone counterpart, Internet e-mail utilizes phone lines, wire cables and fiber optic cables, passing through a myriad of private and public routes and computers before it comes to rest in the resident 'in box.' While the possibility of interception exists, it is generally believed that the technical difficulty of locating and isolating the individual bits of messages that travel in may parts over many places makes interception an unlikely prospect." LASHER

at U-11. Nevertheless, both Texas and federal law prohibit the interception of e-mail.

(a) Texas Law

Under TEX.PENAL CODE ANN. §16.02(b) (Vernon Supp. 2000) ("Unlawful Interception, Use, or Disclosure of Wire, Oral, or Electronic Communications"), a person commits a criminal offense if he or she:

> (1) intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication;
>
> (2) intentionally discloses or endeavors to disclose to another person the contents of a wire, oral, or electronic communication if he knows or has reason to know the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> (3) intentionally uses or endeavors to use the contents of a wire, oral, or electronic communication if he knows or is reckless about whether the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> (4) knowingly or intentionally effects a covert entry for the purpose of intercepting wire, oral, or electronic communications without court order or authorization; or
>
> (5) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when the device (A) is affixed to, or otherwise transmits a signal through a wire, cable, or other connection used in wire communications; or (B) transmits communications by radio or interferes with the transmission of communications by radio.

An offense under §16.02 is a second degree felony. TEX.PENAL CODE ANN. §16.02(f) (Vernon Supp. 2000).

TEX.PENAL CODE ANN. §16.04 (Vernon Supp. 2000) ("Unlawful Access to Stored Communications") provides:

> (a) In this section, "electronic communication," "electronic storage," "user," and "wire communication" have the meanings assigned to those terms in Article 18.21, Code of Criminal Procedure.
>
> (b) A person commits an offense if the person obtains, alters, or prevents authorized access to a wire or electronic communication while the communication is in electronic storage by:
>
> (1) intentionally obtaining access without authorization to a facility through which a wire or electronic communications service is provided; or
>
> (2) intentionally exceeding an authorization for access to a facility through which a wire or electronic communications service is provided.
>
> (c) Except as provided by Subsection (d), an offense under Subsection (b) is a Class A misdemeanor.
>
> (d) If committed to obtain a benefit or to harm another, an offense is a state jail felony.
>
> (e) It is an affirmative defense to prosecution under Subsection (b) that the conduct was authorized by:

(1) the provider of the wire or electronic communications service;

(2) the user of the wire or electronic communications service;

(3) the addressee or intended recipient of the wire or electronic communication; or

(4) Article 18.21, Code of Criminal Procedure.

There are no Texas authorities specifically addressing the issue of the interception of e-mail. Many commentators, however, analogize possible scenarios involving such interception to "traditional" wiretap cases, of which there are several reported in Texas. *See, e.g.,* LASHER at U-10- U-11 ("...it seems unlikely that an uninvited e-mail interception of a similar communication would granted that [sic] a domestic exemption status....[a]lthough these cases [*i.e., Parker v. Parker,* 897 S.W.2d 918 (Tex. App.-Fort Worth 1995, writ denied), and *Collins v. Collins,* 904 S.W.2d 792 (Tex. App.-Houston [1st Dist.] 1995, writ denied)] deal with telephone calls, their application to e-mail in which one has an expectation of privacy seems appropriate"); GREEN at Q-6 ("[w]hile *Parker* and *Collins* dealt with taping phone calls, they would be applicable to interception of e-mail communication").

It should also be noted that TEX.CIV.PRAC.& REMEDIES CODE ANN. §123.001 *et. seq.* (Vernon 1997) makes interception of a "communication," defined as speech uttered by a person or information including speech that is transmitted in whole or in part with the aid of a wire or cable, an actionable civil tort (with mandatory attorney's fees, minimum damages, as well as potential punitive damages. *See* LASHER at U-11. Since e-mail is transmitted through phone lines, wire cables, and\or fiber optic cables, Chapter 123 of the Texas Civil Practice and Remedies Code arguably applies to the interception of e-mail. *See* Lewis at G-9.

(b) Federal Law

According to Judge Patricia LASHER, the federal government has been in the forefront of computer related legislation, an understandable result given the inherent intra-jurisdictional nature of computer communications and the Internet. LASHER at U-12. In 1986, federal lawmakers passed the Stored Wire and Electronic Communications and Transactional Records Act, 18 U.S.C. §§2701-2711. In 1998, such act was amended by congress and became Title II of the Electronic Communications Privacy Act (ECPA). Title II of the ECPA specifically addresses e-mail and stored communications.

The Electronic Communications Privacy Act, 18 U.S.C. §§2701-2711, provides as follows:.

(i) Section 2701 makes it a crime to intentionally access, without authorization, an electronic communications server facility (*e.g.,* America Online or CompuServe).

(ii) Section 2702 makes it a violation for a server to divulge the contents of stored communications to an unauthorized person or entity.

(iii) Section 2703 sets forth the requirements, such as a warrant or court order, for the government to access stored communications under the control of the server.

(iv) Section 2704 provides that the governmental entities may include in a subpoena or court order a requirement that the server make back-up copies of the contents of stored communications.

(v) Section 2706 creates a civil cause of action for service providers, subscribers or customers who have been aggrieved by any violation of the Act. Relief includes equitable or declaratory relief, damages including actual damages and ill-gotten profits of the violator, but in no event less than $1,000.00 in reasonable attorney's fees and litigation costs.

Civil actions under section 2706 must be commenced within two years from the date the violation was or reasonably should have been discovered. *See* LASHER at U-12-U-13.

(c) Federal Case Law

In *Jessup-Morgan v. America Online, Inc.,* 20 F.Supp.2d 1105, 1106 (E.D. Mich. 1998), Terry Jessup and Phillip Morgan began an illicit relationship some time prior to January, 1996, while Phillip Morgan was still married to another woman, Barbara Smith, although a divorce action was pending between the two.

On January 11, 1996, Jessup (then an America Online ("AOL") member) used her AOL account to post publicly on the Internet a message, under the "screen name" (*i.e.*, alias) of "Barbeeedol," meant to harass and injure Barbara Smith. In pertinent part, the message read as follows:

> Call me ..... I'm single, lonely, horny and would love to have either phone sex or a [sic] in person sexual relationship....My name is Barbara and I'm a single white female looking for just about any kind of sex I can have with someone other than myself ...If you can help, call me at (810) 977-9476.

The listed telephone number was the phone number of Barbara Smith's parents' home, with whom Barbara Smith and her two young children were residing pending resolution of the divorce. Jessup posted the message in an Internet usenet newsgroup entitled "alt.amazon-women.admirers," a public electronic bulletin board containing messages accessible to, and read by, potentially 40 million persons worldwide.

As intended by Jessup, posting this message resulted in persons Barbara Smith did not know calling her parents' home to request sexual liaisons with "Barbara." This gravely disturbed and distressed Barbara Smith and her parents. From the nature of the calls, and from the information callers supplied about how they obtained her parents' home phone number, Barbara Smith concluded that she was the intended target of the person(s) who posted the message on the Internet.

Ultimately, Barbara Smith determined that the sender was another AOL member, and requested that AOL identify the person who posted the message. AOL reviewed Smith's complaint and the "Barbeeedol" message, and determined that the posting originated from Jessup's AOL account, which constituted an egregious breach of the AOL Member Agreement signed by Jessup. *Id.* at 1106-1107. AOL, therefore, terminated its contract with Jessup and closed her AOL account. AOL's records list the grounds for this termination as "excessive USENET abuse." *Id.* at 1107. The same day, AOL sent Smith two messages. The first message explained that, for confidentiality reasons, AOL could not disclose information about actions it took against other AOL members. The second message explained that as a matter of AOL policy, information identifying the AOL member who posted the offensive message could only be released in response to a subpoena. Barbara Smith's divorce attorney then served AOL with a civil subpoena for information which would identify the AOL member who authored the injurious message. In compliance with the subpoena, AOL produced a document which identified Jessup as the person who had posted the offensive message.

Subsequently, Jessup brought suit against AOL claiming, among other things, that AOL's compliance with the subpoena and release of stored electronic information violated section 2707 of the Electronic Communication Privacy Act ("ECPA"), 18 U.S.C. §2707. In her suit, Jessup requested damages in excess of $47 million. Jessup did not deny that she perpetrated the offense against Barbara Smith (by posting the fraudulent Internet message), but nevertheless she complained that AOL's disclosure that she committed the offense affected her child

custody hearings (she was involved in legal proceedings involving a child), "her future husband's [Phillip Morgan's] divorce hearing, and other personal matters," as well as her "reputation in the community...and her reputation among her friends." AOL responded by filing a motion for judgment on the pleadings on the grounds that Jessup's pleadings failed to state a claim upon which relief could be granted. *Id.* at 1108.

The federal district court held that the prohibitions of the ECPA, 18 U.S.C. §§2701 *et seq*., were inapplicable. *Id.* The federal court noted that the ECPA prohibits disclosure of the contents of an electronic communication to any person or entity (18 U.S.C. §2702) or to the government (18 U.S.C. §2703) without first meeting certain restrictions. *Id.* Further, according to the district court, 18 U.S.C. §2711 states that the definitions in 18 U.S.C. §2510 apply to the ECPA's provisions, and that 18 U.S.C. §2510(8) provides that "'contents', when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication," [not information concerning the identity of the author of the communication]. *Id.* The district court held that the "content" of a communication under the ECPA was not at issue in the case; rather disclosure of information identifying an AOL electronic communication account customer was at issue, and such information was specifically acknowledged as separate from the "content" of electronic communications by the ECPA. *Id, citing,* 18 U.S.C. § 2703(c)(1)(C). In other words, the ECPA actually authorized AOL's disclosure. *Id.* Thus, because the prohibitions of the ECPA did not apply to the AOL disclosure, Jessup's claim that AOL violated the ECPA failed, and the district court dismissed the claim. *Id.*

The Houston Chronicle recently reported a situation similar to that in *Jessup-Morgan.* The Chronicle reported that Landry's Seafood Restaurant Chain "wants to know who's saying nasty things about it on the Internet," and has requested a court order that Yahoo--an Internet service provider--reveal the identity of people posting "unlawful messages" on the Yahoo site. *Landry's asks judge for Yahoo identities / Chain alleges defamatory Net postings*, HOUSTON CHRONICLE, April 23, 1999. The article states that Landry's is seeking the identities to determine if a lawsuit should be filed. *Id.* Landry's alleges that some of the postings suggest knowledge of "inside" information detrimental to the chain, its investors, and the stock market as a whole. *Id.*

According to the article, messages posted recently on the Yahoo site revealed an animosity toward users known as "Sockscats" and "Imitation." *Id.* One message posted by "Sockscats" read as follows: "I better go see about getting some glasses. Am I reading this right. Landry's operating income was only 400K? And the stock is up today anyway?" *Id.* A message posted the following day stated: "My boss (T-Man) would like me to cut you to pieces [referring to Landry's chairman, Tilman Fertilla]." *Id.*

In *United States v. Simons,* 29 F.Supp.2d 324 (E.D. Va. 1998), the Defendant, who was charged with receiving and possessing materials containing child pornography, moved to suppress evidence obtained from his office computer. The Defendant was employed as an electronic engineer within the Foreign Bureau of Information Services ("FBIS"), a component of the CIA. *Id.* at 325 (further factual references to the same page of the opinion are omitted.) The Defendant had access to a government computer system owned and operated by the CIA, and he had access to the Internet.

The manager of the computer network for FBIS was responsible for monitoring Internet connections through a device called a "firewall," which logs all traffic going outside of the networks, and indicates which computers have accessed the outside. In a routine check of the firewall system, the manager discovered that the firewall log was

very large. Consequently, he conducted a search for the keyword "sex," and determined that there were a significant number of "hits" on Internet web sites, most of which traced back to the same work station. *Id.* at 326. Since such use of the system was prohibited, the manager contacted his Network Branch Chief, and ultimately the Chief and others determined that the web site accessed was pornographic ("www.xratedpictures.com"). FBIS then investigated whether any pictures had been downloaded to the work station involved, and found that over 1,000 files had been downloaded that contained pictures. After the FBIS and the others involved copied the Defendant's hard drive, the FBI was called in because certain files appeared to depict child pornography. The FBI obtained a warrant and made copies of the Defendant's hard drive and floppy disks. The Defendant moved to suppress the evidence.

The federal district court ultimately held that the Defendant lacked a reasonable expectation of privacy with regard to any Internet use, because the FBIS had official policies regarding such use, which provided, in part, that official business use, incidental use, lawful use, and contractor communications were permitted, that audits would be implemented to support identification, termination, and prosecution of unauthorized activity, and that audits would be capable of recording web sites visited. *Id.* at 327-28.

The Defendant also argued that the searches conducted without a warrant produced evidence that could not be used at trial, since the government's interception of his personal e-mail was equivalent to electronic interception of personal phone calls, which violates 18 U.S.C. §§2515-2516. *Id.* at 329. However, the federal district court noted that there was nothing in the record suggesting that the Defendant's e-mail was obtained while it was being transferred. *Id.* Instead, stated the district court, the Defendant's e-mail was copied while it was in storage, and therefore sections 2515-2516 did not apply. *Id.* Accordingly, the district court denied the Defendant's motion to suppress. *Id.*

In *Steve Jackson Games, Inc. v. United States Secret Service*, 36 F.3d 457, 458-59 (5th Cir. 1994), the Fifth Circuit addressed a case that arose when the federal government, under a warrant, seized a computer system used by an employee of Steve Jackson Games, Inc. (SJG). The employee was suspected of hacking into a Bell Telephone computer system. *Id.* The seized computer system included an electronic bulletin board service provided to subscribers of SJG. *Id.* at 458. During the course of the government's investigation of the hacking incident, the stored, and as yet undelivered, bulletin board e-mail was read by U.S. Secret Service agents, who also deleted some of the information. *Id.* at 459.

Subsequently, SJG and several individuals whose e-mail had been seized and read filed suit against, among others, the Secret Service and the United States, claiming, *inter alia*, violations of the Federal Wiretap Act, as amended by Title I of the ECPA, 18 U.S.C. §§2510-2521 (proscribing, *inter alia*, the intentional interception of electronic communications), and Title II of the ECPA, the Stored Wire and Electronic Communications and Transactional Records Act, 18 U.S.C. §§2701-2711 (proscribing, *inter alia*, intentional access, without authorization, to stored electronic communications). *Id.*

The trial court held, and the Fifth Circuit concurred, that the government had not violated Title I of the ECPA, the Federal Wiretap Act. *Id.* at 460-461. On appeal, the sole issue was very narrow -- whether the seizure of a computer on which was stored private e-mail that has been sent to an electronic bulletin board, but not yet read (retrieved) by the recipients, constituted an "intercept" proscribed by 18 U.S.C. §2511(1)(a). Agreeing with the trial court, the Fifth Circuit held that the government had not illegally "intercepted" the e-mail, as the term "intercept" is defined and used in Title I

of the ECPA (the Federal Wiretap Act), because the government's acquisition of the contents of the electronic communications was not "contemporaneous with the transmission of those communications" (the seized e-mail had already been stored). *Id.* at 460-461.

The trial court also held that the government had violated the statutory requirements of Title II of the ECPA (the Stored Wire and Electronic Communications and Transactional Records Act) because no notice of the proposed seizure was given, as mandated by Title II of the ECPA, and no back-up copies of the deleted e-mail were made. *Id.* at 459. The Fifth Circuit upheld the trial court's award of $1,000.00 to each plaintiff.

Monotype Corp. PLC v. International Typeface Corp., 43 F.3d 443 (9th Cir. 1994), involved a dispute between a typeface designer and one of the designer's licensors in which the designer claims that the licensor copied some of the designer's typefaces. At trial, the designer attempted to introduce as evidence e-mail correspondence from an employee of the licensor to an employee of another corporation. *Id.* at 450. The plaintiff argued that the e-mail constituted business records and should be admitted; the trial court excluded the e-mail on the grounds that its prejudicial nature outweighed its relevancy. *Id.*

On appeal, the Ninth Circuit distinguished e-mail from computer printouts, which are admissible as evidence, on the grounds that "E-mail is far less of systematic business activity than a monthly inventory printout," with e-mail being an ongoing electronic message and retrieval system, whereas electronic inventory recording system is a regular, systematic function of a bookkeeper prepared in the course of business. *Id.* Thus, the Ninth Circuit held that the trial court had properly excluded the e-mail correspondence. *Id.*

(d) Privacy Issues

Professor William L. Prosser cataloged four distinct injuries under the tort of invasion of privacy: (1) intrusion upon a person's right to be left alone in his or her own affairs; (2) publicity given to private information about a person; (3) appropriation of some element of the person's personality for commercial use; and (4) false light. *Cain v. Hearst Corp.*, 878 S.W.2d 577, 578 (Tex. 1994), *citing,* William L. Prosser, HANDBOOK OF THE LAW OF TORTS 638 (2d ed. 1955). These four variations of the tort were adopted by the Second Restatement of Torts. *Cain,* 878 S.W.2d at 578; *see also,* RESTATEMENT (SECOND) OF TORTS §652A (1977).

Texas did not recognize any of the four types of invasion of privacy until the Texas Supreme Court's decision in *Billings v. Atkinson*, 489 S.W.2d 858, 860 (Tex.1973), which involved the first category of invasion of privacy as developed by Prosser and recognized by the Restatement: an intrusion into the plaintiff's seclusion. *Cain,* 878 S.W.2d at 578. "Intrusion" is the form of invasion of privacy most application to the interception of e-mail. LASHER at U-17; GREEN at Q-8. In fact, language used by the Texas Supreme Court in *Billings* seems particularly applicable to the modern technology used in computer communications:

> One of the principal arguments advanced in support of the doctrine of privacy by its original exponents is that the increased complexity and intensity of modern civilization and the development of man's spiritual sensibilities have rendered man more sensitive to publicity and have increased his need of privacy, while the great technological improvements in the means of communication have more and more subjected the intimacies of his private life to exploitation by those who pander to commercialism and to prurient and idle curiosity. A legally enforceable right of privacy is deemed to be a proper protection against this type of

encroachment upon the personality of the individual.

Billings, 489 S.W.2d at 860, *quoting*, 62 AM. JUR. 2D *Privacy* § 4.

However, it should be noted that RESTATEMENT (SECOND) OF TORTS §652B (1977) defines "intrusion" as the intentional invasion into a person's physical seclusion or private affairs in a manner ***highly offensive to a reasonable person***. Whether a fact-finder would conclude, for example, that the reading of a spouse's e-mail is "highly offensive" to a reasonable person is a question unanswered in Texas law. GREEN at Q-8. The issue may turn on the efforts made by the sender and the recipient to guarantee privacy, such as encryption.

In *Smyth v. The Pillsbury Co.,* 914 F.Supp 97, 98 (E.D. Pa. 1996), the Pillsbury Company maintained an electronic mail communication system ("e-mail") in order to promote internal corporate communications between its employees (further references to facts from the same page of the opinion are omitted). Pillsbury repeatedly assured its employees, including the Plaintiff, that all e-mail communications would remain confidential and privileged, and further assured its employees, including the Plaintiff, that e-mail communications could not be intercepted and used by Pillsbury against its employees as grounds for termination or reprimand.

In October 1994, the Plaintiff received certain e-mail communications from his supervisor over Pillsbury's e-mail system on his computer at home. Relying on Pillsbury's assurances regarding the confidentiality of the e-mail system, Plaintiff responded and exchanged e-mails with his supervisor. Subsequently, contrary to the assurances of confidentiality it had made, Pillsbury intercepted the Plaintiff's private e-mail messages made in October 1994. On January 17, 1995, Pillsbury notified Plaintiff that it was terminating his employment effective February 1, 1995, for transmitting what it deemed to be inappropriate and unprofessional comments over Pillsbury's e-mail system. *Id.* at 98-99.

The Plaintiff sued Pillsbury, but since he was an at-will employee, he had to prove that his dismissal violated a clear mandate of public policy. *Id.* at 99. Consequently, the Plaintiff claimed that his termination violated "public policy which precludes an employer from terminating an employee in violation of the employee's right to privacy as embodied in Pennsylvania common law." *Id.* at 100.

However, in applying the law regarding the tort of "intrusion upon seclusion" to the facts of the case before it, the federal district court found that the Plaintiff failed to state a claim upon which relief could be granted. *Id.* at 101. The district court stated that, unlike urinalysis and personal property searches, there was no reasonable expectation of privacy in e-mail communications voluntarily made by an employee to his supervisor over the company e-mail system, notwithstanding any assurances that such communications would not be intercepted by management. *Id.* According to the federal court, once the Plaintiff communicated the alleged unprofessional comments to a second person (his supervisor) over an e- mail system which was apparently utilized by the entire company, any reasonable expectation of privacy was lost. *Id.*

Moreover, continued the district court, even if it did find that an employee had a reasonable expectation of privacy in the contents of his e-mail communications over the company e-mail system, it could not then find that a reasonable person would consider Pillsbury's interception of such communications to be a substantial and highly offensive invasion of his privacy. *Id.* The federal court noted that, by intercepting such communications, Pillsbury was not, as in the case of urinalysis or personal property searches, requiring the employee to disclose any personal information about himself or invading the employee's person or personal effects. *Id.* Further, according to the district

court, Pillsbury's interest in preventing inappropriate and unprofessional comments, or even illegal activity, over its e-mail system outweighed any privacy interest the employee may have in those comments. *Id.* Therefore, the Plaintiff's lawsuit was dismissed. *Id.*

3. Attorney-Client Confidentiality

TEX. DISCIPLINARY R.PROF.CONDUCT 1.05 (1998), *reprinted in* TEX.GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon 1998) (STATE BAR RULES art. X, §9) generally provides that a lawyer shall not reveal confidential client information, whether such information is privileged or unprivileged, to anyone other than the client without the express authorization or consent of the client. Neither Texas case law nor any ethical opinion has addressed the issue of the use of e-mail by a lawyer to communicate with or about a client. *See* LASHER at p. U-10.

However, the American Bar Association Committee on Ethics and Professional Responsibility recently issued a formal opinion stating that a lawyer does not violate Model Rule of Professional Conduct 1.6(a) [in Texas, Rule 1.05] by sending a client information in unencrypted e-mail, provided the lawyer takes reasonable precautions to guard against disclosure of the information. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 99-413 (March 1999) (protecting the confidentiality of unencrypted e-mail); *see Red-Letter Day for E-Mail*, 85 A.B.A.J. 79 (June 1999).

The opinion concludes that e-mail poses "no greater threat of interception or disclosure" than traditional communication methods, such as phone calls or letters, which are accorded a reasonable expectation of privacy. 85 A.B.A.J. at 79. However, the Committee also recommends that an attorney check with his or her client about highly sensitive information before sending such information to the client. In addition, the attorney should take reasonable steps to safeguard the security and privacy of e-mail communications, although the Committee does not detail or explain what such measures might be. *Id.* According to the ABA Journal, the Committee's opinion reflects the trend of the majority of state bar associations across the country. *Id.*

As already stated, in Texas, the issue of whether information remains confidential, when it is communicated between an attorney and client by the use of e-mail, has not be definitively decided. *See, e.g.,* Green at Q-5. Some commentators take the position that information communicated via e-mail is confidential and does not lose its privileged character: "[a]s a general principle, otherwise privileged information does not lose its privileged character merely by being intercepted or reviewed while being transmitted as a electronic communication over the Internet." Hricik at 106.

Other commentators urge caution, pointing out that either the client or the attorney may inadvertently waive the attorney-client privilege, for example, by forwarding copies of the e-mail message to friends or family for purposes of discussion, or accidentally forwarding the message too all members of the client's book-of-the-month club. In addition, a client may save an e-mail, which might allow another person to review the communication at a later date, for instance, just before trial. LASHER at U-10. Consequently, at least one commentator believes that, "[u]nless and until the client and attorney have a clear understanding about the protection of information that passes over the Internet, that tool is best left for general, non-confidential communication of court dates, parenting classes and appointments." *Id.*

X. CONVERSION

A. Elements

Conversion is the wrongful exercise of dominion and control by one person over the property of another. *Waisath v. Lack's Stores,*

Inc., 474 S.W.2d 444, 446 (Tex.1971). Conversion may be direct or constructive; it is concerned with possession, not title; it is complete when a person unlawfully and wrongfully exercises dominion and control over the property of another to the exclusion of the right of possession of the owner or of the person entitled to possession of the property involved. *McVea v. Verkins*, 587 S.W.2d 526, 530-31 (Tex.Civ.App-Corpus Christi 1979, no writ). It is the act of conversion itself that gives a right of action and not the intention to convert. *Id.* at 531. Thus wrongful intent to convert another's property is not an essential element of conversion, nor is it material to any issue involved in a conversion suit except the issue of exemplary damages. *Powell v. Forest Oil Corporation*, 392 S.W.2d 549, 552 (Tex.Civ.App.-Texarkana 1965, no writ).

Before a plaintiff is allowed to recover for conversion, he must prove that he (1) is the owner of the converted property; (2) had legal possession of the property; or (3) is entitled to possession of the property. *Lone Star Beer, Inc. v. Republic National Bank of Dallas*, 508 S.W.2d 686, 687 (Tex.Civ.App.-Dallas 1974, no writ).

As a general rule, a demand for the return of the property and a refusal to do so are required to establish a conversion by a person who lawfully obtained possession of the involved property. *McVea*, 587 S.W.2d at 531. However, a demand and refusal are not necessary if the possession was acquired wrongfully, or after the conversion has become complete, or where it is shown that a demand would have been useless. *Id.*

B. Damages

A plaintiff must prove damages before recovery is allowed for conversion. *Prewitt v. Branham,* 643 S.W.2d 122, 123 (Tex.1982). Generally, the measure of damages is the value of the property converted at the time of conversion, plus legal interest. *Imperial Sugar Co., Inc. v. Torrans*, 604 S.W.2d 73, 74 (Tex. 1980). However, damages are limited to the amount necessary to compensate the plaintiff for the actual losses or injuries sustained as a natural and proximate result of the defendant's conversion. *Multi-Moto Corp. v. ITT Commercial Fin. Corp*., 806 S.W.2d 560, 566 (Tex.App.-Dallas 1990, writ denied). A conversion should not unjustly enrich either the wrongdoer or the complaining party. *United Mobile Networks, L.P. v. Deaton*, 939 S.W.2d 146, 148 (Tex. 1997).

Damages may also include, however, other losses or expenses necessary to compensate the plaintiff for all actual losses or injuries sustained, not merely the reasonable market value of the property, as a natural and proximate result of the defendant's wrong. *First Nat. Bank of Missouri City v. Gittelman*, 788 S.W.2d 165, 168-69 (Tex.App.-Houston. [14th. Dist.] 1990, writ denied); *Virgil T. Walker Constr. Co. v. Flores*, 710 S.W.2d 159, 161 (Tex.App.-Corpus Christi 1986, no writ) (shipping costs); *Clifton v. Jones*, 634 S.W.2d 883, 887 (Tex.App.-El Paso 1982, no writ) (travel expenses were proper as damages arising from the conversion)*; Groves v. Hanks*, 546 S.W.2d 638, 647 (Tex.Civ.App.-Corpus Christi 1976, writ ref'd n.r.e.) (lost profits).

A party requesting the return of converted property may recover money damages for the loss of use of the property during the period of detention. *Southwind Aviation, Inc. v. Avendano*, 776 S.W.2d 734, 737 (Tex.App.-Corpus Christi 1989, writ denied). This is not allowed when the plaintiff is suing for the value of the property. *Id., citing*, *Sibley v. Fitch*, 226 S.W.2d 885 (Tex.Civ.App.-Waco 1950, writ ref'd).

To recover exemplary damages for conversion, the plaintiff must prove that the defendant acted with malice. *Southwestern Inv. Co. v. Alvarez*, 453 S.W.2d 138, 141 (Tex.1970). To establish malicious conversion, the plaintiff must show more than bad faith and wrongful conduct; the plaintiff must show that the wrongful act was of a

"wanton and malicious nature." *Ogle v. Craig*, 464 S.W.2d 95, 97 (Tex.1971). It should be noted that some courts, however, have held that actual ill will is not necessary and that ill will may be implied from the knowing conversion of another"s property without justification. *Courtesy Pontiac, Inc. v. Ragsdale*, 532 S.W.2d 118, 121 (Tex.Civ.App.-Tyler 1975, writ ref'd. n.r.e.).

Prejudgment interest for the loss of use of the converted property or special damages for loss of use of the converted property may be recovered. *Imperial Sugar Co., Inc.*, 604 S.W.2d at 74.

Damages for mental anguish are not ordinarily awarded in conversion actions, although they may be considered in determining punitive damages. *Winkle Chevy-Olds-Pontiac, Inc. v. Condon,* 830 S.W.2d 740, 746 (Tex.App.-Corpus Christi 1992, writ dism'd); *see also, Earthman's, Inc. v. Earthman,* 526 S.W.2d 192, 208 (Tex.Civ.App.-Houston [1st Dist.] 1975, no writ) (jury may consider mental anguish, among other factors, in fixing the amount of exemplary damages).

C. Conversion in Family Law Cases

Although rare, allegations of conversion do arise in family law. *See, e.g., Connell*, 889 S.W.2d at 540-541.

There is an argument that conversion can exist in the family law setting only where the converted property is the separate property of the plaintiff. In *Belz v. Belz*, 667 S.W.2d at 246, the Dallas Court of Appeals that "fraud on the community," as already discussed, could not be brought as an independent cause of action in a divorce suit. However, the Dallas appellate court also held that a spouse may, in the context of a divorce, recover for other intentional torts committed upon the spouse during marriage, noting that, in such cases, the tort is committed upon the spouse's separate estate, while fraud on the community is necessarily perpetrated on a spouse's interest in the community. *Id.* at 247; s*ee also, Arena v. Arena,* 822 S.W.2d 645, 651 (Tex.App.-Fort Worth 1991, no writ) (wife converted separate property gun collection belonging to husband).

However, cases exist in which community property was converted. *See, e.g., Stevenson v. Koutzarov,* 795 S.W.2d 313, 322-323 (Tex.App.-Houston [1 Dist.] 1990, writ denied) (evidence support jury finding of conversion where friends of the wife helped the wife sell community property car, despite the wife's knowledge of temporary orders forbidding the sale or other disposal of community property); *Jacobs v. Jacobs*, 670 S.W.2d 312, 313 (Tex.App.-Texarkana 1984, writ ref'd n.r.e) (wife awarded an undivided one-half interest in land based upon the fraudulent conversion of community assets during pendency of divorce proceedings).

D. Other Jurisdictions

In *Weaver v. Weaver*, 643 P.2d 499 (Ariz. 1982), the Arizona Supreme Court held that a claim that one spouse had destroyed separate property of the other spouse could not be remedied in the divorce action because that court did not have jurisdiction over the sole and separate property of the parties and thus a separate action would need to be filed. However, if the separate property was still in the possession of the offending spouse, even in the form of cash, the divorce court would have the inherent power to require restitution of the converted property.

In *Young v. Young*, 709 P.2d 1254 (Wyo. 1985), Husband who withheld oil and gas royalties which were awarded to his wife in a divorce decree committed the tort of conversion.

In *Slansky v. Slansky*, 553 A.2d 152 (Vt. 1988), the court held that a conversion action may exist against a former spouse arising out of the other spouse's removing the plaintiff's name from a health policy prior to the divorce.

In *Hebbring v. Hebbring*, 207 Cal.App.3d 1260, 255 Cal. Rptr. 488 (1989), the court held that the wife could not bring a separate conversion action against the husband for destroying her property while the divorce action was pending. The court stated that the wife could be granted full relief in the underlying action, and, therefore, would be barred from bringing a subsequent tort action.

In *Neumann v. Neumann*, 182 B.R. 502 (N.D. Ohio 1995), the husband's failure to deliver his wife's half of the marital estate was found to be conversion. The divorce decree awarded the wife 50% of the former marital assets consisting of household goods and furniture valued at $40,000. The evidence established that the husband sold some of these assets and was uncooperative in arranging for their exchange, thereby depriving the wife of her right to possess her property. Damages were assessed in the amount of $5,000 for the past deprivation of property and prospectively in the amount of $20,000 for the cost of replacing the property if husband did not turn it over by a certain date.

XI. WRONGFUL INTERFERENCE WITH EXISTING CONTRACT

A. Elements

To recover for tortious interference with an existing contract, a plaintiff must prove: (1) the existence of a contract subject to interference; (2) a willful and intentional act of interference; (3) the act was a proximate cause of the plaintiff's damages; and (4) actual damage or loss. *Holloway v. Skinner*, 898 S.W.2d 793, 795-96 (Tex.1995). Even if a plaintiff establishes the elements of this cause of action, a defendant may still prevail upon establishing the affirmative defense of justification. *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 210 (Tex. 1996).

B. Damages

Actual damages are necessary. The plaintiff must prove that the defendant's intentional interference entailed "intentional and willful acts calculated to cause damage and with the unlawful purpose of causing damage to the contracting parties without right or justifiable cause." *CF&I Steel Corp. v. Pete Sublett & Co.*, 623 S.W.2d 709, 714 (Tex.Civ.App.-Houston [1st Dist.] 1981, writ ref'd n.r.e.).

To support the recovery of punitive damages, there must be a finding of actual malice: ill-will, spite, evil motive, or purposing the injury of another. *Clements v. Withers*, 437 S.W.2d 818, 822 (Tex.1969). Actual malice need not be shown to recover compensatory damages for the tort of interference with an existing contractual relationship. *Id.; Armendariz v. Mora*, 553 S.W.2d 400, 407 (Tex.Civ.App.-El Paso 1977, writ ref'd n.r.e.) (stating that "actual malice is a necessary element to sustain an award of exemplary damages" for tortious interference).

XII. TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIP

A. Elements

Tortious interference with business or prospective contractual relations concerns business relations that have not yet been reduced to a contract or to a continuing business relationship not amounting to a formal contract. *See,* RESTATEMENT OF TORTS (SECOND) §766B, comments a, c (1979). To establish a cause of action for interference with prospective contractual relations, the plaintiff must prove (1) the reasonable probability that a contract would be created; (2) an intentional act to prevent the contract's formation; (3) lack of justification; and (4) damages. *See, Winston v. American Medical Int'l, Inc*., 930 S.W.2d 945, 953 (Tex.App.-Houston [1st Dist.] 1996, writ denied). A formal contractual relationship, however, is not always required; according to the Restatement, the expression "prospective

contractual relation" should not be strictly construed. RESTATEMENT OF TORTS (SECOND) §766B, comment c (1979); *Heil-Quaker Corp. v. Mischer Corp.,* 863 S.W.2d 210, 214 (Tex.App.-Houston [14 Dist.]1993), *set aside by agreement w.r.m.*, 877 S.W.2d 300 (1994).

B. Damages

In an action for interference with the business relations of another, the plaintiff may recover such damages sustained by him as are a natural and proximate consequence of the interference. *Gonzalez v. Gutierrez*, 694 S.W.2d 384, 390 (Tex.App.-San Antonio 1985, no writ). Where the interference involves the acceptance by one party of salable items intended for his competitor, there may be a recovery for loss of profits. *Id.; see also, Browning-Ferris, Inc. v. Reyna*, 852 S.W.2d 540, 549 (Tex.App.-San Antonio 1992), *reversed on other grounds,* 865 S.W.2d 925 (1993). Where the result of the interference is to put the plaintiff out of business, it has been said that his damages are the difference between the value of his business in the absence of the interference and the amount realized by liquidation. *Gonzalez,* 694 S.W.2d at 390. Further, one who is liable to another for interference with a contract or prospective contractual relation is liable for damages for (a) the pecuniary loss of the benefits of the contract or the prospective relation; (b) consequential losses for which the interference is a legal cause; (c) emotional distress or actual harm to reputation if they are reasonably to be expected to result from the interference. RESTATEMENT (SECOND) OF TORTS §774A (1979); *Gonzalez,* 694 S.W.2d at 390.

The victim of tortious interference with contractual and business relations is entitled to recover prejudgment interest. *Sandare Chemical Co., Inc. v. WAKO Intern., Inc.,* 820 S.W.2d 21, 25 (Tex.App.-Fort Worth 1991, no writ).

Exemplary damages may also be awarded to one who establishes his cause of action for tortious interference with business relationships. *Victoria Bank & Trust Co. v. Brady*, 779 S.W.2d 893, 911 (Tex.App.-Corpus Christi 1989), *reversed in part on other grounds and aff'd in part,* 811 S.W.2d 931 (1991).

C. Other Jurisdictions

In *Wilmington Trust Co v. Clark*, 424 A2d 744 (Md. 1981), a divorced wife, whose former husband committed suicide, brought an action against the husband's estate to recover the monetary loss allegedly sustained as a result of his premature death. The wife claimed that her damages were the difference between what was payable under the property settlement agreement during the husband's life and the lesser amount payable following his death. The trial court dismissed the contract count, but found in favor of the wife on the tort count and awarded judgment for $75,311. The court of appeals reversed on the basis that suicide did not constitute an actionable tort either as a new tort or on the ground of intentional interference with contractual rights. Recognizing that suicide was a crime under state law, the court found that not every violation of the criminal law constituted a tort, nor does the criminal law automatically impose a tort duty. The court of appeals held that this tort cannot be asserted by one party to a contract against the other party to the same contract. The tort is committed only by a third party.

In *Landis v. Landis*, 664 N.E.2d 754 (Ind. App. 1996), the Court affirmed a verdict of $2.125 million in compensatory and $50,000 in punitive damages against an ex-husband who confronted his former wife at their corporation, which they established during marriage and continued to co-own post-dissolution. The ex-husband physically and verbally abused her in front of their employees and threatened to kill her if she ever returned to the office.

In *Joel v. Weber*, 581 N.Y.S.2d 579 (N.Y. Sup. Ct. 1992), the business manager of entertainer Billy Joel sued Joel's wife, Christie Brinkley, for tortiously interfering with a contract between Joel and his manager. The trial court dismissed the complaint, holding that a spouse must have absolute immunity against this type of claim reasoning that marriage partners must have the unfettered ability to discuss all aspects of domestic economics.

XIII. INTERFERENCE WITH CHILD CUSTODY

A. Common Law Cause of Action

In *Silcott v. Oblesby*, 721 S.W.2d 290, 292-293 (Tex. 1986), the Texas Supreme Court recognized the common law cause of action of interference with child custody. The Supreme Court based its decision upon §700 of the RESTATEMENT (SECOND) OF TORTS (1977), which provided:

> One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces the minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent.

See also, Fenslage v. Dawkins, 629 F.2d 1107, 1109 (5th Cir.1980) (in which the Fifth Circuit predicted that the Texas Supreme Court would follow the principles set forth in section §700 when given the opportunity to do so).

B. Chapter 42 of the Texas Family Code

Beginning in 1983, former Family Code Chapter 36 provided a cause of action for interference with child custody. Under *Silcott*, § 700 of the Second Restatement of Torts applied to cases tried before September 1, 1983. Ultimately, former Family Code Chapter 36 was the enactment of the common-law damages remedy for interference with child custody and did not derogate common-law right. *Smith v. Smith***,** 720 S.W.2d 586, 600 (Tex.App.-Houston [1st Dist.] 1986, no writ)

According to Professor John Sampson, Chapter 42 is intended to be "comprehensive attack on parental kidnapping," but although it creates liability for a broad range of individuals who assist a child-snatching parent, it has been used infrequently. Sampson & Tindall's TEXAS FAMILY CODE ANNOTATED, p. 141 (August 1999).

1. Liability for Interference with Possessory Right

> (a) A person who takes or retains possession of a child or who conceals the whereabouts of a child in violation of a possessory right of another person may be liable for damages to that person.
>
> (b) A possessory right is violated by the taking, retention, or concealment of a child at a time when another person is entitled to possession of or access to the child.

TEX.FAM.CODE ANN. §42.002 (Vernon 1996). For the purposes of §42.002, "Order" means a temporary or final order of a court of this state or another state or nation, and "Possessory right" means a court-ordered right of possession of or access to a child, including conservatorship, custody, and visitation. TEX.FAM.CODE ANN. §42.001 (Vernon 1996).

2. Aiding or Assisting Interference with Possessory Right

> (a) A person who aids or assists in conduct for which a cause of action is authorized by this chapter is jointly and severally liable for damages.

> (b) A person who was not a party to the suit in which an order was rendered providing for a possessory right is not liable unless the person at the time of the violation:
> (1) had actual notice of the existence and contents of the order; or
> (2) had reasonable cause to believe that the child was the subject of an order and that the person's actions were likely to violate the order.

TEX.FAM.CODE ANN. §42.003 (Vernon 1996).

The former statute (Chapter 36) provided one of the grounds for a mother suing her children's paternal grandmother for aiding the children"s father in secreting the children. *Weirich v. Weirich*, 796 S.W.2d 513, 515 (Tex.App.-San Antonio 1990), *rev'd*, 833 S.W.2d 942 (1992). In *Weirich* the mother alleged the grandmother directly interfered with the mother's custodial rights either by taking, retaining, or concealing the children in violation of an existing court order or by aiding and assisting the father in doing the same. The jury awarded a judgment of almost $6 million against the father and grandmother, jointly and severally, and found the grandmother liable under both former §36.02(a) and former §36.02(c). The appellate court held that the mother failed to give proper notice under the statute. In reversing the court of appeals, the Texas Supreme Court stated that such notice is not required with respect to claims for aiding and assisting another who is interfering with custody rights, and that there was evidence the grandmother had violated the Family Code's child custody provisions, as well as aided and assisted the father's violation of former Chapter 36. *Weirich*, 833 S.W.2d at 945.

C. Damages

Under TEX.FAM.CODE ANN. §42.006(a) (Vernon 1996), damages may include (1) the actual costs and expenses incurred, including attorney's fees, in (A) locating a child who is the subject of the order; (B) recovering possession of the child if the petitioner is entitled to possession; and (C) enforcing the order and prosecuting the suit; and (2) mental suffering and anguish incurred by the plaintiff because of a violation of the order. Further, a person liable for damages who acted with malice or with an intent to cause harm to the plaintiff may be liable for exemplary damages. TEX.FAM.CODE ANN. § 42.006(b) (Vernon 1996).

Under §42.006, "actual costs and expenses" include prospective costs and expenses that are supported by evidence. *Smith,* 720 S.W.2d at 601.

D. No Independent Cause of Action Exists in Texas for Negligent Interference with the Familial Relationship

In *Helena Laboratories Corp. v. Snyder*, 886 S.W.2d 767 (Tex. 1994) (*per curiam*) the Texas Supreme Court considered whether an employer could be held liable for failing to prevent two employees from engaging in extramarital relations.

Joe Golias, the husband of Allison Golias, was a vice-president of Helena Laboratories. Pam Snyder, the wife of Robert Snyder, was Joe Golias' executive secretary. *Id.* at 768. While employed by Helena Labs, Joe Golias and Pam Snyder entered into an extramarital relationship. *Id.* Allison Golias and Robert Snyder brought this action against Helena Labs for negligently interfering with their familial relations by failing to take action to prevent the affair between their spouses. *Id.*

The Texas Supreme Court held that, stating that it had never recognized an independent cause of action for negligent interference with the familial relationship. *Id.* In some circumstances, the Texas Supreme Court noted, damages may be recovered for such injuries, but such recovery is allowed only in connection with some recognized tort. *Id.*

XIV. NO TORT FOR FAILURE TO REPORT CHILD ABUSE

Recently, the Texas Supreme Court resolved an existing conflict in Texas appellate courts as to whether the failure to report child abuse or neglect, in contravention of the Texas Family Code, constituted an independent tort, by refusing to recognize such a cause of action. *Perry v. S. N.,* 973 S.W.2d 301 (Tex. 1998).

A. Duty to Report Child Abuse or Neglect

The Texas Family Code makes it a criminal offense to fail to report child abuse. TEX.FAM.CODE ANN. §261.101(a) (Vernon Supp. 2000) provides in pertinent part:

> A person having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report as provided by this subchapter.

According to the Texas Supreme Court, by enacting §261.101 the Texas Legislature voiced a strong policy to protect children from abuse. *Golden Spread Council, Inc. No. 562 of Boy Scouts of America v. Akins*, 926 S.W.2d 287, 291 (Tex. 1996).

For the purposes of the reporting statute, "abuse" and "neglect" are broadly defined by TEX.FAM.CODE ANN. §261.001 (Vernon Supp. 2000). Further, having thus established a duty to report child abuse, the Family Code then puts teeth into the requirement by making it a Class B misdemeanor criminal offense (punishable by a fine up to $2,000 and jail-time of up to 180 days, or both) for a knowing failure to make a report. TEX.FAM.CODE ANN. §261.109 (Vernon 1996).

B. Justice Cornyn Opens the Door

In *Golden Spread Council, Inc. # 562 of the Boy Scouts of America and Boy Scouts of America v. Akins*, the Texas Supreme Court held that a local boy scout council, by the affirmative act of recommending a potential scout master to the church that asked the council to introduce it to a potential scoutmaster, owed a duty to both the church and to the children and parents involved in the troop, to use reasonable care in light of the information the council had received about the scout master later recommended. Suit had been brought on allegations that the scoutmaster recommended by the council had sexually molested a scout. The local council had received reports in the past of possible abuse committed by the scoutmaster in question.

In a concurring opinion, Justice Cornyn asserted that Family Code section 261.101(a) imposes an independent duty to report child abuse or neglect and that the Court should have acknowledged this duty as an additional basis for civil liability. *Golden Spread Council* 926 S.W.2d at 293. Justice Cornyn further noted that both tort law and criminal law are concerned with preventing future harm and so, "it should not be surprising that a penal statute may in itself create a legal duty in a civil case, separate and apart from any duty imposed by common law." *Id.* Therefore, he argued that when a statute is designed to prevent injury to people like the injured party in *Golden Spread Council*, an unexcused violation may constitute negligence *per se*, concluding that "[a] violation of section 261.101(a) of the Family Code...fits this well-established paradigm for civil liability and should [have been] adopted by the Court." *Id.*

C. Conflict Among the Courts of Appeals

1. *Nash v. Perry*, 944 S.W.2d 728 (Tex. App. -- Austin 1997), *rev'd,* 973 S.W.2d 301 (Tex. 1998).

In apparent agreement with Justice Cornyn's arguments in *Golden Spread Council*, the Austin Third Court of Appeals reversed a summary judgment regarding a negligence *per se* claim based on an alleged failure to report child abuse. *See* 944 S.W.2d at 728-29.

In *Nash,* the plaintiff parents alleged that the defendants had breached both common law and statutory duties in failing to report the physical and sexual abuse of the plaintiffs' children. The Austin appellate court held that the defendant's conduct violated no common law duty. 944 S.W.2d at 729. However, since there could be no question that the negligence *per se* doctrine was a part of the jurisprudence of the state and thus binding on all courts until abolished, the Austin Court of Appeals went on to determine as a judicial question whether a negligence action may be founded upon a violation of the statutory duty imposed by § 261.101(a). *Id.* at 730.

In such determination, the Third Court of Appeals weighed competing factors. Two justifications favored adoption of tort liability: (1) a penal statute generally gives notice to the public that certain conduct is unacceptable; and (2) enactment of the statute implies that the legislature found, after resort to its superior investigative facilities, that compliance with the statute is practicable as well as desirable. *Id.* Against these, the Austin appellate court considered several dangers: (1) the statute may impose liability without fault because scienter is not required; (2) the statute may be so obscure that it is not really susceptible of notice; and (3) the statute may impose ruinous liability based upon the violation of a relatively minor regulation. *Id.*

The Austin court held that there was no danger of liability without fault in the statutes under consideration because scienter is implicit in the requirement that a person have "cause to believe" and in the requirement of a "knowing" failure to report. *Id.*; *see also,* Texas Family Code §261.101(a); Texas Family Code §261.109(a). Further, the Third Court of Appeals stated that it could not regard the statutory requirements as obscure or a minor regulation of conduct, as the abuse of children has become notorious. *Id.* Consequently, the Austin Court of Appeals held that the statutes defined the conduct of a reasonable person and therefore remanded the case to the trial court so that the plaintiffs could proceed on their claim of negligence *per se*, specifically noting that it remained the plaintiff's burden to persuade the fact finder concerning the alleged violation of the statutory duty and proximate cause, and that it was the defendants' burden to plead, prove and persuade the fact finder regarding a permissible excuse. *Id.*

2. *Marshall v. First Baptist Church of Houston,* 949 S.W.2d 504, (Tex.App.-Houston [14th Dist.] 1997, no writ).

In *Marshall v. First Baptist Church of Houston*, the plaintiff alleged that in 1984, when he was 12 years old, he was sexually molested by the director of children's music program at the defendant church. *Id.* at 505. The plaintiff also alleged that in 1987, 1988, and 1989, he reported the abuse to various church members and officials, but that nobody ever reported the incident. *Id.* at 505-506.

On appeal after the trial court granted the church's motion for summary judgment, on the grounds of limitations, the plaintiff argued that the trial court erred in granting the motion for summary judgment because the Church's conduct constituted a continuing tort. *Id.* at 508. Specifically, the plaintiff alleged that because the Church failed to report his prior abuse to the proper authorities, the Church violated former Texas Family Code §34.01[repealed, now §261.101], contending that each day Church officials failed to report his abuse (from 1983 until 1989) constituted a new wrongful act, initiating a new limitations period. *Id.*

The Houston Fourteenth Court of Appeals disagreed with the plaintiff's allegation that

the Church failure to report constituted a tort under former §34.01, noting that a violation of the statute is punishable by criminal penalties and that nothing in the statute indicates that it was intended to create a private cause of action. *Id.* Further, according to the Houston appellate court, even if the statute did create a private cause of action, such an action would not be viable in *Marshall* because the statute only creates a duty to report the abuse or neglect of a child. *Id.* Under the plaintiff's argument, noted the Houston Court of Appeals, if a woman, then sixty years old, reveals to her minister that, some fifty years ago, she was abused as a child at age ten, the minister could be either prosecuted or sued for failing to report the abuse to the proper authorities; thus, the appellate court declined to adopt the plaintiff's interpretation that the statute [§261.101] was intended to apply to an instance of past childhood abuse when the victim has attained the age of majority and is no longer in need of this statutory protection. *Id.*

D. The Texas Supreme Court Decides: *Perry v. S. N.*

In *Perry v. S. N.,* 973 S.W.2d 301 (Tex. 1998), the Texas Supreme Court held that plaintiffs may not maintain a cause of action for negligence per se based on the Texas Family Code, which requires any person having cause to believe a child is being abused to report the abuse to state authorities and makes the knowing failure to do so a misdemeanor.

In his opinion, Chief Justice Philips took care to state that the Court did not decide whether a statute criminalizing only the type of egregious behavior with which the defendants were charged--the failure of eyewitnesses to report the sexual molestation of preschool children--would be an appropriate basis for a tort action. *Id.* at 305. Rather, the issue before the Texas Supreme Court was whether it is appropriate to impose potential tort liability on any and every person who "has cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect and knowingly fails to report." *Id.* Chief Justice Philips also noted that the plaintiffs did not appeal the court of appeals' judgment affirming the summary judgment against them on common law negligence and, therefore, the question of whether Texas should impose a ***new common law duty*** to report child abuse on the facts of the case was not before the Court. *Id.* at 303.

In analyzing the case, the Texas Supreme Court considered the following factors regarding the application of negligence per se to the Family Code's child abuse reporting provision: (1) whether the statute is the sole source of any tort duty from the defendant to the plaintiff or merely supplies a standard of conduct for an existing common law duty; (2) whether the statute puts the public on notice by clearly defining the required conduct; (3) whether the statute would impose liability without fault; (4) whether negligence per se would result in ruinous damages disproportionate to the seriousness of the statutory violation; (5) whether the statute would impose liability on a broad and wide range of collateral wrongdoers; and (6) whether the plaintiff's injury is a direct or indirect result of the violation of the statute. *Id.* at 309. Ultimately, according the Chief Justice Phillips, because a decision to impose negligence per se could not be limited to cases charging serious misconduct like the one at bar, but rather would impose immense potential liability under an ill- defined standard on a broad class of individuals whose relationship to the abuse was extremely indirect, the Texas Supreme Court held that it was not appropriate to adopt Family Code section 261.109(a) as establishing a duty and standard of conduct in tort. *Id.* Thus, the plaintiffs in *Perry* could not maintain a claim for negligence per se or gross negligence based on defendants' violation of the child abuse reporting statute. *Id.*

However, it should be noted again that Chief Justice Phillips ended his opinion by reiterating his caveat that because the plaintiffs did not appeal the court of appeals' adverse decision on their common law negligence claims, the Texas Supreme Court did not consider whether Texas should impose a common law duty to report or prevent child abuse. *Id.*

XV. TORTS INVOLVING CHILDREN

A. Wrongful Adoption

Over 50,000 children are adopted by nonrelatives each year in this country. J. Lewis, Wrongful Adoption: Agencies Mislead Prospective Parents, 28 Trial 75 (Dec. 1992). Most adoptions result in happy endings. Sometimes, however, adoption agencies have knowledge but do not advise prospective adoptive parents that the child in question has a serious, preexisting physical, mental, or emotional disability. When these conditions are later discovered, the adoptive parents may find themselves responsible for substantial, unanticipated medical or psychological expenses. They may also find themselves physically, emotionally, and financially responsible for the care of a child with a degenerative or fatal disorder or for an abused child who exhibits violent or antisocial behavior, which they were totally unprepared for. When agencies intentionally or negligently misrepresent a child's health or background or conceal other material information, the adoptive parents may have a claim for wrongful adoption.

1 . Misrepresentation by Adoption Agency

Adoption is strictly a creature of statute and is uniformly strictly regulated. Since the early 1900's, all states passed adoption code provisions for complete anonymity between adoptive parents and birth parents. "The quest for confidentiality was premised on the philosophy that adoption constitutes rebirth, in which all ties with the biological family should be severed and an illusion should be created that the adoptee was born into the adoptive family." 2 Adoption Law and Procedure §16.01[l] (J. Hollinger, ed. 1997). As a result, absolutely no information concerning the child's birth parents' health was released, and most often information concerning the health of the child was withheld as well.

Over the decade of the 1990's, however, that philosophy has been abandoned in favor of one that promotes complete communication to the adoptive parents of accurate medical information. The current philosophy is predicated on the belief that parents must know the medical histories of the children they are adopting in order to adequately care for them. Further, when the children become adults, they are entitled to know their medical histories in order to care for themselves. The explosion of judicial expansion of liability for intentional nondisclosure spurred the state legislatures to mandate disclosure of health information. All states now have statutes that mandate or permit disclosure of some medical information to adoptive parents. *See e.g.,* ARIZ. REV. STAT. §8-129. The Uniform Adoption Act §2-106, 9 U.L.A. 1 (1994) mandates the disclosure of medical information.

(a) Wrongful Adoption

Although courts have denominated this tort action as one for wrongful adoption, the cases seem to reveal that the adoptive parents are, in fact, asserting a variety of tort claims, including fraud and intentional misrepresentation, negligent misrepresentation, intentional and negligent infliction of emotional distress, breach of contract, breach of warranty, RICO, and malpractice. While most cases assert a claim for tort damages, some also have requested revocation of the adoption itself.

In *Mohr v. Commonwealth of Massachusetts*, 653 N.E.2d 1104 (Mass. 1995), the Massachusetts Supreme Judicial

Court affirmed a jury award to the adoptive parents of a retarded girl against the state recognizing the tort of "wrongful adoption" for the first time in Massachusetts. The state had withheld information that the girl had been diagnosed as retarded at four months, her biological brother was committed to a state psychiatric institution diagnosed as suffering from schizophrenia, and that the birth mother was schizophrenic. The state only told the parents that the child, who was six years old at the time of adoption, had been abused and that there were no medical records, when in fact they knew about the prior medical diagnosis. Though it was the state's policy to withhold information regarding an adoptive child's medical, genetic, and psychiatric history, they told the adopting parents that the biological mother was young, enjoyed cooking, and had aspirations of becoming a nurse.

In *Michael J. v. Los Angeles County Department of Adoptions*, 201 Cal. App.3d 859, 247 Cal.Rptr. 504 (1988), the court reversed a summary judgment in favor of a county adoption agency for misrepresentations and concealment in the adoption process. The complaint filed by the adoptive mother and child alleged negligent and intentional misrepresentations, fraud, and personal injury. At the time of the adoption, the county knew or should have known that the child's port wine stain on his upper torso and face were a manifestation of Sturge-Weber syndrome. However, this information was concealed from the adopting mother when she inquired.

In *Cesnik v. Edgewood Baptist Church*, 88 F.3d 902 (11th Cir. 1996), the court reversed the dismissal of a Minnesota couple's claim against a Georgia adoption agency for breach of contract and racketeering for deliberately misrepresenting the health of two children they adopted. The court held that the couple was not restricted to rescission of the contract but could seek damages - the expenses they will incur in raising the children in excess of those they would have incurred had the children not been disabled.

In *M.H. and J.L.H. v. Caritas Family Services*, 488 N.W.2d 282 (Minn. 1992), the court held that adoption agencies may be liable for damages resulting from intentional affirmative misrepresentations of facts about a child made to the adopting parents. The agency informed the adopting parents that there was incest in the child's background, but failed to disclose the fact that the genetic father was a 17-year-old boy considered "borderline hyperactive," and tested in the low-average range of intelligence and that the genetic mother was the boy's 13-year-old sister. The parents claims were for mental anguish and considerable medical and psychological bills.

In *Juman v. Louise Wise Services*, 608 N.Y.S.2d 612 (N.Y. Sup. Ct. 1994), affd, 620 N.Y.S.2d 371 (N.Y. App. Div. 1995), the court recognized the tort of wrongful adoption for an adoption intermediary's fraudulent concealment of material facts regarding the adoptive child or his or her biological family that, if known by the prospective adoptive parents, would have resulted in their not proceeding with the adoption. The child in this case was adopted at age 16 months. Over the next 22 years, he suffered psychological disorders, including schizophrenia. The parents ultimately learned, through the child's own investigation, that the biological mother had a long history of mental illness and had a frontal lobotomy before giving birth to the child. The agency had knowledge of this history and secreted the information from the adopting parents.

In *Mallette v. Children's Friend & Service*, 661 A.2d 74 (R.I. 1995), the court recognized the tort of negligent misrepresentation in the adoption context, finding it unnecessary to create a new cause of action for "wrongful adoption." Noting that Rhode Island law does not require an agency to disclose relevant information to adopting parents, the lack of a statutory duty of disclosure does not mean that agencies owe no duty to the parents. This case dealt with an agency that volunteered information to the

potential adoptive parents. The court pointed out that in order to avoid liability an agency simply needs to refrain from making representations or to make representations in a nonnegligent manner.

In *Jackson v. Montana*, 956 P.2d 35 (Mont. 1998), the court held that a state's act of volunteering information to prospective adopting parents gave rise to a duty to use due care and to refrain from negligently misrepresenting that information. The court's ruling came in a case where a trial judge had concluded that the state had neither a common-law nor a statutory duty to fully and accurately disclose to potential adoptive parents information in its possession concerning the psychological and medical backgrounds of their adoptive son's biological parents.

(b) Distinction Between Fraud and Negligence

The distinction between fraud and negligence--and the level of proof required for each--could become crucial in determining the extent of agencies' liability in the future. It could become especially pivotal as suits are filed in cases of adopted children born to drug-addicted of HIV-positive mothers, especially with regard to the applicable statute of limitations period.

In *Moreau v. Roman Catholic Archdiocese of New York City*, No. 13057/96 (N.Y. Sup Ct, Richmond County), a woman adopted an infant with her former husband in 1983. The child, now 15, had been sickly all his life. In 1994, he tested positive for the virus that causes AIDS. Thereafter, plaintiff learned that the birth mother may have been a prostitute, and that the child was born addicted to drugs. Plaintiff was barred by the statute of limitations from suing on the basis of negligent misrepresentation because the limitations period was only three years, and because New York has only expressly approved fraud as a basis of for wrongful adoption cases.

(c) Breach of Contract

There have been several reported cases which have refused to allow adoptive parents to sue adoption agencies when the plaintiffs asserted liability on the basis of breach of contract.

In *Regensburger v. China Adoption Consultants Ltd.*, 138 F.3d 1201 (7th Cir. 1998), the court ruled that a couple who adopted a child from the People's Republic of China and learned several months later that the child was not three years old, as they had been told by Chinese authorities, but was between six and eight years old and mentally and physically delayed, may not pursue an action seeking damages for breach of contract and misrepresentation against an Illinois company that assisted them during the adoption.

In *Ferenc v. World Child, Inc.*, 977 F.Supp. 56 (D.D.C. 1997), the court held that a private agency that arranged for a couple's adoption of a Russian child is entitled to summary judgment in the wrongful adoption action filed by the adoptive parents after discovering that the child had numerous congenital neurological and visual disorders.

(d) Constitutional Theories

Courts have also rejected adoptive parents' proceeding under constitutional theories. *See Griffith v. Johnston*, 899 F.2d 1427 (5th Cir. 1990) (in which the court affirmed the dismissal of a §1983 civil rights action against the State of Texas, which alleged that administration of the state's adoption program for "hard to place" or "special needs" children violated their rights to due process and equal protection); *Collier v. Krane*, 763 F.Supp. 473 (D. Colo. 1991)(summary judgment for defendants granted in a §1983 civil rights action against the department of social services and the county who had placed a baby for adoption with plaintiff but made misrepresentations regarding baby's psychological and physical

disorders because the alleged misrepresentations did not violate any constitutional rights).

2. Torts Involving Attorney's Negligence in Handling Adoptions

Attorneys who handle adoptions for their clients owe them a duty of care consistent with the requisite level of professional competence as a reasonably prudent attorney. Several jurisdictions have dealt with such cases.

In *Doe v. Hughes, Thorsness, Gantz, Powell & Brundin*, 838 P.2d 804 (Alaska 1992), the court found that the attorneys who represented a married couple arising out of a surrogate parenthood arrangement are liable as a matter of law for their failure to satisfy the requirements of the Indian Child Welfare Act (ICWA) in obtaining the consent of the subject child's biological mother. The attorneys knew of the child's Indian heritage (through his father) and, therefore, knew that the adoption was subject to the consent requirements of the ICWA.

In *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154 (Tex. 1991), the plaintiffs asserted that the adoption attorney was negligent in naming himself, and not them, as the child's temporary managing conservator on the affidavit of relinquishment of parental rights signed by the child's mother, who subsequently revoked her consent to the adoption. As a result of the alleged legal malpractice, the suit to terminate the natural parents' rights was ultimately dismissed based on the court's finding that they lacked standing to seek termination.

In *Kohn v. Schiappa*, 656 A.2d 1322 (N.J. Super. Ct. 1995), a couple sued their attorney, retained to assist in their adoption of a child through an approved adoption agency, for emotional distress without economic damages. The court found that the attorney erroneously disclosed information about the adoptive couple to the child's biological parents contrary to state law. The court acknowledged that in legal malpractice actions damages are typically measured by the amount the client would have recovered but for the attorney's negligence; however, it stated that without the client's ability to seek redress for emotional distress damages, negligent counsel would have virtual immunity for any malpractice committed when retained for noneconomic purposes. As examples of cases not predicated upon economic interests, the court pointed to the drafting of a living will, contested custody and visitation disputes, and criminal defense work.

XVI. THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT ("RICO")

Messody Perlberger ("Messody") and Norman Perlberger ("Norman") were married in 1971. In 1987, Norman filed for divorce. In 1991, Messody and Norman were divorced in the Court of Common Pleas of Montgomery County, Pennsylvania.

In 1996, Messody discovered that Norman, an attorney, allegedly had devised and, with the help of others (including accountants, lawyers and others), perpetuated a fraudulent scheme in which Norman was able to conceal the true value of his income and assets from his wife during their divorce proceedings. The alleged scheme resulted in the misrepresentation of Norman's income by more than half and the awards for child support and alimony ordered by the Court of Common Pleas were less than what they would have been if the Court of Common Pleas had known Norman's true income. Messody sued Norman, Perlberger Law Associates, Amy Lundy Brennen (an attorney in Norman's law firm and his current spouse), Allen Rothenberg (an attorney), and accountants Daniel Jones and Jones Hayward & Linzi, in the Federal District Court for the Eastern District of Pennsylvania for, among other things, violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. §§ 1960 *et seq.*). In February 1998 and 1999, the Federal District Court denied motions to dismiss and for summary judgment filed by Norman and

others concerning the RICO allegations. Before discussing the Court's decisions, some general background on RICO is necessary.

A. Overview of RICO (18 U.S.C. §§ 1960 et seq.)

The general elements of a civil RICO claim are (1) a violation of a subsection(s) of 18 U.S.C. § 1962, (2) an injury to the plaintiff's business or property, and (3) the proximate causation of the injury by the RICO violation.

1. Violations of RICO (18 U.S.C. § 1962)

There are four distinct RICO violations described in 18 U.S.C. § 1962.

(a) Section 1962(a).

A person who has received any income derived, directly or indirectly, from a pattern of racketeering activity cannot invest any of the income, or its proceeds, in an enterprise. Likewise, section 1962(a) prohibits taking money earned elsewhere by virtue of the predicate acts of racketeering (i.e., mail and wire fraud) and making an otherwise lawful investment of the money in an enterprise.

(b) Section 1962(b).

Section 1962(b) prohibits acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity. It prohibits the use of the unlawful activity to actually acquire an interest in, or control of, an enterprise.

(c) Section 1962(c).

Section 1962(c) prohibits a person employed by or associated with an enterprise to actually conduct or participate in the affairs of an enterprise through a pattern of racketeering activity. An essential element to establish a section 1962(c) violation is that the defendants were aware of the general existence of the enterprise. In addition, one must participate in the operation or management of the enterprise itself in order to be subject to section 1962(c) liability.

(d) Section 1962(d).

Section 1962(c) prohibits a person from conspiring to violate subsections (a), (b), or (c). An essential element to establish a section 1962(d) violation is that defendants knowingly agreed to participate in the enterprise through a pattern of racketeering.

(e) Common Elements of RICO Violation

Although four distinct RICO violations are declared to be unlawful in 18 U.S.C. § 1962, common elements are present in all four offenses. *Calcasieu Marine Nat'l Bank v. Grant*, 943 F.2d 1453, 1461 (5th Cir. 1991). Reduced to its common elements, a civil RICO claim must involve (1) a person who engages in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of an enterprise. *In re Burzynski*, 989 F.2d 733, 741 (5th Cir. 1993).

2. RICO "person"

A RICO person is the defendant. Section 1961(3) defines "person" to include any individual or entity capable of holding a legal or beneficial interest in property. 18 U.S.C. § 1961(3).

3. Pattern of Racketeering

(a) Racketeering activity

"Racketeering activity" is defined in section 1961(1) in terms of a list of state and federal crimes. 18 U.S.C. § 1961(1). The individual acts of racketeering activity are usually described as the "predicate acts" or "predicate offenses." Under section 1961(1)(B), "racketeering activity" includes any act which is indictable under a number of federal criminal statutes, including mail fraud and wire fraud. Any act that does not fall within the purview of RICO's definition of predicate acts or offenses is not an act of racketeering activity. *See U.S. v. Private*

Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 793 F.Supp. 1114, 11136 (S.D. N.Y. 1983).

A plaintiff may not convert state law claims into a federal treble damage action by alleging that wrongful acts are a pattern of racketeering related to an enterprise. *King v. LASHER*, 572 F.Supp. 1377, 1382 (S.D.N.Y. 1983). Although a criminal conviction of the defendants for mail or wire fraud is not a condition of asserting these offenses as the basis for civil RICO claims, the conduct used to support a civil RICO action must be indictable. *CMI, Inc. v. Intoximeterss, Inc.*, 918 F.Supp. 1068, 1089 (W.D. Ky. 1995); *Central Distrib. of Beer, Inc. v. Conn*, 5 F.3d 181, 183 (6th Cir. 1993). However, the RICO statute imposes no intent requirement beyond that found in the predicate offense. *Gentry v. Resolution Trust Corp.*, 937 F.2d 899, 908 (3rd Cir. 1991); *U.S. v. Biasucci*, 786 F.2d 504, 512 (2d Cir. 1986). Furthermore, allegations of mail fraud and wire fraud must be made with the particularity required by Fed. R. Civ. P. 9(b). *Central Distrib. of Beer, Inc.*, 5 F.3d at 183-83.

The plaintiff must plead and prove each prong of the predicated offense, or "racketeering activity," to maintain a civil action under the RICO statute; thus. the plaintiff must show that each element of a mail fraud or wire fraud offense has been committed by the defendants. *Central Distrib. of Beer, Inc.*, 5 F.3d at 183-84; *CMI, Inc.*, 918 F.Supp. at 1089.

(b) Mail Fraud and Wire Fraud

For mail fraud, it is necessary to show that (1) the defendants formed a scheme or artifice to defraud, (2) the defendants used the U.S. mails or caused a use of the U.S. mails in furtherance of the scheme, and (3) the defendants did so with the specific intent to deceive or defraud. *Central Distrib. of Beer, Inc.*, 5 F.3d at 184; *Schreiber Distrib. Co. v. Serv-Well Furniture Co*., 806 F.2d 1393, 1399-1400 (9th Cir. 1986). A RICO claim asserting mail fraud as a predicate act must allege how each specific act of mail fraud actually furthered the fraudulent scheme, i.e., who caused what to be mailed when, and how the mailing furthered the fraudulent scheme. *Landon v. GTE Communications Servs., Inc.*, 696 F.Supp. 1213, 1217 (N.D. Ill. 1988). However, the mail fraud statute does not reach every business practice that fails to fulfill expectations, every breach of contract, or every breach of fiduciary duty. *U.S. v. Goss*, 650 F.2d 1336, 1346 (5th Cir. 1981); *Marriott Bros. v. Gage*, 704 F.Supp. 731, 739 (N.D. Tex. 1988). To the contrary, there must have been a recognizable scheme formed with the specific intent to defraud. *U.S. v. Goss*, 650 F.2d at 1346; *Marriott Bros.*, 704 F.Supp. at 739. Furthermore, the defendant must have made fraudulent representations or omissions reasonably calculated to deceive. *Marriott Bros.*, 704 F.Supp. at 739.

A wire fraud violation consists of (1) the formation of a scheme or artifice to defraud, (2) the use of the U.S. wires or causing the use of the U.S. wires in furtherance of the scheme, and (3) specific intent to deceive or defraud. The mail fraud and wire fraud statutes are construed similarly, and the same substantive analysis is used with both statutes. *Carpenter v. U.S.*, 108 S.Ct. 316, 320 n. 6 (1987).

In cases using the mail and wire statutes as predicate offenses, civil RICO plaintiffs must allege and prove reliance. *Carpenter v. U.S.*, 108 S.Ct. at 320 n. 6; *Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir. 1991). The fraud connected with the mail and wire fraud must involve misrepresentations or omissions flowing from the defendant to the plaintiff. *Central Distrib. of Beer, Inc.*, 5 F.3d at 184. Furthermore, when a breach of fiduciary duty is involved, an omission of material information when there is a duty to disclose may constitute a violation of the mail fraud and wire fraud statutes. *See U.S. v. Siegel*, 717 F.2d 7, 14 (2d Cir. 1983) (The mail fraud statute is violated when a fiduciary fails to disclose material information which he is under a duty to disclose to another, under circumstances in which the non-disclosure could or does result in harm to the other); *U.S. v. Silvano*, 812 F.2d 754, 759 (1st Cir. 1987).

(c) Pattern of Racketeering activity

The plaintiff in a civil RICO action must also show that there was a **pattern** of racketeering activity. *In re Burzynski*, 989 F.2d at 742. A "pattern of racketeering activity" requires at least two acts of racketeering activity (i.e., predicate acts such as mail and wire fraud) within a ten year period. Although at least two acts of racketeering activity are necessary to constitute a pattern, two acts may not be enough. *Sedima, S.P.R.L. v. Imrex Co.*, 105 S.Ct. 3275, 3285 n. 14 (1985). To prove a pattern of racketeering activity, a plaintiff must show that the predicate acts are related to each other and that they either constitute or threaten long term continued criminal activity (i.e., continuity). *H.J., Inc. v. Northwestern Bell Tel. Co.*, 109 S.Ct. 2893, 2900-01 (1989); *In re Burzynski*, 989 F.2d at 742. Predicate acts are related if they have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. *H.J., Inc. v. Northwestern Bell Tel. Co.*, 109 S.Ct. at 2901; *In re Burzynski*, 989 F.2d at 742. Continuity is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that, by its nature, projects into the future with a threat of repetition. *H.J., Inc. v. Northwestern Bell Tel. Co.*, 109 S.Ct. at 2902. Continuity exists when the predicate acts constitute or threaten continued criminal activity. *H.J., Inc. v. Northwestern Bell Tel. Co.*, 109 S.Ct. at 2901. Examples of what would establish a threat of continued racketeering include (1) the predicate acts inherently involve a distinct threat of long-term criminal activity, (2) the entity exists for the purpose of engaging in criminal activity, and (3) the predicate acts are a regular means of conducting an ongoing legitimate business. *H.J., Inc. v. Northwestern Bell Tel. Co.*, 109 S.Ct. at 2902-03. When the criminal scheme is not open-ended and has reached its fruition, continuity may be shown by proving that a series of related predicate acts extended over a substantial period of time. *H.J., Inc. v. Northwestern Bell Tel. Co.*, 109 S.Ct. at 2902. However, a few weeks or months does not qualify as a "substantial period of time." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 109 S.Ct. at 2902.

4. Existence of an Enterprise

RICO defines "enterprise" very broadly. "Enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity. 18 U.S.C. § 1961(4). There is no restriction upon the associations embraced by the definition -- a RICO enterprise can be either a legal entity or an "association in fact" enterprise. *In re Burzynski*, 989 F.2d at 743. A legitimate business entity such as a corporation may constitute an enterprise; an illegal organization may also be an enterprise for RICO purposes. *U.S. v. Turkette*, 101 S.Ct. 2524, 2527-28 (1981); *U.S. v. Brown*, 583 F.2d 659, 663 (3d Cir. 1978). An enterprise is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. *U.S. v. Turkette*, 101 S.Ct. at 2528. In addition, the enterprise must be shown to have an existence separate and apart from the pattern of activity in which it engages. *U.S. v. Turkette*, 101 S.Ct. at 2528.

5. Separation Between RICO "Person" and RICO "Enterprise"

Section 1961(3) defines "person" to include any individual or entity capable of holding a legal or beneficial interest in property. 18 U.S.C. § 1961(3). Thus, a corporation qualifies as a "person" and may be subject to RICO liability. *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 401 (7th Cir. 1984).

Under section 1962(c), which prohibits a person employed by or associated with an enterprise to actually conduct or participate in the affairs of an enterprise through a pattern of racketeering activity, there must be a distinction between the RICO "person" and the RICO "enterprise;" in other words, the person and the

enterprise must be separate entities. *In re Burzynski*, 989 F.2d at 743. When a legal entity such as a corporation violates section 1962(c), the required separation is not established merely by showing that the corporation, through its employees, officers, and/or directors, committed a pattern of predicate acts in the conduct of its own business. *Old Time Enter., Inc. v. Int'l Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir. 1989). However, an association-in-fact enterprise may have as a member one of a number of RICO defendants. *Cadle Co. v. Schultz*, 779 F.Supp. 392, 397 (N.D. Tex. 1991). *See Guidry v. Bank of LaPlace*, 954 F.2d 278, 283 (5th Cir. 1992) (an unincorporated sole proprietorship may be a distinct enterprise from its owner if it employs several individuals).

6. RICO damages (18 U.S.C. § 1964(c))

A person injured **in his business or property** shall recover three times the damages he or she receives and the cost of the suit including reasonable attorney's fees. Damages under RICO are limited to injuries to business or property and do not include personal injuries and their resulting pecuniary consequences, mental or emotional distress, or speculative or intangible property interests. *Gaines v. Texas Tech University*, 965 F.Supp. 886, 890 (N.D. Tex. 1997); *In Re Taxable Municipal Bond Secs. Litig.*, 51 F.3d 518, 522-23 (5th Cir. 1995); *Fleischhauer v. Feltner*, 879 F.2d 1290, 1300 (6th Cir. 1989). In fact, a showing of injury to business or property requires proof of concrete financial loss. *See Oscar v. Students Coop Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992). However, upon a finding of liability under RICO, the imposition of treble damages is mandatory. *Resolution Trust Corp. v. S & K Chevrolet*, 868 F.Supp. 1047, 1062 (C.D. Ill. 1994).

B. *Perlberger v. Perlberger*

1. Messody's RICO Allegations

In support of her RICO claims, Messody's Complaint included the following allegations.

Norman was an attorney and he and Messody had two children. In 1986, Norman decided to divorce his wife. However, rather than simply leave his wife and file for divorce, Norman devised a scheme to shield his assets and income from scrutiny during his anticipated divorce. While still living with his wife and children, Norman began a romantic relationship with Diane J. Strausser, a client that Norman was representing in her divorce. In May 1987, Norman left his wife and began living with Ms. Strausser; Norman filed for divorce from Messody a few days later.

In June 1987, Norman settled Ms. Strausser's divorce case for $850,000.00 in cash, plus other property. At Norman's suggestion, Ms. Strausser purchased a house in Lionville, Pennsylvania for $420,000.00, where they could live together. Although Norman contributed his own funds to purchase the property, the deed for the property was put only in Ms. Strausser's name so that he could conceal his interest in the property and prevent his wife from making a claim on the property. In addition, the accountants were involved in the negotiations for, and the purchase of, the Lionville property and were aware of and conspired with Norman to use Ms. Strausser to minimize the amount of his assets and income to defraud Messody. The accountants were also involved in negotiations for, and the purchase of, two other homes for Ms. Strausser for the benefit of Norman and in furtherance of the fraudulent scheme.

In June 1988, Norman left the law firm of Blank, Rome, Comiskey & McCauley ("Blank Rome"), where he was a partner, to start his own firm which came to be known as Perlberger Law Associates. When he left Blank Rome, the partnership owed Norman a substantial sum of money from his partnership capital account. Rather than directly investing the money from the capital account in his new firm (and running the risk that the money would be considered a marital asset and subject to a claim by Messody), Norman used Ms. Strausser to obtain financing, in the form of a $500,000.00 line of credit, for his new law firm. He persuaded Ms.

Strausser to secure the line of credit so that he was able to conceal the use of the funds from the capital account to establish his new law firm and to successfully argue in the divorce proceedings that his new law firm was not a marital asset.

Norman employed Ms. Strausser as an office administrator and client counselor in his new law firm. He paid her an inflated salary reflected on the payroll of Perlberger Law Associates. Norman and the accountants structured Ms. Strausser's salary to pay Norman's daily expenses so he could maintain a lavish lifestyle while continuing to represent that he had little personal income of his own. By minimizing the amount of income he reported in the divorce proceedings, Norman was able to decrease his financial exposure and liability to Messody and his children. Norman had the accountants prepare a fraudulent financial statement for use in his divorce proceedings which inaccurately reflected substantial assets owned by Ms. Strausser, minimized the extent of Norman's assets, and concealed the value of Perlberger Law Associates.

In 1992, Norman's personal and professional relationship with Ms. Strausser ended and Amy Lundy Brennen, an attorney employed by, and subsequently married to, Norman, replaced Ms. Strausser as the conduit to shelter Norman's income. Ms. Brennen was paid an inflated salary by Perlberger Law Associates, and the accountants structured payments to Ms. Brennen in the same manner and to the same end as they had with the payments to Ms. Strausser. As Ms. Strausser had done previously, Ms. Brennen acquired and held in her own name substantial real property for Norman's benefit with many of the expenses paid by Perlberger Law Associates.

Allen Rothenberg, an attorney, also assisted Norman in concealing his income from Messody. Mr. Rothenberg, Norman and Perlberger Law Associates "owned" asbestos personal injury cases and other civil cases which had substantial settlement value. Mr. Rothenberg helped Norman shelter his income by sharing fees, "holding" cases for Norman, and deferring the settlement of as many cases as possible until after the finalization of the divorce. In this way, substantial marital assets were concealed from Messody.

2. Messody's RICO Claims

In 1996, Messody sued Norman, Perlberger Law Associates, Amy Lundy Brennen, Allen Rothenberg, and accountants Daniel Jones and Jones Hayward & Linzi in the Federal District Court for the Eastern District of Pennsylvania. Messody alleged, among other things, violations of RICO by use of mail and wire fraud. See 18 U.S.C. §§ 1962, 1341, 1343. Although Messody alleged violations of all four subsections of section 1962, the Federal District Court focused on alleged violations of section 1962(c).

3. February 24, 1998 District Court Opinion:*Perlberger v. Perlberger*, 1998 WL 76310 (E.D. Pa.)

Norman, Perlberger Associates, P.C., Allen Rothenberg and Amy Lundy Brennen (the "Attorney Defendants") filed a motion to dismiss on the ground that Messody's complaint did not state a claim under RICO. Accountants Daniel Jones and Jones Hayward & Linzi (the "Accountant Defendants") also filed a motion to dismiss on the ground that Messody's complaint did not state a claim under RICO. The District Court denied both motions.

(a) Policy Grounds

The Attorney Defendants and Accountant Defendants argued that RICO should apply only to crimes that have been traditionally associated with transgressions of racketeers such as murder, bribery, extortion and kidnaping. The District Court declined to dismiss the RICO claims on policy grounds. The District Court recognized that including "mail and wire fraud within the scope of civil RICO extends RICO beyond the world of racketeers to the realm of common law, 'garden variety' fraud found in commercial litigation." 1998 WL 76310 at *4

(citing *Tabas v. Tabas*, 47 F.3d 1280, 1290 (3d Cir. 1995)). The District Court also acknowledged other federal cases in which courts entertained civil RICO claims related to family law matters. *See Grimmett v. Brown*, 75 F.3d 506 (9th Cir. 1996) (ex-wife's RICO claim -- that the ex-husband and others reorganized ex-husband's medical practices so as to cheat ex-wife out of her post-divorce community property interest in those practices -- was barred by limitations); *Calcasieu Marine Nat. Bank v. Grant*, 943 F.2d 1453, 1458 (5th Cir. 1991) (district court declined to dismiss action on grounds of abstention because the RICO and pendent claims did not implicate any Louisiana family law issues of child custody, alimony, visitation rights, separation or divorce, nor was there an attack on a community property settlement). 1998 WL 76310 at *4.

(b) Enterprise

The Attorney Defendants argued that Messody failed to adequately allege a distinct enterprise required for section 1962(c) claims, but the District Court held the Messody adequately alleged a distinct enterprise. The District Court acknowledged that the distinctness requirement bars a claim against a single entity as both person and enterprise. However, the District Court determined that Messody's allegations satisfied the requirement of a distinct enterprise, as she alleged that a group of five individuals and two professional corporations were the "persons" liable and that the enterprise is the association-in-fact of those persons. 1998 WL 76310 at *6.

(c) Pattern of Racketeering Activity

The Attorney Defendants and Accountant Defendants further argued that Messody failed to adequately allege a **pattern** of racketeering activity. The District Court disagreed, and held that Messody alleged numerous predicate acts including mail and wire fraud dating from 1987 to 1998. 1998 WL 76310 at *6.

The Accountant Defendants argued that Messody alleged only two predicate acts that involved them, that one of those predicate acts was insufficiently plead, and that as a result, Messody had not plead a pattern of racketeering activity that implicated them. The District Court disagreed, holding that Messody alleged numerous predicate acts involving the Accountant Defendants including preparation of a fraudulent joint financial statement for Norman and Ms. Strausser for use in the Perlbergers' divorce, the purchase of the Lionville property and other properties by Ms. Strausser, the financing of Perlberger Law Associates by Ms. Strausser, the payments by Perlberger Law Associates to Ms. Strausser, and the transfer of income and assets of Norman and Perlberger Law Associates to Ms. Brennen. 1998 WL 76310 at *6.

(d) Continuity

A party alleging a RICO claim may demonstrate continuity over a closed period by pleading a series of related predicate acts extending over a substantial period of time. The continuity requirement refers to either a closed period of repeated conduct or to past conduct that by its nature projects into the future with a threat of repetition. The Attorney and Accountant Defendants argued that Messody failed to adequately allege the continuity requirement for the predicate acts. The District Court disagreed, and held that Messody's allegation of a scheme lasting over three years extends over a substantial period of time and therefore constitutes the type of long term criminal conduct that RICO was enacted to address. Thus, Messody adequately alleged the continuity requirement for the predicate acts. 1998 WL 76310 at *7.

4. Allen Rothenberg, Amy Lundy Brennen, and Daniel Jones and Jones Hayward & Linzi

In November 1998, the Federal District Court granted motions for summary judgment filed by Allen Rothenberg, Amy Lundy Brennen, and Daniel Jones and Jones Hayward & Linzi. Concerning Allen Rothenberg, the Court held that Messody failed to make a factual

showing that Mr. Rothenberg engaged in any acts of racketeering activity, was aware of the existence of the RICO enterprise, or agreed to participate in the enterprise. *Perlberger v. Perlberger*, 1998 WL 964182, *8 (Nov. 4, 1998). Concerning Amy Lundy Brennen, the Court held that Messody arguably produced evidence of only one alleged predicate act by Ms. Brennen and, therefore, failed to establish a pattern of racketeering activity. *Perlberger*, 1998 WL 964182, *10 (Nov. 4, 1998). Concerning Daniel Jones and Jones Hayward & Linzi, the Court held that Messody failed to make a factual showing that Mr. Jones and Jones Hayward & Linzi engaged in any acts of racketeering activity, were aware of the existence of the RICO enterprise, agreed to participate in the alleged enterprise, or had a role in directing the affairs of the alleged enterprise. *Perlberger v. Perlberger*, 32 F.Supp. 197, 204, 209 (E.D. Pa. 1998). Thus, after 1998, the only remaining defendants were Norman and Perlberger Law Associates.

5. February 12, 1999 District Court Opinion: *Perlberger v. Perlberger*, 1999 WL 79503 (E.D. Pa.)

Messody alleged the existence of an enterprise consisting of the association-in-fact of all the remaining defendants, i.e., the enterprise now consisting of Norman and Perlberger Law Associates. Norman and Perlberger Law Associates filed a motion for summary judgment asserting that Messody had failed to satisfy the distinctiveness requirement for her section 1962(c) claim requiring conduct by defendant "persons" acting through an "enterprise." They contended that there was no separateness between Norman and his law firm, Perlberger Law Associates, of which Norman is the sole shareholder. In other words, Norman and Perlberger Law Associates cannot be both defendant "persons" and the only members of the "enterprise" without violating the distinctiveness requirement of section 1962(c).

The District Court noted that a complete overlap between the defendant persons and the members of an association-in-fact enterprise does not defeat the distinctiveness requirement. 1999 WL 79503 at *2. The District Court denied the motion for summary judgment holding that, although the enterprise is comprised of the named defendants, it is separate and distinct from its constituent members; in other words, a distinct enterprise exists even when the very same persons named as defendants constitute the association-in-fact enterprise. 1999 WL 79503 at *2.

Although RICO's requirements are rigorous, it may provide a legitimate alternative to other post-judgment remedies. In addition, the potential recovery of treble damages and attorney's fees justify consideration of RICO in appropriate cases.

XVII. VIOLATIONS OF FEDERAL AND STATE SECURITY LAWS

On several occasions, wives have unsuccessfully attempted to bring independent lawsuits against their former husbands for alleged violations of anti-fraud provisions of the federal securities laws (specifically, § 10(b) of the Securities Exchange Act of 1934) in their divorce settlement agreements. Rule 10b(5) provides that it shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality or interstate commerce, or of the mails or of any facility of any national securities exchange: (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. 17 CFR §240.10b(5).

In *Head v. Head*, 759 F.2d 1172 (4th Cir. 1985), the parties were married for 13 years and husband owned a company, Prince Manufacturing, Inc, before he married but husband's wealth increased substantially during the marriage due to his invention of the Prince

tennis racquet. The husband produced financial statements from his accountants that listed book value of his stock at approximately $2.5 million and both parties recognized this figure to be considerably lower than the stock's fair market value. The ultimate property settlement agreement provided a cash payment immediately to wife and a $500,000 promissory note secured by 25,000 shares of the husband's stock. Several months later, the husband paid the wife thereby satisfying the obligation under the promissory note. Thereafter, he sold all of his stock for $45 million. The wife filed suit claiming that the property settlement agreement constituted a fraudulently induced sale of her alleged interest in her husband's stock in violation of the Securities Act. On appeal, the Fourth Circuit affirmed the lower court's summary judgment in favor of husband because wife failed to demonstrate any fraud in connection with that sale as required by Rule 10b(5).

In *McHugh v. McHugh*, 676 F. Supp. 856 (N.D. Ill. 1988), the parties had been married seven years during which time the husband formed a corporation. Under the terms of the property settlement agreement which was incorporated into the decree, the husband was awarded all interest in the corporate stock and the wife released her rights in all of the corporation's stock in return for other property and spousal maintenance payments. During their negotiations, the husband advised the wife that he was unable to determine the value of the corporation's stock. The wife claimed, however, that husband was simultaneously negotiating for the sale of one of the corporation's assets which he sold seven months later for $6 million. The federal district court dismissed the wife's action for violation of §10b(5) reasoning that under state law, only the divorce court may value and divide marital property and that wife's interest in the corporation was not sufficiently identifiable to make the wife a seller of securities for purposes of federal securities law. However, this did not preclude the wife from setting aside the divorce decree in the divorce case and the federal court made note of the fact that such a proceeding was then pending in state court.

In *D'Elia v. D'Elia*, 58 Cal.App.4th 415, 68 Cal.Rptr.2d 324 (1997), the court held that state security fraud laws did not apply to a marital settlement agreement in which spouses divided their community property stock in a privately held corporation. The court reasoned that to characterize the parties' marital settlement agreement as a sale of stock for purposes of securities laws ignores the substance of their transaction, which was not a stock sale, but rather a means by which the spouses divided up the assets within the overall community. Since securities laws were intended to protect genuine investment decisions, rather than allocations of community assets incident to a divorce, wife's remedy in this case, if her husband did misrepresent the value of the stock at the time the agreement was negotiated, was to set aside the agreement. The appellate court reversed the $19.9 million judgment awarded to wife in the trial court.

XVIII. THE LAWYER AS TARGET BY OPPOSING PARTY: THE TORT OF NEGLIGENT MISREPRESENTATION

In *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787 (Tex. 1999), the Texas Supreme Court held that a lawyer may be liable to a non-client for the tort of negligent misrepresentation as defined by the RESTATEMENT (SECOND) OF TORTS § 552 (1977). Although *McCamish* involved a commercial transaction, its application of the tort of negligent misrepresentation to lawyers and non-clients raises significant questions in divorce proceedings. More specifically, whether an attorney has a duty to verify or investigate information from the client which is provided to the opposing party?

A. Sections 552 & 552B, Restatement (Second) of Torts

1. Section 552 -- Information Negligently Supplied for the Guidance of Others

Texas adopted section 552 of the Restatement (Second) of Torts concerning

"negligent misrepresentation" in *Federal Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991). Section 552 states in pertinent part:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3) [concerning one who is under a public duty], the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

2. Section 552B -- Damages for Negligent Misrepresentation

Concerning damages for "negligent misrepresentation," Texas has also adopted section 552B of the Restatement (Second) of Torts. *See Sloane*, 825 S.W.2d at 442; *D.S.A., Inc. v. Hillsboro Indep. School Dist.*, 973 S.W.2d 662, 663-64 (Tex. 1998). Section 552B states:

> (1) The damages recoverable for a negligent misrepresentation are those necessary to compensate the plaintiff for the pecuniary loss to him of which the misrepresentation is a legal cause, including
>
> (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and
>
> (b) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation.
>
> (2) The damages recoverable for a negligent misrepresentation do not include the benefit of the plaintiff's contract with the defendant.

Section 552B has been construed to limit negligent misrepresentation damages to out-of pocket expenses; therefore, damages for benefit of the bargain, lost profits, and mental anguish are not recoverable. *See Sloane*, 825 S.W.2d at 442; *Williams v. City of Midland*, 932 S.W.2d 679, 685 (Tex. App. -- El Paso 1996, no writ).

B. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*: Application of the Tort of Negligent Misrepresentation to Attorneys

F.E. Appling Interests ("Appling") is a general partnership and the managing partner of Boco Chica Development Company, a joint venture formed to develop recreational property. In 1985, Boco Chica obtained a loan and line of credit from Victoria Savings Association ("Victoria Savings") which Boco Chica accepted based upon Victoria Savings' verbal representation that the line of credit would be increased later depending upon several conditions. In 1987, Victoria Savings decided not to extend the additional credit. In 1988, Boco Chica went bankrupt and brought a lender liability claim against Victoria Savings. McCamish, Martin, Brown & Loeffler ("McCamish, Martin") represented Victoria Savings.

Prior to trial, Boco Chica was fearful that the Federal Savings & Loan Insurance

Corporation ("FSLIC") would declare Victoria Savings insolvent and take over control of Victoria Savings before a judgment could be obtained. If Victoria Savings was placed in receivership, Boco Chica's claim based on the breach of a verbal promise would be unenforceable. After Boco Chica and Victoria Savings settled their claims, Appling wanted to ensure that the settlement agreement would be enforceable against FSLIC should Victoria Savings be placed in receivership. Appling agreed to sign the settlement agreement only if Victoria Savings' lawyers would affirm that the agreement complied with the applicable federal statute concerning the enforceability of agreements against FSLIC. However, on March 3, 1989, before the settlement agreement with Boco Chica was signed, the Victoria Savings Board of Directors, which incidentally included a shareholder of McCamish, Martin, signed an agreed order placing Victoria Savings under the voluntary supervisory control of the Commissioner of the Texas Savings and Loan Department. The order provided that no action taken at any Victoria Savings Board meeting would be valid or binding on Victoria Savings unless the action was approved by the Commissioner or his representative.

On March 8 and 9, 1989, the parties and their attorneys, which incidentally included an attorney from McCamish, Martin, signed a settlement agreement in which Victoria Savings and the attorney from McCamish, Martin represented that the agreement complied with the applicable federal statute concerning enforceability against FSLIC. On March 12, 1989, the Victoria Savings Board approved the settlement agreement with Appling and Boco Chica. However, the settlement was never approved by the Commissioner or his representative. In late June 1989, Victoria Savings was declared insolvent and FSLIC was appointed receiver. Subsequently, a federal district court effectively determined that the settlement agreement was not binding on FSLIC because it was not approved as required by the applicable federal statute. Appling and Boco Chica then sued McCamish, Martin, alleging that it negligently misrepresented that the Victoria Savings Board had approved the settlement agreement. The trial court granted summary judgment for McCamish, Martin because, absent privity, McCamish, Martin owed no duty to Appling.

The Texas Supreme Court held that non-clients Appling and Boco Chica may bring a negligent misrepresentation cause of action, as defined by Section 552 of the Restatement (Second) of Torts, against McCamish, Martin. The Court explained that liability under the tort of negligent misrepresentation is not based on the breach of duty a professional owes his or her clients or others in privity, but on an independent duty to the non-client based on the professional's manifest awareness of the non-client's reliance on the misrepresentation and the professional's intention that the non-client so rely. Thus, section 552 imposes a duty to avoid negligent misrepresentation, irrespective of privity. 991 S.W.2d at 792-93. However, the Court acknowledged that section 552 narrows the class of potential claimants and requires that any claimant justifiably rely on the alleged negligent misrepresentation. Under section 552(2), liability is limited to loss suffered:

> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Section 552(2) limits liability to situations in which the attorney or other professional who supplies false information is aware of the non-client and intends that the non-client rely on the information. In other words, a negligent misrepresentation cause of action is available only when information is transferred by an attorney or other professional to a known party for a known purpose. 991 S.W.2d at 793-94. In addition, an attorney or other professional may

avoid or minimize the risk of liability to a non-client by setting forth (1) limitations as to whom the representation is directed and who should rely on it, or (2) disclaimers as to the scope and accuracy of the factual investigation or assumptions forming the basis of the representation or the representation itself. *Id.* at 794. Furthermore, section 552 guards against exposure to unlimited liability by requiring that a claimant justifiably rely on an attorney's representation of material fact. In determining whether section 552's justifiable reliance element is met, one must consider the nature of the relationship between the attorney, client and non-client. *Id.*

C. Possible Applications of the Tort of Negligent Misrepresentation in Divorce Proceedings

The elements of a cause of action for negligent misrepresentation are (a) the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest, (b) the defendant supplies "false information" for the guidance of others in their business, (c) the defendant did not exercise reasonable care or competence in obtaining or communicating the information, and (d) the plaintiff suffers pecuniary loss by justifiably relying on the representation. *Sloane*, 825 S.W.2d at 442.

1. Representations Made in the Course of Business

Undoubtedly representations made by an attorney in settlement discussions or negotiations or otherwise are made in the course of representing the client, i.e., in the course of business.

2. Supplying "False Information" to the Opposing Party

The type of "false information" contemplated under section 552 is a misstatement of an existing or material fact, not a promise of future conduct or statement of negotiating position. *See Airborne Freight Corp., Inc. v. C.R. Lee Enterprises, Inc.*, 847 S.W.2d 289, 294 (Tex. App. -- El Paso 1992, writ denied); *Allied Vista, Inc. v. Holt*, 987 S.W.2d 138, 141 (Tex. App. -- Houston [14th Dist.] 1999, pet.denied). For example, if the client represents to you, his attorney, that the wife's residence was recently appraised at $510,000, this is a representation of an existing or material fact. However, if the client represents to you that the wife's residence might be worth between $480,000 and $540,000 which he believes will be confirmed after an appraisal is completed, this is probably not a representation of an existing or material fact and is probably a statement of negotiating position or promise of future conduct.

In addition, if the client represents to you, his attorney, that a particular tract of property is his separate property because he owned it before he was married, this is a representation of an existing or material fact. However, if the client represents to you that a particular tract of property might be his separate property for unspecified reasons, this is not a representation of an existing or material fact and is probably a statement of negotiating position.

3. Failure to Exercise Reasonable Care or Competence in Obtaining or Communicating the Information

Whether you failed to exercise reasonable care or competence in obtaining or communicating the information will depend upon the client's representations to you, his attorney, concerning the characterization and value of property which you pass on to the opposing counsel without independently verifying or confirming it. The likelihood of your failure to exercise reasonable care will increase depending upon (1) the specificity of the client's representations concerning the characterization and value of property and (2) the dubious or suspicious nature of the client's representations.

(a) Specificity of Representation

For example, if the client represents to you, his attorney, that the wife's residence was recently appraised at $510,000, you probably have a duty of reasonable care to request a copy of the appraisal or contact the appraiser directly. However, if the client represents to you that the wife's residence might be worth between $480,000 and $540,000, you probably do not have a duty of reasonable care to verify or further investigate the value before passing it along to the opposing party.

In addition, if the client represents to you that a particular tract of property is his separate property because he owned it before he was married, you probably have a duty of reasonable care to request a copy of the deed or acquire a copy of the deed from the county clerk before passing this information along to the opposing party. However, if the client represents to his attorney that a particular tract of property might be his separate property for unspecified reasons, you probably do not have a duty of reasonable care to verify or further investigate the character before passing it along to the opposing party.

(b) Nature of Representation

Obviously, if the client's representations concerning the characterization and value of property are far fetched or extremely suspicious, you, his attorney, have a duty of reasonable care to verify or further investigate the representations before passing them along to the opposing party. For example, if the client represents to you that the wife's residence was recently appraised at $510,000 but cannot remember the name of the appraiser, exactly when it was appraised or produce a copy of the appraisal, you have a duty of reasonable care to verify or further investigate the value of the house especially if the "appraised value" seems unrealistically high or low. In addition, if the client represents that his paramour, a part time real estate agent, believes that the wife's residence is worth at least $520,000, you probably have a duty of reasonable care to verify or confirm the value of the house before passing it along to the opposing party. However, if the client represents to you that a locally known realtor believes that the wife's residence might be worth between $480,000 and $540,000, you probably do not have a duty of reasonable care to verify or further investigate the value before passing it along to the opposing party as the opinion of the locally known realtor.

Furthermore, if the client represents to you, his attorney, that a particular tract of property is his separate property because he owned it before he was married but cannot produce a deed, or remember when or from whom he acquired the property, you probably have a duty of reasonable care to verify or further investigate the character of the property before passing it along to the opposing party. If the client represents to you that a particular tract of property is his separate property because it was conveyed to him before he was married by an unrecorded deed which is in the possession of a relative who cannot be located, you probably have a duty of reasonable care to verify or further investigate the character of the property before passing it along to the opposing party. However, if the client represents to you that a particular tract of property might be his separate property for unspecified reasons, you probably do not have a duty of reasonable care to verify or further investigate the character before passing it along to the opposing party.

4. Opposing Party's Justifiable Reliance on the Representation(s)

Whether the opposing party justifiably relied on the misrepresentations will depend upon the nature of the relationship between the attorney, client and non-client. The opposing party's justifiable reliance will also depend upon the client's representations to you, his attorney, concerning the characterization and value of property which you pass on to the opposing counsel without independently verifying or confirming it. The likelihood that the opposing party justifiably relied on the representations will increase depending upon (1) the specificity of the client's representations concerning the characterization and value of property and (2) the plausibility of the client's representations.

(a) Nature of the Relationship Between the Attorney, Client and Non-Client

It is not particularly clear in *McCamish* how the nature of the relationship between the attorney, client and non-client should be evaluated and applied. The Supreme Court notes that several jurisdictions have held that an attorney can be liable to a non-client based upon the issuance of an opinion letter or different types of evaluations. 991 S.W.2d at 793. However, the Court also states that "[g]enerally, courts have acknowledged that a third party's reliance on an attorney's representation is not justified when the representation takes place in an adversarial context." *Id.* at 794, citing *Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 750 P.2d 118, 122-23 (N.M. 1988) (no justifiable reliance on statement by defendant's attorney during jury charge conference in judge's chambers that defendant would not assert immunity even though pleaded) and *Beeck v. Employers Mut. Cas. Co.*, 302 N.W.2d 90, 96-97 (Iowa 1981) (no justifiable reliance on defendant's erroneous admission and answer to interrogatory that allegedly defective product was manufactured by defendant). Regardless, the representation by the McCamish Martin attorney in *McCamish* was made in an adversarial context and the Supreme Court did not decide the case on that basis. Apparently, the justifiable reliance-adversarial context issue will be decided on a case by case basis. However, a recent opinion by the Dallas court of appeals raises doubts. *See Herman v. Mitchell*, 2000 WL 92073 at *1 (Tex. App. -- Dallas January 28, 2000) ("[A]s the relationship between Mitchell [the non-client] and Chapman's [the attorney] client in the earlier suits was 'adverse,' Chapman's conduct in representing his client could not create an actionable duty under section 522 of the Restatement (Second) of Torts."). This appears to be in direct conflict with *McCamish*.

(b) Specificity of Representation

Without a doubt, the specificity of the client's representations to you concerning the characterization and value of property will affect the opposing party's justifiable reliance. For example, if the client represents that the wife's residence was recently appraised at $510,000, the opposing party is probably justified in relying on the representation. However, if the client represents that the wife's residence might be worth between $400,000 and $600,000, the opposing party is probably not justified in relying on the representation.

In addition, if the client represents that a particular tract of property is his separate property because he owned it before he was married, the opposing party is probably justified in relying on the representation. However, if the client represents that a particular tract of property might be his separate property for unspecified reasons, the opposing party is probably not justified in relying on the representation.

(c) Plausibility of Representation

Clearly the plausibility of the client's representations concerning the characterization and value of property will affect the opposing party's justifiable reliance. For example, if the client represents that a mutual friend of he and his wife, a locally known real estate agent, believes that the wife's residence would sell for $500,000, the opposing party is probably justified in relying on the representation. However, if the client represents that the wife's residence was recently appraised at $510,000 but cannot remember the name of the appraiser, exactly when it was appraised or produce a copy of the appraisal, the opposing party is not justified in relying on the representation especially if the "appraised value" seems unrealistically high or low. In addition, if the client represents that his paramour, a part time real estate agent, believes that the wife's residence was worth at least $520,000, the opposing party is not justified in relying on the representation.

In addition, if the client represents that a particular tract of property is his separate property because he owned it before he was married but cannot produce a deed, or remember

when or from whom he acquired the property, the opposing party is probably not justified in relying on the representation. If the client represents that a particular tract of property is his separate property because it was conveyed to him before he was married by an unrecorded deed which is in the possession of a relative who cannot be located, the opposing party is probably not justified in relying on the representation.

5. Potential Methods to Minimize the Risk of Liability

Although *McCamish* recognized that an attorney may be liable to a non-client for the tort of negligent misrepresentation, the Texas Supreme Court did mention some potential methods to minimize the risk of liability. First, the Supreme Court clearly stated that a negligent misrepresentation cause of action is available only when information is transferred by an attorney to a **known party** for a **known purpose**. 991 S.W.2d at 794 (emphasis added). Second, an attorney may avoid or minimize the risk of liability to a non-client by setting forth (a) limitations as to whom the representation is directed and who should rely on it, or (b) disclaimers as to the scope and accuracy of the factual investigation or assumptions forming the basis of the representation or the representation itself. *Id.* For example, every written discussion of the character and value of property or settlement offer could be prefaced with a disclaimer stating that it only states a negotiating position and is not a representation of existing fact, or that the stated characterization and value of property was provided by the client and you, his attorney, have not independently investigated or verified the stated characterization and value of property.

6. Damages -- Section 552B of the Restatement (Second) of Torts

In *Federal Land Bank Ass'n of Tyler v. Sloane*, the Texas Supreme Court limited negligent misrepresentation damages to "out-of pocket expenses" and rejected damages for "benefit of the bargain," lost profits, and mental anguish. 825 S.W.2d at 442. However, it is unclear how damages might be determined "using out-of pocket expenses" as the measure of damages for the misrepresentation of the character or value of property. Consider the following scenario: during settlement discussions, an attorney's client represents that the wife's residence was recently appraised at $510,000, and the wife and her attorney accept that value. In the settlement, the wife receives the residence and the husband receives approximately $510,000 in other community property. In reality, the residence is only worth $200,000, resulting in a $310,000 discrepancy in the division of the community estate. Presumably, the damages would be measured as the amount necessary to correct the discrepancy in the division of the community estate, although this is really a "benefit of the bargain" measure of damages rejected by *Sloane*. However, the appellate courts likely will "construe" the amount necessary to correct the discrepancy in the division of the community estate as an "out-of pocket expenses" measure of damages in divorce proceedings.

7. Hypotheticals

(a) Hypothetical No. 1

You are the attorney representing the husband in a "friendly" divorce proceeding. During negotiations, the client represents the characterization and value of certain property which you, his attorney, pass on to the opposing counsel without independently verifying or confirming it. Based upon the information provided, the parties settle. However, forty-five days after the divorce decree is signed, the ex-wife discovers that, in fact, a significant portion of the information provided to you by the client was false or inaccurate and resulted in a grossly inequitable division of property. The ex-wife threatens to sue you.

Assume that the representations were that the wife's residence was recently appraised at $510,000 or the market value is $510,000. This is a representation of an existing or material fact. If you as the husband's attorney fail to

request a copy of the appraisal or the identity of the appraiser, or if you suspect that the value of the residence is substantially higher or lower but do not verify or otherwise investigate the value, you have probably failed to exercise reasonable care or competence in obtaining or communicating the information. Since the representation is specific, the wife and her counsel are probably justified in relying on the representation. However, if the wife and her counsel suspect, or should have suspected, that the value of the residence is substantially lower than the husband's value because most of the other houses in the area are valued closer to $200,000, then the wife and her counsel probably may not be justified in relying on the representation.

(b) Hypothetical No. 2

You are the attorney representing the husband in a divorce proceeding which involves large separate and community property estates. During negotiations, the client represents the characterization and value of certain property which you pass on to the opposing counsel without independently verifying or confirming it. Based upon the information provided, the parties settle. However, forty-five days after the divorce decree is signed, the ex-wife discovers that, in fact, a significant portion of the information provided by the client was false or inaccurate and resulted in a grossly inequitable division of property. More specifically, a significant portion of the estate had been placed into irrevocable trusts and the husband represented to you, his attorney, that the property was community property. You passed that information along to the opposing party and her counsel without independently verifying or confirming it and it was awarded to the wife in the divorce decree as community property. In addition, your partner was aware of the existence of the trusts, but didn't mention it during the discussions because he assumed that you knew about the trusts. The ex-wife threatens to sue you.

Since the client represented to you and you represented to the opposing party and her counsel that the particular properties were community property, this is a representation of an existing or material fact. Based upon the community property presumption, you probably did not fail to exercise reasonable care or competence in obtaining or communicating the general community property information. However, your partner's knowledge of the existence of the trusts would probably be imputed to you and require you to verify or otherwise investigate the character of the community property. Thus, you have probably failed to exercise reasonable care or competence in obtaining or communicating the information. If there was nothing to raise any suspicion in the community property representation, the wife and her counsel are probably justified in relying on the representation. However, since the wife was probably required to sign the documents creating the trusts or deeds necessary for the creation of the trusts, then the wife would probably not be justified in relying on the representation.

D. Conclusion

In *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, the Texas Supreme Court arguably created a duty for attorneys to verify or investigate information from their clients which is provided to the opposing party. The potential use and abuse of the tort of negligent misrepresentation in divorce proceedings is virtually unlimited and unknown.