THE MARITAL RESIDENCE: THERE'S NO PLACE LIKE HOME

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The authors thank Richard R. Orsinger for permission to use substantial portions of "*Dealing With the Family Home on Divorce*", Ninth Biennial Texas Family Law and Community Property Seminar (1986), and Barbara D. Nunneley for permission to use portions of "*Homestead - What You Need to Know in the 21st Century*," Marriage Dissolution Seminar (2003)

STATE BAR OF TEXAS
31st ANNUAL MARRIAGE DISSOLUTION INSTITUTE
April 17-18, 2008
Galveston

CHAPTER 14

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Texas Super Lawyer 2003, 2004 & 2006 Family Law (Texas Monthly and Law & Politics magazine)

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Member, Planning Committee, Advanced Family Law Course (2003 & 2007)

Member, Planning Committee, Family Law on the Front Lines (University of Texas 2001-2007)

Member, Planning Committee, The Ultimate Trial Notebook - Family Law (2000)

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

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EDUCATION

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

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SELECTED LAW RELATED PUBLICATIONS & PRESENTATIONS

"The Marital Residence: There's No Place Like Home," 31st Marriage Dissolution Seminar, Galveston, Texas, April 2008.

"Dealing with Unusual Trusts", New Frontiers in Marital Property Law, Memphis, Tennessee, October 2007.

"Post Judgment Issues: Sometimes Its Heaven, Sometimes Its Hell, and Sometimes You Don't Even Know," 33rd Annual Advanced Family Law Course, San Antonio, Texas, August 2007.

"Issues in ADR,"30th Marriage Dissolution Seminar, El Paso, Texas, May 2007.

"Marital Property Agreements: Still Crazy After All These Years," 32nd Annual Advanced Family Law Course, San Antonio, Texas, August 2006.

"Temporary Orders: Yes, It's Really a Trial - How to Get Prepared," 32nd Annual Advanced Family Law Course, San Antonio, Texas, August 2006.

"Should the Abuse of Discretion Standard in Child Custody Cases Be Re-Examined?," APPELLATE ADVOCATE, State Bar Appellate Practice & Advocacy Section Vol. XVIII, No. 5 (Summer 2006)

"Witness Preparation," Family Law on the Front Lines, Galveston, Texas, June 2006.

"The 10 Biggest Mistakes Physicians Make in a Divorce", THE BIGGEST LEGAL MISTAKES THAT PHYSICIANS MAKE AND HOW TO AVOID THEM (SEAK, Inc. 2005).

"Family Law Case Update," 20th Annual Texas Association of Domestic Relations Offices Conference, Austin 2004.

"Family Law in Probate Court," Travis County Family Law Section, Austin 2004.

"Appeals and Mandamus - How to Repair Your Case and Prevent the Need for Repairs (or What to Do When Your Case is in the Ditch)", 29th Annual Advanced Family Law Course, San Antonio, Texas, August 2003.

"Early Stage Companies," Family Advocate, Vol. 25, No. 3, American Bar Association Winter 2003.

Obtaining and Retaining the Benefit of the Bargain- Premarital and Martial Agreements," New Frontiers in Marital Property Law, San Antonio, Texas October 2002.

"Business Interests: Characterization as Separate or Community Interests,"Expert Witness Manual, Volume I, Chapter 2-9, State Bar of Texas August 2002.

"Contesting and Defending Premarital Agreements", 28th Annual Advanced Family Law Course, Dallas, Texas, August 2002.

"Termination and Adoption: It Ain't Over Till It's Over", 28th Annual Advanced Family Law Course, Dallas, Texas, August 2002.

"High Tech Evidence: How to Find It, Retrieve It and Get It In", 28th Annual Advanced Family Law Course, Dallas, Texas, August 2002.

"Early-Stage Company Valuation"American Institute of Certified Public Accountants/American Academy of Matrimonial Lawyers National Conference, Las Vegas, Nevada, May 2002.

"Summary Judgments and Declaratory Judgments in Divorce", Marriage Dissolution Seminar, Austin, Texas, May 2002.

"Termination and Adoption: It Ain't Over Till It's Over", Marriage Dissolution Seminar, Austin, Texas, May 2002.

"Child Support Collection: A Practical Guide to the Opportunities and Pitfalls in Enforcing and Defending Child Support Obligations," Family Law on the Front Lines, Galveston, Texas, April 2002.

"Valuation of Law Practice in Divorce," American Academy of Matrimonial Lawyers, Sanibel, Florida March 2002.

"Valuation, Characterization and Division of Unusual Assets", New Frontiers in Marital Property Law, Santa Fe, New Mexico, October 2001.

"Professional Partings: Valuing Medical/Legal Professional Practices", 27th Annual Advanced Family Law Course, San Antonio, Texas, August 2001.

"Valuing and Dividing the Community Business, Marriage Dissolution Seminar, Corpus Christi, Texas, May 2001.

"Interaction of Probate Court and Family Law," Family Law on the Front Lines, Galveston, Texas, April 2001.

"Bottom Line Appellate Issues," Ultimate Trial Notebook: Family Law, New Orleans, Louisiana, December 2000.

"Pretrial and Trial Strategies for the Complex Property Case", Santa Fe, New Mexico, October 2000.

"Representing the High Tech Entrepreneur: IPO's, Venture Capitalists and Beyond", 26th Annual Advanced Family Law Course, San Antonio, Texas, August 2000.

"Family Law Court v. Probate Court: What Every Family Lawyer Should Know", 26th Annual Advanced Family Law Course, San Antonio, Texas, August 2000.

"Bill of Review", 23rd Annual Marriage Dissolution Institute, Ft.Worth, Texas, May 2000

"Appellate Tips: Judges Panel", 23rd Annual Marriage Dissolution Institute, Ft.Worth, Texas, May 2000

"Fiduciary Duties of Spouses and Non-Physical Torts", International Academy of Matrimonial Lawyers, Palm Beach, Florida, March 2000.

Internal Procedures in the Texas Supreme Court Revisited: The Impact of the Petition for Review and Other Changes, 31 TEX. TECH L. REV. 63 (2000)

"Strategic Use of Law Beyond the Family Code", New Frontiers in Marital Property Law, San Diego, California, October 1999.

"Trends in Preservation of Error (At Trial, Charge, and Post Verdict)", 13th Annual Advanced Civil Appellate Practice Course, State Bar of Texas, Austin, Texas, October 1999.

"The Appellate Process-the Good, the Bad, and the Ugly", 25th Annual Advanced Family Law Course, Dallas, Texas, August 1999.

"Litigating Marital Agreements: "You can't always get what you want....",22nd Annual Marriage Dissolution Institute, San Antonio, Texas, May 1999.

"Fiduciary Duties of Spouses, Effective Use of the Remedy of the Constructive Trust, Recoveries for Violations of These Duties, and Issues Presented When Spouses are under Conflicting Fiduciary Duties," New Frontiers in Marital Property Law, Sante Fe, New Mexico October 1998

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

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

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

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

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

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

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

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

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Member, Planning Committee, Marriage Dissolution Institute (2006, 2007 & 2008)

Member, Planning Committee, Family Law on the Front Lines (University of Texas 2005, 2006, and 2007)

Member, Texas Academy of Family Law Specialists, Board of Directors (Class of 2007)

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EDUCATION

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Texas A&M University B.S. 1982

SELECTED LAW RELATED PUBLICATIONS & PRESENTATIONS

"Conservatorship: What's the Fight About?,"31st Marriage Dissolution Seminar, Galveston, Texas, April 2008.

"Standing," 33rd Annual Advanced Family Law Course, San Antonio, Texas, August 2007.

"Post Judgment Issues: Sometimes Its Heaven, Sometimes Its Hell, and Sometimes You Don't Even Know," 33rd Annual Advanced Family Law Course, San Antonio, Texas, August 2007.

"Proving Economic Contribution and Reimbursement Claims,"30th Marriage Dissolution Seminar, El Paso, Texas, May 2007.

"Issues in ADR,"30th Marriage Dissolution Seminar, El Paso, Texas, May 2007.

"Marital Property Agreements: Still Crazy After All These Years," 32nd Annual Advanced Family Law Course, San Antonio, Texas, August 2006.

"Temporary Orders: Yes, It's Really a Trial - How to Get Prepared," 32nd Annual Advanced Family Law Course, San Antonio, Texas, August 2006.

"Tips for Keeping the Presentation of Your Case Straightforward," Family Law on the Front Lines, Galveston, June 2006.

"Practical Tips for Proving Tracing, Economic Contribution and Reimbursement," Austin Bar Association Bench Bar Conference, April 2006.

"Factors and Issues Judges Use in a SAPCR Case," 29th Marriage Dissolution Institute, Austin, April 2006.

"Property Issues and Closing the Case,"Annual Divorce Basics Seminar, Austin, December 2005.

"Business Evaluation in Small Estates," Family Law on the Front Lines, Galveston, Texas, June 2005.

"Judges' Panel," Family Law on the Front Lines, Galveston, Texas, June 2005 (moderator).

"Across the Divide: Trial Techniques for Family Lawyers," Austin Bar Association Bench Bar Conference 2005

"The 10 Biggest Mistakes Physicians Make in a Divorce", THE BIGGEST LEGAL MISTAKES THAT PHYSICIANS MAKE AND HOW TO AVOID THEM (SEAK, Inc. 2005).

"Responding to a Grievance," Travis County Bar Association Family Law Section Luncheon, Austin, Texas, September 2003.

"Children Inside Wedlock/Outside Wedlock," 16th Annual Marriage Dissolution Institute Houston, Texas, May 2003.

"I've got a Divorce in My Guardianship Case!" Guardianship and Advanced Elder Law Course Dallas, Texas, March 2003.

"Family Limited Partnership Basics," State Bar Section Report: Family Law, Volume 2000-2, Spring 2000.

"Summary of the 1999 Amendments to the Texas Family Code," Legal Assistant U, San Antonio, Texas, September 1999.

"Playing By the Rules: Recent Changes in the Rules of Evidence and Discovery," 1998 Winning Techniques in Family Law Litigation.

"Discovery Objections: The Good, the Bad and the Frivolous," 24th Annual Advanced Family Law Course, Dallas, Texas, August 1998.

"Analysis of the Law and Key Issues and Procedures in the Divorce Process," 1998 Texas Family Law Practice for Paralegals.

"Avoiding a Grievance, or When that Fails, Practical Tips for Responding,"1998 Travis County Bar Association Family Law Seminar.

"Ethical Considerations When Leaving a Law Firm," 1993 Travis County Bar Association Moving Up or Moving Out Seminar.

"Ethics in Litigation: A Hitchhiker's Guide," 1993 University of Houston Law Foundation Advanced Civil Litigation Course.

Table of Contents

THE MARITAL RESIDENCE: THERE'S NO PLACE LIKE HOME

I. INTRODUCTION

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

II. OWNERSHIP OF THE HOME

The rights of unmarried persons in a home are governed by rules of ordinary property law, and rules of cotenancy, sometimes complicated with allegation of partnership, joint venture, resulting trust, or of fiduciary relationships giving rise to a constructive trust. Between spouses, rights in the family home are controlled by marital property rules, which can also be complicated by trust principles.

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

A. Establishing Ownership

The starting point for evaluating claims in the family home is to determine where ownership lies. If the parties are unmarried, or if the marriage is an informal marriage subject to dispute, counsel must consider who owns what interest in the house if no marriage exists. If a marriage does exist, then counsel must determine whether the property is separate or community. If title to the home is in a corporation, partnership or trust, or in a third person, then a party may try to take title from such an entity or third person, by establishing an express trust, a resulting trust or a constructive trust. If the house is owned by an entity, perhaps ownership can be captured by proving that the entity is an alter ego of the other party. If the house was transferred away by the other party, then a suit to set aside a fraudulent conveyance, or to establish actual or constructive fraud, may be brought. In most dissolution cases, ownership is indisputably in one or both spouses, and the issue is whether their interests are separate or community.

1. Presumption of Ownership From Possession

Present possession of land gives rise to a presumption of ownership in the possessor. *Stringfellow v. Brown*, 326 S.W.2d 1, 4 (Tex. Civ. App. – Fort Worth 1959, no writ).

2. Presumption of Ownership From Title

A deed, when introduced into evidence, raises a presumption that the grantee in the deed is the owner of the property. *Sims v. Duncan*, 195 S.W.2d 156, 159 (Tex. Civ. App.--Galveston 1946, writ ref'd n.r.e.). When two persons are named as grantees in the deed, but their interests are not specified, a presumption arises that each of the grantees is vested with title to an equal undivided interest in the property. *Zephyr v. Zephyr*, 679 S.W.2d 553, 556 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.); *In re Marriage of Murray*, 15 S.W.3d 202, 205 (Tex. App. – Texarkana 2000, no pet.). When the grantees are husband and wife, the presumption arises that the property is community property. Ordinarily, an interest in real property can be established only by a valid written instrument, not by parol evidence. *Rocha v. Campos*, 574 S.W.2d 233, 236 (Tex. Civ. App.--Corpus Christi 1978, no writ); *Spencer v. Anderson*, 669 S.W.2d 862, 864 (Tex. App. – Corpus Christi 1984, writ ref'd n.r.e.). From a practical standpoint, however, unless the holding of legal title is disputed, oral testimony of that fact will not raise objection. Still, prudence dictates that a certified copy of the deed establishing your client's ownership be available, if a dispute is possible.

B. The Law of Fixtures

Another rule of Texas law affecting the family home is the "law of fixtures." Under the law of fixtures, whatever is affixed to the land becomes part of the land. *Missouri Pacific Ry. Co. v. Cullers*, 81 Tex. 382, 17 S.W. 19, 22 (1891); *Citizen's National Bank of Abilene v. Elk Manufacturing Co.*, 29 S.W. 1062, 1065 (Tex. Comm'n App. 1930, opinion adopted). In the context of marriage, if land is separate property, then any improvements affixed to the land become part of the land, and are separate property. If land is community property, then any improvements affixed to the land become part of the land, and are community property.

1. What is a Fixture?

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

2. Three-Pronged Test

The Texas Supreme Court has established a three-pronged test for fixtures: (i) has there been a real or constructive annexation of the property to the realty; (2) was there a fitness or adaptation of the item to the uses or purposes of the realty; (3) was it the intention of the party annexing it that the chattel should become a permanent accession to the freehold? *O'Neil v. Quilter*, 111 Tex. 345, 234 S.W. 528, 529 (1921); *Logan v. Mullis*, 686 S.W.2d 605, 607 (Tex. 1985).. The latter factor is controlling; the first two are primarily evidentiary and constitute evidence of intention. *Sonnier v. Chisholm-Ryder Co., Inc.*, 909 S.W.2d 475, 479 (Tex. 1995); *Logan v. Mullis*, 686 S.W.2d at 607; *Capital Aggregates, Inc. v. Walker*, 488 S.W.2d 830, 834 (Tex. Civ. App.--Austin 1969, writ ref'd n.r.e.).

3. Examples

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

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

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

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

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

4. Why Concede Fixtures?

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

C. Separate Vs. Community

Separate property is defined in the Texas Constitution and the Texas Family Code. Community property consists of all property acquired by a spouse during marriage, that is not his or her separate property. TEX. FAM. CODE § 3.002. To determine a spouse's ownership and management rights in personal property acquired while domiciled in another jurisdiction, or in realty located in another jurisdiction, one must refer to Section 7.002 (the "quasi-community property statute") to the Texas Family Code, which makes property acquired by a spouse while domiciled in another jurisdiction divisible on divorce in Texas if the property would have been community had the acquiring spouse been domiciled in Texas at the time of acquisition. The Supreme Court of Texas has also adopted this rule of law as a matter of public policy. *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982).

1. Definition of Separate Property

Separate property is defined both in the Texas Constitution and in the Texas Family Code. Under the Constitution, all property owned or claimed by a spouse before marriage, and that acquired after marriage by gift, devise, or descent, is the separate property of the spouse. Spouses, or persons about to marry, can partition or exchange community property on hand or to be acquired, with the result that the partitioned or exchanged assets belong to the separate estate of one or the other spouse. Spouses also may agree that the income or property from all or part of the separate estate of one spouse shall be the separate

property of that spouse. Also, when one spouse gives property to the other spouse, a presumption arises that the gift includes all income or property which might arise from the property given. TEX. CONST. art. 16 § 15. *See* TEX. FAM. CODE § 3.005 (gifts between spouses).

Section 3.001 of the Texas Family Code defines a spouse's separate property as: (i) the property owned or claimed by the spouse before marriage; (2) the property acquired by the spouse during marriage by gift, devise, or descent; and (3) the recovery for personal injury sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage. TEX. FAM. CODE § 3.001. Section 4.102 of the Texas Family Code provides that property transferred to a spouse by a partition or exchange agreement becomes his or her separate property. TEX. FAM. CODE § 4.102. Section 4.103 of the Texas Family Code provides that spouses may agree that the income or property arising from separate property assets shall be the separate property of the owning spouse. TEX. FAM. CODE § 4.103. Section 3.005 of the Texas Family Code provides that when one spouse gives property to the other, the gift is presumed to include all the income and property which may arise from that Property. TEX. FAM. CODE § 3.005.

a. Gift

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

(1) Burden of Proving Gift

The burden of proving an inter vivos gift is on the party claiming that the gift occurred. *Woodworth v. Cortez*, 660 S.W.2d 561, 564 (Tex. App.--San Antonio 1983, writ ref'd n.r.e.); *Green v. Canon*, 33 S.W.3d 855, 858 (Tex. App. – Houston [14th Dist.] 2000, pet. denied).

(2) Donative Intent

"The controlling factor in determination of a gift inter vivos is the intent of the donor...." *Alexander v. Bowens*, 595 S.W.2d 176, 178 (Tex. Civ. App.--Tyler 1980, no writ). In the case of *Haile v. Holtzclaw*, 414 S.W.2d 916, 927 (Tex. 1967), the Supreme Court said: "In determining whether a gift was intended by the execution of a deed, we must look to the facts and circumstances surrounding its execution in addition to the recitation in the deed itself." In *Haile*, the Supreme Court held the conveyance was a gift, as a matter of law, despite contrary testimony from the donor. *Id.* The testimony of the donor is admissible to prove that a gift was intended to one and not both spouses. *Grost v. Grost*, 561 S.W.2d 223, 228 (Tex. Civ. App.--Tyler 1978, writ dism'd). The Supreme Court has held that "a witness cannot testify to the state of mind of another person." *Lehman v. Corpus Christi Nat. Bank*, 668 S.W.2d 687, 689 (Tex. 1984). *See also* TEX. R. EVID. 701; *Christian v. Walker*, 381 S.W.2d 675 (Tex. Civ. App.--Texarkana 1964, no writ) (conclusory opinion that person made a gift is not admissible on the point).

(3) Delivery Required

There has to be actual or constructive delivery to the donee for a gift to occur; *Bishop v. Bishop*, 359 S.W.2d 869, 871 (Tex. 1962). *See Grimsley v. Grimsley*, 632 S.W.2d 174 (Tex. App.--Corpus Christi 1982, no writ). Possession of a deed by the grantee raises a presumption of delivery. The recording of a deed also raises a presumption of delivery. *Raymond v. Aquarius Condominium Owners Ass'n, Inc.*, 662 S.W.2d 82, 91 (Tex. App.--Corpus Christi 1983, no writ) (filing of deed creates rebuttable presumption of delivery).

(4) Acceptance

Proof of acceptance of a gift is aided by a presumption that a donee will not refuse a gift of valuable property. *See Cooper v. Durham*, 565 S.W.2d 308, 312 (Tex. Civ. App. – Eastland 1978, writ ref'd n.r.e.). Also, the filing of a deed is prima facie evidence of acceptance. *Panhandle Baptist Foundation, Inc. v. Clodfelter*, 54 S.W.3d 66, 71-72 (Tex. App. – Amarillo 2001, no pet.).

(5) Parol Gift of Land

To establish a parol gift of land, the proponent must show three elements: (i) the gift; (2) possession under the gift by the donee with the donor's consent; and (3) permanent and valuable improvements to the property by the donee, with the donor's knowledge and consent. Absent such improvements, a parol gift of land will be recognized only if to refuse to do so would work a fraud on the donee. *Dawson v. Tumlinson*, 150 Tex. 451, 242 S.W.2d 191, 192-93 (1951). The test is essentially the same as the test for a parol sale of land, announced in *Hooks v. Bridgewater*, 111 Tex. 122, 229 S.W. 1114 (1921), except that proof of gift instead of proof of consideration is required. *Dawson v. Tumlinson*, 242 S.W.2d at 192-93. *See Grimsley v. Grimsley*, 632 S.W.2d 174, 178 (Tex. App.--Corpus

Christi 1982, no writ) (trial court's finding of parol gift of land from man to woman prior to marriage reversed).

(6) Gift vs. Onerous Consideration

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

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

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

Id. at 929. In *Kiel*, a jury found that a gift was intended. *Id.* at 929. Arguably, the parents' intention of gift should have effect only for the equity in the property. *See Estate of Kuenstler v. Trevino*, 836 S.W.2d 715, 717 (Tex. App. – San Antonio 1992, no writ) (A donor may make a gift of encumbered property in which the donee agrees to discharge the indebtedness).

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

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

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

(7) Recital of Gift

A deed which recites consideration of "ten dollars and love and affection" is a gift deed. *Indemnity Ins. Co. of North America v. Hare*, 107 S.W.2d 737, 739 (Tex. Civ. App.--Beaumont 1937), *rev'd in part on other grounds*, *First National Bank in Hemphill v. Arnold*, 128 S.W.2d 1151 (Tex. Comm'n App.--1939, opinion adopted); *Babb v. McGee*, 507 S.W.2d 821 (Tex. Civ. App.-Dallas 1974, writ ref'd n.r.e.). A deed for property from one spouse as grantor to the other spouse as grantee creates a presumption the grantee spouse received the property as separate property by gift. *Magness v. Magness*, 241 S.W.3d 910, 912 (Tex. App. – Dallas 2007, pet. filed); *Raymond v. Raymond,* 190 S.W.3d 77, 81 (Tex. App.-Houston [1st Dist.] 2005, no pet.); *Roberts v. Roberts,* 999 S.W.2d 424, 432 (Tex. App. – El Paso 1999, no pet.). The presumption may be rebutted by proof the deed was

procured by fraud, accident, or mistake. *Raymond,* 190 S.W.3d at 81; *Roberts,* 999 S.W.2d at 431.

(8) Deed to Both Spouses

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

(9) Presumption of Gift From Parent to Child

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

b. Devise and Descent

Property acquired by a spouse during marriage by devise or descent is also separate property. TEX. FAM. CODE § 3.001. When a spouse acquires property in settlement of his inheritance, that too is his separate property. *Estate of McWhorten v. Wooten*, 622 S.W.2d 844, 846 (Tex. 1981).

2. Definition of Community Property

Community property is defined as "the property, other than separate property, acquired by either spouse during marriage." TEX. FAM. CODE § 3.002.

3. Presumptions Affecting Proof of Character

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

a. Presumption of Community Property

Property possessed by either spouse during or on dissolution of marriage, is presumed to be community property. TEX. FAM. CODE § 3.003. Whoever would show otherwise must bring forward proof that the asset in question is not community property. *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973). This can be done by showing that the property is not owned by the spouse, or that it is separate property.

b. Presumption of Community Credit

There is a presumption under Texas law that "debts contracted during marriage are presumed to be on the credit of the community and thus are joint community obligations, unless it is shown that the creditor agreed to look solely to the separate estate of the contracting spouse for satisfaction." *Cockerham v. Cockerham*, 527 S.W.2d 162, 171 (Tex. 1975). The mere intent of the spouses does not control whether the credit is community or separate. *Gleich v. Bongio*, 128 Tex. 606, 99 S.W.2d 881, 884 (1937); *Nesmith v. Berger*, 64 S.W.3d 110, 116-117 (Tex. App. – Austin 2001, pet. denied). Note that even if the debt created to buy an asset is a community liability, the property acquired on this community credit may become the separate property of the other spouse, if a gift, partition or exchange is effected.

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

The question of whether a debt is a separate or community debt is different from the question of whether the debt is a joint debt. A debt is a separate debt only if the creditor agrees to look solely to the borrowing spouse's separate estate for repayment. In this instance, the community estate and the other spouse's separate estate are not liable for the separate

debt. If the debt is a community debt incurred by one spouse, then the ordinary rules of marital property liability apply. *See* TEX. FAM. CODE § 3.202.

c. Presumptions From Deed Recitals

Presumptions as to the character of realty possessed by a spouse can arise from recitals contained in the deed. When the deed to the spouse recites that separate property consideration was paid, or that the property was taken as the grantee-spouse's separate property, a presumption of separate property arises. *Kahn v. Kahn*, 94 Tex. 114, 58 S.W. 825, 826 (1900). *But see Holcemback v. Holcemback*, 580 S.W.2d 877 (Tex. Civ. App.--Eastland 1979, no writ) (holding that when the deed conveying real property from a third party to a spouse recites separate property, and the other spouse is not a party to the transaction, no presumption arises). When the other spouse is transferor, or is otherwise chargeable with causing or acquiescing in the recital, the presumption of separate property becomes irrebuttable. *Kahn*, 58 S.W. at 826. *Accord*, *Henry S. Miller Company v. Evans*, 452 S.W.2d 426, 431 (Tex. 1970); *Lindsay v. Clayman*, 254 S.W.2d 777, 780 (Tex. 1952). However, even the irrebuttable presumption can be overcome by proof that the recitals were inserted in the deed through fraud, accident or mistake. *Henry S. Miller Company*, 452 S.W.2d at 431. The same rationale should apply when the deed recites community property, rather than separate property. *See Raymond v. Raymond*, 190 S.W.3d 77, 81 (Tex. App. – Houston [1st Dist.] 2005, no pet.) ("A spouse who is a party to a deed transaction may not introduce parol or extrinsic evidence to contradict the express recitals in the deed without first tendering evidence of fraud, accident, or mistake.").

d. Presumption From Interspousal Conveyance, Without Recital of Separate Property

Even without a recital that the grantee-spouse receives the realty as separate property, when one spouse conveys realty to the other spouse, there is a presumption that the grantor-spouse made a gift to the grantee-spouse. *Kahn v. Kahn*, 94 Tex. 114, 58 S.W. 825 (Tex. 1900); *Raymond v. Raymond*, 190 S.W.3d at 81. The presumption arises even though the deed is not a gift deed. If the realty was community property, the presumption of gift applies to the entire property, not just to the grantor's undivided one-half community property interest. If such a gift is found, a presumption arises that the income or property from the property is part of the gift. TEX. FAM. CODE § 3.005. The presumption of gift from an interspousal conveyance containing no gift language or recital of separate property is rebuttable by evidence of no donative intent, or that the gift was procured by fraud, accident or mistake. *Kahn*, 58 S.W. at 826; *Raymond v. Raymond*, 190 S.W.3d at 81. When the deed recites a conveyance as the grantee's separate property, however, the presumption of gift is irrebuttable.

e. Presumption From Naming Other Spouse in the Deed

When one spouse exchanges separate property for realty, but takes title in the name of the other spouse alone, a rebuttable presumption of gift to the grantee-spouse arises. *Kahn v. Kahn*, 984 Tex. 114, 58 S.W. 825, 826 (Tex. 1900); *Kitchens v. Kitchens*, 372 S.W.2d 249, 255-56 (Tex. Civ. App.--Waco 1963, writ dism'd). The presumption may be overcome by evidence showing a different intent. *Peterson v. Peterson*, 595 S.W.2d 889, 892 (Tex. Civ. App.--Austin 1980, writ dism'd). When separate property consideration is exchanged for realty, and title is taken in the name of both spouses, a rebuttable presumption arises of a gift of a one-half interest in the land to the grantee-spouse. *Cockerham v. Cockerham*, 527 S.W.2d 162, 168 (Tex. 1975); *In re Marriage of Morris*, 12 S.W.3d 877, 881 (Tex. App. – Texarkana 2000, no pet.). When a spouse gives community property for realty, no presumption of gift arises from the taking of title in the name of the other spouse alone, *Kahn*, 58 S.W. at 826, or in the name of both spouses. *Gibson v. Gibson*, 614 S.W.2d 487, 488 (Tex. Civ. App.--Tyler 1981, no writ).

D. The Inception of Title Rule

The "inception of title rule" has been described as follows:

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

Wierzchula v. Wierzchula, 623 S.W.2d 730, 731-32 (Tex. Civ. App.--Houston [ist Dist.] 1981, no writ); *Garza v. Garza*, 217 S.W.3d 538, 550-551 (Tex. App. – San Antonio 2006, no pet.). The inception of title rule mandates that the separate or community character of an interest in real estate be determined by the circumstances that exist at the time the right or claim to the property arises, without regard to subsequent events relating to the property. However, subsequent occurrences must still be examined for other events affecting ownership or character, such as a subsequent transfer of the interest from the owner-spouse to another person, gifts, sales, partitions or exchanges between spouses, the passing of title upon death of a spouse, etc.

1. When Does Title Incept?

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

a. Adverse Possession

When the party acquiring land by adverse possession enters upon the land as a naked trespasser, he has no basis for a claim of title until limitations has run; consequently, inception of title occurs when the statute of limitations runs. If the statute runs during marriage, the property is acquired as community property, despite the fact that the holding period began before marriage. *Strong v. Garrett*, 148 Tex. 265, 224 S.W.2d 471, 474 (1949). In *Strong v. Garrett*, the husband moved onto a parcel pursuant to a deed which accidentally conveyed the wrong tract of land. Because he had, at the time his possession began, an equitable right to reform the deed, inception of title occurred at the time of the faulty conveyance, and not when limitations ran. However, when the adverse possession begins while the possessor has an equitable right to the property, the right to the property incepts at the beginning of the period of adverse possession. In such a case, when possession begins before marriage, the property is acquired as separate property, even if title is acquired during marriage. *Id.* at 474.

b. Contract for Deed

The ultimate acquisition of a deed pursuant to a contract for deed, or installment land contract, relates back to the time the contract was entered into. *Wilkerson v. Wilkerson*, 992 S.W.2d 719, 722 (Tex. App. – Austin 1999, no pet.). *See Riley v. Brown*, 452 S.W.2d 548 (Tex. Civ. App.--Tyler 1970, no writ) (when contract of sale or purchase was entered into during marriage, it was community property, even though title was taken by the husband after divorce).

c. Lease/Option, With Deed Placed in Escrow

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

d. Earnest Money Contract

In *Wierzchula v. Wierzchula*, 623 S.W.2d 730 (Tex. App.--Houston list Dist.] 1981, no writ), the husband entered into an earnest money contract prior to marriage. Also prior to marriage, he applied for a loan guaranty from the Veteran's Administration. He received the loan commitment. Then he married. Then he received the deed to the land, and executed a promissory note, "in his individual capacity," and a deed of trust. The trial court found the property to be his separate property because his claim to the property arose prior to marriage, when the earnest money contract was entered into. The Court of Appeals affirmed. The appellate court acknowledged that a presumption arose that the property was acquired on community credit, and was therefore community property. The court held, however, that the husband overcame the presumption of community credit, by showing that the application for the loan was made as a single man, that the loan commitment was to a single man, that the deed was to the husband as a single man, and that he alone signed the note and deed of trust. *See Carter v. Carter*, 736 S.W.2d 775, 779 (Tex. App. – Houston [14th Dist.] 1987, no writ).

e. Residential Leasehold Interest

When a residential lease is entered into prior to marriage, the leasehold interest would seem to be the lessee-spouse's separate property.

E. Express, Resulting and Constructive Trusts

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

1. Express Trust

The presumption of ownership can be rebutted by proof that title is held solely as trustee under an express trust. An express trust comes into existence when a person who has legal and equitable dominion over property executes an intention to create the express trust. *Mills v. Gray*, 147 Tex. 33, 210 S.W.2d 985, 987-88 (1948). An "express trust" is defined in the Property Code as "a fiduciary relationship with respect to property which arises as a manifestation by the settlor of an intention to create the relationship and which subjects the person holding title to the property to equitable duties to deal with the property for the benefit of another person." TEX. PROP. CODE § 111.004(4). *See McAdams v. Ogletree*, 348 S.W.2d 75

(Tex. Civ. App.– Beaumont 1961, writ ref'd n.r.e.) (daughter found to hold realty in trust for her mother).

Express trusts were controlled by the common law in Texas, until April 19, 1943. On that date, the Texas Trust Act went into effect. *See* TEX. REV. CIV. STAT. art. 7425a *et seq.*; *Land v. Marshall*, 426 S.W.2d 841, 845 (Tex. 1968). The Texas Trust Act controlled express trusts until its repeal, effective December 31, 1983. On January 1, 1984, the Texas Trust Code went into effect. *See* TEX. PROP. CODE . chs. 111-115. The old Texas Trust Act still controls the validity of trusts created while the Act was in effect, and actions taken relating to express trusts while the Act was in effect. The newer Texas Trust Code applies to trusts created on or after January 1, 1984, and to transactions relating to prior trusts, but which occur on or after January 1, 1984.

a. Requirement of Writing

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

b. Rescission of Trust Conveyance

If there is fraud in a conveyance to a trustee, then the transaction can be cancelled through an action in equity. If title was received by the trustee from a third person, title can be placed in the proper party through the resulting trust or constructive trust doctrines.

2. Resulting Trust

A resulting trust arises by operation of law when title is conveyed to one party while consideration is provided by another. *Cohrs v. Scott*, 338 S.W.2d 127, 130 (Tex. 1960). Generally, a resulting trust can arise only when title passes, not at a later time. *Id.* at 130. This rule, often stated in the case law, must be modified for transactions involving spouses. With spouses, the inception of title rule applies, so that a resulting trust can arise only at the inception of title, even if title passes at a later time. A resulting trust also arises when a conveyance is made to a trustee pursuant to an express trust, which fails for any reason. *Nolana Development Ass'n v. Corsi*, 682 S.W.2d 246, 250 (Tex. 1984). Ordinarily, the proponent of a resulting trust has the burden of overcoming the presumption of ownership arising from title by "clear, satisfactory and convincing" proof of the facts giving rise to the resulting trust, *Stone v. Parker*, 446 S.W.2d 734, 736 (Tex. Civ. App.--Houston [14th Dist.] 1969, writ ref'd n.r.e.). However, when marital property is in issue, the presumption of community prevails over the presumption of ownership arising from title, so proof that property is possessed by a spouse during marriage is sufficient to establish, prima facie, a resulting trust in favor of the community even when title is held in the name of one spouse alone. *See* TEX. FAM. CODE § 3.003. An example of a resulting trust is if a couple's parents buy them a home, but the couple are making the payments on the home.

a. *Villarreal v. Villarreal*

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

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

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

b. Irrebuttable Presumption From Written Conveyance

When an inter vivos conveyance is evidenced by a writing stating that the transferee is to take the property for his own benefit, extrinsic evidence is not admissible to show an unstated intent that the transferee holds the property in trust for another. *Messer v. Johnson*, 422 S.W.2d 908, 912 (Tex. 1968). Thus, in *Messer*, where the husband signed a deed conveying realty to the wife as her separate property, the husband could not present parol evidence to establish a resulting trust in favor of the community estate, absent allegation and proof of fraud, duress or mistake. *Id.* at 912.

3. Constructive Trust

A "constructive trust" is not really a trust; it is an equitable remedy. *Oak Cliff Bank & Trust Co. v. Steenberger*, 497 S.W.2d 489 (Tex. Civ. App.--1973, writ ref'd n.r.e.). The court imposes a "constructive trust" when an equitable title or interest ought to be, as a matter of equity, recognized in someone other than the taker or holder of legal title. *Mills v. Gray*, 147

Tex. 33, 210 S.W.2d 985, (1948). The Texas Supreme Court said: "A transaction may, depending on the circumstances, provide the basis for a constructive trust where one party to that transaction holds funds which in equity and good conscience should be possessed by another." *Meadows v. Bierschwale*, 516 S.W.2d 125, 131 (Tex. 1974). Thus, a constructive trust arises, not by agreement, but rather by fiat of the court, as an equitable remedy to undo an unjust enrichment. A constructive trust most often arises in connection with the breach of a fiduciary duty, constituting constructive fraud.

a. *Burgess v. Burgess*

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

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

Id. at 121.

b. *Maxie v. Maxie*

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

c. *Andrews v. Andrews*

Andrews v. Andrews, 677 S.W.2d 171 (Tex. App.--Austin 1984, no writ), involved the purchase of a residence prior to marriage. The parties, who were then engaged to be married, agreed jointly to buy a residence to use as their marital homestead, and to use their joint borrowing power to secure the loan, and to repay the loan jointly. The woman completed a loan application, and gave it to the man. He, however, submitted a different application to the lender, one that had not been signed by the woman. The initial documents reflected both their names. Prior to closing, the man had the woman's name stricken from the papers, and took title in his name alone. The woman did not pay any earnest money. At his suggestion, she did not attend the closing. Only the man signed the note and deed of trust. Two weeks after the purchase, the parties married and began living in the house. Loan payments were made with community funds. The home was improved with community funds and labor, as well. Some years later, wife learned that the deed was in husband's name alone. She filed for divorce. Husband claimed the home as his separate property. The trial court found that a confidential and fiduciary relationship existed prior to the house purchase. The parties had been seeing each other for seven years, were living together and were engaged to be married. In response to husband's arguments that wife had no interest because she paid none of the purchase price at inception of title, the appellate court stated:

> John Andrews argues that because Cynthia Mae Andrews did not contribute to the down-payment for the purchase of the residence, she cannot be the beneficiary of a

resulting trust. This may be true. Nevertheless, this Court does not understand that appellee was required to prove a contribution to the down-payment for the purchase of the house as a condition for the imposition of a *constructive trust* as distinguished from a resulting trust.

Id. at 174.

d. *Johnston v. Mabrey*

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

e. Constructive vs. Resulting Trusts

In *Mills v. Gray*, 147 Tex. 33, 210 S.W.2d 985, 987-88 (1948), the Texas Supreme Court drew the following distinction between a resulting trust and a constructive trust:

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

4. Effect of Trust Doctrines on Deed Recitals

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

III. HOMESTEAD RIGHTS AND LIMITATIONS

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

A. The Homestead

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

1. What is a "Homestead"

A "homestead" is an estate in land, not just a privilege of exemption or possession. *Andrews v. Security Nat. Bank of Wichita Falls*, 121 Tex. 409, 50 S.W.2d 253, 256 (1932); *Villarreal v. Laredo Nat. Bank*, 677 S.W.2d 600, 607 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.). The homestead exemption does not depend upon unqualified fee ownership of the land. *Villarreal v. Laredo Nat. Bank*, 677 S.W.2d 600, 606 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.); *Gann v. Montgomery*, 210 S.W.2d 255, 258 (Tex. Civ. App.--Fort Worth 1948, writ ref'd n.r.e.). The homestead right

is akin to a life estate. *Sparks v. Robertson*, 203 S.W.2d 622 (Tex. Civ. App.--Austin 1947, writ ref'd).

In *Norris v. Thomas*, 215 S.W.3d 851 (Tex. 2007), the Texas Supreme Court considered whether a boat qualifies as a homestead under article XVI, sections 50 and 51 of the Texas Constitution. Mr. Norris claimed his 68 foot yacht as a homestead to shield it from bankruptcy creditors. Mr. Norris stated that he took up permanent residence on the boat after he and his wife sold their previous home. *Id.* at 852. When the boat was dry docked, it received water, phone service, and electricity through connections to a dock. After reviewing precedent involving primarily mobile homes, the Supreme Court concluded that

> the proper test for whether a residence attains homestead status is whether the attachment to land is sufficient to make the personal property a permanent part of the realty. Significantly, both the Constitution and the Property Code use the word "thereon" when describing any protected homestead improvements; the Constitution also stipulates "on the land," which is plainly not the same as "in the water.

Id. at 856. The Court further stated that "[m]ovable chattels do not possess the characteristics of a fixture attached to real property and do not acquire the character of realty. As the [*Capitol Aggregates, Inc. v.*] *Walker* [448 S.W.2d 830 (Tex. Civ. App. – Austin, 1969, writ ref'd n.r.e.)] court put it, "'[i]t is their attachment to realty which gives them homestead character.'" *Id.* at 857. The Supreme Court held

> that Norris's boat remains a movable chattel; it does not rest "thereon" or "on the land" as Texas homestead law clearly requires; it has not become a permanent part of the real estate; and it has not sufficiently attached to real property to merit homestead protection. In our view, the homestead exemption from creditors found in the Constitution and the Property Code contemplates a requisite degree of physical permanency and attachment to fixed realty-"thereon" and "on the land" constitute the operative language-that is not present in the pending case.

Id. at 857-58. *See Clark v. Vitz,* 190 S.W.2d 736 (Tex. Civ. App.– Dallas 1945, writ ref'd) (The court held that Vitz's attachment of the house-trailer to his residence made the trailer part of the homestead); *Gann v. Montgomery,* 210 S.W.2d 255 (Tex. Civ. App.– Fort Worth 1948, writ ref'd n.r.e.) (The court held that house trailers without the characteristics of permanent fixtures attached to realty are not protected homesteads); *Capitol Aggregates, Inc. v. Walker,* 448 S.W.2d 830, (Tex. Civ. App.– Austin 1969, writ ref'd n.r.e.) (The court found it persuasive that the house was "as physically attached to the land as frame houses" and held that the trailer house was a homestead); *Minnehoma Financial Co. v. Ditto,* 566 S.W.2d 354 (Tex. Civ. App.– Fort Worth 1978, writ ref'd n.r.e.) (The court stated that "a mobile home may be deemed an improvement to the realty when attached to the realty in a manner indicating an intention that it be a permanent part of the real estate. The nature of a mobile home does not preclude its being given homestead protection. If a mobile home is attached in such a manner to a homestead, it is entitled to homestead protection).

2. Acquisition of Homestead

This subsection discusses how a party acquires a homestead interest in land.

a. Homestead Requires Some Interest in Land

Homestead can adhere only to some title or interest in land. *Villarreal v. Laredo Nat. Bank*, 677 S.W.2d 600, 606 n. 3 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.). However, fee simple ownership in the land is not required. *Id.* at 606. Sufficient interests include tenancy in common, tenancy at will, and a right of present possession. *Id.* at 606 n. 3. In *Villarreal*, the provision in the decree of divorce allowing the wife "use and occupancy" of the house until the youngest child turned 18 was a sufficient interest to support a homestead claim for the wife, as against a creditor, even though ownership of the house was awarded by the Decree of Divorce to the husband.

b. When Right Arises

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

c. Designation of Homestead

The fact that the owner has or has not designated the property as homestead for property tax purposes is not controlling. *Dodd v. Harper*, 670 S.W.2d 646 (Tex. App.--Houston [1st Dist.] 1983, no

writ). Such designation, or the lack thereof, is merely one evidentiary factor to consider on the ultimate question, which is whether the claimant intended to make the property his homestead.

d. Forcing Designation

The Property Code provides a way for a creditor to require a person to declare a homestead. When execution is issued against someone who holds land which might be homestead, the judgment creditor can give the judgment debtor notice to designate homestead. The notice must state that upon failure of the debtor to designate a homestead, the court will appoint a commissioner to make such a designation, at the debtor's expense. TEX. PROP. CODE § 41.021. The debtor has until 10:00 a.m. on the Monday following the twentieth day after service of notice to designate his homestead, by filing a written designation with the court issuing writ of execution. The designation must include a plat. TEX. PROP. CODE § 41.022. If the debtor fails to do so, then on motion of the judgment creditor filed within 90 days of issuance of execution, the court issuing execution must appoint a commissioner, together with a surveyor and others whose assistance is needed. The commissioner is to file his designation, and plat, on behalf of the judgment debtor, within 60 days of appointment, or within such time as the court may allow. Either the judgment creditor or the judgment debtor may, within 10 days thereafter, request a hearing from the court on the designation, and, by filing exceptions to the designation prior to hearing, be entitled to present evidence for or against the designation. TEX. PROP. CODE § 41.023. After the hearing, the court designates the homestead, and orders sale of any excess property. The fees and expenses of the commissioner, appraiser and others appointed, are taxed against the debtor as costs of execution. TEX. PROP. CODE § 41.023.

3. Types of Homestead

a. Urban Homestead

The size of the homestead is set out in Section 41.002 of the Texas Property Code. An urban homestead consists of not more than ten acres of land, which can be in one or more lots, together with any improvements thereon. TEX. PROP. CODE § 41.002(a). An urban homestead may be used for the purposes of an urban home or as both an urban home and a place to exercise a calling or business. TEX. PROP. CODE § 41.002(a); *Norris v. Thomas*, 215 S.W.3d 851, 854 (Tex. 2007). Before 1999, an urban property owner could claim both a business homestead and a residential homestead. In 1999, the constitution was amended to do away with the separate urban business homestead. *Majeski v. Estate of Majeski*, 163 S.W.3d 102, 108 (Tex. App. – Austin,2005, no pet.). *See* Tex. Const. art. XVI, § 51. A homestead is considered to be urban if, at the time the designation is made, the property is (1) located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision, and (2) served by police protection, paid or volunteer fire protection, and at least three of the following services provided by a municipality or under contract to a municipality: (a) electric; (b) natural gas; (c) sewer; (d) storm sewer; and (e) water. TEX. PROP. CODE § 41.002(a).

b. Rural Homestead

A rural homestead for a family is not more than 200 acres, and for an individual not more than 100 acres, whether in one or more parcels, together with any improvements thereon. TEX. PROP. CODE § 41.002(b). The sizes given in the Property Code apply to all homesteads, regardless of when they were created. TEX. PROP. CODE § 41.002(c). When dealing with a rural homestead, be aware of the potential consequences of the future loss of a qualified open-space land appraisal. TEX. TAX CODE § 23.51. Rural land which qualifies for an open-space land appraisal is appraised at a greatly reduced amount for purposes of property taxation. However, if the use of land changes, an additional tax is imposed on the land equal to the difference between the taxes imposed on the land for each of the five years preceding the year in which the change of use and the tax that would have been imposed had the land been taxed on the basis of market value in each of those years, plus interest at an annual rate of seven percent calculated from the dates on which the differences would have become due. TEX. TAX CODE § 23.55(a).

4. Loss of Homestead

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

a. Death

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

b. Abandonment

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

(1) Temporary Absence Not Fatal

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

(2) Temporary Renting Not Fatal

The temporary renting of the homestead does not destroy its homestead character provided the claimant has not acquired another homestead. TEX. PROP. CODE §41.003.

(3) Moving Out Upon Separation Not Fatal

Several courts have addressed the question of whether a spouse's leaving the home upon marital separation constitutes abandonment of that spouse's homestead interest.

(a) *Posey v. Commercial Nat. Bank*

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

(b) *Sakowitz Bros. v. McCord*

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

(c) *Rimmer v. McKinney*

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

(d) Other Authorities

See also Villarreal v. Laredo Nat. Bank, 677 S.W.2d 600, 606 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.) ("[a]s a general rule, the complete breaking up of the family for any cause does not operate to forfeit the homestead right of one who has acquired it and continues to use the property as his home"); *Wierzchula v. Wierzchula*, 623 S.W.2d 730, 732 (Tex. Civ. App.--Houston [1st Dist.] 1981, no writ) ("[t]he homestead character of the property is not destroyed by a divorce if one of the parties to the divorce continues to maintain it as homestead"); *Patterson v. First Nat. Bank of Lake Jackson*, 921 S.W.2d 240, 245-46 (Tex. App. – Houston [14th Dist.] 1996, no writ).

5. Homestead in Other Spouse's Separate Property

A spouse can have a homestead interest in land which is the separate property of the other spouse. *Villarreal v. Laredo Nat. Bank*, 677 S.W.2d 600, 606 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.) (en banc). This interest, or the right to use the property as a residence, can be awarded to the custodial spouse for the duration of the minority of the parties' children. *Hedtke v. Hedtke*, 248 S.W. 21, 22 (Tex. 1923). *See Eggemeyer v. Egqemeyer*, 554 S.W.2d 137, 138 (Tex. 1977); *Villarreal v. Laredo Nat. Bank*, 677 S.W.2d 600, 606 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.) (en banc). An argument can be made that the homestead interest of the non-owner spouse in separate property of the other spouse can be awarded to the non-owner spouse, thereby excluding the owner-spouse from use of his land, even when there are no minor children. The Supreme Court, in *Hedtke v. Hedtke*, 112 Tex. 404, 248 S.W. 21, 23 (1923), said:

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

occupancy of homestead property, as of any other, may be adjudged to the husband, the wife, or the children.

B. Liens

Prior to 1998, only three liens could be foreclosed against a homestead: purchase money liens, tax liens, and builder's and mechanic's liens.

Currently, under the Texas constitution, seven liens can be foreclosed against a homestead: purchase money liens, tax liens, builder's and mechanic's liens, owelty liens, refinance of a lien, home equity lien, and a reverse mortgage lien. TEX. CONST. art. XVI, § 50. The Texas Property Code states that "[e]ncumbrances may be properly fixed on homestead property for: (1) purchase money; (2) taxes on the property; (3) work and material used in constructing improvements on the property if contracted for in writing as provided by Sections 53.254(a), (b), and (c); (4) an owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding; (5) the refinance of a lien against a homestead, including a federal tax lien resulting from the tax debt of both spouses, if the homestead is a family homestead, or from the tax debt of the owner; (6) an extension of credit that meets the requirements of Section 50(a)(6), Article XVI, Texas Constitution; or (7) a reverse mortgage that meets the requirements of Sections 50(k)-(p), Article XVI, Texas Constitution." TEX. PROP. CODE § 41.001(b). "The homestead claimant's proceeds of a sale of a homestead are not subject to seizure for a creditor's claim for six months after the date of sale."TEX. PROP. CODE § 41.001(c)

1. Vendor's Lien

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

2. Mechanic's, Contractor's or Materialman's Lien

The mechanic's, contractor's or materialman's lien is covered by Chapter 53 of the Texas Property Code. Chapter 53: (i) describes persons entitled to the lien, and the property which is subject thereto; (ii) describes the procedure for perfecting the lien; and (iii) provides for the withholding of funds by the owner on behalf of subcontractors; etc. If these issues become important in a family law case, reference should be made to these provisions. Ordinarily, however, the family home will be homestead, and will be protected by Section 41.001 of the Texas Property Code. Section 41.001 provides that an encumbrance may be properly fixed on homestead property for work and material used in constructing improvements on the property only if contracted for in writing as provided by Sections 53.254(a), (b), and (c). TEX. PROP. CODE § 41.001(b)(3). Section 53.254 requires the owner of the property and the person supplying the materials or performing the labor to sign a written contract setting forth the terms of the agreement, the contract must be executed before the material is furnished or the labor is performed, and both spouses must sign the contract if the homestead claimant is married. TEX. PROP.CODE § 53.254(a-c). *See also* TEX. CONST. art. XVI, § 50 (a)(5)(A).

3. Tax Lien

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

4. Owelty Lien

Owelty of partition is defined as: "A sum of money paid by one of two coparceners or co-tenants to the other, when a partition has been effected between them, but, the land not being susceptible of division into exactly equal shares, such payment is required to make the portions respectively assigned to them of equal value." Black's Law Dictionary 1105 (6th ed.1996). *See Handley v. Handley*, 122 S.W.3d 904, 909 n.2 (Tex. App. – Corpus Christi 2003, no pet.). Owelty liens are appropriate when the court cannot partition real estate into equal shares without materially injuring its value. The court may divide the real property into unequal shares, order payment of an owelty to equalize the value of the shares, and then impose a lien on the greater share in favor of the recipient of the lesser share to secure the owelty payment. *See Sayers v. Pyland,* 161 S.W.2d 769, 772 (Tex.1942); *Goldberg v Goldberg*, 392 S.W.2d 168, 171 (Tex. Civ. App. – Fort Worth 1965, no writ)..

We use an owelty deed of partition when one spouse is buying the other spouse's interest in the homestead. The owelty deed is used because the conveying spouse wants to be assured that he/she has a security interest on the entire homestead and not just

on the conveying spouse's one-half ownership interest. The owelty deed creates a secured indebtedness between the parties on the entirety of the homestead. Any time one spouse is purchasing or buying out the interest of the other spouse in the homestead it will be necessary for you to have the parties execute an owelty deed. After much controversy regarding owelty in the 90's, the Texas voters passed a constitutional amendment which provided that an owelty of partition may be imposed against the entirety of homestead property by court order or written agreement in a divorce or other partition, for example, an agreement incident to divorce.

To ensure the title transfer of the homestead in a divorce, the following should be accomplished: (1) the divorce decree or judgment should order the payment of a specific dollar amount for the partition or award of the homestead; (2) the divorce decree should order the imposition of an owelty lien on the entire homestead property; and (3) an owelty deed should be executed and recorded.

5. Refinance of a Lien

The Texas Constitution provides, in relevant part, that "[t]he homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for...the refinance of a lien against a homestead, including a federal tax lien resulting from the tax debt of both spouses, if the homestead is a family homestead, or from the tax debt of the owner...." TEX. CONST. art. XVI, § 50(a)(4). The Texas Constitution provides that "[a] refinance of debt secured by a homestead and described by any subsection under Subsections (a)(1)-(a)(5) that includes the advance of additional funds may not be secured by a valid lien against the homestead unless: (1) the refinance of the debt is an extension of credit described by Subsection (a)(6) of this section; or (2) the advance of all the additional funds is for reasonable costs necessary to refinance such debt or for a purpose described by Subsection (a)(2), (a)(3), or (a)(5) of this section."TEX. CONST. art. XVI, § 50(e). However, neither the Constitution nor the Property Code defines "refinance." *See* 7 TEX. ADMIN. CODE § 1.102(25) (2006) (defining "refinance" as "[a] new loan contract that includes, in whole or in part, the net balance of one or more existing loan contracts"); 12 C.F.R. § 226.20(a),.1(a), (b) ("Regulation Z") (2006) ("[a] refinancing occurs when an existing obligation that was subject to this subpart is satisfied and replaced by a new obligation undertaken by the same consumer."). *See Rains v. Construction Financial Services, Inc*., 2006 WL 2448205 at *3 (Tex. App. – Austin 2006, no pet). *See also LaSalle Bank National Association v. White*, ___ S.W.3d ____ 2007 WL 4465716 (Tex. 2007).

6. Home Equity Loans

The Texas Constitution allows an extension of credit that can be secured by a homestead via home equity loans. TEX. CONST. art. XVI, § 50(a)(6). A home equity loan is an extension of credit under which money is borrowed and repaid in accordance with the terms of a written loan agreement with the consent of each owner and each owner's spouse. TEX. CONST. art. XVI, § 50(a)(6)(A). The laws permitting these home equity loans still include restrictions on their use. *See* TEX. CONST. art. XVI, § 50(a)(6). A lender may make a home equity loan on business, residential, or dairy farm homesteads, but not homestead designated for agricultural use. TEX. CONST. art. XVI, § 50(a)(6)(I). The money from a home equity loan may be used by the borrower for any purpose the borrower chooses. The constitutional amendment dictates about two dozen requirements in order to have a valid home equity mortgage. The requirements include: (a) a three percent limit on fees paid by the borrower; (b) a twelve day cooling off period; (c) a three day right of recision; (d) an eighty percent limit on ratio of mortgage debt to land value; (e) a home equity disclosure; (f) a disclosure in home equity mortgage that it is a home equity mortgage; (g) no home equity mortgage on land assessed for tax purposes as agriculture use unless used primarily for production of milk; (h) a copy of documents to be given to land owner; (i) the closing at office of lender, attorney, or title company; (j) no blanks in documents signed by borrowers; (k) only one home equity mortgage on a homestead at a time; and (l) no home equity mortgage within twelve months of a prior home equity mortgage.

7. Reverse Mortgages

Texans voted on a reverse mortgage amendment to the Texas Constitution that became effective January 1, 1998. TEX. CONST. art. XVI, § 50(a)(7). Reverse mortgage means, among other things, an extension of credit (1) that is secured by a voluntary lien on homestead property created by a written agreement with the consent of each owner and each owner's spouse, (2) that is made to a person who is or whose spouse is 62 years or older, (3) that is made without recourse for personal liability against each owner and the spouse of each owner, (4) under which advances are provided to a borrower based on the equity in a borrower's homestead, (5) that does not permit the lender to reduce the amount or number of advances because of an adjustment in the interest rate if periodic advances are to be made, (6) that requires no payment of principal or interest until (A) all borrowers have died, (B) the homestead property securing the loan is sold or otherwise transferred, (C) all borrowers cease occupying the homestead property for a period of longer than 12 consecutive months without prior

written approval from the lender; or (D) among other things, the borrower (i) defaults on an obligation specified in the loan documents to repair and maintain, pay taxes and assessments on, or insure the homestead property, or (ii) commits actual fraud in connection with the loan. TEX. CONST. art. XVI, § 50(k). A reverse mortgage must provide that (1) the owner does not use a credit card, debit card, preprinted solicitation check, or similar device to obtain an advance, (2) after the time the extension of credit is established, no transaction fee is charged or collected solely in connection with any debit or advance, and (3) the lender or holder may not unilaterally amend the extension of credit. TEX. CONST. art. XVI, § 50(v).

8. Equitable Lien

On divorce, when the court awards the house to one party and a money judgment to the other for his or her interest in the home, the money judgment can be secured by an equitable lien, created in the decree of divorce, which is enforceable against a claim of homestead. *Lettieri v. Lettieri*, 654 S.W.2d 554, 559 (Tex. App.--Fort Worth 1983, writ dism'd). In *Wierzchula v. Wierzchula*, 623 S.W.2d 730, 732 (Tex. Civ. App.--Houston [1st Dist.] 1981, no writ), the court said that in a divorce action a lien could be placed on a spouse's separate property homestead "to secure the payment of the amount awarded to the other spouse for the spouse's homestead interest." *See Cole v. Cole*, 880 S.W.2d 477, 484 (Tex. App. – Fort Worth 1994, no writ). *See also Buchan v. Buchan*, 592 S.W.2d 367, 371-72 (Tex. Civ. App.--Tyler 1979, writ dism'd) (husband awarded judgment to offset leasehold interest in wife's separate property residence taken from him in divorce).

9. Economic Contribution Lien

Section 3.406 of the Family Code provides that upon dissolution of a marriage, the court shall impose an equitable lien on property of a marital estate to secure a claim for economic contribution in that property by another marital. TEX. FAM. CODE § 3.406(a). In *Langston v. Langston*, 82 S.W.3d 686 (Tex. App. – Eastland 2002, no pet.), the Eastland Court of Appeals addressed the economic contribution lien. The Court stated

> A claim for economic contribution does not create an ownership interest in the property; it merely creates a claim against the property of the benefitted estate which matures upon the termination of the marriage.... In making this division upon termination of the marriage, the court *shall* impose an equitable lien on property of a marital estate to secure a claim for economic contribution in that property by another marital estate.
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> * * * * *
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> Although a court cannot divest a spouse of his separate property, the trial court must impose an equitable lien on that spouse's separate property to secure the other spouse's claim for economic contribution. That lien, if not satisfied, is subject to foreclosure as any other judgment lien.

I*d.* at 689. (Emphasis in original). However, the Court of Appeals stated that "[t]he issue of whether a Section 3.406 lien can be foreclosed on a spouse's separate property which is homesteaded is not before us." I*d.* at 689 n.1. Since an economic contribution lien is an equitable lien, foreclosure upon a spouse's separate property homestead should be available.

10. Implied Vendor's Lien

The Texas Supreme Court has ruled that when one party sells realty on credit to another, an implied vendor's lien arises to secure the debt. *McGoodwin v. McGoodwin*, 671 S.W.2d 880, 882 (Tex. 1984). In *McGoodwin*, the wife conveyed her interest in the parties' homestead to the husband pursuant to an agreement incident to divorce. No vendor's lien was retained in the deed. The Supreme Court held that an implied vendor's lien arose from the property settlement agreement, securing the wife's one-half community property interest conveyed. The Court specifically noted that the lien only reached the undivided one-half community property interest actually conveyed by the wife pursuant to the property settlement agreement. *Id.* at 882-83. *See Magallanez v. Magallanez*, 911 S.W.2d 91, 94-95 (Tex. App. – El Paso 1995, no writ).

A similar result was reached by the Austin Court of Appeals in *Colquette v. Forbes*, 680 S.W.2d 536, 538 (Tex. App.--Austin 1984, no writ), in which an implied vendor's lien was held to have arisen from the agreement incident to divorce even though no vendor's lien was retained in the deed conveying the husband's one-half community property interest in the property to the wife.

11. Equitable Subrogation to Lien

Texas has long recognized a lienholder's common law right to equitable subrogation. *LaSalle Bank National Association v. White*, ___ S.W.3d ____ 2007 WL 4465716 at *2 (Tex. 2007). *See Benchmark Bank v. Crowder,* 919 S.W.2d 657, 661 (Tex.1996).

The doctrine allows a third party who discharges a lien upon the property of another to step into the original lienholder's shoes and assume the lienholder's right to the security interest against the debtor. *LaSalle Bank National Association v. White*, ___ S.W.3d ____ 2007 WL 4465716 at *2; *First Nat'l Bank of Kerrville v. O'Dell,* 856 S.W.2d 410, 415 (Tex.1993). The doctrine of equitable subrogation has been repeatedly applied to preserve lien rights on homestead property. *LaSalle Bank National Association v. White*, ___ S.W.3d ____ 2007 WL 4465716 at *2.

In *Citizens Sav. Bank & Trust Co. v. Spencer*, 105 S.W.2d 671, 677 (Tex. Civ. App.--Amarillo), *writ dism'd*, 110 S.W.2d 1151 (Tex. 1937), the Court stated:

> A third person who has paid or has loaned money to pay a debt secured by a vendor's lien, is entitled to be subrogated to the rights of the vendor where the money was advanced at the debtor's request and for his benefit.

See also Henke v. First Southern Properties, 586 S.W.2d 617, 621 (Tex. Civ. App.--Waco 1979, writ ref'd n.r.e.) (one who discharges a vendor's lien upon land, even homestead, either by paying as surety, or at the request of the debtor, or at a judicial sale, which for some reason fails to convey the title, is subrogated to the lien of the creditor to the extent of the payment made).

In *LaSalle Bank National Association v. White*, ___ S.W.3d ____ 2007 WL 4465716 (Tex. 2007), White executed a home-equity note, later assigned to LaSalle Bank, in the principal amount of $260,000. The note recited that the transaction was an "extension of credit," as defined by article XVI, section 50(a)(6) of the Texas Constitution. The note was secured by a lien against 10.147 acres of White's 53.722-acre homestead property which was designated for agricultural use. At the time of disbursement, the lender used $185,010.51 of the loan proceeds to pay off the valid purchase-money lien against the total acreage, and another $9,410.96 to pay a state property-tax lien (the "refinance portion"). The remainder after closing costs, $57,518.50, was paid directly to White (the "cash-out portion"). After White stopped making payments, LaSalle Bank filed an application for a home-equity loan foreclosure, Because the Texas Constitution prohibits homestead property designated for agricultural use from being pledged to secure a home-equity loan, and mandates forfeiture of all principal and interest for loans so secured, White filed suit seeking a declaratory judgment that the bank had forfeited all principal and interest because the loan violated the Texas Constitution. *Id.* at *1.

The Supreme Court held "that the forfeiture penalty does not preclude the lender's recovery of the refinance portion of the loan proceeds that were used to pay the debtor's constitutionally permissible pre-existing debt because the lender was equitably subrogated to the prior lienholders' interests." *Id.* at *1. The Court explained

> Invalidation of a contractual lien does not preclude equitable subrogation. In *Texas Land & Loan Co. v. Blalock,* we held that, although a home-equity loan was invalid under the Texas Constitution, the lender was entitled to equitable subrogation to the extent of the prior valid purchase-money lien that the loan had been used to discharge. 76 Tex. 85, 13 S.W. 12, 13-14 (Tex.1890). In *Faires,* too, we stated that "[o]ne who discharges the vendor's lien upon lands, *even the homestead,* either by paying as surety, or at the request of the debtor, or at a judicial sale, which, for irregularities in the process, fails to convey the title, is entitled to be subrogated to the lien of the creditor to the extent of the payment so made." 31 S.W. at 194 (emphasis added) [*Faires v. Cockrill*, 31 S.W. 190 (Tex. 1985)]. And again in *Martin,* we reiterated that the refinancing lender which discharged a valid mechanic's lien was entitled to equitable subrogation, even though such a lien on the homestead would otherwise violate the constitution. *Martin,* 88 S.W.2d at 469-70 [*Farm & Home Sav. Ass'n v. Martin*, 88 S.W.2d 459 (Tex. 1935)]. Throughout our jurisprudence, we have stressed that the doctrine of equitable subrogation works to protect homestead property. Without equitable subrogation, lenders would be hesitant to refinance homestead property due to increased risk that they might be forced to forfeit their liens. The ability to refinance provides homeowners the flexibility to rearrange debt and avoid foreclosure. Article XVI, section 50(e) does not abrogate this longstanding common law principle or preclude LaSalle Bank's entitlement to equitable subrogation for the refinance portion of the loan proceeds that were used to extinguish White's

constitutionally permissible purchase-money and property-tax liens.

Id. at *3 (some citations omitted).

C. Foreclosure

In most circumstances, a lien may be foreclosed in a non-judicial proceeding. For example, a sale of real property under a power of sale conferred by a deed of trust or other contract lien must be a public sale at auction held between 10 a.m. and 4 p.m. of the first Tuesday of a month. With some exceptions, the sale must take place at the county courthouse in the county in which the land is located, or if the property is located in more than one county, the sale may be made at the courthouse in any county in which the property is located. TEX. PROP. CODE § 51.002(a). With some exceptions, notice of the sale, which must include a statement of the earliest time at which the sale will begin, must be given at least 21 days before the date of the sale by: (1) posting at the courthouse door of each county in which the property is located a written notice designating the county in which the property will be sold; (2) filing in the office of the county clerk of each county in which the property is located a copy of the notice posted; and (3) serving written notice of the sale by certified mail on each debtor who, according to the records of the mortgage servicer of the debt, is obligated to pay the debt. TEX. PROP. CODE § 51.002(b).

However, special rules apply for home equity loans and for a reverse mortgage. Under Texas Rule of Civil Procedure 735 , a party seeking to foreclose a home equity lien created under Article XVI, section 50(a)(6) of the Texas Constitution may file (1) a suit seeking judicial foreclosure, (2) a suit or counterclaim seeking a final judgment which includes an order allowing foreclosure under the security instrument and Texas Property Code section 51.002, or (3) an application under rule 736 of the Texas Rules of Civil Procedure for an order allowing foreclosure. *Douglass v. Country Wide Home Loans, Inc.*, 2005 WL 1542658 at *8 (Tex. App.– Fort Worth 2005, pet. denied). *See* TEX.R. CIV. P. 735.

Rule 736 requires a party to file an application seeking a court order allowing the foreclosure of a home equity loan, or a lien for a reverse mortgage in the district court in any county where all or any part of the real property encumbered by the lien sought to be foreclosed is located. Rule 736 also requires a specific notice to be served upon the party obligated to pay the debt. On the filing of a response, the application shall be promptly heard after reasonable notice to the applicant and the respondent. No discovery of any kind shall be permitted in a proceeding under Rule 736. Unless the parties agree to an extension of time, the issue shall be determined by the court not later than ten business days after a request for hearing by either party. At the hearing, the applicant shall have the burden to prove by affidavits on file or evidence presented the grounds for the granting of the order sought in the application. The only issue to be determined under Rule 736 shall be the right of the applicant to obtain an order to proceed with foreclosure under the security instrument and Tex. Prop. Code § 51.002.

The court shall grant the application if the court finds applicant has proved that (1) a debt exists, (2) the debt is secured by a lien created under Tex. Const. art. XVI, § 50(a)(6), for a home equity loan, or § 50(a)(7), for a reverse mortgage, (3) a default under the security instrument exists, and (4) the applicant has given the requisite notices to cure the default and accelerate the maturity of the debt under the security instrument, Tex. Prop. Code § 51.002, Tex. Const. art. XVI, § 50(k)(10), for a reverse mortgage, and applicable law. Otherwise, the court shall deny the application. The granting or denial of the application is not an appealable order. The applicant is to file a certified copy of the order in the real property records of the county where the property is located within ten business days of the entry of the order. Failure to timely record the order shall not affect the validity of the foreclosure or defeat the presumption of Tex. Const. art. XVI, § 50(i).

No order or determination of fact or law under Rule 736 shall be res judicata or constitute collateral estoppel or estoppel by judgment in any other proceeding or suit. The granting of an application under these rules shall be without prejudice to the right of the respondent to seek relief at law or in equity in any court of competent jurisdiction. The denial of an application under these rules shall be without prejudice to the right of the applicant to re-file the application or seek other relief at law or in equity in any court of competent jurisdiction.

A proceeding under Rule 736 is automatically abated if, before the signing of the order, notice is filed with the clerk of the court in which the application is pending that respondent has filed a petition contesting the right to foreclose in a district court in the county where the application is pending. A proceeding that has been abated shall be dismissed.

D. Fraud Vitiates Homestead Protection

The homestead exemption will not serve as a shield against imposition of a constructive trust when the homestead claimants knowingly misused property transferred to them for the benefit of another. For example, in *Kolstelnick v. Roberts*, 680 S.W.2d 532, 535-36 (Tex. App.--Corpus Christi 1984, writ ref'd n.r.e.), the trial court imposed a constructive trust for

the benefit of a third party upon a mobile home and other property alleged to be homestead.

E. Federal Preemption

In *United States v. Rodgers*, 461 U.S. 677 (1983), the United States Supreme Court decided that the Texas law of homestead has been preempted by the Internal Revenue Code insofar as the Code affords the United States government the right to collect taxes owed to the government out of property recognized under Texas law as homestead. In *Rodgers*, the Supreme Court held that a husband's tax liability could be paid out of proceeds derived from selling his share of homestead property, even if that property is also the homestead of his wife, who had no liability to the United States government. The Supreme Court further held that the government was not constrained to sell only the husband's interest in the property, but rather that the entire homestead property could be sold, with the government collecting its due from the husband's share of the proceeds. The wife's share of the proceeds would be given to her after the sale of her home. *See Vannerson v. Vannerson*, 857 S.W.2d 659, 676 (Tex. App. – Houston [1st Dist.] 1993, writ denied).

F. Limitations on Management Power of Spouse

Texas law limits the power of a spouse over the homestead, and over joint management community property generally.

1. Limitations Regarding Homestead

The limitations on a spouse's power over the homestead are both constitutional and statutory.

a. Constitutional and Statutory Restrictions

There are a number of constitutional and statutory provisions which restrict the power of a spouse in dealing with the homestead.

(1) Texas Constitution

Article 16, Section 50 of the Texas Constitution provides restrictions on the freedom of a spouse to deal with the homestead. Under this Section, the homestead is subject to forced sale for the payment of home improvement indebtedness only when the work and material used in constructing the improvements are contracted for in writing, with the consent of both spouses, and in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead. TEX. CONST. art. XVI, § 50(a)(5)(A). The Constitution further provides that the owner or claimant of property claimed as homestead, if married, cannot sell or abandon the homestead without the consent of the other spouse, given in such a manner as may be prescribed by law. TEX. CONST. art. XVI, § 50(b).

(2) Family Code Provisions

Section 5.001 of the Texas Family Code provides that, regardless of whether the homestead is separate or community property, neither spouse may sell, convey or encumber the homestead without the joinder of the other spouse. TEX. FAM. CODE § 5.001. However, there are exceptions to the rule. For example, if the homestead is the separate property of a spouse and the other spouse has been judicially declared incapacitated, the owner may sell, convey, or encumber the homestead without the joinder of the other spouse. TEX. FAM. CODE § 5.002. In addition, if the homestead is the separate property of a spouse, a district court may order the sale if the other spouse (1) has disappeared and that the location of the spouse remains unknown, (2) has permanently abandoned the homestead and the petitioning spouse, (3) has permanently abandoned the homestead and the spouses are permanently separated, or (4) has been reported by an executive department of the United States to be a prisoner of war or missing on public service of the United States. TEX. FAM. CODE § 5.101. If the homestead is the community property of the spouses and one spouse has been judicially declared incapacitated, the competent spouse may sell, convey, or encumber the homestead without the joinder of the other spouse. TEX. FAM. CODE § 5.003. If the homestead is the community property of the spouses, a district court may order the sale if the other spouse (1) has disappeared and that the location of the spouse remains unknown, (2) has permanently abandoned the homestead and the petitioning spouse, (3) has permanently abandoned the homestead and the spouses are permanently separated, or (4) has been reported by an executive department of the United States to be a prisoner of war or missing on public service of the United States. TEX. FAM. CODE § 5.102.

(3) Property Code Provisions

The Texas Property Code contains several restrictions on the power of a spouse to deal with the homestead. If a homestead claimant is married, a homestead cannot be abandoned without the consent of the claimant's spouse. TEX. PROP. CODE § 41.004. If the claimant is married, an encumbrance for work and material used in constructing improvements to the homestead is valid only if joined in by both spouses. TEX. PROP. CODE § 53.254(c).

b. Can One Spouse Convey Community Property Homestead?

Considering the absolute language of Section 5.001 of the Texas Family Code, one would think that

a spouse acting alone could not sell, convey or encumber the community property homestead. This is a partially true but misleading statement of the law.

(1) Yes, But Only Subject to Homestead Right

As stated in *Zable v. Henry*, 649 S.W.2d 136 (Tex. App.--Dallas 1983, no writ):

> A conveyance by a husband, not joined by his wife, of homestead property, is not void but is merely inoperative while the property continues to be homestead, or until such time as the homestead may be abandoned, or the deed ratified in accordance with law. *Grissom v. Anderson*, 125 Tex. 26, 79 S.W.2d 619, 621 (1935)
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> * * * * *
>
> Other decisions reflect that the Texas courts have adhered strictly to the principle that one-spouse homestead transactions are not void, but are merely inoperative while the property remains the non-signing spouse's homestead.

Id. at 137 (citations omitted). Thus, in *Zable*, an option to purchase the community homestead granted by the husband without the joinder of the wife was held to be valid, but subject to the wife's homestead rights. If the option was exercised at a time when the wife's homestead right existed, and the wife refused to convey the property, an action for damages would lie against the husband; however, absent ratification by the wife, specific performance against the wife would not be available for as long as her homestead right continued. *Id.* at 138. *See Geldard v. Watson*, 214 S.W.3d 202, 207 (Tex. App. – Texarkana 2007, no pet.).

c. Restriction on Separate Property Homestead

Ordinarily, a spouse has the sole management, control and disposition of his or her separate property. TEX. FAM. CODE § 3.101. However, Section 5.001 imposes limitations upon this power when the separate property in question is the homestead of the spouses. TEX. FAM. CODE § 5.001. As with the community homestead, it appears that the spouse who owns the homestead as his separate property may encumber or convey this separate property, but only subject to the homestead right of the other spouse.

(1) *Villarreal v. Laredo National Bank*

Villarreal v. Laredo National Bank, 677 S.W.2d 600, 609 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.) (en banc), involved a home that was awarded to the husband in the divorce, subject to the right of the wife to live there until the parties' youngest child reached majority. The house was encumbered by a builder's and mechanic's lien which the husband was ordered to discharge. Both spouses had signed the original note and lien agreement, but after the divorce the ex-husband alone renewed the note. The ex-husband failed to make the payments, and when the Bank moved to foreclose, the ex-wife sued for injunction to stop the sale. The Bank argued that the ex-wife was not entitled to notice of the sale, etc. since she no longer owned the property and because the renewal and extension of the indebtedness absolved her of any liability under the original note. The court held that the renewal and extension by ex-husband was subject to the ex-wife's homestead right, and that the lien, though valid, could not be enforced against the ex-wife until her homestead right ended. The creditor was allowed to sell the ex-husband's interest in the property, but only subject to the ex-wife's right of possession. *Id.*

The appellate court made it clear that a renewal of an indebtedness does not extinguish the old debt unless the parties so intend. The burden of proving a novation is on the person asserting it. *Id.* at 607. However, the Bank did not argue wife's liability under the old note. Instead, the Bank argued that the wife was not entitled to notice of foreclosure, etc. because "she no longer had any responsibility for or interest in the note." *Id.* at 608. This apparently followed from the Bank's position that it had no obligation to notify the wife of foreclosure because she had no interest in the land once the husband was made sole owner of the property in the divorce decree. *Id.* at 606. Unfortunately for the Bank, the wife was deemed to have a continuing homestead interest. In retrospect, perhaps the Bank should have reposted the property, notified the wife, and ousted her under the original mechanic's lien, which was signed by her. *See First Huntsville Properties Co. v. Laster*, 797 S.W.2d 151, 152-53 (Tex. App. – Houston [14th Dist.] 1990, *aff'd*, 826 S.W.2d 125 (Tex. 1991).

d. Ratification by Other Spouse

A conveyance of the homestead by one spouse alone can become effective if ratified by the non-participating spouse. *See Kunkel v. Kunkel*, 515 S.W.2d 941, 948-49 (Tex. Civ. App.--Amarillo 1974, writ ref'd n.r.e.) (a husband's conveyance of the community property homestead without joinder of wife became enforceable when the wife later ratified the transaction by signing a release of lien in favor of the grantees). *See Geldard v. Watson*, 214 S.W.3d 202, 208 (Tex. App. – Texarkana 2007, no pet.).

2 Limitations Regarding Joint Management Community Property

The Texas Family Code, in describing the management powers of spouses in community property, divides community property into two classes: sole management community property and joint management community property. TEX. FAM. CODE § 3.102. Each spouse has sole management power over the community property that he or she would have owned if single. *Id.* This includes personal earnings, revenue from separate property, recoveries for personal injuries, and the increases of, mutations of, or revenue from, sole management community property. *Id.* All other community property is subject to the joint management, control and disposition of the spouses. *Id.* If the sole management community property of one spouse is mixed or combined with the sole management community property of the other spouse, the mixed or combined property is subject to joint management. *Id.* However, the spouses can agree to transfer the power of management, control, and disposition over certain community property assets from one spouse to the other, by written power of attorney or other agreement. *Id. See also LeBlanc v. Walker*, 603 S.W.2d 265, 266-67 (Tex. Civ. App.--Houston [14th Dist.] 1980, no writ) (post separation oral agreement to divide marital estate was sufficient to transfer power of control, management and disposition).

a. Can One Spouse Convey Joint Management Community Property?

The question arises whether one spouse, acting alone, can convey or encumber joint management community property. There appears to be divided authority on the point.

There are several authorities stating that a spouse acting alone can convey or encumber his one-half community property interest in joint management community property. *Williams v. Portland State Bank*, 514 S.W.2d 124, 127 (Tex. Civ. App.--Beaumont 1974, writ dism'd); *Vallone v. Miller*, 663 S.W.2d 97, 98 (Tex. App.--Houston [14th Dist.] 1983, writ ref'd n.r.e.) (in dictum). However, in *Vallone*, the court found that the contract of sale contemplated transfer of the entire interest in the property, including the wife's share. When she declined to join in the contract of sale, the entire instrument failed, even as to the husband's one-half interest. *Id.* at 98-99. However, in *Dalton v. Don J. Jackson, Inc.*, 691 S.W.2d 765, 768 (Tex. App.--Austin 1985, no writ), the court of appeals concluded that to allow one spouse to unilaterally convey his undivided community property interest in property to a third party would violate Section 5.22(c), which was repealed and recodified as Section 3.102(c), of the Texas Family Code, and also the terms of Article XVI, Section 15 of the Texas Constitution, controlling partitions of community property. Thus, in *Dalton*, a contract to sell joint management community realty, signed by one spouse alone, was held unenforceable. *Id.* at 768.

b. Implication Regarding Power to Convey Community Property Homestead

If *Dalton* is correct, then the cases holding that one spouse alone can convey or encumber a community asset which is the homestead of the other spouse, subject to the other spouse's homestead rights, are in error whenever the homestead is joint management community property.

G. Restraint on Power of Court in Divorce

The protections of the homestead limit the power of the court in a decree of divorce. For example, the court cannot order the homestead sold and the proceeds therefrom paid to unsecured creditors. *Walston v. Walston*, 971 S.W.2d 687, 695 (Tex. App.--Waco 1998, pet. denied); *McIntyre v. McIntyre*, 722 S.W.2d 533, 537 (Tex. App.--San Antonio 1986, no writ). However, the power to order a "just and right" division also includes the power to order the sale of the homestead and the partition of the proceeds. *Laster v. First Huntsville Properties Co.*, 826 S.W.2d 125, 131 (Tex.1991). After a partition sale, a spouse's homestead right carries over to his or her portion of the proceeds of sale. The spouse may seek continued homestead protection for the proceeds of the partition sale as he or she could for the proceeds of any other type of sale of her homestead interest. *Id.* at 132. *See* TEX. PROP. CODE § 41.001(c) ("The homestead claimant's proceeds of a sale of a homestead are not subject to seizure for a creditor's claim for six months after the date of sale.").

IV. LIABILITY AND THE HOME ON DIVORCE

Property received by the spouses in a divorce is subject to the claims of creditors for debts owed prior to the divorce decree. *Stewart Title Co. v. Huddleston*, 598 S.W.2d 321, 323 (Tex. Civ. App.--San Antonio), *writ ref'd n.r.e.*, 608 S.W.2d 611 (Tex. 1980) (per curiam). In some estates, therefore, there is a specific attraction to receiving exempt property in the divorce. To evaluate these issues requires an understanding of the rules of marital property liabilities, homestead rights, and exemptions.

A. Rules of Marital Property Liability

The rules of marital property liability are set out in Sections 3.201 and 3.202 of the Texas Family Code. The husband's pre-marital liabilities can be collected from his separate property, his sole

management community and joint management community property, but not the wife's sole management community property and not the wife's separate property. The husband's non-tortious liabilities incurred during marriage can be collected from his separate property, his sole management community property, and the joint management community property, but not the wife's sole management community property and not the wife's separate property. Tortious liabilities of the husband incurred during marriage can be collected from the husband's separate property, his sole management community property, his joint management community property and the wife's sole management community property, but not the wife's separate property. The converse is true for the wife. A joint liability, being a liability of each spouse individually, can be collected from all of the parties' non-exempt property.

When one spouse alone incurs a liability, it is ordinarily an obligation of only the contracting or tort-feasing spouse. However, in certain situations, a liability incurred by one spouse can be a liability of both spouses, individually. In such a situation, the debt is a joint debt. A joint contractual debt arises when both spouses manifest an intent that the debt be a debt of each. A joint tortious liability arises when both spouses are held personally liable on the tort claim. In such event, the non-exempt separate property of each spouse, as well as the entire non-exempt community estate, is liable for the joint debt. For standards used to determine whether a contractual debt is a joint debt, *see Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975). *See also Humphrey v. Taylor*, 673 S.W.2d 954 (Tex. App.--Tyler 1984, no writ) (source of repayment contemplated by the creditor, as well as the other spouse's attitude toward the debt, indicates whether the debt is joint or not); *Providian Nat. Bank v. Ebarb*, 180 S.W.3d 898-902 (Tex. App. - Beaumont 2005, no pet.).

B. Homestead Protection

Under Texas law, the homestead is immune from execution for judgment liens, except for liens connected with purchase money debts, improvements loans, tax liens, owelty of partition, refinance of a lien, home equity loan, and a reverse mortgage. TEX. CONST. art. XVI § 50; TEX. PROP. CODE § 41.001(b). And the proceeds from sale of the homestead are immune from garnishment for six months, during which time they can be reinvested in another homestead property. TEX. PROP. CODE § 41.001(c). Nonetheless, outstanding judgment liens can affect the saleability of the homestead, since title companies refuse to insure the title of a homestead as long as judgment liens appear to exist against the property. Thus, parties with outstanding judgment liens may be required by circumstances to use some or all of the existing proceeds from sale of their homestead to complete the sale of the homestead.

V. VALUATION

The family lawyer will frequently need to know how to determine the value of the family home in order to properly advise the client. This discussion addresses both determining the value of the family home, and proving that value in a court proceeding.

A. Determining the Value of the Home

The family home has differing values, depending upon the purpose of the valuation. While the law prefers "fair market value" as the measure of value, the law also recognizes other types of value, such as insurable value, assessed value, "value in use," and value to the owner. The various values may be considerably different from fair market value. For insurance purposes, replacement cost is the key. The value given to the home by the appraisal district for property tax purposes is affected by practical considerations, such as whether the house is new or old, and whether reevaluation of an older house is done as part of a comprehensive valuation effort, or in response to the issuance of a building permit, etc. In a divorce, the home may have settlement value quite different from fair market value. The types of value which are likely to arise in family law practice are explored below.

1. Credentials of Appraiser

The validity of any appraisal is directly related to the credentials, the capability and ethics of the appraiser.

a. Types of Appraisers

Appraisers are licensed, certified and regulated by the Texas Appraiser Licensing and Certification Board. TEX. OCC. CODE §§ 1103.001-1103.5545. The Texas Appraiser Licensing and Certification Board regulates several classifications of appraiser certification and licensure including (1) Certified General Real Estate Appraiser, (2) Certified Residential Real Estate Appraiser, and (3) State Licensed Real Estate Appraiser. An appraisal performed by a person subject to the Texas Appraiser Licensing and Certification Act must conform with the "Uniform Standards of Professional Appraisal Practice" (USPAP) of the Appraisal Foundation in effect at the time of the appraisal. 22 TEX. ADMIN. CODE § 155.1(a).

To be eligible for a certificate, an applicant must: (1) pass an examination; (2) successfully complete the number and type of classroom hours or other educational qualifications required by the Appraisal Qualifications Board of The Appraisal

Foundation; (3) provide evidence satisfactory to the board that the applicant has at least the minimum number of hours of experience in performing appraisals over the specified number of calendar years as required by the Appraiser Qualifications Board; and (4) satisfy the board as to the applicant's honesty, trustworthiness, and integrity. TEX. OCC. CODE § 1103.202.

To be eligible for a license, an applicant must: (1) pass an examination; (2) successfully complete the number and type of classroom hours or other educational qualifications required by the guidelines of the Appraiser Qualifications Board of The Appraisal Foundation; (3) provide evidence satisfactory to the board that the applicant has at least the minimum number of hours of experience in performing appraisals over the specified number of calendar years as required by the guidelines of the Appraiser Qualifications Board; and (4) satisfy the board as to the applicant's honesty, trustworthiness, and integrity. TEX. OCC. CODE § 1103.203.

b. Certified General Real Estate Appraiser

Certified General Real Estate Appraisers may appraise of all types of real property without regard to transaction value or complexity; and are bound by the Competency Rule and all other provisions of the Uniform Standards of Professional Appraisal Practice (USPAP) in effect at the time of the appraisal. 22 TEX. ADMIN. CODE § 153.8(a).

Applicants for General Real Estate Appraiser Certification whose application is received by the Texas Appraiser Licensing and Certification Board prior to November 1, 2007 must have successfully completed 180 classroom hours in courses which meet certain requirements set out in Title 22, Section 153.13 of the Texas Administrative Code. Of these 180 classroom hours at least 15 classroom hours must be in a class devoted to the Uniform Standards of Professional Appraisal Practice completed within two years prior to submission of the application. At least 30 classroom hours of the fundamental real estate appraisal course requirements must be in courses with emphasis on the appraisal of non-residential properties. Applicants for General Real Estate Appraiser Certification whose application is received by the Texas Appraiser Licensing and Certification Board after October 31, 2007 shall meet all educational requirements set forth by the Appraiser Qualifications Board. These requirements include the successful completion of 300 classroom hours in courses which meet certain requirements. Of these 300 classroom hours at least 15 classroom hours must be in a class devoted to the Uniform Standards of Professional Appraisal Practice completed within two years prior to submission of the application. In addition, the applicant must have a Bachelors Decree from an accredited college or university, or 30 semester credit hours in the following courses: English Composition; Micro Economics; Macro Economics; Finance; Algebra, Geometry or higher math; Statistics; Computer Science; Business or Real Estate Law; and 2 elective courses in accounting, geography, agricultural economics, business management, or real estate. 22 TEX. ADMIN. CODE § 153.13(a).

An applicant for General Real Estate Appraiser Certification must provide evidence satisfactory to the Texas Appraiser Licensing and Certification Board that the applicant possesses the equivalent of 3,000 hours of real estate appraisal experience over a minimum of 30 months. At least 1,500 hours of experience must be in non-residential real estate appraisal work. Hours may be treated as cumulative in order to achieve the necessary hours of appraisal experience. 22 TEX. ADMIN. CODE § 153.15(a).

c. Certified Residential Real Estate Appraiser

Certified Residential Real Estate Appraisers may (1) appraise one-to-four residential units without regard to transaction value or complexity; (2) appraise vacant or unimproved land for which the highest and best use is for one-to-four family purposes; (3) not appraise subdivisions; and (4) associate with a state certified general real estate appraiser, who shall sign the appraisal report, to appraise non-residential properties. In addition, Certified Residential Real Estate Appraisers are bound by the Competency Rule and all other provisions of the Uniform Standards of Professional Appraisal Practice in effect at the time of the appraisal. 22 TEX. ADMIN. CODE § 153.8(b).

Applicants for Residential Real Estate Appraiser Certification whose application is received by the Texas Appraiser Licensing and Certification Board prior to November 1, 2007 must have successfully completed 120 classroom hours in courses which meet certain requirements set out in Title 22, Section 153.13 of the Texas Administrative Code. Of these 120 classroom hours at least 15 classroom hours must be in a class devoted to the Uniform Standards of Professional Appraisal Practice completed within two years prior to submission of the application. Applicants for Residential Real Estate Appraiser Certification whose application is received by the Texas Appraiser Licensing and Certification Board after October 31, 2007 shall meet all educational requirements set forth by the Appraiser Qualifications Board. These requirements include the successful completion of 200 classroom hours in courses which meet certain requirements. Of these 200 classroom hours at least 15 classroom hours must be in a class devoted to the Uniform Standards of Professional Appraisal Practice completed within two years prior to submission of the application. In addition, the applicant must have an

Associate Decree from an accredited college or university, or 21 semester credit hours in the following courses: English Composition; Principle of Economics (Micro or Macro); Finance; Algebra, Geometry or higher math; Statistics; Computer Science; and Business or Real Estate Law. 22 TEX. ADMIN. CODE § 153.13(b).

An applicant for Residential Real Estate Appraiser Certification must provide evidence satisfactory to the Texas Appraiser Licensing and Certification Board that the applicant possesses the equivalent of 2,500 hours of real estate appraisal experience over a minimum of 24 months. Hours may be treated as cumulative in order to achieve the necessary hours of appraisal experience. 22 TEX. ADMIN. CODE § 153.15(b).

d. State Licensed Real Estate Appraiser

State Licensed Real Estate Appraisers may (1) appraise non-complex one-to-four residential units having a transaction value less than $1 million and complex one-to-four residential units having a transaction value less than $250,000; (2) appraise vacant or unimproved land for which the highest and best use is for one to four family purposes; (3) not appraise subdivisions; and (4) associate with a state certified general real estate appraiser, who shall sign the appraisal report, to appraise non-residential properties. In addition, State Licensed Real Estate Appraisers are bound by the Competency Rule and all other provisions of the Uniform Standards of Professional Appraisal Practice in effect at the time of the appraisal. 22 TEX. ADMIN. CODE § 153.8(c).

Applicants for a Real Estate Appraiser License whose application is received by the Texas Appraiser Licensing and Certification Board prior to November 1, 2007 must have successfully completed 90 classroom hours which meet certain requirements set out in Title 22, Section 153.13 of the Texas Administrative Code. Of these 90 classroom hours at least 15 classroom hours must be in a class devoted to the Uniform Standards of Professional Appraisal Practice completed within two years prior to submission of the application. Applicants for Real Estate Appraiser License whose application is received by the Texas Appraiser Licensing and Certification Board after October 31, 2007 shall meet all educational requirements set forth by the Appraiser Qualifications Board. These requirements include the successful completion of 150 classroom hours in courses which meet certain requirements. Of these 150 classroom hours at least 15 classroom hours must be in a class devoted to the Uniform Standards of Professional Appraisal Practice completed within two years prior to submission of the application. 22 TEX. ADMIN. CODE § 153.13(c).

An applicant for a State Real Estate Appraiser License must provide evidence satisfactory to the Texas Appraiser Licensing and Certification Board that the applicant possesses at least 2,000 hours of real estate appraisal experience which was acquired over a minimum of twelve months. 22 TEX. ADMIN. CODE § 153.15(c).

2. Fair Market Value

"Fair market value" has been defined by the Texas Supreme Court as "the price the property will bring when offered for sale by one who desires to sell, but is not obliged to sell, and is bought by one who desires to buy but is under no necessity of buying." *State v. Carpenter*, 126 Tex. 604, 618-19, 89 S.W.2d 979, 980 (1936). *Accord City of Pearland v. Alexander*, 483 S.W.2d 244, 247 (Tex. 1972); *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 182 (Tex. 2001). This measure of value, however, "presupposes an existing, established market." *Wendlandt v. Wendlandt*, 596 S.W.2d 323, 325 (Tex. Civ. App.--Houston [1st Dist.] 1980, no writ).

3. Highest and Best Use

Real property appraisers normally appraise property based upon the appraiser's opinion of its "highest and best use." Appraisers sometimes use the test of the "Four P's," the highest and best use must be (I) the most profitable; (2) permissible (legal by zoning, restrictions, etc.); (3) possible (physically); and (4) probable (economically feasible and likely to happen). Highest and best use is ordinarily, but not necessarily, its current use. For example, the highest and best use of a house and lot in a residential subdivision, zoned for single family dwellings, would ordinarily be use as a dwelling, either by the owner or by tenants. However, in many cities, developers have acquired houses and lots in older residential areas, secured zoning changes, and constructed high density housing, retail stores, professional offices or even office buildings. Also, many rural properties, previously used for resident farming and ranching, have been purchased by land developers for residential subdivisions, or commercial or industrial uses. In a family law case, the highest and best use of the family home will ordinarily be as a residence. However, this is not always true, and the family lawyer should evaluate other possible uses that might lead to a higher valuation of the property.

4. The Appraisal Process

Texas courts, lending institutions and the real estate appraisal profession, recognize three methods of determining the fair market value of real estate: the "market data approach"; the "income approach"; and

the "cost approach." *See Missouri-Kansas-Texas R.R. Co. v. City of Dallas*, 623 S.W.2d 296, 300 (Tex. 1983); *Religious of the Sacred Heart v. City of Houston*, 836 S.W.2d 606, 615-17 & n. 14 (Tex.1992) (The three traditional approaches to determining market value are the comparable sales method, the cost method, and the income method); *Morgan v. Morgan*, 657 S.W.2d 484, 489 (Tex. App.-Houston [1st Dist.] 1983, no writ). Ideally, all three methods should be combined in an appraisal to arrive at the fair market value of the property. Practically speaking, however, the market data approach substantially outweighs the income approach and cost approach in valuing residential real estate. Since many home mortgages are insured by, or sold to, federally-created agencies or entities which have standardized appraisal guidelines, and since these guidelines are also recognized standards for the private secondary market for home mortgages, what constitutes accepted practice in appraising urban residences is fairly uniform throughout the country.

a. The "Market Data Approach"

Under the "market data approach," the appraiser is to determine the fair market value of a piece of real estate by determining the price at which comparable properties have recently sold. The selling price of each comparable property is then adjusted for the difference between the comparable and the subject property.

(1) Similarity of Comparable Properties

The crux of the "market data approach" is finding truly comparable properties which have been recently sold. This can be a time-consuming process, and good comparables are not always there to find. It is hard for a professional to justify extensive analysis when the cost of the finished report may be only $400.00 to $500.00. Although not the best practice, some appraisers translate the sales prices of houses in the neighborhood into a price per square foot of usable floor area inside each house, then multiply this factor times the square footage of the subject property, to arrive at a value. When using this "short cut" method, specific features of the comparable, such as the number of bathrooms, or whether the comparable had central air or heat, and factors like the age of the paint job and the age of the roof, or an expensive security system, as well as landscaping, location in the neighborhood, lot size and many other factors which might have affected the sales price of the comparable, are ignored in the comparison. Frequently the square footage of the comparables is taken from the local appraisal district records, or a computerized data base, which can contain errors. Footage inside a porch or garage which was enclosed, or in a lesser quality addition to the house, is treated as equal to footage originally built into the house, although it generally is not. It can be seen that, in the context of residential appraisals, it is impractical to give the customer a technically perfect appraisal and remain competitive. It should also be recognized that the greater the "dollar size" of the adjustments to the comparables, the greater the degree of appraiser judgment, causing accuracy to decrease.

(2) Remoteness of Comparable Sales in Time and Distance

If an insufficient number of similar properties have recently sold in the immediate area, the appraiser must either go further away to find a comparable or must consider older sales. Lenders prefer comparable sales less than six months old, and frown upon comparables more than a year old. Hence, if there are not enough recent sales of comparable properties in a neighborhood, the appraiser will have to go into other neighborhoods to find comparable sales. As the comparable becomes more distant, either in time or location, the need increases for the appraiser to "adjust" the sales price of the comparable to reflect differences between the comparable and the subject property. Making these adjustments is one area where the skill and effort of the appraiser can have a significant impact on the opinion of value.

(3) Correctness of Information

It is customary for an appraiser to confirm sales price information by telephone conversation with principals to the transaction. Mortgage lenders generally require confirmation from two independent sources. This may not always be done. Additionally, even when contact is made, the confirmation is nothing more than an unsworn assertion by a third party which would not be admissible as evidence except for the fact that the appraisal profession has, of necessity, accepted the practice. When confirmation is made with the lender or a broker involved in the sale, perhaps the information is reliable. When the appraiser must rely upon private individuals to reveal this personal detail of their lives, a high degree of confidence may not be warranted.

Ideally, the appraiser should know as much about the comparable sale as he does about the subject property. However, in the ordinary residential appraisal, an appraiser does not necessarily confirm his information regarding dimensions and condition of the comparables. While lot size can be verified by examining a subdivision plat, or in rural properties sometimes by reading the legal description in the deed, the dimensions of structures can ordinarily be confirmed only by measuring them. Although lenders generally require a photograph of each comparable property, this does not require anything

more than a "windshield" inspection by the appraiser. In a typical residential appraisal, an appraiser will not "measure up," or especially inspect the interior of, the comparable residences.

(4) Hidden Factors Affecting Sales Price

Often there are factors unique to the comparable sale that affect its sales price. The terms of the sale (cash vs. credit, etc.) is one of these factors. For example, a seller will sometimes "buy down" the interest rate of the buyer's mortgage indebtedness to a below-market rate by paying "points" to the buyer's mortgage company, effectively reducing the sales price below the contracted amount. Also, a house will sometimes sell for more, when the seller takes part of the purchase price in the form of a first or second lien note with below market terms, than it would have if the seller wanted all cash on closing. The validity of the comparison can be weakened by other non-apparent differences (i.e., renovated kitchen and baths, hardwood floors, termite infestation, foundation problems) between the subject and the comparable properties, often unknown to the appraiser who is unable to inspect the comparable property in the hands of its new owner.

Also, residential appraisals normally assume that all sales involve a transfer of fee simple interest. In reality, different residential lots can be subject to different utility easements, set-back lines, deed restrictions, etc. affecting the suitability of the property to the buyer's intended use, thus possibly affecting the sales price. Furthermore, the validity of the market data approach is directly related to the time spent by the appraiser in verifying the comparable data and the credentials, the capability and ethics of the appraiser.

b. The "Income Approach"

The "income approach" to valuation assumes that the property can be sold to an investor, who will purchase the property for its income potential. The Supreme Court has said: "In simple terms, the [income] approach involves estimating the future income of the property and applying a capitalization rate to that income to determine market value." *Polk County v. Tenneco, Inc.*, 554 S.W.2d 918, 921 (Tex. 1977). As explained below, for residences a multiplier other than the capitalization rate is used for the income approach.

(1) Picking the Multiplier

In theory, in using the "income approach," the appraiser would divide the net income expected to arise from the property by some capitalization rate. By doing this, the appraiser converts the expected future stream of income into a present value dollar figure.

(a) The "Cap Rate"

The capitalization rate is "the rate of interest investors would require as a return on their money before they would invest in the income-producing property, taking into account all the risks involved in that particular enterprise." *Polk County v. Tenneco, Inc.*, 554 S.W.2d 918, 921 (Tex. 1977). The capitalization rate must be determined not only with reference to the time value of money, but also with reference to the risk of loss associated with the particular investment. The selection of the "cap rate," the key to this appraisal method, should be based on the "cap rates" of comparable sales. However, comparable sales information for rental residences may not be readily available.

(b) The Gross Rent Multiplier

A capitalization rate is generally used for commercial investments, such as apartment complexes, hotels, etc. In valuing residential properties, the appraiser will normally use a "gross rent multiplier." To arrive at a gross rent multiplier, the appraiser determines the economic rental value of comparable properties which have sold. The sales price of each comparable is then divided by its monthly gross rent, to arrive at the multiplier. For example, if a comparable sold for 125 times its gross monthly rent, the gross rent multiplier is 125. By multiplying the economic rental value of the subject property times the gross rent multiplier, the appraiser arrives at a price for which the property can be sold, using the "income method."

(2) The Data is Generally Not There

The "income approach" is not well-suited to the average residential property. Practically speaking, there is not much data available to the appraiser using the income method to determine the value of a residence.

c. The "Cost Approach"

When comparable sales figures are lacking or the income method is otherwise inadequate as a measure of fair market value, courts have accepted testimony based on the cost approach. The cost approach, which looks to the cost of replacing the property, is best suited for valuing improved property that is unique in character and not frequently exchanged on the marketplace. *Religious of the Sacred Heart v. City of Houston*, 836 S.W.2d 606, 616 (Tex.1992). While the cost method takes the property's depreciation into account, it still "tends to set the upper limit of true market value." *Polk County v. Tenneco, Inc.*, 554 S.W.2d 918, 921 (Tex.1977). *See City of Harlingen v. Estate of Sharboneau* 48 S.W.3d 177, 183 (Tex. 2001). The cost approach is not typically representative of the motivation of buyers and sellers in the single family residential market. The method is

better suited to appraising, for example, small income-producing properties, such as 2-10 unit properties.

(1) The Basic Approach

There are three basic steps to the cost approach to appraising: (i) the appraiser must estimate the replacement cost of the improvements; (2) the appraiser must subtract accrued depreciation which would be recognized in the market place; and (3) the appraiser must add the estimated land value. Combining these three factors, the appraiser arrives at an opinion of fair market value.

(2) Shortcomings

The major weakness in the cost approach is estimating depreciation in older structures due to: (1) physical deterioration; (2) functional obsolescence; and (3) economic or locational obsolescence. In many older, fully-developed neighborhoods, it is difficult to locate comparable vacant land sales to accurately estimate the land value of comparable properties, in order to see what portion of the purchase price is attributable to the improvements on the land. The appraiser must know the portion of the sales price of the comparable attributable to the improvements, in order to see how much market forces had depreciated the improvements from their replacement cost. When recent sales of comparable raw land is not available, the appraiser must speculate as to what portion of the sales price of the comparable is attributable to the improvements. This shortcoming is particularly important in older, prestigious sections of the city, where land values may constitute 50% to 90% of the total value of the whole property.

d. In Sum

In summary, the appraisal process basically consists of the following three steps: (1) collection of data; (2) verification of data; and (3) analysis of data in order to develop a final value estimate. The final step typically includes a correlation of the various value estimates developed in the three approaches. Although the three approaches have different names, all three approaches are based upon market data. When good comparable sales are available, particularly in appraising single family residences, the market data approach is typically given most or all the weight in the final correlation and value estimate. When appraising income producing properties, the income approach is typically given most of the weight. Almost every appraisal will include a cost approach. However, it is typically given the least amount of weight unless there is a lack of good comparable sales and/or the subject property is a relatively new property which has little or no depreciation and adequate sales of vacant land are available in order to accurately estimate the land value. Almost all appraisals require a significant amount of judgment on the part of the appraiser. Thus, it is particularly important to select an appraiser who has displayed a history of being reputable and possessing good judgment. Likewise, the attorney and/or attorney's client should be prepared to adequately compensate the appraiser in order that the appraiser will spend the necessary time required by the appraisal process.

5. Uniform Residential Appraisal Report - Form 1004

This form is one of the commonly used forms for the appraisal of residences. This report form is designed to report an appraisal of a one-unit property or a one-unit property with an accessory unit, including a unit in a planned unit development, based on an interior and exterior inspection of the property. This report form is not designed to report an appraisal of a manufactured home or a unit in a condominium or cooperative project.

a. Modifications, Additions, or Deletions

The appraisal report is subject to the scope of work, intended use, intended user, definition of market value, statement of assumptions and limiting conditions, and certifications contained in the report form. Modifications, additions, or deletions to the intended use, intended user, definition of market value, or assumptions and limiting conditions are not permitted. The appraiser may expand the scope of work to include any additional research or analysis necessary based on the complexity of the appraisal assignment. Modifications or deletions to the certifications are also not permitted. However, additional certifications that do not constitute material alterations to the appraisal report, such as those required by law or those related to the appraiser's continuing education or membership in an appraisal organization are permitted.

b. Scope of Work

The scope of work for the appraisal is defined by the complexity of the appraisal assignment and the reporting requirements of the appraisal report form, including the definition of market value, statement of assumptions and limiting conditions, and certifications. The appraiser must, at a minimum: (1) perform a complete visual inspection of the interior and exterior areas of the subject property, (2) inspect the neighborhood, (3) inspect each of the comparable sales from at least the street, (4) research, verify, and analyze data from reliable public and/or private sources, and (5) report his or her analysis, opinions, and conclusions in the appraisal report.

c. Required Exhibits

A street map that shows the location of the subject property and of all comparables that the appraiser used. An exterior building sketch of the improvements that indicates the dimensions. The appraiser must also include calculations to show how he or she arrived at the estimate for gross living area. A floor plan sketch that indicates the dimensions is required instead of the exterior building or unit sketch if the floor plan is atypical or functionally obsolete, thus limiting the market appeal for the property in comparison to competitive properties in the neighborhood.

Clear, descriptive photographs (either in black and white or color) that show the front, back, and a street scene of the subject property, and that are appropriately identified. The photographs must be originals that are produced either by photography or electronic imaging. Clear, descriptive photographs (either in black and white or color) that show the front of each comparable sale and that are appropriately identified. Generally, photographs should be originals that are produced by photography or electronic imaging; however, copies of photographs from a multiple listing service or from the appraiser's files are acceptable if they are clear and descriptive.

B. Proving the Value in Court

The family lawyer must know the different ways to establish the value of the family home in court.

1. By Stipulation

Often the spouses in a divorce will agree upon the value of the parties' home. This may be something the spouses have talked about before seeing lawyers. Or, after comparing the opinions of value of various "friendly realtors" or appraisers, the parties may be able to agree on a price.

2. By Expert Testimony

One of the most effective ways to present evidence of value of the family home is through expert witnesses. Under Rule 702, Texas Rules of Evidence, when scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify to such knowledge and render his opinions on the point. TEX. R. EVID. 702. However, to be admitted into evidence, a real estate appraiser's expert opinion must be relevant and reliable. *Guadalupe-Blanco River Auth. v. Kraft,* 77 S.W.3d 805, 807 (Tex.2002) (citing Tex.R. Evid. 702). There are numerous authorities which establish that qualified experts may render an opinion of value of real property. *See, e.g. In re Marriage of Rice*, 96 S.W.3d 642 (Tex. App. – Texarkana 2003, no pet.).

3. By Opinion of Owner

In *Porras v. Craig*, 675 S.W.2d 503 (Tex. 1984), the Texas Supreme discussed the proof of value of land by the owner:

> In a suit for permanent damage to land, . . . the measure of damages is the difference in the market value of the land immediately before and immediately after the trespass.... Opinion testimony concerning these damages is subject to the same requirements as any other opinion evidence, with one exception: the owner of the property can testify to its market value, even if he could not qualify to testify about the value of like property belonging to someone else....
>
> * * *
>
> Even an owner's testimony, however, is subject to some restrictions. In order for a property owner to qualify as a witness to the damages to his property, his testimony must show that it refers to market, rather than intrinsic or some other value of the property. This requirement is usually met by asking the witness if he is familiar with the market value of his property.

Id. at 504-05. Based on the record in *Porras*, the Supreme Court held that the owner's testimony was no evidence of market value. The Court went on to say:

> We should not be understood as retreating from the general rule that an owner is qualified, to testify about the market value of his property. Moreover, this is not just a case in which the lawyer failed to ask his client if he was familiar with the market value of the property. Instead, in this case the owner's testimony affirmatively showed that he referred to personal rather than market value ... [The owner] was qualified to give an opinion of the market value of his land; he simply failed to do so.

Id. at 505. *See Cooper v. Lyon Financial Services, Inc.*, 65 S.W.3d 197, 204 (Tex. App. – Houston [14th Dist.] 2001, no pet.); *R.V.K. v. L.L.K*, 103 S.W.3d 612, 618

(Tex. App.– San Antonio 2003, no pet.); *Garcia v. Garcia*, 170 S.W.3d 644, 651 (Tex. App. – El Paso 2005, no pet.).

4. By Showing Purchase Price

Evidence of the purchase price of property is admissible to prove its present value, if the sale was voluntary and not too remote in time. *Adickes v. Andreoli*, 600 S.W.2d 393, 946 (Tex. Civ. App. – Houston [1st Dist.] 1980, writ dism'd) (real estate); *Maxey v. Texas Commerce Bank of Lubbock*, 571 S.W.2d 39, 46 (Tex. Civ. App.--Amarillo 1978), *writ ref'd n.r.e.*, 580 S.W.2d 340 (Tex. 1979) (involving value of corporate assets). Because of current volatile market, the purchase price paid for the house is not necessarily a good indication of its current value.

5. By Showing Offers to Sell or Buy, But Not Options

As a general rule, an unaccepted offer to purchase or sell land is not admissible as to value. *Hanks v. Gulf, Colorado & Santa Fe Ry. Co.* , 159 Tex. 311, 320 S.W.2d 333, 336-37 (Tex. 1959); *City of Fort Worth v. Beaupre*, 617 S.W.2d 828, 831 (Tex. Civ. App.--Fort Worth 1981, writ ref'd n.r.e.) (realty); *State v. Clevenqer*, 384 S.W.2d 207, 209 (Tex. Civ. App.--Houston 1964, writ ref'd n.r.e.) (in condemnation proceeding); *Lee v. Lee*, 47 S.W.3d 767, 785 (Tex. App. – Houston]14th Dist.] 2001, pet. denied). However, a landowner's offer to sell his land for a certain price constitutes an admission of value, if the offer is freely and openly made. *Maxey v. Texas Commerce Bank of Lubbock*, 571 S.W.2d at 46. For example, evidence that a house has been listed for a period of time at a certain price, and that there have been no takers, or that the highest counter-offer is "X" dollars, tends to establish an upper limit on value. An unconsummated agreement to buy or sell land has been held inadmissible as to value. *Redding v. Ferguson*, 501 S.W.2d 717, 723-24 (Tex. Civ. App.--Fort Worth 1973, writ ref'd n.r.e.); *Elrod v. Elrod*, 517 S.W.2d 669, 673 (Tex. Civ. App. – Corpus Christi 1974, no writ). *But see Moore v. Bank Midwest, N.A.*, 39 S.W.3d 395, 402 (Tex. App. – Houston [1st Dist.] 2001, pet. denied); *State v. Clevenger*, 384 S.W.2d at 210; *Robards v. State*, 285 S.W.2d 247, 249 (Tex. Civ. App.--Austin, 1955, writ ref'd n.r.e.). An option to purchase comparable land has been held inadmissible to show fair market value, *Niemann v. State*, 471 S.W.2d 124, 131 (Tex. Civ. App.--San Antonio 1971), *rev'd on other grounds*, 479 S.W.2d 907 (Tex. 1972).

a. When Earnest Money Contract is Really an Option

Contingencies in an executory contract, such as the unconditional right to cancel, or when a buyer's liability for breach is limited to forfeiture of earnest money, or when the obligation to perform is subject to buyer's obtaining financing, or even worse, subject to the buyer's determination that the property is "suitable" for its planned use, can turn an agreement to buy or sell into what is tantamount to an option. For example, in *Hott v. Pearcy/Christon, Inc.*, 663 S.W.2d 851 (Tex. App.--Dallas 1982, writ ref'd n.r.e.), buyer and seller entered into an earnest money contract conditioned upon buyer's obtaining suitable financing. No earnest money deposit was required, but buyer was to make a series of deposits to extend the financing deadline. If buyer breached, seller's sole remedy was to retain the earnest money deposits. Seller repudiated the agreement prior to the first deposit. Buyer's claim for specific performance was rejected on the ground that when a contract limits buyer's liability to forfeiture of earnest money, the contract is merely an option. *Id.* at 853. *See Baldwin v. New,* 736 S.W.2d 148, 151 (Tex. App.– Dallas 1987, writ denied).

6. Not by Showing Property Tax Valuation

The value placed upon land for purposes of taxation, without participation of the owner, has been held inadmissible to prove the fair market value of land. *Kuehn v. Kuehn*, 594 S.W.2d 158, 161 (Tex. Civ. App.-- Houston [14th Dist.] 1980, no writ). *Accord Houston Lighting & Power Co. v. Fisher*, 559 S.W.2d 682, 686 (Tex. Civ. App.-- Houston [14th Dist.] 1978, writ ref'd n.r.e.) (stating that tax assessment values rarely reflect true value); *In the Matter of the Marriage of Scott*, 117 S.W.3d 580, 585 (Tex. App. – Amarillo 2003, no pet.).

VI. RIGHTS AND DUTIES BETWEEN OWNERS, POSSESSORS AND REMAINDERMEN

In family law matters, the attorney will sometimes need to know the rights and responsibilities between owners, possessors and remaindermen concerning the family home. These rules are similar to, but different from, marital property rules.

A. Between Co-Owners

When a couple who is not married splits up, their rights must be adjusted under ordinary property law, because when there is no marriage, marital property law does not apply. There are also instances when the spouses (or their heirs) are left as cotenants of property after dissolution of marriage, by death or divorce. And spouses are sometimes left with shared ownership in the family home after the divorce.

1. Types of Cotenancy

The term "cotenancy" describes the situation when different persons or entities own an asset jointly.

Generally, all cotenants have the right to possess and use the shared property. In Texas, there are two types of cotenancy – tenancy in common and joint tenancy. A tenancy in common is a cotenancy between two or more persons who have undivided possession but several interests. *See Dierschke v. Central Nat. Branch of First Nat. Bank of Lubbock*, 876 S.W.2d 377, 379 (Tex. App. – Austin 1994, no writ). Joint tenancy is a cotenancy in which the joint tenants have equal rights to share in use and enjoyment of the property. The key element of joint tenancy is the fact that joint tenants take full title to the property by the instrument creating the joint tenancy. *Calvert v. Wallrath*, 457 S.W.2d 376, 379 (Tex. 1970).

a. Creating A Joint Tenancy

Under common law, to create a joint tenancy, there had to be four unities: time, title, interest and possession. That is, the interests of the joint tenants had to arise simultaneously, under the same instrument, and be derived from one source, and each joint tenant must have the right to the same undivided possession. *Spires v. Hoover*, 466 S.W.2d 344, 347 (Tex. Civ. App.--El Paso 1971, writ ref'd n.r.e.). The right of survivorship was inherent in joint tenancy under common law. Section 46 of the Texas Probate Code, however, provides for the interest of a joint tenant to pass to his heirs upon death. TEX. PROB. CODE § 46. A right to survivorship can still be created by written agreement that the joint tenant's share will inure to the surviving joint tenant upon death. *Id.* This rule also applies to spouses dealing with community property. Section 451 of the Texas Probate Code provides that at any time, spouses may agree between themselves that all or part of their community property, then existing or to be acquired, becomes the property of the surviving spouse on the death of a spouse. TEX. PROB. CODE § 451.

2. Use and Possession

The Supreme Court has stated:

> A tenant in common as the owner of property is legally entitled to make such use of it as he sees fit, subject to those qualifications necessarily imposed by society for the promotion of the public good and those dictated by the qualities of the property and characteristics of its ownership.

Cox v. Davidson, 397 S.W.2d 200, 202-03 (Tex. 1965).

3. Shares of Ownership

When the instrument creating the cotenancy does not describe the interests of each cotenant, they are presumed equal. *Wooley v. West*, 391 S.W.2d 157, 159 (Tex. Civ. App.--Tyler 1965, writ ref'd n.r.e.); *In re Marriage of Murray*, 15 S.W.3d 202, 205 (Tex. App. – Texarkana 2000, no pet.). This presumption is rebuttable, however, and when persons join in the purchase of a property, they will own the property in the same proportion as the consideration furnished by each for the purchase. *In re Marriage of Murray*, 15 S.W.3d 202, 205 (Tex. App. – Texarkana 2000, no pet.); *Bray v. Clark*, 9 S.W.2d 203, 205 (Tex. Civ. App.--Waco 1928, writ dism'd). When the proportions contributed by several owners to a common fund cannot be established and the equities are balanced, the owners are considered equal tenants in common. *Dessommes v. Dessommes*, 505 S.W.2d 673, 679 (Tex. Civ. App.--Dallas 1973, writ ref'd n.r.e.)

4. Duty to Care and Preserve

All cotenants have a duty to preserve the common property. *Sadler v. Duvall*, 815 S.W.2d 285, 293 (Tex. App. – Texarkana 1991, writ denied). When one cotenant expends sums to preserve the joint property, a right of reimbursement arises against other cotenants, in proportion to their ownership interests in the property. *Shaw & Estes v. Texas Consol. Oils*, 299 S.W.2d 307, 313 (Tex. Civ. App. – Galveston 1957, writ ref'd n.r.e.); *Neeley v. Intercity Management Corp.*, 732 S.W.2d 644, 646 (Tex. App. – Corpus Christi 1987, no writ).

5. Right to an Accounting

At any time, a cotenant may bring an action for an accounting. Each cotenant will have to account for any rents and profits received, waste committed, moneys fradulently obtained, improvements, taxes, etc. *Sayers v. Pyland*, 139 Tex. 57, 161 S.W.2d 769 (1942). A suit for accounting may be brought without seeking partition of the property. *Manning v. Benham*, 359 S.W.2d 927, 932 (Tex. Civ. App.--Houston 1962, writ ref'd n.r.e.). In an accounting, reimbursement claims between cotenants are calculated, rents received must be accounted for, and any allowable offsets are adjusted.

6. Right to Reimbursement for Expenditures

If one cotenant expends sums for proper and necessary preservation of the property, he is entitled to reimbursement from other cotenants, in proportion to their interests, and he is entitled to a lien in the property to enforce repayment. *Shaw & Estes v. Texas Consol. Oils*, 299 S.W.2d 307, 313 (Tex. Civ. App. – Galveston 1957, writ ref'd n.r.e.); *Neeley v. Intercity Management Corp.*, 732 S.W.2d 644, 646 (Tex. App. – Corpus Christi 1987, no writ). Proof of enhancement is not required. However, a cotenant who develops the property without joinder of other cotenants is not

entitled to reimbursement. *Cox v. Davidson*, 397 S.W.2d 200, 201 (Tex. 1965). When reimbursement is sought, the court may recognize certain offsets. For example, an offset for use value may be allowed when an occupying tenant in common seeks equitable contribution from other cotenants for funds expended to benefit the common estate. *Scott v. Scruggs* 836 S.W.2d 278, 281 (Tex. App.-Texarkana,1992, writ denied). In addition, there is authority that reimbursement is not available to a cotenant in possession after ouster of the other cotenants. *See Vermillion v. Haynes*, 147 Tex. 359, 215 S.W.2d 605, 608-09 (1948); *Poenisch v. Quarnstrom*, 386 S.W.2d 594, 597 (Tex. Civ. App.--San Antonio 1965, writ ref'd n.r.e.). *But see Wooley v. West*, 391 S.W.2d 157, 160 (Tex. Civ. App.--Tyler 1965, writ ref'd n.r.e.) (reimbursement even if ouster has occurred).

a. When Right to Reimbursement Arises

The right of a cotenant to contribution or reimbursement by his cotenants arises when an advancement is made. Interest may be recovered on such advancements, from the date they are made. *Shluter v. Sell*, 194 S.W.2d 125, 131 (Tex. Civ. App.--Austin 1946, no writ).

b. What is Included

A cotenant is entitled to reimbursement from other cotenants for sums expended to discharge the other cotenants' shares of an encumbrance against the jointly-owned property, *Doss v. Roberts*, 487 S.W.2d 839, 842 (Tex. Civ. App.--Texarkana 1972, writ ref'd n.r.e.); for payment of taxes and repairs on the property, *Perez v. Hernandez*, 658 S.W.2d 697, 701 (Tex. App.--Corpus Christi 1983, no writ) (taxes); *Shluter v. Sell*, 194 S.W.2d 125, 133 (Tex. Civ. App.--Austin 1946, no writ) (taxes and repairs); and for premiums paid for insurance coverage benefiting co-tenants, *Doss v. Roberts*, 487 S.W.2d 839, 841 (Tex. Civ. App.--Texarkana 1972, no writ). When pled for, interest can be recovered on advancements. *Shluter v. Sell*, 194 S.W.2d at 133. Reimbursement exists even for cutting lawns or hedges. *Id.* at 133. *See Manning v. Benham*, 359 S.W.2d 927 (Tex. Civ. App.--Houston 1962, writ ref'd n.r.e.) (ex-husband sued ex-wife for reimbursement for payment of lien against community property house not divided in the decree of divorce).

(1) No Reimbursement for Taxes When Possessing Under Decree

In *Miller v. Two Investors, Inc.*, 475 S.W.2d 610 (Tex. Civ. App.--Dallas 1972, writ ref'd n.r.e.), the Dallas Court of Civil Appeals held:

> [O]ne who has the right under a divorce decree to exclusive occupancy of property and to enjoyment of the rents and revenues from it has the obligation to pay the taxes, unless the decree otherwise directs.

Id. at 612. The Dallas Court relied on other cases holding that the divorced wife's exclusive right of occupancy under a divorce decree is tantamount to a life estate. *See Berg v. Berg*, 232 S.W.2d 783 (Tex. Civ. App.--Dallas 1950, no writ); *Sims v. Sims*, 62 S.W.2d 495 (Tex. Civ. App.--Galveston 1933, writ dism'd). The Dallas Court also equated the ex-wife's right to possession under a decree of divorce to the right of a surviving spouse to exclusive occupancy of the homestead. Cases regarding the right of a widow to live in the homestead have held that the person entitled to enjoyment and revenues of the property should also be responsible for current taxes. *See Sargeant v. Sargeant*, 118 Tex. 343, 15 S.W.2d 589 (1929). The Dallas Court did not, however, decide that the right to occupancy under a decree of divorce is equivalent to a life estate. The Dallas Court merely held "that the equity and good conscience likewise require her to assume the burden of the taxes." *Id.* at 612.

(2) No Reimbursement for Improvements Without Consent

When a cotenant goes beyond preserving the jointly-held property and develops the property in some way, nonjoining cotenants have no obligation to pay for these improvements. *Cox v. Davidson*, 397 S.W.2d 200, 201 (Tex. 1965); *Perez v. Hernandez*, 658 S.W.2d 697, 701 (Tex. App.--Corpus Christi 1983, no writ). *But see Poenisch v. Quarnstrom*, 386 S.W.2d 594, 598 (Tex. Civ. App.--San Antonio 1965, writ ref'd n.r.e.) (reimbursement allowed for amount of enhancement for improvements). In *City of Grand Prairie v. City of Irving*, 441 S.W.2d 270, 273 (Tex. Civ. App.-Dallas 1969, no writ), the court said "when one of joint owners of property pays for improvements on the property which are necessary and beneficial, the owner who incurred such expense shall have contribution from the other joint owners in an amount in proportion to the interests of the other joint owners."

(3) No Reimbursement for Personal Services

A tenant in common who takes control of property he owns in common with others,in the absence of an agreement with the other tenants in common, is not entitled to reimbursement for personal services rendered in managing the jointly-owned property. *Gonzalez v. Gonzalez*, 552 S.W.2d 175, 182 (Tex. Civ. App.--Corpus Christi 1977, writ ref'd n.r.e.). *Accord Neal v. Neal*, 470 S.W.2d 383, 386-87 (Tex. Civ. App.--Houston [1st Dist.] 1971, no writ).

c. Rental Value as Offset for Claim for Reimbursement

When a cotenant who has used the property sues other cotenants for contribution for funds expended for the betterment of the common property, the other cotenants are entitled to an offset for the reasonable rental value of the claimant's use. In *Roberts v. Roberts*, 136 Tex. 255, 150 S.W.2d 236, 238 (1941), the Supreme Court stated:

> [W]hile at common law, under the rule above announced, a tenant-in-common who occupies joint property without complaint from his co-tenants is not required to account for the value of the use thereof, yet when he resorts to equity and seeks contribution from his co-tenants for funds expended in the betterment of the common estate, it would seem that he should be required to do equity and allow as an offset the value of the use of the premises.

Accord Rucker v. Butcher, 300 S.W.2d 183, 185 (Tex. Civ. App.--Fort Worth 1957, no writ).

(1) Not When Occupancy is Pursuant to Decree

An offset for reasonable rental value is not available if the party is in possession of the property by virtue of a court order. This principle was exemplified in the case of *Gilleland v. Meadows*, 351 S.W.2d 656 (Tex. Civ. App.--Dallas 1961, no writ). In *Gilleland*, the parties' homestead was divided equally, but the wife was given the right to live at the property "for the use and benefit of the three minor children, *provided, however, that the plaintiff remains a single person*, until the youngest of said children shall become 21 years of age." *Id.* at 656 (emphasis added). The woman remarried, and the ex-husband sued for partition. The trial court negated the condition that the woman remain single, as being contrary to public policy. The Waco Court of Civil Appeals reversed the trial court, concluding that the clause was not a limitation on her right to remarry, but merely on her use of the ex-husband's share of the house. On remand, the ex-wife sought contribution for payments on the lien indebtedness, taxes and insurance, as well as for improvements to the property. The Court of Civil Appeals concluded that the ex-husband was entitled to offset for the reasonable rental value of the home beginning when the woman remarried. Prior to that time, she was entitled to live at the house pursuant to the decree of divorce giving her possession and use of the property, and was not required to account for the rental value.

(2) Not When Use is for Equal Benefit of Party Seeking Offset

An offset for reasonable rental value is not available when the property was used by one cotenant for the equal benefit of the cotenant seeking offset. In *Shluter v. Sell*, 194 S.W.2d 125, 131-32 (Tex. Civ. App.--Austin 1946, no writ), an ex-husband was denied offset for the rental value of a home owned jointly with his ex-wife, when she lived in the property with the parties' son, whom both parents had an obligation to support. He had consented to the son living there, and thus derived equal benefit from the use of the property.

7. Right to Accounting for Rentals or Rental Value

A tenant in common can use jointly-owned property without liability for its rental value. *Eddings v. Black*, 602 S.W.2d 353, 358 (Tex. Civ. App.--El Paso 1980), *writ ref'd n.r.e.*, 615 S.W.2d 168 (Tex. 1981). However, in certain instances other cotenants are entitled to an accounting for the rents received on the property, or the rental value for the property. An accounting for rents or rental value is differentiated from the offset for reasonable rental value. Even if the party in possession is not seeking reimbursement for advances, under certain circumstances, cotenants out of possession can sue for an accounting of the reasonable rental value of the property.

a. When Rents Are Received From Third Parties

The right of a cotenant to use the property personally without accounting for the rental value, does not extend to keeping rentals paid on the property by others. *Eddings*, 602 S.W.2d at 358 (A tenant in common can use jointly owned property without liability for its rental value, but, when the tenant in possession rents the property to a third person, he must account to his cotenant). Rentals received from others constitute profits received beyond the permitted personal occupancy and use, and the tenant receiving them must account proportionately to the other cotenants. *Poenisch v. Quarnstrom*, 386 S.W.2d 594, 598 (Tex. Civ. App.--San Antonio 1965, writ ref'd n.r.e.); *Haynes v. Vermillion*, 242 S.W.2d 444, 447 (Tex. Civ. App.--Fort Worth 1951, writ ref'd n.r.e.).

b. When One Cotenant Ousts the Others

When one cotenant ousts his cotenants, the cotenant effecting the ouster must account to the others for the reasonable rental value of the property. Under such circumstances, the excluded tenants-in-common may, without demand for joint possession, recover for the use and occupation of their part of the land. *Burns v. Wood*, 427 S.W.2d 353, 357 (Tex. Civ. App.--Tyler 1968, writ ref'd n.r.e.); *Haynes v. Vermillion*, 242

S.W.2d 444, 447 (Tex. Civ. App.--Fort Worth 1951, writ ref'd n.r.e.).

8. Ouster

An "ouster" occurs when one cotenant asserts an exclusive right to ownership, possession or control of jointly-held property, and the other cotenants receive notice of this fact. *Poenisch v. Quarnstrom*, 361 S.W.2d 367, 369 (Tex. 1962). *See Morton v. Morton*, 286 S.W.2d 702 (Tex. Civ. App.--Texarkana 1955, no writ). Ouster also occurs when one cotenant conveys to a third party what purports to be the entire title to jointly-owned property. *Jones v. Siler*, 129 Tex. 18, 100 S.W.2d 352, 353 (1937).

9. Right to Partition

Co-owners of a jointly-held property have the right to seek partition of the property. In partitioning jointly-held property, the court may divide the property into shares of equal value. If this cannot readily be done, the court can divide the property into shares of unequal value, and may fix a lien on the larger share in favor of the party receiving the smaller share for this difference in value. An award for this difference in value is called "owelty." Owelty is considered in the nature of purchase money, and can be secured by vendor's lien in the larger tract, and is enforceable against any homestead rights claimed by the other co-owner. *Sayers v. Pyland*, 139 Tex. 57, 161 S.W.2d 769, 772 (1942).

10. Insurance

A cotenant may insure just his interest in jointly-owned property, or he may insure the interest of all joint owners. If he insures just his interest, only he will participate in any proceeds from that policy. *Doss v. Roberts*, 487 S.W.2d 839, 841 (Tex. Civ. App.--Texarkana 1972, writ ref'd n.r.e.). If he insures all owners' interests, he may collect all of the insurance proceeds, but can keep only his proportionate share. *Id.* at 841. A co-owner who insures the interest of other co-owners in the property is entitled to reimbursement from the other co-owners for the cost of the premiums paid on their behalf. *Id.* at 841. *But see Gilroy v. Richards*, 63 S.W. 664, 668 (Tex. Civ. App.-1901, no writ).

11. Limitations on Claims

The statute of limitations on a claim for accounting for rents received by a cotenant on the jointly-held property does not begin to run until the cotenant in possession repudiates the trust and notice of this repudiation is given to other cotenants. *Eddings v. Black*, 602 S.W.2d 353, 358 (Tex. Civ. App.--El Paso 1980), *writ ref'd n.r.e.*, 615 S.W.2d 168 (Tex. 1981).

12. Homestead

Although a cotenant may have homestead rights in jointly-owned property, these rights are subject to the rights of other cotenants. *Sayers v. Pyland*, 139 Tex. 57, 161 S.W.2d 769, 773 (1942).

B. *Gleich v. Bongio* - Tenancy in Common

Property purchased with separate and community funds is owned as tenants in common by the separate and community estates. *Cockerham v. Cockerham*, 527 S.W.2d 162, 168 (Tex. 1975); *Scott v. Scott*, 805 S.W.2d 835, 838 (Tex. App. – Waco 1991, writ denied). Percentages of owner ship are determined by the amount of funds contributed by each estate to the total purchase price. *Gleich v. Bongio*, 128 Tex. 606, 99 S.W.2d 881, 883 (1937); *Scott v. Scott*, 805 S.W.2d at 838. In addition, the purchase of property during marriage partly with community funds (i.e., community financing) and partly with separate funds of one of the spouses creates a tenancy in common between the separate and community estates, each owning an interest in the proportion that it supplies to the consideration. *Chacon v. Chacon*, 222 S.W.3d 909, 914 n.5 (Tex. App.- El Paso,2007, no pet.); *Gleich v. Bongio,* 99 S.W.2d at 883. In *Gleich v. Bongio*, the Supreme Court explained:

> The question thus presented is: What is the status of property, with reference to its being separate or community, when purchased during marriage partly with separate funds of the husband and partly on the credit of the community? The question presented cannot be distinguished from one in which a part of the purchase price is paid with the separate funds of the husband and the remainder with money borrowed on the credit of the community. Money borrowed on a community obligation is community property. Similarly, property acquired on the credit of the community is community property. Had no cash consideration been paid for these lots and the entire consideration been a community obligation, it would probably not be contended that the property is not wholly community. It would follow, it seems to us, as a matter of course, that, since a community obligation constituted a part of the purchase

> price, the community estate acquired a part interest in the lots.... [I]n Texas it has long been established that such an acquisition has the effect of creating a kind of tenancy in common between the separate and community estates, each owning an interest in the proportion that it supplies the consideration....

Id. at 883 (citations omitted). Unfortunately, the facts in *Gleich v. Bongio* are somewhat convoluted, but the concept is relatively simple.

A good example of the application of *Gleich v. Bongio* is described in *Scott v. Scott*, 805 S.W.2d 835 (Tex. App. – Waco 1991, writ denied). *Scott* involved the proceeds from the sale of a house, a 1986 Cadillac and a Cessna airplane. Concerning the proceeds from the sale of house, the house was purchased for $79,000, Betty Scott used $10,000 of her separate property in the purchase and the balance was paid from community property. The Court of Appeals explained that "the community owned 87.34 percent ($69,000/$79,000 = 87.34%) of the home, or $68,655.35 of the $78,607 remaining in escrow from its sale. The remaining 12.66 percent of the funds in escrow, or $9,951.65, was owned by Betty's separate estate." *Id.* at 838. Concerning the 1986 Cadillac, Betty used $15,000 of her separate funds and the community had used $15,000 to purchase the $30,000 Cadillac. The Court of Appeals explained that "the community and Betty's separate estate owned the Cadillac as tenants in common, each owning an undivided one-half interest." *Id.* Concerning the Cessna airplane, Betty used $12,000 in separate property funds and the community used $4,5000 to purchase the airplane. The Court of Appeals explained that "the community owned 27.3 percent ($4,500/$16,500 = 27.3%) of the Cessna 177, with the remaining 72.7 percent ($12,000/$16,500 = 72.7%) being Betty's separate property." *Id.* at 839. However, *Gleich v. Bongio* is sometimes overlooked by practitioners. *See Garcia v. Garcia*, 170 S.W.3d 644, 647 n.1 (Tex. App. – El Paso 2005, no pet.); *Chacon v. Chacon*, 222 S.W.3d 909, 914 n.5 (Tex. App.- El Paso,2007, no pet.).

C. Between Life Tenants or Homestead Owners and Remaindermen

The relationship between life tenants and homestead owners, on the one hand, and remaindermen, on the other, is not cotenancy, for an essential right of cotenancy is the present right of possession. *Cline v. Henry*, 239 S.W.2d 205, 208 (Tex. Civ. App.--Dallas 1951, writ ref'd n.r.e.). For the same reason, the relationship between remaindermen is not a cotenancy. The homestead interest of a spouse or surviving spouse in the homestead "is treated as a life estate, so long as the property retains its homestead character." *Sparks v. Robertson*, 203 S.W.2d 622, 623-24 (Tex. Civ. App.--Austin 1947, writ ref'd); *Cline v. Henry*, 239 S.W.2d at 208. *See Dominguez v. Castaneda*, 163 S.W.3d 318, 329 (Tex. App. – El Paso 2005, pet. denied).

1. Insurance

If the person owning a homestead interest in property insures the property, he is entitled to keep all of the proceeds to the extent of the loss, since the homestead owner's interest is insurable to the full value of the property. *Doss v. Roberts*, 487 S.W.2d 839, 841 (Tex. Civ. App.--Texarkana 1972, writ ref'd n.r.e.). If the homestead is abandoned, he cannot keep the full value of the insured dwelling, but rather just the portion of the proceeds equal to his interest in the property. *Id.* at 841-42. In such a situation, the homestead owner is entitled to reimbursement for insurance premiums paid on behalf of the remaindermen. *Id.* at 842.

2. Reimbursement to Life Tenant

The rules of reimbursement for life tenants versus remaindermen are as follows:

a. For Permanent Improvements

A life tenant, who owns no interest in the property greater than the life estate cannot secure reimbursement from remaindermen for permanent improvements made to the property, unless otherwise agreed between the parties. *Sparks v. Robertson*, 203 S.W.2d 622, 624 (Tex. Civ. App.--Austin 1947, writ ref'd). A similar rule applies to a surviving spouse holding a homestead estate in property partly owned by the heirs of the deceased spouse. In *Sargeant v. Sargeant*, 118 Tex. 343, 15 S.W.2d 589, 592 (1929), it was held that "the survivor, holding the homestead as such after the death of the other spouse, is not entitled

to reimbursement for expenditures on account of permanent improvements made on the property during the time he retains possession of the property as homestead, when such improvements are voluntarily made." *Sargeant* held that a life tenant, who owns an interest in the fee, has no greater right to contrlbution for permanent improvements than one who has a life estate alone. *Id.* at 625.

b. For Repairs, Etc.

The owner of the life estate is liable for current taxes. He therefore has no right to reimbursement for taxes paid. *Sargeant v. Sargeant*, 118 Tex. 343, 15 S.W.2d 589, 594 (1929). The same rule applies to expenditures by the life tenant for the cost of repairs. *Id.* However, when an ex-spouse possesses the homestead under a decree of divorce, the right to reimbursement can be provided in the decree. *Miller v. Two Investors, Inc.*, 475 S.W.2d 610, 612 (Tex. Civ. App.--Dallas 1972, writ ref'd n.r.e.).

3. Waste

The Texas Supreme Court defined the tort of "waste" as follows:

> Waste is an injury to the reversionary interest in land caused by the wrongful act of a tenant or other party rightfully in possession, and is primarily distinguished from trespass in that trespass is an injury to land caused by the act of one not rightfully in possession.

R. C. Bowen Estate v. Continental Trailways, 256 S.W.2d 71, 72 (Tex. 1953). *See King's Court Racquetball v. Dawkins*, 62 S.W.3d 229, 232-33 (Tex. App. – Amarillo 2001, no pet.). The Court went on to say that "[w]aste includes injury resulting from failure to exercise reasonable care in preserving the property. *R. C. Bowen Estate v. Continental Trailways*, 256 S.W.2d at 72. The theory of waste is to protect the remaindermen in his reversionary interest. *Barrera v. Barrera*, 294 S.W.2d 865, 867 (Tex. Civ. App.--San Antonio 1956, no writ); *King's Court Racquetball v. Dawkins*, 62 S.W.3d at 233. When damages are not an adequate remedy, injunctive relief against the possessor may be available.

VII. UPON DIVORCE

The culmination of all the concerns stated above is the ultimate adjudication of these various rights and claims. When the parties are not married, the culmination may be a suit for partition, for dissolution of a partnership, or other property-related suit. As between spouses, the culmination is the suit for divorce or annulment.

A. Lis Pendens Regarding Home

Few opponents will attempt to encumber or sell the family home during the pendency of a divorce. However, that possibility should be considered. The ability to set aside a transfer or encumbrance after joinder of a third party and litigation is small consolation when the entire problem could have been avoided by the filing of a notice of lis pendens at the outset of the case. Also, it appears that a spouse can unilaterally convey some interest in the homestead.

A notice of lis pendens is a document, to be recorded in the deed record office of the county where the land is located, giving notice to the world of a pending suit which assets a claim to the subject realty. *See* TEX. PROP. CODE § 13.004. The lis pendens deprives third party purchasers of any defense that they had no notice of the adverse claim. *Id.*

B. Can't Divest Separate Property

Section 7.001 of the Family Code does not authorize the trial court in a divorce to divest one spouse of separate property and to award it to the other spouse. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 139 (Tex. 1977). Such an action would also violate the Texas constitution. *Id.* at 140-41. Thus, it is reversible error to award ownership of a house which is all or partly the separate property of one spouse to the other spouse. It is also reversible error to order the house sold, and to award one spouse's separate property share of the proceeds to the other spouse. *Gerami v. Gerami*, 666 S.W.2d 241 (Tex. App.--Houston [14th Dist.] 1984, no writ).

C. Possible Ways to Divide the Home

Most of the possible ways to divide the home on divorce have been thought up and tried. The more typical of these are discussed below.

1. Award Home to One Spouse

The court is not required to divide each community asset evenly. *Mial v. Mial*, 543 S.W.2d 736 (Tex. Civ. App.--El Paso 1976, no writ). It can award some assets to one spouse, and other assets to the other spouse.

2. Undivided Interests

Although Section 7.001 of the Texas Family Code instructs the court to "divide the estate of the parties," the court is not required to divide all of the assets. The court can leave the parties with undivided interests in some assets. *See Mial*, 543 S.W.2d at 738; *Mogford v. Mogford*, 616 S.W.2d 936, 945 (Tex. Civ. App.--San Antonio 1981, writ ref'd n.r.e.) (The trial

court has the power to partition real estate in kind). However, when one of the parties is given exclusive use of the house for a period of time, the value of the interest awarded to the other party is significantly diminished. If this diminishment in value is not taken into consideration, the court may unknowingly do an injustice.

3. Lien on Proceeds of Sale

Another possibility is for one spouse to receive the house subject to a lien on a percentage of the proceeds of the sale of the house. For example, if the mother wants to stay in the house so the children can remain in the house for a specific period of time such as graduation from high school but there is not enough community property to offset the value of the house, the father can receive a lien on a percentage of the net proceeds from the sale of the house. Thus, the father will be awarded a lien on a percentage of the proceeds of the sale of the house and the house will be sold by a date certain. However, if the mother is in the house for an extended period of time and the value of the house increases significantly, the value of the father's interest will significantly increase and he will benefit by the mother's payment of the mortgage, etc. *See Nelson v. Nelson*, 436 S.W.2d 200, 202 (Tex. Civ. App.--Dallas 1969, no writ).

4. House to One, Note or Judgment to the Other

The trial court in a divorce is permitted to award assets to one spouse and an offsetting promissory note or judgment to the other spouse, to arrive at a just and right division of the estate. *Clay v. Clay*, 550 S.W.2d 730, 734 (Tex. Civ. App.--Houston [1st Dist.] 1977, no writ) (promissory note); *Magallanez v. Magallanez*, 911 S.W.2d 91, 94-95 (Tex. App. – El Paso 1995, no writ) (promissory note); *Wisdom v. Wisdom*, 575 S.W.2d 124, 125-26 (Tex. Civ. App.--Fort Worth 1978, writ dism'd) (judgment). When the home represents such a large portion of the community estate that the court cannot achieve a just division of the estate of the parties by awarding the house to one party and other property to the other spouse, courts often award the other spouse a promissory note or judgment, to offset part of the value of the home. In doing this, many courts and lawyers overlook the fact that the value of the offsetting note or judgment may not be its face amount. Thus, the court may unknowingly be doing an injustice.

5. Sell House and Divide Proceeds

The Court in a divorce has the authority to order the parties' home sold, and the proceeds divided. *Mogford v. Mogford*, 616 S.W.2d 936, 945 (Tex. Civ. App.--San Antonio 1981, writ ref'd n.r.e.); *Nixon v. Nixon*, 540 S.W.2d 740 (Tex. Civ. App.--Texarkana 1976, no writ) (affirming order that home be sold, with proceeds used to pay community debts, and unused portion to be split 60/40). However, some courts disfavor ordering the sale of the residence, especially when there is a disparity of earning capacity and children involved. *Maben v. Maben*, 574 S.W.2d 229, 232 (Tex. Civ. App.– Fort Worth 1978, no writ).

a. Can't Order Proceeds Paid to Ordinary Creditors

The court cannot order that the proceeds from sale of the homestead be used to pay unsecured creditors. *Brock v. Brock*, 586 S.W.2d 927, 930 (Tex. Civ. App.--El Paso 1979, no writ); *Delaney v. Delaney*, 562 S.W.2d 494, 495-46 (Tex. Civ. App.--Houston [14th Dist.] 1978, writ dism'd); *Klein v. Klein*, 370 S.W.2d 769, 774 (Tex. Civ. App.--Eastland 1963, no writ). See TEX. PROP. CODE § 41.001(c) ("The homestead claimant's proceeds of a sale of a homestead are not subject to seizure for a creditor's claim for six months after the date of sale."). In *Brock*, the court ordered that the homestead, and four other parcels of land, be sold by a realtor appointed as trustee, and the proceeds used to pay the expenses of sale, the liens on the properties, $12,000.00 in community debt, and the balance divided between the spouses. The wife complained at the use of proceeds from the sale of the homestead to pay unrelated debts. Since the evidence reflected that the total value of the properties exceeded the unsecured debt, it was not necessarily true that any home proceeds would be used to pay the debts. The wife's complaint was rejected on appeal.

b. But Not if Purely Separate Property

In *Gerami v. Gerami*, 666 S.W.2d 241 (Tex. App.--Houston [14th Dist.] 1984, no writ), the trial court ordered the homestead sold and the proceeds divided. The home was entirely the husband's separate property. This action was reversed as a violation of the prohibition of divesting a spouse of title to separate realty. *See Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977). When the house is partly separate and partly community, it can be sold, with the portion of the sale proceeds representing the separate interest returned to its owner and the community portion divided equitably. *Mogford v. Mogford*, 616 S.W.2d 936, 944-45 (Tex. Civ. App.--San Antonio 1981, writ ref'd n.r.e.).

6. House to One, Option to the Other

The Court can give one spouse the option to purchase the house from the other, after a certain time, or under certain conditions. For example, in *Garza v. Garza*, 666 S.W.2d 205 (Tex. App.--San Antonio 1983, writ ref'd n.r.e.), the trial court awarded real property

to the wife, subject to an option in the husband to buy the property for a stated price within 90 days.

7. Place Home in Trust

The marital home could be placed in a trust with the parent residing in the home to be the trustee and the beneficiaries of the trust could be the children of the marriage.

8. Life Estate

The transaction could be structured as a conveyance of a life estate to one spouse, with retention of a remainder interest by the other spouse, or with the remainder interest going to the parties' children, or a charity.

9. Reversion

A spouse could be given title to the house, subject to a reversion to the grantor-spouse at the end of a specified term, or if the grantee-spouse dies, remarries, or ceases to use the house as her principal residence. In this way, the grantee would own the property, and would be able to deduct the full amount of the property taxes and interest payments made by her, but still have the use of the home only during her period of need.

10. Lease

One spouse could receive the home in the divorce, but lease it to the other spouse for a specific term, possibly subject to renewal for a stated rental at the lessee's option. The lessor-spouse would have taxable rental income, but would be able to deduct interest expense and property taxes, and take depreciation on the house, at what may amount to a net savings. The wife could meet her need for shelter while allowing the husband to enjoy the prospect of appreciation in the value of the house. However, in the author's experience, spouses that don't want to be married, don't want to be landlord and tenant.

D. Awarding Possession to One Spouse or Parent

It is apparent that in certain circumstances the trial court in a divorce can award the right to possess the home to one party, even though the other party owns a community interest, or even separate property interest in the home. There is some question as to just how far the trial court can go in subjecting a spouse's ownership interest to exclusive use by the other spouse. The limits may be different, depending on whether the action is taken for the support of minor children, and whether the home is community or separate property.

1. For Use by Children

Even when the house is the separate property of one of the spouses, the court has the power to award use of the house to the other spouse, as custodian of the parties' minor children, during the children's minority. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 138 (Tex. 1977); *Gerami v. Gerami*, 666 S.W.2d 241. 242)Tex. App.--Houston [14th Dist.] 1984, writ dism'd); *Villarreal v. Laredo National Bank*, 677 S.W.2d 600, 607 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.) (en banc); *Burney v. Burney*, 225 S.W.3d 208, 220 (Tex. App. – El Paso 2006, no pet.).

2. For Use by Spouse When Home is Community

The court in a divorce can award the use of a community property home to one spouse with a reversionary interest in the other. *Nelson v. Nelson*, 436 S.W.2d 200, 202 (Tex. Civ. App.--Dallas 1969, no writ) (not alimony to divide the house 60/40 but allow wife to live there until child reached age 21); *Harris v. Harris*, 190 S.W.2d 489, 491 (Tex. Civ. App.--Galveston 1945, no writ) (trial court affirmed in awarding wife exclusive use and possession of the residence until her remarriage or death).

3. For Use by Spouse When Home is Separate

It has been held that the court may award the use of one spouse's separate property home to the other spouse, for a term, or until remarriage, etc., even if there are no minor children. In *Bush v. Bush*, 237 S.W.2d 708 (Tex. Civ. App.--Amarillo 1950, no writ), the appellate court upheld the trial court's giving the wife the right to use the husband's separate property house until she remarried. *Accord Farris v. Farris*, 15 S.W.2d 1083 (Tex. Civ. App.--San Antonio 1929, no writ) (separate property home of husband set aside to wife for life). A provision in a decree of divorce that the right of the wife to live in the homestead, which was husband's separate property, would end if she remarried, was upheld against her attack that the clause was unenforceable as a restraint on marriage in *Smith v. Rabago*, 672 S.W.2d 38, 40 (Tex. Civ. App.--Houston [14th Dist.] 1984, no writ).

E. Awarding a Lien in the Home

The Court can affix a lien in the home, even if it is homestead, for a number of purposes. Examples include: a lien to secure: (1) reimbursement for community funds spent in payment of a purchase money lien against the property, *Day v. Day*, 610 S.W.2d 195, 198 (Tex. Civ. App.--Tyler 1980, writ ref'd n.r.e.); *Kimsey v. Kimsey*, 965 S.W.2d 690, 697-98 (Tex. App. – El Paso 1998, pet. denied); (2) a money judgment to the husband for his leasehold interest in the wife's separate residence. *Buchan v. Buchan*, 592 S.W.2d 367, 371 (Tex. Civ. App.--Tyler 1980, writ dism'd); (3) an amount awarded the other

spouse for his or her homestead interest in the property. *Wierzchula v. Wierzchula*, 623 S.W.2d 730, 732 (Tex. Civ. App.--Houston [ist Dist.] 1981, no writ); and (4) an equitable lien on property of a marital estate to secure a claim for economic contribution in that property by another marital estate. *Langston v. Langston*, 82 S.W.3d 686, 689 (Tex. App. – Eastland 2002, no pet.)

Fixing a lien in one spouse's separate property to secure a money obligation owed to the other spouse does not violate the prohibition discussed in *Eggemever v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977), against divesting a spouse of the prohibition described in title to separate realty and awarding it to the other spouse. *Buchan v. Buchan*, 592 S.W.2d 367, 371 (Tex. Civ. App.-Tyler 1980, writ dism'd); *Wisdom v. Wisdom*, 575 S.W.2d 124, 125-26 (Tex. Civ. App.--Fort Worth 1979, writ dism'd). *But see Duke v. Duke*, 605 S.W.2d 408, 412 (Tex. Civ. App.--E1 Paso 1980, writ dism'd) (error for trial court to order husband to execute and deliver to wife a deed of trust in his separate property real estate, by way of owelty).

F. House in Another State

In a divorce, the court is directed to divide the estate of the parties, together with property acquired while domiciled elsewhere, wherever it may be situated. TEX. FAM. CODE § 7.001, 7.002. However, a court may not, by direct operation of its decree, pass title to realty located outside of Texas. *Fall v. Eastin*, 215 U.S. 1, 8 (1909); *Brock v. Brock*, 586 S.W.2d 927, 930 (Tex. Civ. App.--El Paso 1979, no writ); *Kaherl v. Kaherl*, 357 S.W.2d 622, 624 (Tex. Civ. App.--Dallas 1962, no writ). A decree purporting to pass title to out-of-state realty is not entitled to full faith and credit in the situs state. *Fall v. Eastin*, 215 U.S. at 12. However, the decree may be enforced in that jurisdiction as a matter of comity. *See McElreath v. McElreath*, 162 Tex. 190, 207-08, 345 S.W.2d 722, 733 (1961). There is ample authority for the proposition that a trial court may require parties over whom it has *in personam* jurisdiction to execute a conveyance of real estate located in another state. *McElreath v. McElreath,* 162 Tex. 190, 345 S.W.2d 722, 724 (1961) (op. on reh'g); *Dankowski v. Dankowski*, 922 S.W.2d 298, 303 (Tex. App.- Fort Worth 1996, writ denied). ; *Matter of Marriage of Read,* 634 S.W.2d 343, 348-49 (Tex. App.- Amarillo 1982, writ dism'd); *Brown v. Brown,* 590 S.W.2d 808, 812-13 (Tex. Civ. App.- Eastland 1979, writ dism'd by agr.). In so doing, "[t]he trial court can consider the existence and value of such realty in dividing the community property of the parties and, in the exercise of its equitable powers, order one party to execute [the] conveyance[.]" *In re Read*, 634 S.W.2d 343, 348-49 (Tex. App.-Amarillo 1982, writ dism'd).

G. Instruments Needed to Accomplish a Transfer Incident to Divorce

The attorney in a divorce will need to prepare documents reflecting the disposition of the family home in the divorce. These documents typically include the decree of divorce, a special warranty deed, a deed of trust, a deed of trust to secure assumption, and an assignment of escrow balance. Counsel may also want to have an assignment of utility or telephone deposits and accounts, and an assignment of the right to use the telephone number at the house. An assignment of rights under a contract with a security company may also be needed. The transferor may wish to send a letter to the local real property tax assessor-collector, enclosing a copy of the warranty deed and requesting that his or her name be removed from the tax account for that property.

1. The Necessity for an Adequate Description

It is a matter of great concern that the real property being transferred in the divorce be adequately described. As troublesome as it may be, there is nothing better than using the full legal description of the property in every document which touches upon it.

2. Partition and Exchange Agreement

When creditors of a spouse might cause problems for the other spouse after divorce, the parties may wish to consider using a partition and exchange agreement instead of an agreement incident to divorce. Ordinarily, spouses take property in a divorce subject to the claims of the creditors of each of the spouses. Worse still, in one case the creditors of an spouse succeeded in setting aside that spouse's property settlement agreement as a fraudulent transfer. *Steed v. Bost*, 602 S.W.2d 385 (Tex. Civ. App.--Austin 1980, no writ). By partitioning the property instead of dividing it, the wife may be better insulated from the claims of the husband's creditors, and vice versa, since partitions and exchanges are binding upon creditors unless done with the intent to defraud them. TEX. FAM. CODE § 4.106; TEX. CONST. art. XVI, § 15.

3. Special Warranty Deed with Vendor's Lien

In conveying the house from one spouse to the other, it is advisable to use a special warranty deed. If part of the consideration of the transfer is a promise to pay money in the future, the deed should retain a vendor's lien in the property conveyed, particularly if it is to be the homestead of the transferee. If the house is the separate property of a spouse, a quitclaim deed from the other spouse should suffice to eliminate any potential claim against the property.

4. Deed of Trust

Whenever the transferee spouse is to pay the transferor spouse a sum of money in return for conveyance of the house, the obligation should be secured by a vendor's lien retained in the warranty deed, and by a deed of trust. Although the Texas Supreme Court has ruled that an implied vendor's lien arises from an agreement incident to divorce, when part of the purchase price is unpaid, it will take a lawsuit to establish such a lien, and without a deed of trust the only foreclosure procedure available is judicial foreclosure. *See McGoodwin v. McGoodwin*, 671 S.W.2d 880 (Tex. 1984); *Magallanez v. Magallanez*, 911 S.W.2d 91, 94-95 (Tex. App. – El Paso 1995, no writ).

5. Deed of Trust to Secure Assumption

The transferring spouse will want a deed of trust to secure assumption whenever there is a debt on the home which is not extinguished in the transfer incident to divorce.

a. Mortgage Debt of Transferor Not Extinguished by Divorce

Ordinarily, both spouses will have signed any purchase money or home improvement loan obligations pertaining to the home. The mere fact that the property is transferred from one spouse to the other in the divorce, and the transferee spouse agrees and/or is ordered to pay those debts, in no way relieves the transferor spouse of liability under the notes signed by him or her. The liability of the spouses to third party creditors who are not parties to the divorce is in no way diminished by the disposition of property in the divorce.

b. The Role of the Deed of Trust to Secure Assumption

The deed of trust to secure assumption basically allows the transferor spouse to pay arrearages in the mortgage payment which may subsequently accrue, or to expend other sums required of the parties under the deed of trust securing the assumed lien, and to demand reimbursement from the party assuming the indebtedness. If reimbursement is not received within a specified time, the trustee under the deed of trust to secure assumption can post notice and sell the transferee-spouse's interest in the property at non-judicial foreclosure sale, subject of course to the assumed indebtedness secured by superior lien in the property.

6. Assignment of Escrow Balance and Insurance Rights

It is advisable to secure an assignment of the escrow balance on the house mortgage and any insurance policies relating to the husband. While the likelihood is that the mortgage company will pay taxes and insurance with that escrow balance in the due order of business, arguably if the escrow balance is not divided in the decree it constitutes an undivided community property asset.

7. Muniment of Title Language in Decree

Muniment of title has been defined as "[d]ocumentary evidence of title," and "[t]he instruments of writing and written evidences which the owner of lands, possessions, or inheritances has, by which he is enabled to defend the title of his estate."Black's Law Dictionary 918 (5th ed.1979). The language in the Decree of Divorce may serve as a muniment of title for the award of real property to the spouses. *See McCarthy v. George*, 623 S.W.2d 772, 777-78 (Tex. App. – Fort Worth 1981, writ ref'd n.r.e.) (evidence of a divorce judgment was sufficient as a muniment of title).

8. Other Documents

Other documents that could be prepared in connection with the division of the family home include, without limitation, an assignment of utility deposits; an assignment of the right to use the telephone number; a letter to the local taxing authority removing the grantor's name from the tax account; a letter to the homeowners' association; an assignment of a contract for home security; an assignment of any outstanding insurance claim for damage or repairs to the home; a quitclaim deed relinquishing any claim in the separate property home of a spouse, etc.

9. Getting Documents Signed

It has been held that an order requiring the parties to sign all notes and instruments necessary to carry out the decree is not enforceable by contempt. *Ex parte Myrick*, 474 S.W.2d 767 (Tex. Civ. App.--Houston [1st Dist.] 1971, no writ). To skirt the problem, copies of the documents actually to be signed can be attached to the decree of divorce and the parties ordered to sign, notarize and deliver them when the decree is signed by the court. *See Ex parte McKinley*, 578 S.W.2d 437 (Tex. Civ. App.--Houston [1st Dist.] 1979). Failing that, the decree or agreement will have to be relied upon to pass title, or else a proceeding to enforce the decree can be brought pursuant to Section 9.001-9.014 of the Texas Family Code.

10. Other Ideas

While the special warranty deed, deed of trust, and deed of trust to secure assumption are the usual combination of documents used to award the family home to a spouse upon divorce, there is no reason why other approaches could not be used.

VIII. HOME AND CHILD SUPPORT

A. Use of Home During Minority as Child Support

When the use of the home is awarded to the custodial spouse for part or all of the minority of the parties' children, a question arises whether that award of use is child support. If so, then is it modifiable for changed circumstances? Clearly, it is. Section 154.003 of the Family Code provides that "[t]he court may order that child support be paid by: (1) periodic payments; (2) a lump-sum payment; (3) an annuity purchase; (4) the setting aside of property to be administered for the support of the child as specified in the order; or (5) any combination of periodic payments, lump-sum payments, annuity purchases, or setting aside of property." TEX. FAM. CODE § 154.003.

In *Burney v. Burney*, 225 S.W.3d 208 (Tex. App. – El Paso 2006, no pet.), the Court of Appeals recognized that a trial court may set aside separate property for the use and benefit of a child born of the marriage as part of an award of child support. *Id.* at 220. For example, a trial court may award the separate property residence of one spouse to the other spouse until the child reaches the age of majority. *Id. See Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 141 (Tex. 1977); *Gerami v. Gerami*, 666 S.W.2d 241. 242 (Tex. App.--Houston [14th Dist.] 1984, no writ).

B. Swapping Interest in Home for Child Support Arrearages

One court has held that a trial court can offset the ex-husband's interest in the house against his child support arrearages. *Stephens v. Stephens*, 543 S.W.2d 686 (Tex. Civ. App.--Houston [1st Dist.] 1976, no writ). However, in *Smith v. Rabago*, 672 S.W.2d 38 (Tex. App.--Houston [14th Dist.] 1984, no writ), a more complex rule was expressed. In *Smith*, the divorce court allowed the wife to use the husband's separate property house until the parties' child became 14, or the wife remarried. Years later, the wife sued to reduce child support arrearages to judgment. The husband discovered that the wife had remarried several years before, and therefore sued her for the reasonable rental value of the home since her marriage. The trial court offset the claims, but was reversed by the Court of Appeals. According to the appellate court, set-off requires mutuality of claims, or that the claims be due between the parties acting in the same capacities. The child support was owed for the benefit of the child; the rent was owed to the husband individually. Mutuality did not exist, and offset was held inappropriate. *Id.* at 40. *See Marcos v. Marcos*, 1997 WL 531194 at *2 (Tex. App. – Houston [1st Dist.] 1997, no pet.). In *Miller v. Two Investors, Inc.*, 475 S.W.2d 610, 612 (Tex. Cir. App.--Dallas 1971, writ ref'd n.r.e.), it was held that child support arrearages are not the type of equities which can be adjusted in a partition suit.