Chapter 1

The Texas Marital Property System

A. Introduction

The general principles which govern Texas marital property law have existed for more than 150 years. The utilization and application of Texas marital property laws were expanded by the June 26, 2015 United States Supreme Court opinion, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), wherein the Court held that "[t]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty . . ." The Court further held that "[s]tates must recognize lawful same-sex marriages performed in other States." This historic decision must be kept in mind throughout your course of study.

In compliance with the Supreme Court mandate, same sex marriages have been recognized in Texas since *Obergefell* and marriage licenses have been issued to same sex couples. However, the Texas legislature has not taken specific steps to repeal numerous sections of the Texas Family Code that seemingly restrict Texas marriages to a man and a woman. For example, see Texas Family Code 2.001(b) that provides "[a] license [marriage] may not be issued for the marriage of persons of the same sex." One can only speculate as to the reason for this inaction.

This text will present and address all current law, however, it cannot be ignored that Texas marital property law enjoys a rich history, a history that cannot be ignored because it is viable and applicable today. The study of marital property law focuses upon the effect that marriage has upon property ownership. From ownership springs the right to manage property during marriage. Along with ownership, the right to manage property may affect whether or not the property will be liable for debts or obligations incurred prior to or during a marriage. Likewise, the disposition of property on death or divorce is affected by its ownership.

In essence, a marital property system governs ownership, management, liability, and disposition of all property possessed during and upon dissolution of a marriage. Texas marital property is governed by community property principles derived from Spanish law. Texas is one of only nine community property states. Originally, there were eight community property states: Texas, Arizona, California, Idaho, Louisiana, Nevada, New Mexico and Washington. With its enactment of the Wisconsin Marital Property Act, which was effective January 1, 1986, Wisconsin became the ninth community property state.[1]

Although the basic discipline of community property is consistent from community property state to community property state, the narrower principles encompassed within each state can differ greatly from state to state. In addition, you will discover that in Texas, community property is constitutionally driven. For that and other reasons, the community property determinations of other states and the underlying rationale may not be transferable to Texas. Although the opinions of other state courts and certain federal cases will be peripherally mentioned, this text will focus on Texas law. The opinions of other jurisdictions are included only when there is an undecided issue or a concept that may be clarified in a manner consistent with or which might impact the Texas rationale.

[1] Howard S. Erlanger & June M. Weisberger, *From Common Law to Community Property: Wisconsin's Marital Property Act Four Years Later*, 1990 WIS. L. REV. 769, 770, 790. (Wisconsin is the first and only state to base its marital property system on the Uniform Marital Property Act).

1. An Overview of the Texas Constitution and Marital Property

As Justice Walker of the Texas Supreme Court has explained, in Texas "[a]ll marital property is . . . either separate or community." *Hilley v. Hilley*, 342 S.W.2d 565 (Tex. 1961). That is, Texas marital property is owned by a spouse separately or by the community; although ownership can be held by a combination of separate and community ownership interests.

The Texas Constitution specifically defines separate property. *See* TEX. CONST. art XVI, §15. Although the current Texas Constitution, adopted in 1876, has been amended numerous times, the basic separate property definition has remained constant. The amendments to art. XVI § 15 have removed gender based references so that men and women are treated equally and have broadened the means of acquiring separate property. The amendments have not changed the original basic separate property definition which has existed for more than 150 years, predating the constitution of 1876.[2] Simply put, separate property is that owned or claimed before marriage or that acquired after by gift, devise, or descent. The evolution of TEX. CONST. art XVI, §15 will be set forth within this text. Likewise, very early cases which address the ownership of marital property are included within Chapter 1 of this text and less frequently throughout the remainder of the text. Because the basic definition of separate property has not changed since 1876, the early cases do not merely provide a historical perspective; rather, they provide viable precedent, often cited in current opinions. These early cases will be viewed in light of the constitution as it existed at the time the opinions were rendered.

The Texas Constitution does not specifically define community property. As we progress through the text, we will see that case law has provided some guidance as to how we recognize community property. It has been said that "[t]he principle which lies at the foundation of the whole system of community property is, that whatever is acquired by the joint efforts of the husband and wife, shall be their common property." *De Blane v. Hugh Lynch & Co.*, 23 Tex. 25, 29 (1859). This principle is also known as acquisition under the doctrine of onerous title. *Graham v. Franco*, 488 S.W.2d 390, 392 (1972). In contrast, community property has also been simply defined as that property which does not meet the Texas Constitution definition of separate property, utilizing the doctrine of implied exclusion. *Arnold v. Leonard*, 273 S.W.2d 799, 802 (1925). Although these analytical doctrines can co-exist, it will become evident that sometimes they are mutually exclusive.

The Texas Constitution is the touchstone for the characterization of marital property. The one thing that must never be forgotten is that the constitutional definition of separate property reigns supreme and cannot be impinged upon by either the legislature or the spouses. *See Arnold v. Leonard*, 273 S.W.2d 799, 801 (1925); *Kellett v. Trice*, 95 Tex. 160, 66 S.W.2d 51 (1902). While holding that the constitutional definition of marital property cannot be changed by legislation or by contract, the courts have recognized that the constitutional definition encompasses more than literal interpretation would allow. The constitution does provide that laws may be passed to more clearly define a spouse's rights in separate property, as well as that property held as community property. So, while the constitution does not address the concepts of marital property management or of liability, the courts have also sustained the power of the legislature to enact statutes dealing with management and liability of marital property. This first chapter will introduce this balancing of strict construction against the legislature's power to define.

[2] *See* TEX. CONST. art. 7 §19 (1845). (First Texas state constitution contained like separate property language).

2. An Overview of the Statutes and Marital Property

The Texas Constitution does not define community property. Even though the Texas Constitution only provides a definition of separate property, the legislature, within the Texas Family Code, has provided not only a separate property definition, but a community property definition as well. The definition of separate property is found in TEX. FAM. CODE § 3.001 which, except for subsection (3), tracks the definition found in TEX. CONST. art. XVI § 15. Specifically, TEX. FAM. CODE § 3.001, titled "Separate Property," provides:

> A spouse's separate property consists of:
>
> (1) the property owned or claimed by the spouse before marriage;
>
> (2) the property acquired by the spouse during marriage by gift, devise or descent.
>
> (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.

The definition of community property is found in TEX. FAM. CODE § 3.002, which provides:

> Community property consists of the property, other than separate property, acquired by either spouse during marriage.

Of course, the legislature did not stop with mere definitions of separate and community property. Indeed, entire chapters of the Texas Family Code are dedicated to marital property matters, most notably: Chapter 1 - Marital Property Rights and Liabilities §§ 3.001-3.410; Chapter 4 - Premarital and Marital Property Agreements §§ 4.001-4.206; Chapter 5 - Homestead Rights §§ 5.001-5.108; Chapter 7 - Award of Marital Property §§ 7.001-7.008; Chapter 8 - Maintenance §§ 8.001-8.305; and Chapter 9, Post-Decree Proceedings, §§ 9.001-9.302. These chapters of the Texas Family Code, along with other chapters relevant to this course can be found in the Appendix at the end of this text.

3. The Community Property Presumption and Characterization

The goal in most marital property cases is to determine whether marital property is a spouse's separate property or community property. The term "characterization" or the phrase "to characterize" means to determine whether marital property was acquired at a time or in a manner which would deem it separate property of a spouse or whether it will simply be presumed community property. The task of characterization begins with the application of a primary principle known as the community property presumption. The community property presumption provides the first step in the analysis of every marital property case, whether during marriage or upon dissolution of a marriage by death or divorce. This presumption has served as the cornerstone for case analysis since the Texas Legislature adopted the Spanish model of community property laws in 1840.[3] The presumption, a product of the common law, is now codified at TEX. FAM. CODE § 3.003(a) which provides:

> Property possessed by either spouse during or on dissolution of marriage is presumed to be community property.

In applying this presumption, the operative word is "possessed." The presumption is not limited to property purchased or otherwise acquired during marriage. Thus, upon death or divorce all property possessed by the spouses is presumed to be community property.

[3] William O. Huie, *The Texas Constitutional Definition of the Wife's Separate Property*, 35 TEX. L REV. 1054 (1957).

This presumption can only be rebutted by clear and convincing proof that the property in question is separate property. TEX. FAM. CODE § 3.003(b). If the property, by application of constitutional or statutory definitions or judicial precedent, is characterized as separate property, then the community property presumption has been rebutted.

Many practical reasons exist for characterizing marital property as either separate or community property. Upon dissolution of the marriage, different criteria control the disposition of separate property and of community property.

In a death case, the testate deceased spouse can devise only his separate property and one-half of the community property. Likewise, the separate property and the community property of the intestate deceased spouse will descend under different sections of the Probate Code and will be distributed in different manners.

In a divorce case, the trial court has broad discretion in the division of community property, but cannot divest title to separate property. In addition, during marriage, characterization is essential in identifying the spouse or spouses with power to manage marital property under TEX. FAM. CODE §§ 3.101, 3.102, and §§ 3.201-3.309. Characterization is also essential in determining, under TEX. FAM. CODE § 3.202, the extent to which marital property is liable for obligations incurred either before or after marriage by a spouse to a third party, as well as the order in which property is subject to execution under TEX. FAM. CODE § 3.203.

The cases that follow provide lessons in characterization and in rebutting the community property presumption. The cases may seem ancient, but they are still viable and still cited by counsel and courts, alike.

Question

A potential client pulls up in front of your office driving a new (paper tags) red Corvette. Client enters your office and states, simply, that a divorce is desired and that when the marriage began Client had an estate of $500,000 which, in the single year the marriage has endured, has been reduced to $300,000. Client just wants out of the marriage and let's you know that in Client's opinion the divorce should be very simple because no community property was acquired. Client further explains that the estate was less at the end of marriage, which can be proved by looking at the reduction to $300,000, and that all should be awarded to Client. How would you respond to Client?

B. The Constitution of 1876

1. Article XVI § 15 as effective 1876-1947

The Texas Constitution of 1876, article XVI § 15, defines separate property as follows:

> All property, both real and personal of the wife, owned or claimed by her before marriage, and acquired afterward by gift, devise or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.

The above constitutional provision begins the study of Texas marital property law. This same definition of separate property appeared without change in the earlier Constitutions of 1845, 1861, and 1866. The provision was omitted from the Reconstruction Constitution of 1869 which merely provided that the rights of married women to their separate property should be protected by law. For a discussion of the early background and history of the provision, *see Arnold v. Leonard*, 273 S.W. 799, 800-801 (Tex. 1925); William O. Huie, *The Texas Constitutional Definition of the Wife's Separate Property*, 35 TEX. L. REV. 1056 (1957). Notably, the definition of separate property has been expanded but not significantly altered since that time. *See* TEX. CONST. art. XVI § 15 (1948); TEX. CONST. art. XVI § 15.

Questions

1. What appears to be the single most limiting aspect of the 1876 definition of separate property set forth above?

2. Women were not in the Texas Legislature and, in fact, could not vote when the above definition was adopted. Why would a government run by men extend such property rights to women?

---

2. Statutes and Decisions, 1845-1947

The first case in this section *De Blane v. Hugh Lynch & Co.*, is more than a century and a half old. The issue is the character of cotton grown during marriage on the separately owned lands of the wife. Character of these crops is in issue because creditors levied against the bales of cotton to satisfy a debt owed by husband. At the time, only the separate property of the wife would have been safe from creditors. As noted in the introduction, the definition of separate property has not substantively changed since 1845; likewise, the analysis and application of that definition has also remained constant for more than 150 years. This case provides precedent for the current characterization of crops. As you read *De Blane*, think of situations to which the case might be applied today; realize that the precedent is more than 150 years old. *See Winger v. Pianka*, 831 S.W.2d 853 (Tex. App.—Austin 1992, writ denied); *see also, McElwee v. McElwee*, 911 S.W.2d 182 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

DeBlane is followed in *Stringfellow v. Sorrells*, which guides us in the characterization of livestock and their progeny and *Arnold v. Leonard* which addresses the characterization of rents and revenues. *Kellett v. Trice* introduces the strict interpretation of the Texas Constitution as it relates to marital property and the restrictions that such an interpretation places upon individuals; extension of the restrictions to the legislature is seen in *Arnold v. Leonard*. Once again, the analysis within these opinions is as viable today as when written. This section culminates with *North Texas Traction Co. v. Hill*, which focuses upon the characterization of personal injury recoveries; although the decision would probably stand today, the characterization of the recovery would be different as will be established in the next section by *Graham v. Franco*.

DE BLANE
v.
HUGH LYNCH & CO.
23 Tex. 25
(1859)

BELL, JUSTICE.

On the 27th day of October, 1847, Hugh Lynch & Co. obtained judgment in the district court for Liberty County, against Volizard DeBlane, for the sum of one hundred and twenty-three dollars and eighty cents, debt, and seventeen dollars and fifteen cents, costs.

On this judgment an execution was issued, and levied on ten bales of cotton. The cotton was claimed by the present appellant as her separate property. The appellant is the wife of Volizard DeBlane, the defendant in the execution. There was a trial of the right of property. The proof was, that the ten bales of cotton levied on was the crop, or a portion of the crop, of the year 1848, grown upon land which was the separate property of Madame DeBlane, and produced by the labor of slaves which were also the separate property of Madame DeBlane.

Under the instruction of the court, the Hon. C.W. Buckley presiding, the jury returned a verdict that the cotton was liable to the execution. There was judgment accordingly, and from that judgment Madame DeBlane has appealed.

The only question presented is, whether the cotton grown upon the land of the wife, by the labor of the slaves of the wife, remained her separate property, or became the common property of the husband and wife. If the cotton was common or community property, it was, of course, subject to the exception; if it remained the separate property of the wife, it was not subject to the execution.

We are of opinion that the cotton was community property, and subject to the execution.

So far as I am informed, the proposition that crops produced on the land of the wife, remain the separate property of the wife, is founded and supported upon what is supposed to be the true import of the term "increase of land," used in the act of 1848, better defining the marital rights of parties.

It will be observed that the act of January 20, 1840, did not use the expression "increase of land." That statute provided "that neither the lands nor slaves which the wife may own, or to which she may have any right, title, or claim, at the time of her marriage, nor the lands or slaves to which she may acquire, during the coverture, any right, title, or claim, by gift, devise, or descent, nor the increase of such slaves, in each case, nor the paraphernalia as defined at common law, which the wife may have at the time of the marriage, or which she may acquire during the coverture, as aforesaid, shall, by virtue of the marriage, become the property of the husband, but shall remain the separate property of the wife."

The statute of 1848 provides, that "all property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise or descent, as also the increase of all lands or slaves thus acquired, shall be the separate property of the wife."

In an etymological sense, it cannot be doubted, that the word "increase," as applied to land, or to the soil, means that which grows out of it, or that which is produced by the cultivation of it. The word is frequently employed in this sense in the English Bible. Instances of it will be found in the twenty-fifth chapter of the book of Leviticus. It is there said, "and for thy cattle, and for the beast that are in thy land, shall all the increase thereof be meat." Again, it is said; "behold, we shall not save nor gather in our increase." So, in the sixty-seventh Psalm, the expression occurs, "then shall the earth yield her

increase." That the word was properly used as applying to the produce of the soil cannot be doubted, when it is remembered, that the translators of King James' Bible have perhaps never been surpassed in accurate scholarship. But to adopt this meaning of the word "increase", as used in our statute, and to interpret the statute accordingly, would, we think, lead to results wholly inconsistent with the recognized principles of law upon which the system of community property is based. It would also lead to results inequitable and unreasonable. If it be admitted, that the "increase of land" meant by our statute, is the product of the soil itself, then it would follow, that a crop grown on the land of her husband, by the labor of the slaves of the wife, would be the separate property of the husband, because it was the "increase" of his land. The husband has, by the statute, the control and management of the separate property of the wife; and if the husband owned land, as separate property, and the wife owned slaves, as separate property, the husband could always employ the wife's slaves in the cultivation of his own land, and thus add to his separate property by the use of her separate property.

The principle which lies at the foundation of the whole system of community property is, that whatever is acquired by the joint efforts of the husband and wife, shall be their common property. It would be an unnecessary consumption of time, to quote authorities for this proposition.

It is true, that in a particular case, satisfactory proof might be made, that the wife contributed nothing to the acquisitions; or, on the other hand, that the acquisitions of property were owing wholly to the wife's industry. But from the very nature of the marriage relation, the law cannot permit inquiries into such matters. The law, therefore, conclusively presumes that whatever is acquired, except by gift, devise or descent, or by the exchange of one kind of property for another kind, is acquired by their mutual industry. If a crop is made by the labor of the wife's slaves on the wife's land, it is community property, because the law presumes that the husband's skill or care contributed to its production; or, that he, in some other way, contributed to the common acquisitions.

It cannot be objected, that this rule will subject the *corpus* of the wife's estate to be diminished for her support, while the husband enjoyed the proceeds or fruits of her property. The law (HART. DIG. art. 2416) provides, that the wife may have so much of the proceeds of her separate property set apart for the support of herself, and for the nurture and education of her children, as the courts of the country may deem necessary, under the circumstances of any particular case. On the other hand, as was before said, a literal construction of the words of the statute, "the increase of land," would enable the husband to make acquisitions of separate property, by the use of the separate property of his wife. And in this way his children by another wife might become rich, while her children by another husband might remain comparatively poor. The judgment of the court below is affirmed.

Notes, Comments & Questions

1. *De Blane* contrasts with a California decision of the same period which, applying a constitutional provision identical to that of the Texas Constitution, held that dividends from separate property of the wife were the wife's separate property. *George v. Ransom*, 15 Cal. 322 (Cal. 1860). Texas courts have adhered strictly to the doctrine that dividends, interest, rent, and other income derived from separate property of a spouse are community property. *See Estate of Wyly v. Commissioner*, 610 F.2d 1282 (5th Cir. 1980). *But see* art. XVI, § 15 of the Texas Constitution as amended, effective November 25, 1980, and § 3.005 of the Family Code, originally enacted as § 5.04 and originally effective September 1, 1981.

2. What does the court perceive to be the inequity of crops grown on separate property being characterized as separate property?

3. What does the court identify as the "principle which lies at the foundation of the whole system of community property?" This "principle" should be kept in mind as you continue to read cases. What is a descriptive name for the "principle"?

4. Keep Madame De Blane's situation in mind as you progress through the text. Consider whether the decision would have been different if the case had been decided at a later time.

STRINGFELLOW
v.
SORRELLS
18 S.W. 689
(Tex. 1891)

MARR, JUSTICE.

Before and at the time of her marriage to W.J. Sorrells in the year 1884 the appellee, Mrs. C.V. Sorrells, owned in her own right, together with other separate property, two mules. These animals were then colts, and worth $35 each; and a portion of their present value, as a result of their growth and avoirdupois as the years rolled on, is the subject of this controversy. The appellant, in the year 1888, held a just debt, merged into a valid judgment, for a small sum against the husband of the appellee, and in satisfaction of which he caused a writ of execution to be levied upon these mules of the wife during that year. At the time of the levy the animals were grown, and each of them worth in the market $75, instead of $35 as originally. The husband had managed and cared for the mules since the marriage, and the community estate furnished the provender for the animals during the intermediate time.

The appellee replevied the property, and duly made her claim thereto under the statute, "to try the rights of property." The case came up to the district court from a justice court, and the former court rendered a judgment in favor of the wife. The appellant insists that the enhanced value of the mules, which has resulted from the attention of the husband and the food furnished by the community since the marriage, and amounts to $80, is an *increase* of the separate estate of the wife, and consequently is community property, and liable to his execution. There is a modicum of plausibility in his contention, based upon the construction given by the Supreme Court to "the increase of the lands" of the wife, but these decisions were inspired by the necessity of protecting, not of destroying, her estate. *De Blane v. Lynch*, 23 Tex. 25; *Forbes v. Dunham*, 24 Tex. 611; *White v. Lynch*, 26 Tex. 195; *Cleveland v. Cole*, 65 Tex. 402; *Epperson v. Jones*, *id*. at 425; *Braden v. Gose*, 57 Tex. 37; *Carr v. Tucker*, 42 Tex. 336.

The Supreme Court has often decided what is not "the increase of the wife's lands," but, so far as we are aware, have not decided what *is*; and we are not required to do so now. The rule contended for would be most impracticable in application. The equitable criterion, if any were admissible in cases like the present, should be the expenses to the husband or the community, regarded as an investment of rearing the mules, not the increased value, which may be due to other causes, subject to be offset by the value of their use, if anything. This would add to "confusion worse confounded." As applied to livestock belonging to the wife, "the *increase*" of such property has been invariably (ever since the decision of the Supreme Court in *Howard v. York*, 20 Tex. 670) recognized in the reported cases to denote the progeny of the original stock or their descendants. This construction comports with the etymology of the term, and accords with the universal understanding. *De Blane v. Lynch*, *supra*. The record therefore develops no "increase" of these particular mules in the sense that would add to or

constitute a part of the community estate. They are still the same animals which the wife owned at the time of her marriage, and, mule like, they have stubbornly refused "to bring forth after their kind."

The sex of these particular mules, nor their capacity for reproduction, if any, is not disclosed by the record, but the general rule, founded on common knowledge, with possibly some sporadic exceptions, must be recognized that mules do not "increase, multiply, and replenish the earth," according to the ordinary laws of procreation and the generic command. It would seem, therefore, that there can be no "increase" of the wife's separate estate, if composed solely of specific mules at the time of her marriage. In cases of other live stock, his interest, recognized by law, in the offsprings thereof, compensates the husband and the community, but the erratic mule standeth apart, "like patience on a monument, smiling at grief." It would tend to entirely destroy the corpus of the wife's estate, consisting of live personal property, to declare that an augmentation in weight or value should be deemed an "increase" of the property itself, so as to constitute a part of the community to that extent. Suppose it should decline under the ministrations of the husband, what, then, would compensate the wife? Fortunately she does not hold her separate property by so precarious a tenure as to depend upon the fluctuations of weight or the prices in the market. If she did, then the alert creditor would only need to abide his time in confidence of ultimately seizing, upon a ruthless execution, the flock, the drove, and feathered tribe of the wife. The law too closely guards "with flaming sword and cherubim" the sacred rights of the good housewife in her own "separate property" to admit of such grave consequences.

We need only to add that the use of the mules, and the products of their labor, may be supposed to compensate the community for the provender consumed, and the husband would scarcely demand any recompense for the felicity of teaching them how "to work in the traces."

We conclude that the judgment of the district court is a most righteous one, and ought to be affirmed.

STAYTON, CHIEF JUSTICE. Affirmed, as per opinion of Commission of Appeals.

Notes, Comments & Questions

1. The Texas Supreme Court in *Stringfellow v. Sorrells* declines to decide what is an "increase of the wife's lands." What do you think "an increase of the wife's lands" is?

2. Take note of the court's next to the last sentence in *Stringfellow v. Sorrells*. Think about what that sentence might foreshadow.

3. Under the Texas statutes, as interpreted by early decisions, the husband possessed sole management powers over all the marital property, including the separate property of the wife, except that the wife's joinder was required in deeds conveying real estate which was homestead or which was separate property of the wife. The husband's creditors could reach the husband's separate property, and the community property but not the wife's separate property.

4. The husband's control over the wife's separate property could easily be used to his advantage and to her ultimate disadvantage. The Texas Supreme Court expressed this concern in *De Blane*. Do you recall that argument? Another such situation arose in *Kellet v. Trice*. Keep *Kellet* in mind throughout the course, especially when the most recent amendment to TEX. CONST. art. XVI, § 15 is discussed. *See also* TEX. FAM. CODE §§ 4.201-.206.

KELLET
v.
TRICE
66 S.W. 51
(Tex. 1902)

[In *Kellet v. Trice*, husband and wife, shortly prior to divorce, joined in execution of a deed conveying separate property of the wife to a trustee "for the purpose of divesting the separate estate and title of us in and to the property (hereinafter described) in which each of us shall hereafter own . . . an equal undivided community interest. . . ."

On the following day the trustee conveyed the property to the husband as the community property of the husband and wife, through a deed containing the recital that it had been executed for the same purpose as the prior deed. In post-divorce litigation between the former husband and wife, the court held that the deeds were not effective to change the separate property of the wife to community property. The court said:]

. . . On the other hand, the policy of the law protects the wife's property from liability for her husband's debts, and she cannot make it subject to them by mere agreement not amounting to some kind of legal conveyance. *Magee v. White*, 23 Tex. 180. Her property is protected also against alienations by the husband, and she cannot, by power of attorney or other mere agreement, enable him to divest her title. *Cannon v. Boutwell*, 53 Tex. 626.

The power to convey does not, therefore, enable her to contract generally with reference to her separate property, but only to dispose, in whole or in part, of her title; and the only operation which her conveyances have is to pass such title or some interest in it. *Wadkins v. Watson*, *supra*.

The effect of her conveyances, as well as those of others, is governed by the law applicable to the existing facts under which they are made; and the case therefore resolves itself into the inquiry: Did the facts essential to make the property in question community property exist when the transaction took place; and, if not, could the husband and wife, by their mere volition, make it such in the manner attempted?

Property of husband and wife in this state gets its character as belonging separately to one of them or in common to both from the statutes defining their separate and community estates. Property which either of them owns before marriage and that which he or she acquires afterwards by gift, devise, or descent is his or her separate property. Property acquired by either after marriage otherwise than by gift, devise, or descent is their common property. By construction, property which is acquired after marriage in exchange for separate property, or which is purchased with separate funds, is held to belong to that estate which furnished the consideration. Separate property of either spouse may be conveyed to the other in such way as to become his or her separate property, and community property may be so conveyed by the husband to the wife as to make it hers separately. This is true, not because the parties chose to name the property separate, but because the facts transpire to bring it within the statutory definition; and the law, operating upon such facts, vests title in accordance with them. The act of the parties is such as the law defines as necessary to create the separate right. Therefore, the question whether particular property is separate or community must depend upon the existence or nonexistence of the facts, which, by the rules of law, give character to it, and not merely upon the stipulations of the parties that it shall belong to one class or the other. Thus, when one spouse passes to the other by gift his or her title to separate property, it could not become the community property of both, because the law declares that property so acquired shall be the separate property of the donee; and a gift by the

husband to the wife of his interest in community property would become the separate property of the donee for the same reason. And so property acquired in the name of either spouse during marriage, otherwise than by gift, devise, or descent, or in exchange for separate property, would, by force of the statute, be community property. It is true that in the acquisition or afterwards, the husband may give to the wife all his interest in the property, and thus, by gift, make it hers; but at last this would be true only because the facts defined in the law exist and the separate right is derived through a gift, the husband having full power over the community estate.

If the deeds in question were without consideration, and passed title to the husband, under these rules of law they would vest in him a separate title to the land, because it is the wife's separate title that is attempted to be conveyed, and the conveyance would be a gift. Yet the deeds in effect declare that they shall not have this, but a different, operation. The one power the wife had was to convey her title, and, by her conveyance, invest her grantee with the right conveyed. The power she tried to exercise was, by the form of a conveyance, to make a contract changing the legal character of the property. As we have seen, the power of conveying does not include the power to do any such thing. It has been held in several cases that husband and wife cannot, by their mere agreements, alter the character given to property by the law acting upon the facts under which it is acquired. *Cox v. Miller*, 54 Tex. 27; *Green v. Ferguson*, 62 Tex. 529.

The admissions made in these cases that community property in existence, or as it comes into existence, may be made the separate property of the wife by gift from the husband, are thoroughly consistent with what we have said. The gift fulfills the requirements of the law under which the title of one is transferred to the other so as to become separate. Here the attempt of the wife is to make a gift without at the same time so conveying her title as to make the gift have its proper effect.

Recurring to the principles already stated, we see that, while a married woman, through the intervention of a trustee, may give or sell her property to her husband so as to make it his and, therefore, subject to his control and to his debts, and may also mortgage it to secure his debts, the power is withheld from her, while retaining, to empower him to alienate it, or to subject it to his debts. A more effectual method of defeating the last-named restrictions could not be devised than that employed in this case if it were upheld. All the mischiefs sought to be guarded against would at once flow from such a transaction, and this shows that the objections to it are not of a merely technical character. In our opinion, such transactions have no place in our laws regulating marital rights.

A statement of the effect of a real conveyance by the wife of her separate property, through the medium of a trustee, to her husband, such as has been upheld by this court, will serve to illustrate the difference between it and the transaction in question. By such a conveyance, the wife's title, or a part of it, to the whole or a part of the property would pass to and vest in the husband, and such interest as was conveyed would become his separate property. If only a part were conveyed, the remainder would continue to be her separate property, and would be protected from her husband's debts, as well as from alienation by him. Here the wife, while she pretends to divest her whole separate title, does not convey it to her husband, but declares that the instrument shall only operate to make the property belong to the community estate, the effect of which would be to vest in her husband an interest and in herself an interest of a different character from that which she owned and pretended to convey, and to put the whole forever beyond her control, and subject to that of the husband alone. This makes it apparent that this is not really a conveyance of her title such as she could make, but only an agreement by which a change in the character of such title is attempted, without the existence of the facts necessary, under the law, to effect the change.

The wife may hold the title to community property, legally acquired, as well as the husband. If, without consideration, she and her husband should execute such an instrument to a trustee upon the

trust that he should reconvey the property to her, and should provide that it should thereby become community property, would it not be evident that the entire substance of such instruments would be the agreement to change the property from separate to community, and that in reality there would be no conveyance of her separate title? We instance a case in which there is no consideration because we do not wish to go beyond the facts of this case.

It is not necessary to hold that a married woman's separate property may not be so conveyed as to become, in law, community property. It may be that a purchase may be made of such property by the husband with community funds, so that the consideration will belong to the wife separately, and the property taking its place will belong to the community estate. If this is true, it is because the law, and not the mere agreement, would give such effect to the transaction. No such case is presented here.

The deeds are without valuable consideration. The recitals of money paid are evidently merely formal and nominal (*Lewis v. Simon*, 72 Tex. 475, 10 S.W. 554); and, besides, according to the recitals, equal sums were paid to each party, so that the wife received no more than she paid. The other recitals merely give the reasons and purposes actuating the parties and show no benefit to the wife, or detriment, disadvantage, or inconvenience to the husband whatever. The transaction, if the instrument should have effect, would operate wholly to the benefit of the husband without pecuniary consideration received by the wife.

We conclude that the transaction did not change from separate to community the property mentioned in the deeds, and this, with what we have said, answers the questions asked.

Notes, Comments & Questions

1. If spouses wanted to transform separate property into community, what were the available means in 1902?

2. Take a quick look at the Texas Family Code, *see* Appendix, and determine whether the means to transform separate property into community have been expanded.

3. If there has been an expansion of the means to transform separate property into community, when and how did such expansion occur?

---

3. Statutory Changes, 1911-1917

Between 1911 and 1921, several newly enacted statutes were intended to enlarge the rights and powers of married women with respect to marital property

Tex. Laws 1911, Ch. 52, at 92 empowered a married woman to obtain an order from the district court to remove her disabilities of coverture and to declare her feme sole for mercantile and trading purposes.

Tex. Laws 1913, Ch. 32 at 61 effected the following changes in articles 4621 and 4622 as they had existed previously:

(1) The wife acquired the power to manage her separate property, except that the joinder of the husband was required for the conveyance of real estate or the transfer of stocks and bonds.

(2) The wife acquired the power of control, management, and disposition of what was later termed the "special community property" consisting of the personal earnings of the wife, the rents from the wife's real estate, the interest on bonds and notes belonging to her and dividends on stocks owned by her.

(3) Exemption from liability for debts contracted by the husband was extended to the wife's special community property as well as to her separate property. The wife's separate property was held to be exempt from debts incurred by the husband's prior to the 1913 statute.

Tex. Laws 1915, Ch. 54, at 103 added a completely new section to the statute, which provided as follows:

All property or moneys received as compensation for personal injuries sustained by the wife shall be her separate property, except such actual and necessary expenses as may have accumulated against the husband for hospital fees, medical bills and all other expenses incident to the collection of said compensation.

Finally, Tex. Laws 1917, Ch. 194, at 436 further amended article 4621 to define rents and revenues derived from separate property of either spouse as separate property of that spouse.

The case of *Kellet v. Trice* combined with these statutory changes set the stage for *Arnold v. Leonard*.

ARNOLD
v.
LEONARD
273 S.W. 799
(Tex. 1925)

GREENWOOD, JUSTICE.

The Court of Civil Appeals states the nature and facts of this case and the question which the Supreme Court is requested to determine as follows:

The suit was brought by the appellee, Mrs. Adele E. Leonard, a married woman, joined pro forma by her husband, St. Clair Leonard, for an injunction to restrain the appellant, Gus I. Arnold, as administrator of the estate of Gus Schultz, deceased, from seizing or attempting to subject certain rents and revenues from a number of pieces of real estate in the city of Galveston, all being the separate estate of the wife, Mrs. Adele E. Leonard, to the payment of a judgment owned and held by the appellant against St. Clair Leonard, the husband.

The facts alleged in the bill for injunction were agreed to be true by both parties to the suit, and showed, as recited, that all the real property involved is owned by Mrs. Adele E. Leonard, the wife, as her separate estate; that the judgment held and owned by the appellant in his capacity as administrator of the estate of Schultz was against the husband, St. Clair Leonard, and represented a community indebtedness; that in these circumstances the administrator was seeking, by threatening the issuance of writs of garnishment on the judgment against various renters and tenants of Mrs. Leonard's separate real estate, to subject the rents and revenues thereof to the payment of this judgment.

The appellant in the trial court answered the petition and prayer for an injunction with a special exception to the effect that it appeared from the allegations of the petition itself that the rent and revenues, the collection of which was so sought to be enjoined, constituted the community estate of Mrs. Adele E. Leonard and her husband, St. Clair Leonard, and by virtue of the Constitution of Texas, Article 16, § 15, the rents and revenues of the separate estate of the wife are community property and subject to the debts of the husband, and that Article 4621, Chapter 3, Title, 68, of the Revised Statutes of Texas of 1911, and the amendment thereof by the act of the regular session of the Thirty-Seventh Legislature, Chapter 130, Section 1, which undertakes to declare the rents and revenues of the wife's separate real property to be her separate estate, is contrary to the terms of the Constitution referred to, and is therefore void.

The trial court overruled the special exception of the appellant and granted the injunction prayed for by the appellees, restraining the appellant from in any manner undertaking to have the rents and revenues from the separate real property of the appellee, Mrs. Adele E. Leonard, applied to the liquidation of the judgment so held against her husband, holding that the rents and revenues of her separate estate constituted her separate property and were beyond the reach of a creditor of the community estate of the husband and wife.

It being obvious that the sole question involved in the case is as to the constitutionality of said Revised Statutes, Article 4621, because of the importance of the question and of some doubt entertained by different members of this court as to the correctness of the trial court's determination of it, we deem it advisable to certify for your decision the following question:

> Is the act of the Legislature above stated, which declares the rents and revenues of the wife's separate real property to be her separate estate, violative of Article 16, Section 15, of our State Constitution? In this connection we call attention to the case of *Rudasill v. Rudasill*, 219 S.W. 843.

* * *

Section 15 of Article XVI of the Constitution declares:

> All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.

This section is found, without a single word changed, in the Constitutions of 1845, 1861, and 1866. Section 19, Article VII, Constitutions of 1845, 1861, and 1866; Vol. IV, SAYLES' TEXAS STATUTES, pages 209, 246, 321.

* * *

The plain and obvious import of the language of the Constitution is to prescribe a test by which to determine when an acquest by the wife becomes a portion of the wife's separate estate. The test during coverture relates to the method by which the property is acquired. If the method be by gift, devise, or descent to the wife, then the Constitution makes the property belong to the wife's separate estate. If the method of acquiring during marriage be different, then the property falls without the class of separate estate of the wife, as fixed by the Constitution. We think the Supreme Court was doing no more than giving effect to the words of the Constitution when it said, through CHIEF JUSTICE WILLIE, "But of the property which a wife may acquire during marriage, none becomes her separate estate except such as is derived by gift, devise or descent." *Ezell v. Dodson*, 60 Tex. 332.

We have no doubt that the people in adopting the Constitution in 1845, as in 1876, understood that it was intended to put the matter of the classes of property constituting the wife's separate estate beyond legislative control. Thereby both the wife and the husband were given constitutional guaranty of the status of all property derived by means of or through the wife. Our duty is plain to give effect to the people's will. COOLEY'S CONSTITUTIONAL LIMITATIONS (7th Ed.) p. 89.

It is a rule of construction of constitutions that ordinarily, when the circumstances are specified under which any right is to be acquired, there is an implied prohibition against the legislative power to either add to or withdraw from the circumstances specified. *Koy v. Schneider*, 110 Tex. 378, 218 S.W. 479, 221 S.W. 880; *Dickson v. Strickland* (Tex. Sup.) 265 S.W. 1015; *Ex parte Vallandigham*, 1 Wall. 252, 17 L.Ed. 589; COOLEY'S CONSTITUTIONAL LIMITATIONS, p. 99; 6 R.C.L. § 43. Hence, when the Constitution says that as to property, not owned or claimed by the wife at marriage, it becomes her separate property when acquired in one of three specified modes, the Legislature is prohibited from saying that property acquired after marriage in some other mode may also become the wife's separate property.

The rule of implied exclusion is no more binding in construing statutes than in interpreting constitutions. In *Howard v. York*, 20 Tex. 672, in an opinion of Judge Roberts, it is said that for the Legislature to preserve to the wife's separate property increase of land and slaves "impliedly negatives the idea that the increase of any other property becomes separate property."

Had it been the purpose of the Constitution to empower the Legislature to add to the wife's separate property, it is hardly to be doubted that the power would have been conferred, when the framers of the Constitution were expressly authorizing the enactment of laws to more clearly define the rights of the wife in relation to both her separate property and community property.

* * *

Since rents and revenues derived from the wife's separate lands are entirely without the constitutional definition of the wife's separate property, and since the Legislature can neither enlarge nor diminish such property, it follows that the portions of the Acts of 1917 and 1921, which undertake to make rents and revenues from the wife's separate lands a part of her separate estate, are invalid.

* * *

By an Act approved March 21, 1913, it was provided that "neither the separate property of the wife, nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings shall be subject to the payment of debts contracted by the husband;" and the act committed the classes of property enumerated as exempt from payment of the husband's debts to "the control, management, and disposition of the wife alone," provided the joinder of the husband was necessary in an incumbrance or conveyance of the wife's separate lands, and in a transfer of her stocks and bonds, unless she was authorized to act alone by an order of the District Court, and provided that the husband and wife must join in a conveyance of the homestead. The Acts of 1917 and 1921 retain each and all of the above provisions of the Act of 1913.

There can be no doubt that the Act of 1913 left the rents and revenues of the wife's separate lands assets of the community estate. *Red River Nat'l. Bank v. Ferguson*, 109 Tex. 290, 206 S.W. 923; *Whitney Hardware Co. v. McMahan*, 111 Tex. 245, 231 S.W. 694; *Scott v. Scott* 170 S.W. 273; *Tannehill v. Tannehill* 171 S.W. 1051. Nor can there be any doubt that the act of 1913 and the subsequent acts intended to exempt rents of the wife's separate lands from payment of a community debt contracted by the husband. The provision of the Acts of 1917 and 1921, declaring the exemption, is separate and distinct from the portions of the Acts undertaking to change the ownership of rents and

revenues from the wife's separate lands. Hence such provision might be operative in each Act despite failure of the purpose to make the rents separate property of the wife. *Western Union Tel. Co. v. State*, 62 Tex. 633.

The Supreme Court of the United States upholds the validity of legislation conferring on the wife not only the right to manage but the right to dispose of community property, so long as the husband's interest attaches to the proceeds of such property.

Speaking through CHIEF JUSTICE WHITE, the Court states its conclusions as follows:

> The Legislature could as well have provided that the wife could convey, as the husband; and if it had power to say that either could dispose of the community interest of the other, it could say that neither could do so. Changing the manner of conveyance did not alter the status of ownership. It could not make the interest of either spouse in community lands greater or less.
>
> * * *
>
> It is a misconception of that system to suppose that because power was vested in the husband to dispose of the community acquired during marriage, as if it were his own, therefore by law the community property belonged solely to the husband. The conferring on the husband the legal agency to administer and dispose of the property involved no negation of the community, since the common ownership would attach to the result of the sale of the property. *Warburton v. White*, 176 U.S. 484, 20 S. Ct. 404, 44 L. Ed. 555.

To the same effect is *Arnett v. Reade*, 220 U.S. 318 to 320, 31 S. Ct. 425, 55 L. Ed. 477, 36 L.R.A. (N.S.) 1040.

These conclusions harmonize with the conceptions underlying the Texas decisions that the wife's capacity to own and hold property is as complete as that of the husband; that each marital partner owns an estate in the community property equal to that of the other partner; and that statutes empowering the husband to manage the wife's separate lands and community assets make the husband essentially a trustee, accountable as such to the separate estate of the wife, or to the community. *Edrington v. Mayfield*, 5 Tex. 366 to 368; SPEER'S LAW OF MARITAL RIGHTS IN TEXAS, § 296*; Richardson v. Hutchins*, 68 Tex. 89, 3 S.W. 276; *Dority v. Dority*, 96 Tex. 224 to 226, 71 S.W. 950, 60 L.R.A. 941; *Waggoner Bank & Trust Co. v. Warren*, 111 Tex. 322, 234 S.W. 387.

We see no escape from the deduction that if the Legislature may rightfully place such portions of the community as it may deem best under the wife's separate control and make same subject to disposition by her alone, it may likewise exempt the same from payment of the husband's debts, without the exemption being open to successful constitutional attack by either the husband or his creditors.

* * *

The sum of our conclusions is: The Legislature, in defining the wife's rights in and to her separate property and property held in common with her husband, could lawfully deprive the husband of the power granted him for many years to manage and control the wife's separate property and portions of the community property which were derived from use of the wife's separate property or from her personal exertions, and could confide the management, control, and disposition thereof to the wife alone, and could exempt, not only her separate property, but said portions of the community from payment of the husband's debts. In making this grant of enlarged rights to the wife and working the corresponding diminution in rights to be exercised by the husband, the Legislature was lawfully defining the wife's rights in both her separate estate and common property, as expressly authorized by the Constitution. But the Legislature could not divest the husband of all interest in and to property which, under

the Constitution, was guaranteed either to the community or to the husband's separate estate, and use the same to enlarge the wife's separate estate beyond its constitutional limits.

We, therefore, answer to the certified questions that so much of the Act of 1917 and of the Act of 1921 as undertook to declare the rents and revenues of the wife's separate realty to be her separate estate was violative of Section 15, of Article XVI, and of Section 35, of Article III of the Constitution, but that the provisions of said Acts, and of the prior Act of 1913, are valid, which render the rents and revenues of the wife's separate lands free from liability to forced sale for the payment of debts contracted by the husband.

Questions

1. What rule arises from *Arnold v. Leonard*?
2. In what way does this case comport with *Kellet v. Trice*?
3. What if Madame De Blane's case had been heard concurrently with *Arnold v. Leonard*?
4. Why is the limit on legislative power irrelevant to the outcome of *Arnold v. Leonard*?
5. What would be the only means to accomplish the change attempted by the Legislature, but disallowed by the Texas Supreme Court in *Arnold v. Leonard*?

NORTHERN TEXAS TRACTION CO.
v.
HILL
297 S.W. 778
(Tex. Civ. App.—El Paso 1927, writ ref'd)

PELPHREY, CHIEF JUSTICE.

Appellee, joined by her husband, T.A. Lambert, originally filed this suit in the Sixty-Eighth district court of Dallas county, Tex., against appellant. She thereafter, under the name of Mrs. Nettie Hill (joined by her husband, R.H. Hill), filed her second amended original petition.

She alleged in said amended petition that at the time of the original filing of the suit she was the wife of T.A. Lambert, but that since said filing she had been divorced from said Lambert and had married R.H. Hill, who was joined as plaintiff.

Appellee alleged that on or about October 24, 1923, appellant owned, operated, and controlled a system of interurban electric railway extending from the city of Dallas to the city of Fort Worth; that on said date while riding in an automobile driven by her then husband, T.A. Lambert, an interurban car, owned and operated by appellant, collided with said automobile, and as a result of such collision appellee suffered certain injuries.

Appellee more particularly alleged that appellant was guilty of negligence per se in that it had failed to keep the crossing in the condition required by the ordinances of the city of Dallas, and that the motorman failed and neglected to warn appellee as the ordinances required, and that the motorman failed to keep a proper lookout for vehicles approaching the crossing where the accident occurred.

Appellant answered by general demurrer, special exceptions to appellee's petition, general denial, and contributory negligence on the part of appellee and her then husband, T.A. Lambert. Appellee filed a supplemental petition containing special exceptions and a general denial. The case was tried before a jury, and resulted in a verdict in favor of appellee for $7,500. From a judgment on said verdict the Northern Texas Traction Company has appealed to this court.

Appellant bases its appeal on 34 separate propositions, all of which we deem it unnecessary to discuss.

Appellant specially excepted in its first amended original answer to appellee's petition because T.A. Lambert, who was the husband of the appellee at the time of the accident, was not made a party plaintiff. This exception was by the court overruled, and appellant assigns error thereto. We agree with appellant in its contention and hold that T.A. Lambert was a necessary party plaintiff, and that appellant's exception should have been sustained.

The right to sue for damages for a tort is a choice in action and property, within the legal sense of that term. *Ezell v. Dodson*, 60 Tex. 331; 2 BISHOP ON MARRIED WOMEN, art 271; SPEER ON LAW OF MARRIED WOMEN, art 193. The right to sue, being property in the legal sense of the term, was the community property of appellee and T.A. Lambert, unless by law it is made her separate property.

Article 4615, Revised Statutes of 1925, reads as follows:

> All property or moneys received as compensation for personal injuries sustained by the wife shall be her separate property, except such actual and necessary expenses as may have accumulated against the husband for hospital fees, medical bills, and all other expenses incident to the collection of said compensation.

It is contended by appellant that this statement is in contravention of article 16, § 15, of the Constitution, and in support of its contention cites a decision of our Supreme Court in the case of *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799.

The constitutional provision is as follows:

> All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.

As said by the court in *Arnold v. Leonard*, *supra*:

> But the Legislature could not divest the husband of all interest in and to property which under the Constitution, was guaranteed either to the community or to the husband's separate estate and use the same to enlarge the wife's separate estate beyond its constitutional limits.
>
> It is a rule of construction of Constitutions that ordinarily when the circumstances are specified under which any right is to be acquired there is an implied prohibition against legislative power to either add to or withdraw from the circumstances specified. *Koy v. Schneider*, 110 Tex. 378, 218 S.W. 479, 221 S.W. 880; *Dickson v. Strickland*, 114 Tex. 176, 265 S.W. 1015; *Ex parte [Vallandigham] Vallandigham*, 1 Wall 252 [17 L. Ed. 589]; COOLEY'S CONSTITUTIONAL LIMITATIONS, p. 99; 6 R.C.L. § 43. Hence, when the Constitution says that as to property, not owned or claimed by the wife at marriage, it becomes her separate property when acquired in one of three specified modes, the Legislature is prohibited from saying that

property acquired after marriage in some other mode may also become the wife's separate property."

The court held in the above-cited case the acts of the Legislature, which undertook to make the rents and revenues from the wife's separate bonds a part of her separate property, invalid.

We think the same reasoning applies in the present case, and hold article 4615, R.S. 1925, to be unconstitutional. Article 4619, Revised Statutes 1925, reads as follows:

"All property acquired by either the husband or wife during marriage, except that which is the separate property of either, shall be deemed the common property of the husband and wife, and during coverture may be disposed of by the husband only.

By this article the cause of action, not being the separate property of either, became the community property of T.A. Lambert and appellee, vesting in each a half interest therein. *Fort Worth & R.G. Ry. Co. v. Robertson*, 55 Tex. Civ. App. 309, 121 S.W. 202; *Id*., 103 Tex. 504, 121 S.W. 202, Ann. Cas. 1913A. 231, Judge Dunklin so held in construing a similar statute in a dissenting opinion in the above case, and the Supreme Court agreed with his opinion in 103 Tex. 504, 131 S.W. 400, Ann. Cas. 1913A, 231. Therefore T.A. Lambert, having a half interest in the right of action, was necessary party plaintiff. Appellant pleaded contributory negligence on the part of T.A. Lambert, and appellee in her supplemental petition specially excepted to said plea on the ground that the negligence of the husband is not imputable to the wife.

This exception was by the court sustained, and appellant assigns error to the court's action. If we are correct in our conclusion that the right of action was the community property of T.A. Lambert and appellee, then we must also conclude that the negligence of Lambert, if he was negligent, would be a defense to this action, for to hold otherwise would be to allow him to recover regardless of his own negligence. As was said by the Supreme Court in *Gulf C.& S. R. Ry. Co. v. James S. Greenlee et ux*., 62 Tex. 344:

Under the circumstances of this case it is quite clear that Mrs. Greenlee might well rely upon the prudence and caution of her husband in making the approach to, as well as crossing, the railroad. The correlative of the proposition is also true, that she would be bound by his negligence or want of due care.

See also Mo. Pacific Ry. Co. v. White, 80 Tex. 202 15 S.W. 808.

* * *

In our opinion, it is unnecessary to discuss the other assignments.

The judgment of the trial court is reversed and the cause remanded.

Notes, Comments & Questions

1. *Northern Texas Traction* is not the end of the road on the characterization of personal injury damages. After reading *Graham v. Franco*, consider whether the holding in *Northern Texas Traction* would be sustained under that later analysis.

2. Was the doctrine of implied exclusion properly applied in *Northern Texas Traction*? Come back to this question after you read *Graham v. Franco*.

3. The doctrine of implied exclusion, as explained in *Arnold v. Leonard*, continued to be utilized in response to attempts by private parties to change the character of property or acquire separate property by means not recognized in TEX. CONST. art. XVI § 15.

(a) In *Gorman v. Gause*, 56 S.W.2d 855 (Tex. Comm. App. 1933, judgment adopted) the court applied the doctrine of implied exclusion to a prenuptial agreement (or postnuptial, as the date executed was disputed). The agreement in *Gorman* declared that no property acquired during the marriage would be community. The court viewed this agreement as an attempt by the parties to fix the character of marital property by means different from that recognized in the state constitution, holding the agreement to be void and unenforceable. The court, depending upon *Arnold v. Leonard*, reasoned:

> [I]f the legislature is powerless to enact a law enlarging the wife's separate estate beyond its constitutional limits, it is clear that . . . such enlargement [cannot be] accomplished by mere agreement of the parties made in contemplation of marriage.

(b) In *Strickland v. Wester*, 112 S.W. 2d 1047 (Tex. 1938), the court held that a deed executed by a husband conveying property to his wife was effective as a gift. Prior to reaching this result, the court disposed of another contention of counsel, saying:

> According to the testimony of Mrs. Wester, she purchased this lot from her husband with money which she had earned as a school teacher. She had been teaching 27 years at the date of the trial, and many years ago she and her husband, who was also a teacher during his lifetime, entered into an agreement that her personal earnings should be her separate property. That agreement was not valid, for the community property law cannot be changed by contract.

c) In *King v. Bruce*, 201 S.W. 2d 803 (Tex. 1947), a husband and wife attempted to partition their community property into the separate property of each via an elaborate series of transactions. The court held the couple's attempt ineffective, as it was not recognized by the Texas Constitution as a means of acquiring separate property.

According to some authorities, *King v. Bruce* gave rise to TEX. CONST. art. XVI § 15 (1948) which finally enlarged the rights of spouses to partition and exchange their community property to create separate property.

4. Although the doctrine of implied exclusion and the analysis resting thereon are still used today, the impact is weakened as will be demonstrated in *Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972).

5. What license have you seen, thus far, taken with the separate property parameters established by the Texas Constitution?

C. The Constitution as Amended in 1948

1. Article XVI § 15 as effective 1948-1980

TEX. CONST. art. XVI, § 15 (1948)

§ 15. Separate and Community Property of Husband and Wife

> All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of the wife; and laws shall be passed more clearly defining the rights of the wife, in relation as

well to her separate property as that held in common with her husband; provided that husband and wife, without prejudice to pre-existing creditors, may from time to time by written instrument as if the wife were a feme sole partition between themselves in severalty or into equal undivided interests all or any part of their existing community property, or exchange between themselves the community interest of one spouse in any property for the community interest of the other spouse in other community property, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property of such spouse.

This Amendment is self-operative, but laws may properly be passed prescribing requirements as to the form and manner of execution of such instruments, and providing for their recordation, and for such other reasonable requirements not inconsistent herewith as the Legislature may from time to time consider proper with relation to the subject of this Amendment. Should the Legislature pass an Act dealing with the subject of this Amendment and prescribing requirements as to the form and manner of the execution of such instruments and providing for their recordation and other reasonable requirements not inconsistent herewith and anticipatory hereto, such Act shall not be invalid by reason of its anticipatory character and shall take effect just as though this Constitutional Amendment was in effect when the Act was passed.

Notes, Comments & Questions

1. By what two means may spouses create separate property?

2. Explain the difference between those means.

3. How are creditors protected?

4. Although the right to partition or exchange community property has been expanded in the most recent versions of the Texas Constitution, the strictness with which the courts met initial efforts to partition and exchange cannot be ignored. As you read the following notes and cases, be mindful of the precise application of the Constitutional requirements by the Texas courts.

2. Statutes and Decisions, 1948-1967

In the classic case of *Hilley v. Hilley*, 342 S.W. 2d 565 (Tex. 1961), the court held that community property could not be used to create a joint tenancy with right of survivorship between the spouses. Such a transaction was not an interspousal gift, but was an attempt to transfer a survivorship right or interest in community property between the spouses for a valuable consideration. Because consideration paid by each spouse is derived from the community estate, the right or interest which each acquired would remain part of the community estate. Thus, the court held that the attempted transaction did not comport with the constitutional requisites and that the property remained community property. The court pointed out, however, that the spouses could make an effective survivorship agreement with reference to separate property owned by either or both. Six years later, after section 46 of the Probate Code had been amended, *Hilley* was followed in *Williams v. McKnight*, 402 S.W. 2d 505 (Tex. 1966).

As we will see, per a 1987 amendment to the Texas Constitution which was effective January 1, 1988, spouses are now allowed to agree that all or part of their community property will become the

separate property of the surviving spouse on the death of the other spouse. Tex. Const. art. XVI, §15. Today, the two step process of partition and then establishment of a joint tenancy with right of survivorship is not needed. The Texas Supreme Court has recently made this clear in *Holmes v. Beatty*, 290 S.W. 3d 852 (Tex. 2009) which will be considered, in depth, later in the course. *Hilley v. Hilley, Williams v. McKnight*, and their progeny are the most important cases of the period following the 1948 amendment to the Texas Constitution. In 1948, spouses were given the right to create separate property by partition or exchange. This new right to create separate property was taken too far by the legislature and spouses who overstepped constitutional boundaries, bypassing partition or exchange, in an attempt to create separate property. The cases that follow are relevant not only for an understanding of the evolution of Texas marital property law, but also because they exemplify the strict interpretation of Tex. Const. art. XVI, §15. These cases can be used to persuade a court that, historically, a liberal interpretation of Tex. Const. art. XVI, §15 has been rejected and that a strict interpretation has, historically, been utilized and should continue to be so used.

Notes, Comments & Questions

1. In *Davis v. East Texas Sav. & Loan Ass'n*, 354 S.W.2d 926 (Tex. 1962), the court held that the spouses could utilize separate property to create a valid joint tenancy with right of survivorship, with the spouses as joint tenants. In *Krueger v. Williams*, 359 S.W.2d 48 (Tex. 1962), the court held that a spouse, utilizing community property, could create a valid joint tenancy with right of survivorship with the spouse and a third party as joint tenants.

2. Much later, *Williams v. McKnight* was followed in *Maples v. Nimitz*, 615 S.W.2d 690 (Tex. 1981) which confirmed that a two-step process was required to establish a joint tenancy with right of survivorship from community property. That is, there must first be a partition of the community property into separate property of the wife and the husband and then, second, a joint tenancy with right of survivorship can be created.

3. Perhaps the most strict application of the constitutional partition requisites can be found more recently in *Jameson v. Bain*, 693 S.W.2d 676 (Tex. App.—San Antonio 1985, no writ). In this case, the partition/joint tenancy card was signed in the wrong order; that is, the spouses did not *first* partition the property, but rather, did so *after* creating a joint tenancy. The attempt was not successful, even under the 1980 amendments to the Constitution. Today, spouses can by written agreement provide that all or part of their community estate becomes the property of the surviving spouse on the death of a spouse.

3. Statutes and Decisions, 1968-1980

This section begins with *Few v. Charter Oak Fire Ins. Co.*, where attorney for an injured wife took the bold step of suing for worker's compensation damages in wife's own name. What is of interest here is the balance between rules of procedure and statutes, as well as the basic rights of management and control that are finally being extended to women. At first glance, the next case of *Graham v. Franco* appears to be simply a case characterizing personal injury damages sought by wife. However, the more important aspect of the case is the court's determination of whether a statute that characterizes personal injury recoveries as separate property is constitutional, especially in light of earlier case law, including *Arnold v. Leonard*. The historical and constitutional underpinnings of the opinion cannot be ignored. This section culminates with *Williams v. Williams*, a premarital agreement opinion out

of the Texas Supreme Court that reiterates the importance of complying with TEX. CONST. art. XVI, §15. This principle endures today even though TEX. CONST. art. XVI, §15 has been greatly expanded. Do not consider *Williams* to be simply a homestead case; rather it is a case in which only the homestead clause of the premarital agreement was upheld because the remainder was found to be unconstitutional. The analysis of the Texas Supreme Court provides a template for future cases.

FEW
v.
CHARTER OAK FIRE INS. CO.
463 S.W.2d 424
(Tex. 1971)

POPE, JUSTICE.

Mary Frances Few, joining her husband pro forma, sued Charter Oak Fire Insurance Company for total and permanent incapacity suffered in the course of her employment with Safeway Grocery in Mineola, Texas. The trial court awarded judgment for the plaintiffs, naming both Mary Frances and her husband in the judgment. The court of civil appeals, with a divided court, reversed the judgment for plaintiffs and remanded the cause for re-trial, holding that the husband was an indispensable party and that he was not joined as a real party.

* * *

Mary Frances Few and her husband, Milburn Few, had been married for many years prior to her accident on June 20, 1968, and they are still married. For this reason her workmen's compensation award was their community property. *Pickens v. Pickens*, 125 Tex. 410, 83 S.W.2d 951, 953 (1935). Community ownership may also be called a joint ownership. *Dillard v. Dillard*, 341 S.W.2d 668 (Tex. Civ. App.1961, writ ref. n.r.e.); *Hitchcock v. Cassel*, 275 S.W.2d 205 (Tex. Civ. App.1955, writ ref. n.r.e.). Rule 39, Texas Rules of Civil Procedure, as it was worded at the time of the trial,[2] provided that persons having a joint interest shall be made parties. It was this rule which prompted the court of civil appeals to hold that the wife's husband was an indispensable party. The court relied upon our recent opinion in *Petroleum Anchor Equipment Co., Inc. v. Tyra*, 406 S.W.2d 891, 892-893 (Tex. 1966), in which we applied Rule 39. In that case we held that persons who hold a joint interest shall or must be made parties and are indispensable parties.

If only Rule 39 were involved in the case before us, our decision would be controlled by our earlier decision in *Petroleum Anchor*. However, we are now faced with two relevant statutes enacted by the legislature. Article V, Sec. 25, of the Texas Constitution, VERNON'S ANN. ST. vests in the Supreme Court the power to establish rules of procedure "not inconsistent with the law of the State." Legislative authority for this power is found in Article 1731a, Sec. 2. Rule 39 was established pursuant to this power. As the constitutional provision indicates, this is a limited power; and when a rule of the court conflicts with a legislative enactment, the rule must yield. *Missouri, K. & T.R. Co. v. Beasley*, 106 Tex. 160, 155 S.W. 183 (1913), *rehearing denied*, 106 Tex. 160, 160 S.W. 471.

Articles 4621 and 4626 are the statutes which control this case. Enacted by the 60th Legislature and effective January 1, 1968, they provided:

---

[2] The rule was changed, effective January 1, 1971.

Art. 4621.

* * *

During marriage each spouse shall have sole management, control and disposition of that community property which he or she would have owned if a single person, including (but not limited to) his or her personal earnings, the revenues from his or her separate property, the recoveries for personal injuries awarded to him or her, and the increase, mutations and revenues of all property subject to his or her sole management, control and disposition; the earnings of an unemancipated minor are subject to the management, control and disposition of the parents or parent having custody of the minor; if community property subject to the sole management, control and disposition of one spouse is mixed or combined with community property subject to the sole management, control and disposition of the other spouse, the mixed or combined community property is subject to the joint management, control and disposition of the spouses unless the spouses otherwise provide; any other community property is subject to the joint management, control, and disposition of the husband and wife.

Art. 4626.

* * *

A spouse may sue and be sued without the joinder of the other spouse. When claims or liabilities are joint and several, the spouses may be joined under the rules relating to joinder of parties generally.

Articles 4621 and 4626 were designed to correct an anomalous situation concerning the rights of a Texas wife. Almost from the beginning of Texas history, the right of a wife to own property has been recognized, but it has taken more than a century to give the wife managerial powers over that which she owns.

The Constitution of 1836 recognized the community property system of Mexico and Spain and on January 20, 1840, the Fourth Congress of the Republic determined to follow that system in matters of marital property. 2 GAMMEL LAWS OF TEXAS 177-178 (1840). The system has proved to be much fairer in its recognition of the wife's rights of ownership than that afforded her by the common law. 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, Sec. 3 (1943).

The common law had visited upon a wife an intolerable state of civil disability both in owning and managing property. As expressed by Vaughn, that system "suspended the wife's legal existence during the marriage, or at least consolidated it into that of the husband." Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 Bay. L. Rev. 20, 48-49 (1967). At common law, the husband and wife were one, and the husband was that one. *Murphy v. Coffey*, 33 Tex. 508 (1870). The woman's legal existence, according to BLACKSTONE, was merged into that of her husband, "under whose wing, protection, and cover, she performs everything; and is therefore called in our law—French, a feme covert, and is said to be under the protection and influence of her husband, her baron, or lord, and her condition during her marriage is called her coverture.

* * *

If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name, as well as her own."

* * *

ERLICH'S BLACKSTONE, pp. 83, 84 (1959).

The Republic treated the wife's right to manage her property differently from her right to own that property. The same act of the Fourth Congress which recognized the community property system of ownership, took from the wife any powers to manage what she owned and gave the sole management of the wife's property to the husband. 2 GAMMEL, LAWS OF TEXAS 178 (1840). It has been the law of Texas for more than a century that, except in limited situations, only the husband could bring suit for community recoveries arising out of a wife's loss of earning capacity. *Roberts v. Magnolia Petroleum Co*., 142 S.W.2d 315 (Tex. Civ. App. 1940, writ ref., (135 Tex. 289, 143 S.W.2d 79)); *Loper v. Western U. Teleg. Co*., 70 Tex. 689, 8 S.W. 600 (1888); *Gallagher v. Bowie*, 66 Tex. 265, 17 S.W. 407 (1886); *Ezell v. Dodson*, 60 Tex. 331 (1883); *Murphy v. Coffey*, *supra*; *Firence Footwear Co. v. Campbell*, 406 S.W.2d 516, 411 S.W.2d 636 (Tex. Civ. App. 1967, writ ref. n.r.e.); *Urban v. Field*, 137 S.W.2d 137 (Tex. Civ. App. 1940, no writ).

Seventy years ago Judge Ocie Speer deplored the situation which recognized the wife's equality of ownership, yet denied that equality with respect to a wife's management of what she owned. He wrote:

> The foolish fiction that her existence is merged in that of her husband has given way to the more enlightened recognition of her identity as an individual, and her consequent capacity to own property, to make contracts, and to sue and be sued. Yet, as though fearing serious consequences of much moment, it has not altogether removed her fetters, but is slowly, yet surely, tending, through the course of legislative acts and judicial interpretations, toward the enlargement of her rights and powers, which will in time culminate in a proper recognition of all her civil rights. SPEER, THE LAW OF MARRIED WOMEN IN TEXAS, § 25 (1901).

Efforts to rectify the wife's inferior legal powers as the manager of her property have been infrequent; and over-broad corrective legislation changing the definition of community property has been stricken down on constitutional grounds. *See* Huie, § 11, *Commentary-Community Property Law*, 13 VERNON'S TEX. STATS., p. 39; *Northern Texas Traction Co. v. Hill*, 297 S.W. 778 (Tex. Civ. App.1927, writ ref.).

The disabilities of coverture remained as a remnant of the common law until 1967. During the intervening years, the wife in fact was still covert; her husband was still lord and baron. The 60th Legislature, in enacting Articles 4621 and 4626, avoided the constitutional difficulties arising from an attempt to modify legislatively the constitutional definition of community property. These statutes leave undisturbed the definition of community property, but more clearly define the managerial rights of each spouse. Article 4621 gave the injured spouse powers to manage that community which she would have owned if a single person, including recoveries for personal injuries. Article 4626 authorized the wife to sue without joining her husband, but it also provided that in the case of joint and several claims, the spouses "may be joined under the rules relating to joinder of parties generally."

Charter Oak argues that Rule 39(a) is the rule of joinder to which Article 4626 referred in its phrase "under the rules relating to the joinder of parties generally." However, the statute, unlike Rule 39(a) is permissive in terms. It is our opinion that the legislature, in using permissive terms, was recognizing that while the spouses' ownership interest in certain property may be joint, the managerial interest in the same property would be several. The legislature surely did not intend by the use of the phrase "may be joined" in Article 4626 to take away the sole managerial authority which it had just established in Article 4621. In terms of the facts presently before us, Mr. Few would be a proper party to the suit because of his ownership interest in the workmen's compensation benefit. However, he was not an indispensable party in view of his wife's sole managerial interest in the benefit. *See*, 23 S.W.L.J. 55 (1969); 22 S.W. L.J. 132 (1968). We hold that Mary Frances Few properly sued without

joining her husband for the recovery of workmen's compensation benefits arising out of her own injury.

* * *

Notes, Comments & Questions

1. Why was the worker's compensation claim summarily characterized as community property?
2. Is there a general rule of legal analysis that emerges from this case?
3. Review TEX. FAM. CODE § 3.001(3).

GRAHAM
v.
FRANCO
488 S.W.2d 390
(Tex. 1972)

GREENHILL, CHIEF JUSTICE.

The writ of error was granted in this case to pass upon the constitutionality of a statute which provides: "The recovery awarded for personal injuries sustained by either spouse during marriage shall be the separate property of that spouse except for any recovery for loss of earning capacity during marriage." We hold that the statute, as construed, is constitutional. We also hold that the acts of negligence of the husband as found by the jury are not imputed to the wife so as to bar her recovery.

This action arises out of a rear end collision. The car in which the plaintiffs, Mr. and Mrs. Franco, were riding was struck from the rear at night by a truck owned by Bill Graham and driven by Roosevelt Tillis. The Francos testified that Mr. Franco was driving down the right side of the highway with lights burning. As to the rear lights, the testimony was that they had recently been checked and found to be in good order. The truck driver testified that the Franco car was stopped on the highway with its lights off.

The jury found that the truck driver was negligent in failing to keep a proper lookout. It also found that the acts of Mr. Franco in stopping his car on the highway and in having the car upon the highway without a rear light burning constituted negligence. Each of such acts was found to be a proximate cause. There were no allegations or findings that the wife, Mrs. Franco, was guilty of negligence in any respect.

The jury found that Mr. Franco's damages were "zero." It also found that Mrs. Franco's medical expenses were $2,212.92; but her damages, resulting from the occurrence in question, were likewise found to be "zero." The trial court entered judgment for the defendants.

As to Mr. Franco, the Court of Civil Appeals affirmed. His contributory negligence was held to have barred his recovery, and the question of his damages became immaterial. As to Mrs. Franco, that court reversed and remanded for a new trial. It found that the answer to the damages issue of "zero" was against the great weight and preponderance of the evidence. It recited, among other things, that she was in the hospital for 13 days, several of which were in intensive care.

The Character of Recovery for Personal Injury

The Court of Civil Appeals, in holding the statute constitutional, held that a wife would be entitled to recover, as her separate property, damages for injury to her body, including disfigurement, loss or impairment of the use of the body, and physical pain and suffering, both past and present. It excluded from her separate recovery loss of earnings, medical expenses, and "all other damages." These latter items were held to be recoverable by the community of the husband and wife.

In arriving at a proper solution of this problem, it is necessary to begin with law as it existed at the time of the adoption of our Texas constitutions and to ascertain the purpose of those portions of the constitutions which provide for the separate and community estates. Generally speaking, our civil procedure and our rules of necessary parties were adopted from the English; but the substantive rights of the spouses in separate and community property were taken from Spain and Mexico. In England, the spouses were one; and generally, the husband was dominant. He generally controlled the property of the wife and most litigation. He, at least, was generally a necessary party.

The problem in this litigation begins with the early Texas case of *Ezell v. Dodson*, 60 Tex. 331 (1883). The court had before it the right of a wife to sue alone for her personal injuries growing out of an assault. The defendant filed exceptions on the ground that the husband was a necessary party. The wife refused to amend, and the trial court dismissed her suit. This Court affirmed. We have examined the transcript in that case, and the only question was one of necessary parties. The character of the recovery, if any, whether separate or community, was not at issue. Nevertheless, by dictum, the court added that the assault and battery upon the wife gave rise to a chose in action; that the chose in action was property; and since it was acquired after marriage and not by way of gift, devise or descent, it would be community property. Thus the dictum was that an injury to the wife constitutes an asset or claim of the community estate.

The holding of *Ezell* was correct on the parties question as the law then existed. But we are of the opinion that its dictum was wrong for the reasons set out below and as ably discussed by Dean Leon Green in his analysis of the Texas Death Act in 26 Texas Law Review 461 at 466 et seq.

After *Ezell*, the question as to the character of the recovery for personal injuries, whether separate or community, was not examined in depth. The courts simply followed the dictum of *Ezell*.

The basic question is the interpretation of Section 15 of Article 16 of the Texas Constitution. With the key words underscored by us, it provides:

> All *property*, both real and personal, of the wife, *owned* or claimed by her before marriage, and that *acquired* afterward by gift, devise or descent, shall be the separate property of the wife; . . .

This Court in *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925), held unconstitutional a statute which attempted to declare as separate property the rents and revenues from the wife's separate realty. The holding of that case is so limited; and in view of the history of our community property system and laws, it was a correct decision. The language of the opinion, however, is broad. The reasoning of the court in *Arnold v. Leonard*, and of cases following it, is one of implied exclusion; i.e., if property was acquired during marriage by any other means than gift, devise, or descent, it was and is necessarily community.

A much later case of this Court reverted to a test more akin to that prevailing under the Spanish and Mexican law, and several early opinions of this Court, dealing with community property. It applied an affirmative test; i.e., that property is community which is acquired by the work, efforts or labor of the spouses or their agents, as income from their property, or as a gift to the community. Such

property, acquired by the joint efforts of the spouses, was regarded as acquired by "onerous title" and belonged to the community. *Norris v. Vaughan*, 152 Tex. 491, 260 S.W.2d 676 (1953); *De Blane v. Lynch*, 23 Tex. 25 (1859); *Smith v. Strahan*, 16 Tex. 314 (1856); *Epperson v. Jones*, 65 Tex. 425 (1886); DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY (1971) § 62; MOYNIHAN, COMMUNITY PROPERTY, 2 AMERICAN LAW OF PROPERTY (1952) § 7.16. Under this reasoning, it is clear that the personal injuries to the wife are not "acquired" by the efforts of the spouses and would not belong to the community. Thus in *Norris v. Vaughan*, *supra*, JUSTICE SMITH wrote for this Court that:

> The principle which lies at the foundation of the whole system of community property is, that whatever is acquired by the joint efforts of the husband and wife, shall be their common property.

It is not necessary, however, to here make a decision on the correctness or applicability of *Norris v. Vaughan* and related cases and the concept of "onerous title."

The dictum of *Ezell* reasoned, as indicated, that if the wife were injured after marriage, this created a chose in action; that a chose in action [a cause of action for personal injuries] was property; that this property (chose in action) was acquired after marriage; and since it was not acquired by gift, devise or descent, it belonged to the community.

There is a large body of law, including cases by this Court, that a chose in action (a cause of action) for injuries to the *person* (as contrasted to injuries to *property*) was not regarded as *property* at the time of the adoption of our constitution. . . .

* * *

The *Ezell* opinion cites two authorities for the proposition that a chose in action for personal injuries is property: 2 BISHOP ON MARRIED WOMEN § 271, and C.*B. & Q. RR. Co. v. Dunn*, 52 Ill. 260 (1869). Bishop does not say that a chose in action for personal injuries is *property*. It says only that "the right to sue for a tort which one has suffered is a chose in action," and that after marriage the suit must be brought in the joint names of the husband and wife,—the *procedural* point before the *Ezell* court. Bishop continues, "But where the injury is in whole or in part to the wife, the right to sue for the injury to her is her postnuptial chose in action."

The other authority cited in *Ezell*, the *Dunn* opinion by the Illinois court, is one based on the construction of the intent of the Illinois Legislature in enacting a statute to change the common law. That opinion demonstrated that the Illinois Legislature intended that the cause of action for damages arising out of personal injuries should become *property*. Moreover, contrary to *Ezell*, the Illinois court said that it was *the wife's property*:

> Who is the natural owner of the right? Not the husband, because the injury did not accrue to him; it was wholly personal to the wife. It was her body that was bruised; it was she who suffered the agonizing mental and physical pain. 52 Ill. at 264.

Assuming that a chose in action arising out of a personal injury to a spouse is, or created, "property," the character of the "property" was personal to the one spouse injured at common law.

MCKAY, in his work on COMMUNITY PROPERTY cited above, says, at page 269, that in a personal injury, the right violated is to personal security; that no right is more intensely separate than this; and that the violator of this separate right gives rise to a separate cause of action. "This right belonged to the wife at common law, and so did the cause of action for its violation. There has never been any mistake about this in the common law authorities . . . ."

Similarly under Spanish law, an injury to the wife gave rise to rights in *her*, for her separate estate, not to the community. . . .

* * *

It was also recognized at the time of the adoption of our various constitutions including that of 1876, that as to property which was exchanged for other property, and damages which were awarded to the separate property of a spouse, the recovery would be separate in character. *Love v. Robertson*, 7 Tex. 6 (1851); *Rose v. Houston*, 11 Tex. 324 (1854); *Chapman v. Allen*, 15 Tex. 278 (1855); *Cleveland v. Cole*, 65 Tex. 402 (1886); *San Antonio & A.P. Ry. Co. v. Flato*, 13 Tex. Civ. App. 214, 35 S.W. 859 (1896).

Under this line of authorities, able scholars have reasoned that the body of the wife brought into the marriage was peculiarly her own; and that if any "property" was involved in a personal injury to the wife, it was peculiarly hers. If her house, her separate property, were set afire and destroyed by a third person, the recovery should be her separate property. If an automobile were owned by the wife before marriage and was injured or destroyed, the recovery should go to repay the loss or damage to her separate property. So, the reasoning continues, if the arm of the wife is cut off, the recovery for the loss because of disfigurement and for the attendant pain and suffering should go to the wife. The reasoning is that the recovery is a replacement, in so far as practicable, and not the "acquisition" of an asset by the community estate. *See* Huie, *Definition of Wife's Separate Property*, 35 TEXAS LAW REVIEW 1054 at 1061 (1957); McKnight, *Personal Injury as Separate Property*, 3 TRIAL LAWYERS FORUM 7 (1968); McKnight, *Matrimonial Property*, 26 SOUTHWESTERN LAW JOURNAL 31 at 36 (1972); McSwain, *The New Marital Property Statutes*, 2 FAMILY LAW NEWSLETTER (STATE BAR OF TEXAS), number 3 (1968).

Other noted writers outside of Texas agree with Dean Green that the *Ezell* dictum and cases following it are incorrectly decided. Green, *The Texas Death Act*, 26 TEXAS LAW REVIEW 461 at 466 et seq.; MOYNIHAN, 2 AMERICAN LAW OF PROPERTY (1952) § 7.16; MCKAY, LAW OF COMMUNITY PROPERTY §§ 182, 184, and 378. In Section 398, MCKAY concludes,

> But neither at common law or by the law of community does he [the husband] hold the wife's right to personal security and should not be permitted to recover for the violation of this right. It does not belong to him nor to the community. The wife's physical pain and suffering are not his loss nor the loss of the community.

In the light of the foregoing, it is our conclusion that, in adopting the provisions of Section 15 of Article 16 of our constitution, the people did not intend to change the common law or the Spanish law under which Texas operated so as to make a cause of action for injuries to the wife an asset of the community. A personal injury, and the chose in action created, was not "property" at common law as then understood, and it was not property "acquired" by any community effort. If it was "property" under the common law, the Spanish law, or the Texas law, its character was separate, or personal, to the wife. In using the word "property," the framers of the constitution apparently had in mind property which could be given, bought and sold, and passed by will or by inheritance. A chose in action, or cause of action, arising out of injury to the wife was none of these. So, as stated, the dictum of *Ezell v. Dodson* was in error, and it still is. Granted our great reluctance to disapprove or overrule decisions in the field of property, or in the field of contracts upon which people deliberately rely, we consider it our particular duty to follow the constitution and to right the wrongs especially where the Legislature has felt strongly enough about it to take the action it has. This Court has, in the past, corrected the dictum of its previous decisions when the dictum was wrong. *Valmont Plantations v. State of Texas*, 163 Tex. 381, 355 S.W.2d 502 (1962). We have also overruled opinions where we regard them as erroneous.

Watkins v. Southcrest Baptist Church, 399 S.W.2d 530 at 535 (Tex. 1966), and *Howle v. Camp Amon Carter*, 470 S.W.2d 629 at 630 (Tex. 1971). The dictum of *Ezell v. Dodson* is therefore overruled.

Most of the opinions of this Court dealing with injuries to the wife after *Ezell* were, like *Ezell*, concerned with procedural matters, mainly the question of who could or should, or should not, bring the suit. The merits of the question of the character of the recovery, whether separate or community, apparently were not re-examined. *Texas Central Ry. Co. v. Burnett*, 61 Tex. 638 (1884); *G.C. & S.F. Ry. v. Greenlee*, 62 Tex. 344 (1884); *Missouri Pacific Ry. Co. v. White*, 80 Tex. 202, 15 S.W. 808 (1891). These and other opinions are likewise overruled to the extent that they conflict with this opinion.

The Legislature in 1915 attempted to change the rule by a statute which was too broad. That statute was carried forward in the Revised Statutes of Texas of 1925 as Article 4615. It provided, in effect, that *all* recovery by the wife for personal injuries, except medical expenses, should be her separate property. This included loss of earnings which under common law and community property concepts at the time of the adoption of our constitution were community. The earnings of the spouses were funds acquired by the efforts of a spouse which have been considered part of the community of the spouses. That statute and the drafting of its successor are analyzed by Joseph W. McKnight in his article, *Personal Injury as Separate Property*, 3 TRIAL LAWYERS FORUM 7 (1968).

A court of civil appeals held that the above statute was unconstitutional. *Northern Texas Traction Co. v. Hill*, 297 S.W. 778 (Tex. Civ. App. 1927, writ refused). Because the statute classified all recovery, including personal earnings, to be separate, it was a correct decision as above indicated. But the court in the *Hill* case wrote too broadly and cited only the dictum of *Ezell v. Dodson* for its broad language. To the extent that the holding of the Northern Texas Traction Co. case conflicts with this opinion, it is overruled.

Our holding is that, independent of the statute involved, recovery for personal injuries to the body of the wife, including disfigurement and physical pain and suffering, past and future, is separate property of the wife. And, of course, a statute which provides that such recovery shall be the separate property of the wife is constitutional.

Recovery for Medical Expenses and Loss of Earning Capacity

Though there is room for a difference of opinion, our research indicates that the recovery for medical and related expenses is for the community. The reasoning has been that it is the burden of the community to pay these expenses. MOYNIHAN in 2 AMERICAN LAW OF COMMUNITY PROPERTY (1952) says at page 160:

> Although it would on principle seem the sounder view that damages recovered for pain, suffering and bodily disfigurement are the separate property of the injured spouse, it does not follow that all elements of damage for personal injury are properly classified as separate property. Damages for impairment of earning capacity and consequential damages in the nature of medical, hospital and nursing expenses are properly recoverable for the community.

DE FUNIAK writes in Section 82 of PRINCIPLES OF COMMUNITY PROPERTY, that while recovery for injuries to the spouse should be separate, the rule is different for other elements of recovery:

> But on the other hand, if injury deprives the marital community of the earnings or services of the spouse, that is an injury to the marital community; likewise there is loss to the community

> where the community funds are expended for hospital and medical expenses. . . .[1] If the wife is contributing earnings to the marital community, any injury interrupting or lowering those earnings is equally, as in the case of the husband, an injury to the community. . . .

He also states that:

> The earning capacity, as such, would presumably be translated into earnings during the marriage, which would be community property.

To the extent that the marital partnership has incurred medical or other expenses and has lost wages, both spouses have been damaged by the injury to the spouse; and both spouses have a claim against the wrongdoer. The recovery, therefore, is community in character. This Court has held, however, that the wife could bring suit alone for medical services. *Few v. Charter Oak Fire Ins. Co*., 463 S.W.2d 424 (1971).

Contributory Negligence of Husband

The Texas cases which have denied the wife a recovery for her personal injuries have for their basis the reasoning that, following *Ezell*, the recovery would be community property. Since the husband was negligent, he should not be permitted to recover for his own wrong; and since the husband shares in a recovery for the community property, there should be no recovery. Dean Page Keeton, in analyzing the holdings in the early cases, writes that, "it might be said that contributory negligence is a bar, not because it is unjust to hold the defendant but because it is unjust for the negligent plaintiff [the husband] to benefit from his own wrong." And "it is for this reason that the Texas courts . . . will not allow an injured spouse to recover for personal injuries, where the other spouse contributes to produce the injuries by negligent conduct." Keeton, *Imputed Contributory Negligence*, 13 TEXAS LAW REVIEW 161 at 177 and 179 (1935). This reasoning is spelled out in *Northern Texas Traction Co. v. Hill*, 297 S.W. 778 (Tex. Civ. App. 1927, writ refused) where the court pointed out that the husband had a "half interest" in the cause of action. Hence his contributory negligence would be a defense, "for to hold otherwise would be to allow him to recover regardless of his own negligence." 297 S.W. at 780.

In other situations, our decisions have not denied a wife to recover where the husband has been guilty of wrongdoing. Thus in *Nickerson v. Nickerson*, 65 Tex. 281 (1886), the husband and a third party had the wife wrongfully imprisoned. It was argued that she should not be permitted to recover from the third person because the recovery would be community, and hence the husband would profit from his own wrong. Before the case came to trial, there was a divorce. Contrary to the dictum of *Ezell* and in line with the other authorities cited above, this Court held:

> . . . like other choses in action (for injuries to the person) not reduced to possession during the coverture, the sum recovered would be her separate estate. 65 Tex. at 283.

In any event, the reason for the rule that the negligence of the husband should be imputed to the wife (that he would profit from his own wrong) falls where the recovery for her injuries is her separate property. We have held that such recovery is her separate property, and the recovery will not be to him or the community. Therefore, the contributory negligence of the husband does not bar the recovery by the wife. Cases which have followed the dictum of *Ezell* and have used the community property defense ("imputed negligence") are therefore wrong and should be overruled. Accordingly, the language in *Missouri Pacific Ry. Co. v. White*, 80 Tex. 202, 15 S.W. 808 (an adopted opinion by the Commission of Appeals, 1891), and the holding of *Dallas Railway & Terminal Company v. High*, 129 Tex. 219, 103 S.W.2d 735 (1937), and cases following them such as *Northern Texas Traction Co.* re-

[1] We do not have before us, and express no opinion upon a situation which might show that the medical expenses were paid from the separate funds of the injured spouse.

ferred to above, are overruled in so far as they conflict with this opinion. In the case at bar, the only acts of contributory negligence pleaded, submitted, and found were those of Mr. Franco. Mrs. Franco is therefore not barred from those items for which she may recover, set out above.

Where, as in the case of medical expenses and lost earnings, the recovery would be community, the contributory negligence of the husband must be attributed to the marital community so far as affects any right of action on behalf of the marital community. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY (1971) § 83.

Other points are brought forward which include questions dealing with the admissibility of evidence dealing with contributory negligence, or not, of the husband in stopping his car upon the highway without proper lights burning. We have examined all the points, and we are in substantial agreement with their handling by the Court of Civil Appeals. They are overruled.

The opinion and judgment of the Court of Civil Appeals was that the part of the judgment of the trial court which denied a recovery to the husband was affirmed; but as to the wife, that court reversed the judgment of the trial court and remanded the cause for a new trial. The effect of the judgment of the Court of Civil Appeals was to sever the cause of action of the wife for such damages as she may be entitled to recover, but its judgment did not so provide. We order such a severance. Accordingly, the judgment of the Court of Civil Appeals is reformed to provide for a severance; and as reformed, it is affirmed.

Notes, Comments & Questions

1. Did *Graham v. Franco* change the law regarding characterization of personal injury damages?

2. Does *Graham v. Franco* skirt implied exclusion?

3. Note the discussion in *Graham v. Franco* of the respective doctrines of implied exclusion and of onerous title. How does the court limit the doctrine of implied exclusion? Consider these doctrines when reading the cases that follow such as *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977) and *Williams v. Williams*, 569 S.W.2d 867 (Tex. 1978), *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982), *infra*, and *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984), *infra;* all appear to be influenced by the doctrine of onerous title.

4. *Graham v. Franco* was followed in *Southwestern Bell Telephone Co. v. Thomas*, 554 S.W.2d 672 (Tex. 1977), where the trial court had rendered judgment for the plaintiffs, Mr. and Mrs. Thomas, for damages sustained when a car driven by Mr. Thomas in which Mrs. Thomas was a passenger had been struck from the rear by a truck owned by Southwestern Bell. The Court of Civil Appeals had affirmed, but the Supreme Court reversed and remanded the case as to personal injuries of Mr. Thomas and as to past and future medical expenses of Mr. and Mrs. Thomas, because of the failure of the trial court to submit the issue of contributory negligence, and said:

> Mrs. Thomas' recovery of damages for personal injuries is not barred by contributory negligence on Mr. Thomas's part. *Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972). Her claim for personal injuries is severed, and the judgments below are in that regard affirmed.

5. In *Schwing v. Bluebonnet Express, Inc.*, 489 S.W.2d 279 (Tex. 1973), the court held that in a wrongful death action for the death of a wife, contributory negligence of the husband would be imputed to bar the husband's cause of action, but that it would not serve as a bar to the cause of action of the children. Although the accident occurred in 1964, prior to enactment of the Matrimonial Property Act

of 1967 and prior to the decision in *Graham v. Franco*, the court pointed out that the decision in *Franco* did not turn on provisions of the statute but rested on constitutional grounds.

6. The case of *Graham v. Franco* opened the door for personal injury actions and recoveries to be considered marital property, giving rise to a need to characterize as separate or community property. Other characterization of personal injury cases will be considered within Chapter 2.

7. In *Graham v. Franco*, were medical expenses characterized?

8. Identify other damages which might be recovered in a personal injury case. How might those damages be characterized?

WILLIAMS
v.
WILLIAMS
569 S.W.2d 867
(Tex. 1978)

MCGEE, JUSTICE.

The question presented by this cause is whether a premarital agreement to waive the constitutional and statutory rights of a surviving spouse to a homestead and other exempt property is valid. The trial court held such an agreement to be valid. The court of civil appeals reversed the judgment. 548 S.W.2d 492. We reverse the judgment of the court of civil appeals and affirm that of the trial court.

William Wesley Williams, Sr., and Mildred Disch Lawrence were married on September 9, 1973. Both parties had children by previous marriages and both brought substantial property into this marriage. Four days before their marriage, the parties executed a premarital agreement. The basic agreement containing the provisions relative to the waiver of the homestead right and right to have exempt property set aside to the survivor provided:

> "Whereas the parties desire that all property now owned or hereafter acquired by each of them shall, for testamentary disposition, be free from any claim of the other that may arise by reason of their contemplated marriage, "It is therefore agreed:
>
> "1. Property to be separately owned. After the solemnization of the marriage between the parties, each of them shall separately retain all rights in his or her own property, whether now owned or hereafter acquired, and each of them shall have the absolute and unrestricted right to dispose of such separate property, free from any claim that may be made by the other by reason of their marriage, and with the same effect as if no marriage had been consummated between them."

A supplemental agreement was simultaneously executed and incorporated into the basic agreement. It disclosed the properties that each spouse would bring into the marriage, set forth certain guidelines concerning living and other incidental expenses to be incurred during the marriage, and further provided:

> "5. All income from the separate estate of each party, including dividends, interest, rents and salaries, and any increases, sales proceeds, reinvestments or changes in said separate estate, shall remain under control of the party receiving the same and shall be deposited in such

party's separate account. It is the intent of the parties that such income, except for the personal living expenses hereinabove set forth, shall remain the separate property of each party."

The marriage lasted but 141 days. Shortly after the parties were married, Mr. Williams became ill and died on January 29, 1974. He died testate and his sole devisees were his children, William Wesley Williams, Jr. and Geneva W. Canion, who are the petitioners in this cause. Approximately one year after the death of their father, and relying on the executed premarital agreement, they requested possession of the residence, the household furnishings therein, and a 1971 Chrysler automobile. It is undisputed that the property sought had been the separate property of the deceased and had been devised to the petitioners. Mildred Williams refused to abide by the premarital agreement, choosing instead to claim her rights as a surviving spouse. TEX. CONST. art. XVI, § 52; TEX. PROB. CODE ANN. §§ 271, 272, 284 (1956).

As a result of Mrs. Williams' refusal to vacate the property, the children filed this suit for declaratory judgment. The case was withdrawn from the jury and the trial court rendered judgment in favor of the children. The trial court held that the portion of the premarital agreement by which Mrs. Williams relinquished her constitutional and statutory rights to the homestead was valid and binding on her. The court then ruled that the agreement was void to the extent that it provided that income or other property acquired during marriage should be the separate property of the party who earned or whose property produced such income or acquisition. But the trial court held that the valid and void provisions of the agreement were severable and ordered that the children recover possession of the residence, all personal property belonging to their father at the time of his death, and the Chrysler automobile.

Article XVI, section 52 of the Texas Constitution provides that the homestead shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead.[1] This is sometimes referred to as the probate homestead. O. SPEER, TEXAS FAMILY LAW § 36:62, at 208 (5th ed. 1977). This homestead right of the survivor has been held to be one in the nature of a legal life estate or life estate created by operation of law. *See Sparks v. Robertson*, 203 S.W.2d 622 (Tex. Civ. App.—Austin 1947, writ ref'd); *White v. Blackman*, 168 S.W.2d 531 (Tex. Civ. App.—Texarkana 1942, writ ref'd w.o.m.); *Petrus v. Cage Bros*., 128 S.W.2d 537 (Tex. Civ. App.—San Antonio 1939, writ ref'd); Comment, *The Widow's Exemption in Texas*, 25 BAYLOR L. REV. 346, 347 (1973). The Probate Code requires that the probate homestead and certain exempt personal property[2] be set aside to the surviving spouse. TEX. PROB. CODE ANN. §§ 271, 272, 283, 284 (1956). These rights are provided by law for the protection of the family and to secure a home for the surviving spouse. Therefore, we must decide whether these rights may be waived by a premarital agreement.

The statutory authorization for premarital agreements in Texas is section 5.41 of the Family Code.[3] This statute should be construed as broadly as possible in order to allow the parties as much

---

[1] TEX. CONST. art. XVI, § 52 reads as follows:

"On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same."

[2] TEX. REV. CIV. STAT. ANN. art. 3836 (Supp. 1976-77).

[3] TEX. FAMILY CODE ANN. § 5.41 (1975) provides in pertinent part:

flexibility to contract with respect to property or other rights incident to the marriage, provided the constitutional and statutory definitions of separate and community property or the requirements of public policy are not violated. *See generally* O. SPEER, TEXAS FAMILY LAW § 16:5, at 192 (5th ed. 1976); McKnight, *Commentary to the Texas Family Code*, Title 1, 5 TEX. TECH. L. REV. 281, 374-76 (1974).

Mrs. Williams argues that the policy of the law favoring the security of the widow by preventing an improvident relinquishment of the homestead, or other similar rights, is paramount to the policy of the law favoring flexibility in premarital agreements. Decisions from Kansas and North Dakota support this view. . . . The weight of authority and the better rule, however, allows the premarital waiver of these rights. . . . (cites omitted)

Furthermore, the premarital agreement in question does not violate the public policy of this state. The parties to the agreement were mature individuals. There was no suggestion of fraud, overreaching, or a lack of understanding. Full disclosure was made of the nature and extent of the property interests involved. Both parties had substantial separate property which they desired to preserve for themselves. There were no interests of any minor children to protect. Viewing this agreement in light of these facts and circumstances, as well as the underlying purpose of the transaction, we are of the opinion that neither party would be adversely affected by the premarital agreement.

Mrs. Williams also contends that article XVI, section 52 of the Texas Constitution, in effect, prohibits the premarital agreement now before us. This contention, however, is based on an incorrect interpretation of section 52. While a "surviving" spouse is granted the right to occupy the homestead by section 52, such language is not to be construed as a constitutional prohibition to a waiver of that right by prospective spouses. Therefore, we hold that Mrs. Williams waived her rights to the probate homestead and exempt property by the premarital agreement in question.

The trial court correctly concluded that the agreement was void to the extent that income or other property acquired during marriage should be the separate property of the party who earned or whose property produced such income or acquisition. Such provisions were no more than a mere agreement between the parties to establish the character of the property prior to its acquisition during marriage in violation of both the Texas Constitution and the Family Code, TEX. CONST. art. XVI, § 15; TEX. FAMILY CODE ANN. § 5.01 (1975); s*ee Gorman v. Gause*, 56 S.W.2d 855 (Tex. Comm'n App.1933, jdmt. adopted); *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925); *Hilley v. Hilley*, 161 Tex. 569, 342 S.W.2d 565 (1961). Mrs. Williams contends that the entire agreement is vitiated by these void provisions. On the assumption that the provisions in question constituted part of the consideration for the agreement, she asserts that when a contract is based upon several considerations, one or more of which is illegal, then the entire contract is void. *Edwards County v. Jennings*, 89 Tex. 618, 35 S.W. 1053 (1806); *Patrizi v. McAninch*, 153 Tex. 389, 269 S.W.2d 343 (1954). We disagree.

We are of the opinion that the agreement here is controlled instead by the rule that where the consideration for the agreement is valid, an agreement containing more than one promise is not necessarily rendered invalid by the illegality of one of the promises. In such a case, the invalid provisions may be severed and the valid portions of the agreement upheld provided the invalid provision does not constitute the main or essential purpose of the agreement. *See Wicks v. Comves*, 110 Tex. 532, 221 S.W. 938 (1920); *C.C. Slaughter Cattle Co. v. Potter County*, 235 S.W. 295 (Tex. Civ. App.—Amarillo 1921), *aff'd*, 254 S.W. 775 (Tex. Comm'n App.1923, jdmt. adopted); *cf. Smith v. Morton Independent*

"(a) Before marriage, persons intending to marry may enter into a marital property agreement as they may desire.

"(b) The agreement must be in writing and subscribed by all the parties."

School District, 85 S.W.2d 853 (Tex. Civ. App.—Amarillo 1935, writ dism'd). *See also* 6A A. CORBIN, CONTRACTS § 1521 (1962); J. CALAMARI & J. PERILLO, CONTRACTS § 22-4 (2d ed. 1977); 17 AM. JUR. 2D, *Contracts* § 230 (1964). Mutual promises to marry, subsequently performed, provide valid consideration for the premarital agreement in question. The invalid provisions of the agreement are only a part of the many reciprocal promises in the agreement concerning the rights of the parties to the marriage. Moreover, they did not constitute the main or essential purpose of the agreement. Therefore, we hold that the trial court was correct in severing the invalid provisions from the premarital agreement and enforcing the valid provisions regarding Mrs. Williams' waiver of her rights as a surviving spouse to the homestead and other exempt property.

Accordingly, we reverse the judgment of the court of civil appeals and affirm that of the trial court.

CHADICK, JUSTICE, dissenting.

I respectfully dissent. I would affirm the judgment of the court of civil appeals.

* * *

The homestead laws are designed to protect the stability and welfare of the state. *Andrews v. Security Nat'l Bank*, 121 Tex. 409, 50 S.W.2d 253, 256 (1932); *Black v. Rockmore*, 50 Tex. 88, 96 (1878); 2 G. THOMPSON, REAL PROPERTY, § 970 (2d ed. 1939). By protecting citizens against being driven from their homes, there is some measure of protection against their becoming dependent on the state for housing. Moreover, the protection of the home is intended to encourage citizens to contribute as productive members of society. TEX. CONST. ANN. art. XVI, § 50, comment (Vernon 1955); W. NUNN, TEXAS HOMESTEAD AND OTHER EXEMPTIONS, § 2 (1931); 2 G. THOMPSON, REAL PROPERTY, § 1970 (2d ed. 1939). The Constitution's protection of the family has been expanded by a judicial history of liberal construction which effectuates the homestead law's beneficial purpose, "in accord with the humane principles and wise governmental policy upon which all homestead laws rest." *Woods v. Alvarado State Bank*, 118 Tex. 586, 19 S.W.2d 35, 38 (1929). The homestead law "is entitled to the most liberal construction for the accomplishment of its objects." *Trawick v. Harris*, 8 Tex. 312, 316 (1852).

* * *

III.

Despite the constitutional protection that Texas has historically given the probate homestead, the majority holds that the right may be waived by antenuptial agreement. Even if that is true, nowhere in the present antenuptial agreement is the homestead right expressly mentioned or specifically waived. The agreement contains only the general language that each spouse's separate property shall be "free from any claim" by the other spouse that may arise as a result of the marriage. It must be in this general language, if at all, that the majority finds waiver of the homestead right.

* * *

The antenuptial agreement in the present case fails to adequately identify the probate homestead or to clearly show that Mrs. Williams was waiving her right to it. Waiver should not be enforced against her.

I would affirm the judgment of the court of civil appeals.

STEAKLEY and POPE, JJ., join in this dissent.

Notes, Comments & Questions

1. After *Williams*, what appears to be the only provision which might be included in a premarital agreement?

2. What are the means by which spouses might change the character of property?

3. How about future spouses?

4. *Williams*, coupled with the desire of the general public, yielded an amendment to the Texas Constitution in 1980. Can you surmise what that amendment might be?

5. At the same time that the courts and the legislature were dealing with matters of marital property, the very atmosphere was changing with regard to the rights of women. The stage was set for some big changes, as evidenced by the passage of the Equal Rights Amendment.

The TEX. CONST. art. I, § 3a passed in 1972 provides as follows:

> Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.

Although the Equal Rights Amendment does not deal specifically with the definition of separate property, its influence can be observed in the 1980 amendment to the Constitution in which separate property is no longer defined solely in terms of the wife; rather, it is defined in relation to both spouses.

The Equal Rights Amendment also influenced statutes. For example, TEX. FAM. CODE § 2.501 extended the duty to support to both spouses. *See also* TEX. FAM. CODE §§ 6.501, 6.502.

Case law has also embraced the Equal Rights Amendment beginning with dictum in *Felsenthal v. McMillan*, 493 S.W.2d 729 (Tex. 1973), indicating that if the question had been raised, the court would have recognized the existence of a cause of action by the wife for the tort of criminal conversation, corresponding to the husband's cause of action existing at common law. The tort of criminal conversation was abolished in Texas by legislation in 1975, when § 1.106 was added to the Family Code.

In *Vick v. Pioneer Oil Co.*, 569 S.W.2d 631 (Tex. Civ. App.—Amarillo 1978, no writ), the court held TEX. REV. CIV. STAT. ANN. art. 5172a § 4, providing overtime pay to women, to be unconstitutional under the Equal Rights Amendment. The court also found that the statute violated the Equal Employment Act, 42 U.S.C. § 2000e-2(a) because it favored one sex in employment practices.

Likewise, the Texas Equal Rights Amendment affected long held preferences that were based on gender in paternity and custody litigation. For example, In re *J.W.T.*, 872 S.W.2d 189 (Tex. 1994) established that a biological father has a constitutional right to establish paternity even though the mother and the presumed father—the husband—object. Also, the "tender years doctrine," which historically gave preference to a mother in custody litigation, would be violative of the Equal Rights Amendment to the Texas Constitution. *See Dennis v. Smith*, 962 S.W.2d 67 (Tex. App.—Houston [1st Dist.] 1997, writ denied). *See also* the decisions recognizing the wife's derivative cause of action for loss of consortium, *Whittlesey v. Miller*, 572 S.W.2d 665 (Tex. 1978); *Reed Tool Co. v. Copelin*, 610 S.W.2d 736 (Tex. 1980); *Minyard Food Stores v. Newman*, 612 S.W.2d 198 (Tex. 1980).

In a related area of the law, the United States Supreme Court held in *Orr v. Orr*, 440 U.S. 268 (1979), that an Alabama statute which provided for the award of alimony to wives, but not to hus-

bands, was unconstitutional. During that same year, the Texas Family Code was amended to authorize the award of temporary support during the pendency of divorce proceedings to husbands as well as wives.

It is clear that today's Supreme Court would hold unconstitutional, as a denial of equal protection, the Texas statutes as they existed prior to 1968, giving the husband sole management powers over the community property. *See Kirchberg v. Feenstra*, 450 U.S. 455 (1981). Presumably, the provisions of the present Family Code relating to management of community property would be held valid under the criteria applied in *Kirchberg*.

6. A review of the principles surrounding interspousal transfers is probably prudent at this point.

Either spouse may make a gift to the other spouse of his separate property or of his interest in community property. The property gifted becomes the separate property of the donee spouse. As to gifts of separate property, *see Bishop v. Bishop*, 359 S.W.2d 869 (Tex. 1962); *Dyer v. Dyer*, 616 S.W.2d 663 (Tex. Civ. App.—Corpus Christi 1981, writ dism'd). As to gifts of community property, *see Story v. Marshall*, 24 Tex. 306 (1859); *Parson v. United States*, 460 F.2d 228 (5th Cir. 1972); *Wyly v. Commissioner*, 610 F.2d 1282 (5th Cir.1980). *See also* TEX. CONST. art. XVI § 15 as it exists today.

Whether a gift has been made is a question of fact to be answered by the fact finder, be it judge or jury. The facts must support that a gift has been made. *See Bishop v. Bishop*, 359 S.W.2d 869 (Tex. 1963); *Daubert v. United States*, 533 F. Supp. 66 (W.D. Tex. 1981); *Akin v. Akin*, 649 S.W.2d 700 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.).

Moreover, while property purchased by the community estate from the separate estate of a spouse for a valuable consideration is community property, it is not possible for a gift to be made to the community estate, because of the constitutional definition. *Kellet v. Trice*, 66 S.W. 51 (Tex. 1902); *Tittle v. Tittle*, 220 S.W.2d 637 (Tex. 1949); *McLemore v. McLemore*, 641 S.W.2d 395 (Tex. App.—Tyler 1982, no writ).

7. The issue of gifts led probate attorneys to be concerned about the 1948 version of TEX. CONST. art. XVI, § 15. Under the 1948 amendment, if a spouse gifted to the other spouse an income producing asset, the income produced was characterized as community property by operation of Texas law. Accordingly, the gifting spouse retained an interest in that community income, even though the underlying asset was now the other spouse's separate property.

The Commissioner of Internal Revenue, citing 26 U.S.C. § 2036 (a)(1) and abandoning 30 years of practice based on the dicta found in *Commissioner v. Estate of Hinds*, 180 F.2d 930 (5th Cir. 1950), took the position that the donor spouse had retained an interest in the gifted property and that half of the gifted asset and half of the income should be reported in the donor spouse's estate tax return. The Commissioner's position was tested in *Estate of Wyly v. Commissioner*, 610 F.2d 1282 (5th Cir 1980). The Commissioner failed. The Fifth Circuit, Justice Garza writing for the majority, explained:

> . . . it is our conclusion that § 2036(a)(1) does not sweep the value of these transfers into the donor's gross estate. To summarize our review of federal and state law, we have held that the donor's community property interest in the income produced by these transferred properties is so limited, contingent, and expectant that it does not amount to a "right to the income," within the Act as defined by *United States v. Byrum*, *supra*. The interest is neither "significant," or "substantial" as the Supreme Court and this Court have called for in *United States v. Estate of Grace* and *In Re Estate of Lumpkin*, *supra*, and is therefore not subject to estate tax under this section. We have further held that the interest arises Only by operation of a mandatory defini-

tion contained in the Texas constitution which spouses may not circumvent, and that thus it is neither "retained" within the meaning of the Act, nor arisen "under" the transfers concerned.

8. The position that the Commissioner was taking in *Wyly* concerned probate attorneys who had planned numerous estates with the idea of eliminating assets from one spouse's estate by gifting them to the other. The probate bar did not wait for *Wyly* to be decided. Rather, they supported a constitutional amendment, approved by the voters, and which is now found in the 1980 amendment. Can you identify that portion of the amendment in the current TEX. CONST. art. XVI, §15?

D. The Constitution as Amended in 1980, 1987 and 1999

1. The Current Constitutional Provision

The current version of TEX. CONST. art. XVI, § 15 is set forth below. The numbers within brackets are not found in the official version and have been added so each of the clauses may be easily referenced.

> TEX. CONST. art. XVI, § 15. Separate and Community Property of Husband and Wife.
>
> [1] All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; [2] and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property, provided that persons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any other community property then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse; [3] and the spouses may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned by one of them, or which thereafter might be acquired, shall be the separate property of that spouse; [4] and if one spouse makes a gift of property to the other that gift is presumed to include all the income or property which might arise from that gift of property; [5] and spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse; [6] and spouses may agree in writing that all or part of the separate property owned by either or both of them shall be the spouses' community property.

Clauses 1-4, as amended Nov. 4, 1980, effective November 25, 1980. Clause 5 passed by voters on November 3, 1987, effective January 1, 1988. Clause 6 passed by voters of November 2, 1999, effective January 1, 2000.

Mastery of this constitutional provision, knowing how and when it is applied, is basic to understanding and successfully completing the study of Texas marital property law. For a deeper under-

standing of Texas Marital property law, this version of TEX. CONST. art. XVI, § 15 should be compared and contrasted to previous versions. The clauses are analyzed below.

Clause 1 - Separate Property Defined.

The first clause does nothing more than reiterate the definition of separate property that has been Texas law since before the Civil War. Today, however, the gender neutral term spouse, rather than wife, is used. As before, it is provided that all property owned or claimed before marriage or that acquired afterward by gift, devise or descent is the separate property of the owning or claiming spouse. Since 1866 the legislature has had the power to pass laws more clearly defining those rights - this would include rights of management and liability. *See Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925). The remaining clauses give to the spouses, and in some instances future spouses, the expanded power to change the character of property.

Clause 2 - Partition and Exchange Extended to Spouses & Future Spouses.

The second clause provides that spouses and future spouses may partition *or* exchange their property that is existing or that will be acquired in the future; the property partitioned or exchanged will become the separate property of the spouses. This second clause extends to future spouses and to property to be acquired in the future. Is this a change from the 1948 version that allowed partition or exchange of property? How so?

This clause allows for a partition and exchange to take place prior to the marriage. It is not enough that those about to marry, future spouses, merely agree that their property will be separate property, there must be an actual partition or exchange.

For example, if one spouse or future spouse has a separate property bank account that earns interest (community property) and the other has a separate property stock account that throws off dividends (community property), they may keep the rights in and to those accounts plus all interest or dividends separate *if* there is an exchange of such rights with the other spouse or future spouse. There is no requirement that the exchange be equal. However, if the future spouses had merely agreed (not exchanged) that all increases would be and remain the owning spouse's separate property, it is unlikely that such would withstand a constitutional challenge.

Spouses and future spouses may even exchange rights in and to their salaries so that their respective salaries become their separate property.

A partition is generally used when there is existing property or an identifiable account and the parties partition it into equal undivided interests or into specifically described portions.

This second clause of the constitution can only be utilized if there is no intent to defraud pre-existing creditors. If future spouses or spouses have pre-existing creditors and make an exchange or partition with the intent to defraud such creditors, the agreement will come into question and may be held ineffective. Is this a change from the 1948 version?

Clause 3 - Agreements are Limited to Spouses and Income Producing Property.

The third clause provides that *spouses* may from time to time, by written instrument, agree between themselves that the income from property from all or part of the separate property then owned or which thereafter might be acquired by one of them, shall be the separate property of the owning spouse.

This clause allows the spouses to merely agree; this clause does not allow future spouses to simply agree. Only spouses can agree and they can only agree that *property or income arising from their separate property* might be and remain their separate property. For example, under this clause spouses can agree that rental income from a separate property rent house be and remain the owning spouse's separate property. Likewise, spouses can agree that dividends paid on separately owned stock will be and remain the owning spouse's separate property. Spouses cannot merely agree that their salary will be separate property, because such would not arise from separately owned property. Thus, if a spouse happens to be an attorney at a mega law firm, or a doctor employed by their own closely held corporation, the spouses cannot simply agree that their salary will be separate property. Why? Because salary is not income that arises from separate property.

In order to make separate property earned income separate, one must go back to the preceding clause 2 which requires a partition or an exchange. This is a very tricky and often overlooked limitation. Knowing what you know about the strict interpretation of the constitution, what would be the effect of a mere agreement that salary would be and remain a spouse's separate property?

To reiterate, future spouses can only partition or exchange. This interpretation was accepted in *Fanning v. Fanning*, 828 S.W.2d 135 (Tex. App.—Waco 1992), *aff'd. in part*, *rev'd. in part*, 846 S.W. 2d 225 (Tex. 1993). In *Fanning* the Waco court recognized that "the 1980 amendment did not authorize persons intending to marry to enter into agreements that the income from one spouse's separate property would thereafter be the owner's separate property. Therefore, we hold the trial court correctly concluded that paragraph 6.01 of the premarital agreement was unenforceable to the extent that the parties merely agreed that 'as soon as legally possible all income from their respective separate estates shall be the separate property of the spouse from whose estate such income is derived.' " *Id*. at 141.

Because the Texas Constitution remains the ultimate authority on the character of marital property, a premarital agreement entered into cannot violate the constitutional definition of separate and community property, and any attempt to change the character of property must be done in accordance with the Texas Constitution. That is, partitions or exchanges must be used by future spouses to change the character of any property (i.e., income from separate property, salary) from community to separate. Spouses must also use partition or exchange to change the community character of property, other than that community income that arises from a spouse's separate property which, can be converted from community to separate by mere agreement. Some courts have been quite liberal in their interpretations of agreements, concluding that parties about to be married may agree to exchange their community property interests and thereby maintain as separate property future income from separate property and earnings acquired during the marriage. *See*, *e.g.*, *Dokmanovic v. Schwarz*, 880 S.W.2d 272, 273-76 (Tex. App.—Houston [14th Dist.] 1994, no writ); *Winger v. Pianka*, 831 S.W.2d 853, 858 (Tex. App.—Austin 1992, writ denied); *see also Calmes v. United States*, 926 F.Supp 582, 586-88 (N.D. Tex.)(applying Texas law). Accordingly, it appears that exchanges have, to some extent, been inferred.

Clause 4 - Income Follows a Gift Between Spouses.

Clause 4 provides that if one spouse makes a gift of property to the other, that gift is presumed to include all the income or property which might arise from that gifted property. This clause is often referred to as the *Wyly* Amendment. *See* discussion *supra* at page 52, note 7.

This reference arises from *Estate of Wyly v. Commissioner*, 610 F.2d 1282 (5th Cir. 1980). *Wyly* arose when the Commissioner of Internal Revenue reversed a position held for more than twenty-five years and attempted to levy taxes on income-producing property conveyed from one spouse to the oth-

er. Although such conveyance was a gift, by operation of Texas law the gifting spouse retained an interest in the income arising from that property; accordingly, the Commissioner wanted to tax the gifting spouse.

In order to avoid this result, the Texas Constitution was amended and Clause 4 was enacted. However, it should be noted, that the Fifth Circuit ultimately held that the tax code does not automatically require some portion of the value of property gifted by a Texas spouse to the other spouse included in the donor spouse's gross estate. The problem was solved by Clause 4 and by the Fifth Circuit; today, income from a gift between spouses follows the gift. This applies only to gifts between spouses, not gifts from third parties.

Clause 5 - Spouses Can Establish Rights of Survivorship in Community Property.

Clause 5 provides that spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse. This clause was not effective until 1988; hopefully, it did away with the many problems that arose when spouses attempted to establish a joint tenancy with a right of survivorship in property such as community bank accounts. It is assumed that this clause will eliminate the results of *Hilley v. Hilley*, 342 S.W.2d 565 (Tex. 1949); *Williams v. McKnight*, 402 S.W.2d 505 (Tex. 1966); *Jameson v. Bain*, 693 S.W.2d 676 (Tex. App.—San Antonio 1985, no writ). Joint tenancies with rights of survivorship had been regularly "shot down" because the parties failed to first partition the property into separate property. Now spouses can agree that the community property will be the separate property of the surviving spouse.

Clause 6 - Only Spouses Can Convert Separate Property to Community.

Clause 6, effective January 1, 2000, provides that spouses may agree in writing that all or part of the separate property owned by either or both of them shall be the spouses' community property.

This clause, a long time in coming, was pushed more by the probate bar than the family law bar; it is recognized as an excellent estate planning tool. For example, a monied spouse, by very specific agreement, could transform their separate property into the couple's community property. Upon doing so, half of the monied spouse's estate would be removed from the estate's value upon the death of the monied spouse.

Although this clause aids in estate planning, it can yield big problems for the family law attorney. Once separate property is transformed into community property, a divorce court has the absolute right to make a just and right division. The spouse that had previously owned the separate property could, theoretically, be divested of the entirety of what had at one time been separate property. If the property had remained separate, a trial court would not be able to divest the owning spouse of their separate property. *Eggemeyer v. Eggemeyer*, 554 S.W. 2d 137 (Tex. 1997). While this is an incredible estate planning tool, divorce lawyers should be concerned that a meek property-owning spouse could be left to the mercy of a manipulative and stronger spouse, thereby giving the more powerful spouse the right to acquire the less powerful spouse's separate estate.

2. Statutes Control Enforcement of Pre- and Post-Marital Agreements

Read the entirety of Texas Family Code Chapter 4.

The Uniform Premarital Agreement Act which governs premarital agreements is found at TEX. FAM. CODE §§ 4.001-.010. The most important thing to remember is that the Texas Constitution, though not referenced in the statute, does reign supreme when it comes to the enforcement of premarital agreements. Marital property agreements, also called post-marital agreements, are governed by TEX. FAM. CODE §§ 4.101-.106. The enforcement provisions governing pre and post-marital agreements are identical.

A premarital and post marital property agreement is not enforceable if the party against whom enforcement is sought proves that:

* * *

(1) the party did not sign the agreement voluntarily; or
(2) the agreement was unconscionable when it was signed and, before signing the agreement, that party:
(A) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
(B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other property beyond the disclosure provided; and
(C) did not have or reasonably could not have had adequate knowledge of the property or financial obligations of the other party.

* * *

These enforcement provisions found at TEX. FAM. CODE 4.006 and 4.105 do not encompass agreements that have as their purpose changing separate property into community property. However, all other marital property agreements are held to this standard.

One of the most important things to note is that the fair and reasonable disclosure regarding the property and liabilities of the parties must be given *before* the signing of the agreement. Accordingly, when any pre or post-marital agreement is drafted, a separate disclosure document should be drafted and a time of signing, which precedes the signing of the pre- or post-marital agreement, should be established. In addition, the statute specifies that unconscionability is to be decided by the court and the remedies and defenses provided in the statutes are exclusive. This exclusivity prohibits the use of common law defenses as was recognized, albeit prematurely, in *Daniel v. Daniel*, 779 S.W.2d 110 (Tex. App.—Houston [1st Dist.] 1989, no writ). Nonetheless, as we will see in *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686 (Tex. App.—Austin 2005, pet. denied), common law defenses are probably subsumed in the determination of whether a party signed an agreement voluntarily.

3. Enforcement of Agreements to Convert Separate Property to Community Property.

As with pre and post-marital agreements, the agreements to convert separate property into community property must be in writing and signed by the spouses. The property to be converted must be specifically identified and it must specify that the properties are being converted to the spouses' community property. The mere transfer of the spouse's separate property to the name of the other spouse

or to the name of both spouses is not sufficient to convert the property to community property. TEX. FAM. CODE § 4.203.

The enforcement provisions for the agreements to convert are set forth in TEX. FAM. CODE § 4.205. As with pre and post-marital agreements, an agreement is not enforceable if the spouse against whom enforcement is sought proves that the spouse did not execute the agreement voluntarily. It is also unenforceable if proven that they did not receive a fair and reasonable disclosure of the legal effect of converting the property to community property.

The code does provide that an agreement which contains a statutorily provided statement or substantially similar words prominently displayed in bold face type, capital letters, or underlined, is rebuttably presumed to provide a fair and reasonable disclosure of the legal effect of converting property to community. The statute provides the language which will yield the rebuttable presumption, as follows:

> "THIS INSTRUMENT CHANGES SEPARATE PROPERTY TO COMMUNITY PROPERTY. THIS MAY HAVE ADVERSE CONSEQUENCES DURING MARRIAGE AND ON TERMINATION OF THE MARRIAGE BY DEATH OR DIVORCE. FOR EXAMPLE:
>
> "EXPOSURE TO CREDITORS. IF YOU SIGN THIS AGREEMENT, ALL OR PART OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY PROPERTY MAY BECOME SUBJECT TO THE LIABILITIES OF YOUR SPOUSE. IF YOU DO NOT SIGN THIS AGREEMENT, YOUR SEPARATE PROPERTY IS GENERALLY NOT SUBJECT TO THE LIABILITIES OF YOUR SPOUSE UNLESS YOU ARE PERSONALLY LIABLE UNDER ANOTHER RULE OF LAW.
>
> "LOSS OF MANAGEMENT RIGHTS. IF YOU SIGN THIS AGREEMENT, ALL OR PART OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY PROPERTY MAY BECOME SUBJECT TO EITHER THE JOINT MANAGEMENT, CONTROL, AND DISPOSITION OF YOU AND YOUR SPOUSE OR THE SOLE MANAGEMENT, CONTROL, AND DISPOSITION OF YOUR SPOUSE ALONE. IN THAT EVENT, YOU WILL LOSE YOUR MANAGEMENT RIGHTS OVER THE PROPERTY. IF YOU DO NOT SIGN THIS AGREEMENT, YOU WILL GENERALLY RETAIN THOSE RIGHTS.
>
> "LOSS OF PROPERTY OWNERSHIP. IF YOU SIGN THIS AGREEMENT AND YOUR MARRIAGE IS SUBSEQUENTLY TERMINATED BY DEATH OF EITHER SPOUSE OR BY A DIVORCE, ALL OR PART OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY MAY BECOME THE SOLE PROPERTY OF YOUR SPOUSE OR YOUR SPOUSE'S HEIRS. IF YOU DO NOT SIGN THIS AGREEMENT, YOU GENERALLY CANNOT BE DEPRIVED OF OWNERSHIP OF YOUR SEPARATE PROPERTY ON TERMINATION OF YOUR MARRIAGE, WHETHER BY DEATH OR DIVORCE."

TEX. FAM. CODE § 4.204(b).

This section of the Family Code also provides that if a proceeding regarding enforcement of an agreement that converts separate property to community property occurs after the death of the spouse against whom enforcement is sought, the proof required by subsection A, that being the rebuttable presumption to provide and fair and reasonable disclosure, may be established by an heir of the spouse or personal representative of the estate of that spouse.

4. Statutes and Decisions 1980 to Present

As you read the cases in this section, realize that these cases were decided prior to the recodification of the Texas Family Code. Make sure that you can identify, by number, the current, applicable statutes. Utilize the disposition table, former to current statute number, as provided for you in the "Charts & Tables" section of O'CONNOR'S TEXAS FAMILY CODE – PLUS, or as provided in any other statutory source you may be using.

BRADLEY
v.
BRADLEY
725 S.W.2d 503
(Tex. App.—Corpus Christi 1987, no writ)

UTTER, JUSTICE.

This is an appeal from a decree of divorce in which the trial court held that "no community property other than personal effects has been accumulated by the parties." We reverse the judgment of the trial court and remand for a new trial.

The parties were married on July 31, 1982 and were divorced on July 9, 1986. On July 26, 1982, prior to their marriage, appellant and appellee entered into a prenuptial agreement. During the marriage, appellant was not gainfully employed outside the home, and appellee's income was derived from his medical practice.

In interpreting the prenuptial agreement, the trial court found that "the separate property of each of the parties as well as the revenues, increases, and income from such separate property, and from the respective personal efforts of each party belongs to that party." The trial court obviously considered appellee's income as being derived from appellee's personal efforts and concluded that such income was appellee's separate property.

By her second point of error, appellant contends that the trial court erred in determining that the prenuptial agreement operated to convert appellee's income from personal earnings into his separate property.

Paragraph 2, entitled "Stipulations of Parties," provides that "the general purpose and intent of the parties" is:

> (a) that VICTOR and MARGARET will each continue to own and to manage his or her separate property,
>
> (b) that all revenues, increases, and income from such separate property, and from their respective personal efforts will be subject to the sole management and control of the party whose separate property or personal efforts generated such revenues or income,
>
> (c) that the parties will do any and all things necessary in order to establish or preserve the separate character of all revenues, increases, and income from such separate property, and from their respective personal efforts, ...

Section (b) merely restates TEX. FAM. CODE ANN. § 5.22 (Vernon 1975). Section (c) sets out the parties' intent to preserve the "separate property character" of "their respective personal efforts."

However, the "respective personal efforts" do not acquire separate property character until they have partitioned and exchanged their respective community property interests in the income from each other's personal efforts.

Paragraph 7 of the agreement, entitled "Annual Partition and/or Exchange of the Community Estate, Pursuant to Section 5.42 of the Texas Family Code," provides:

> that on or before the 15th day of April of each year during the existence of this marriage, VICTOR and MARGARET will fairly and reasonably partition (and/or exchange) in writing all of the community estate of the parties on hand that will have accumulated since January 1 of the preceding year whether it be in the form of cash, realty, or other assets.

Upon acquisition, appellee's earnings from his personal efforts became community property. They remain community property until partitioned and exchanged pursuant to TEX. CONST. art. XVI, § 15, and TEX. FAM. CODE ANN. § 5.42 (Vernon Supp.1987). The prenuptial agreement does not itself effect a partition and exchange of the parties' respective community interests in each other's personal earnings. It merely evinces an intent to do so in the future. Appellee testified and admitted that they have never done so.

Section 7 also provides that "[t]he failure of the parties to partition in writing the community estate, if any, . . . shall not constitute a waiver of the parties' obligations and rights hereunder." Appellee contends that this provision should be interpreted to mean "that any *failure* by them to conduct their annual partitions would *not* constitute a waiver of their rights to claim the separate character of their property." [emphasis appellee's] Appellee's interpretation of this provision is contrary to the express provisions of TEX. CONST. art. XVI, § 15, which requires a "written instrument" in order to partition and exchange community property interests.

We hold that the prenuptial agreement itself does not operate to partition and exchange the community property interests in each other's income from personal efforts. To the contrary, it merely contemplates a partition and exchange of community property interests in the future. Therefore, the trial court erred in its interpretation of the prenuptial agreement and in holding that appellee's income from his personal earnings was his separate property. Appellant's second point of error is sustained.

Appellant's third point of error, which contends that the trial court erred in determining that there was no community property of the estate, is also sustained.

The trial court has broad discretion in dividing the property in a divorce action and its division will not be disturbed absent an abuse of discretion. *Reid v. Reid*, 658 S.W.2d 863 (Tex. App.—Corpus Christi 1983, no writ). The trial court's mischaracterization of property will require a reversal only if we determine that the division of the property made was, because of the legal error upon which it was based, so unfair as to constitute an abuse of discretion. *Cook v. Cook*, 679 S.W.2d 581 (Tex. App.—San Antonio 1984, no writ). In other words, appellant must show that, due to the trial court's legal error, the division of the property was so disproportionate so as to be manifestly unfair. *Reid v. Reid*, 658 S.W.2d at 865. Furthermore, appellant must show that the trial court would have probably made a different division of the property if it had been properly characterized. *Id*.

In this case, the trial court made no division of the property of the marital estate because it determined that there was no community property to divide. The trial court decided that the marital estate consisted entirely of separate property and awarded it accordingly. Had the trial court properly characterized appellee's personal earnings, it would probably have made a different division of it. Therefore, the trial court's error in characterizing appellee's personal earnings resulted in a division which was so disproportionate as to be manifestly unfair.

Furthermore, "[w]hen determining what would constitute a fair division of the marital estate, the court may consider such factors as disparity of income or of earning capacity of the parties, their relative physical conditions and financial conditions, the size of their separate estates, business opportunities available to each spouse, and the nature of the property involved." *Cook v. Cook*, 679 S.W.2d at 585. Appellee's annual earnings are approximately $200,000.00, while appellant apparently was a housewife with no income. Appellee admitted that appellant has no profession or vocation. In view of appellee's significantly greater income and earning capacity, the award to appellee of 100% of the community property constitutes a clear abuse of discretion and is manifestly unjust.

That portion of the trial court's judgment which dissolves the marriage of the parties is left undisturbed. The portion of the judgment dividing the marital estate is REVERSED and REMANDED to the trial court for further proceedings consistent with this opinion.

Having addressed the controlling issues, we decline to discuss appellant's remaining points of error. TEX. R. APP. P. 90.

* * *

Questions

1. Why was section 7 of the above agreement ineffective?
2. How would you change the agreement to accomplish the goals of Dr. Bradley?

DEWEY
v.
DEWEY
745 S.W.2d 514
(Tex. App.—Corpus Christi 1988, writ denied)

UTTER, JUSTICE.

This appeal is from a judgment which granted a divorce to the parties and divided the parties' community estate. We affirm the judgment of the trial court.

The parties were married on March 18, 1984, after having executed a pre-marital agreement. Appellee filed suit for divorce on December 8, 1985, but later non-suited her petition and proceeded on appellant's cross-petition for divorce. On April 28, 1986, a decree of divorce and property division was approved and signed by the parties, their respective attorneys, and the court.

Appellee filed a motion for new trial on May 9, 1986, alleging she had been mentally incompetent when the above divorce decree was entered. After hearing the motion, the court set aside the April 28, 1986, divorce decree in its entirety, and granted a new trial. After a jury trial, the final judgment was signed granting a divorce to the parties and dividing the property therein.

Appellant contends in his first point of error that the trial court erred by granting a new trial on both the divorce and the property issues because appellee did not request that the divorce be set aside in her motion for new trial. Appellant complains that he was harmed by the court's setting aside the "divorce" because after the April 28, 1986, divorce decree was approved, he allegedly transferred cer-

tain funds from his separate property into his retirement account. Appellant asserts that the trial court viewed appellant's action as transforming separate property into community property because the community estate had been extended up until the December 19, 1986, judgment setting aside the divorce entered by the trial court.

In her motion for new trial, appellee requested that the "Final Decree of Divorce" should be set aside and a new trial granted. Appellee thereafter stated in her motion that she was requesting a new trial because she was of unsound mind at the time the decree was entered and was incapable of making rational divisions of their community assets. Nowhere did she limit her motion for new trial to the division of property.

Even if appellee had limited her request to the issue of property division, the court, in granting a new trial, would not have been restricted to the grounds set forth in the motion for new trial. *Napier v. Napier*, 555 S.W.2d 186, 188-89 (Tex. Civ. App.—El Paso 1977, no writ); *Brown v. American Finance Co*., 432 S.W.2d, 564, 567 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.). Furthermore, the issue of divorce and the issue of property division are neither separable nor severable under TEX. R. CIV. P. 41, 174, and 320. *Vautrain v. Vautrain*, 646 S.W.2d 309, 315 (Tex. App.—Fort Worth 1983, writ dism'd); *Underhill v. Underhill*, 614 S.W.2d 178, 181 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.). We hold there was no final judgment of divorce until December 19, 1986, when all issues and parties of the case were disposed of. Appellant's first point of error is overruled.

Appellant contends in his second point of error that the court erred in finding the parties had accumulated a community estate, because the pre-marital agreement precluded it. Appellant complains in his third point of error that the court erred in refusing to disregard the jury's answer to special issue number five because the answer was contrary to the great weight and preponderance of the evidence. Special issue number five asked the jury to determine whether the parties, in executing the pre-marital agreement, intended to make the income of each party the separate property of the party receiving the income. The jury answered that the parties did not.

In considering a "no evidence," "insufficient evidence," or "against the great weight and preponderance of the evidence" point of error, we will follow the well-established test set forth in *Pool v. Ford Motor Co*., 715 S.W.2d 629 (Tex. 1986); *Dyson v. Olin Corp*., 692 S.W.2d 456 (Tex. 1985*); Glover v. Texas General Indemnity Co*., 619 S.W.2d 400 (Tex. 1981); *Garza v. Alviar*, 395 S.W.2d 821 (Tex. 1965); *Allied Finance Co. v. Garza*, 626 S.W.2d 120 (Tex. App.—Corpus Christi 1981, writ ref'd n.r.e.); and Calvert, *No Evidence and Insufficient Evidence Points of Error*, 38 TEXAS L. REV. 361 (1960).

Neither party complains of the validity of the pre-marital agreement. The pre-marital agreement should be interpreted according to the true intentions of the parties as expressed in the instrument. *Coker v. Coker*, 650 S.W.2d 391, 393-94 (Tex. 1983); *Miller v. Miller*, 700 S.W.2d 941, 951 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). No single provision taken alone will be given controlling effect; rather, every provision must be considered with reference to the whole instrument. *Coker*, 650 S.W.2d at 393-94.

The pre-marital agreement clearly states that all profits, dividends, interest, and proceeds that accumulate after marriage from each of the parties' separate property will remain that party's separate property. Appellant thereafter listed his professional corporation, George C. Dewey, M.D., P.A., as part of his separate property.

Appellant's professional corporation and appellant are legally distinct entities. *Cf. Sun Towers v. Heckler*, 725 F.2d 315, 331 (5th Cir. 1984), *cert. denied*, 469 U.S. 823, 83 L. Ed. 2d 45, 105 S.Ct. 100 (1984); *Massachusetts v. Davis*, 140 Tex. 398, 168 S.W.2d 216, 222 (1943). The corporate entity is

the owner, and any contribution made by appellant to the professional corporation became corporate property which may not be characterized as either the separate or community property of the individual stockholders. *Cf. Marshall v. Marshall*, 735 S.W.2d 587, 594 (Tex. App.—Dallas 1987, writ ref'd n.r.e.) (applies rule to contributions made to spouse's partnership). Any rights or ownership interest appellant had in the professional corporation, however, could and did become appellant's separate property by virtue of the pre-marital agreement as did any profits, dividends, interest, or proceeds which accrued therefrom. *Williams v. Williams*, 720 S.W.2d 246, 249-50 (Tex. App.—Houston [14th Dist.] 1986, no writ).

The pre-marital agreement, however, did not mention appellant's salary received from the corporation during marriage; nor did it state that there would be no accumulation of a community estate. It merely asserted that the listed property and all profits, dividends, interest and proceeds resulting from that property should remain appellant's separate property. Since appellant's income was not expressly listed in the pre-marital agreement and it was apparently acquired during marriage, it was clearly community property. TEX. FAM. CODE ANN. §§ 5.01, 5.02 (Vernon 1975); *Maben v. Maben*, 574 S.W.2d 229, 232 (Tex. Civ. App.—Fort Worth 1978, no writ). Therefore, there is no ambiguity present on the face of the agreement and parol evidence shall not be considered. *Miller*, 700 S.W.2d at 951. We find the evidence presented was sufficient to support the jury's answer. Appellant's second and third points of error are overruled.

Appellant contends in his sixth point of error that the trial court impermissibly invaded his separate estate by awarding certain jewelry to appellee. Appellant argues that he received the jewelry as a "gift" from appellee and that it was part of his separate estate.

Three elements are necessary to establish the existence of a gift: 1) intent to make a gift; 2) delivery of the property; and 3) acceptance of the property. *Grimsley v. Grimsley*, 632 S.W.2d 174, 177 (Tex. App.—Corpus Christi 1982, no writ). Moreover, it was appellant's burden to show a gift had been made. *Diaz v. Cantu*, 586 S.W.2d 576, 580 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

The record reveals that appellee "intended to return" the jewelry and that she delivered the jewelry to appellant and that appellant apparently accepted the jewelry. However, no evidence was presented that appellee intended to make a "gift" of the jewelry to appellant. On the contrary, the evidence indicates that appellant's mental condition had been deteriorating since March of 1986, and that she was depressed and didn't care about anything. In fact, the April 28, 1986 decree of divorce was later set aside by the court because appellee was not mentally competent to enter into a valid, binding contract at that time. Based on this evidence, the jury found that appellee did not make a gift of her jewelry to appellant. The evidence was sufficient to support the jury's answer. Appellant's sixth point of error is overruled.

Appellant contends in his seventh point of error that the trial court erred in characterizing the George C. Dewey, M.D., P.A. Defined Contribution Plan as community property because the plan was both owned by appellant's separate property professional association and established prior to the parties' marriage. Appellant complains in his ninth point of error that the trial court erred in refusing to disregard the jury's answers to special issues No. 7 and No. 9 because the evidence was insufficient as a matter of law or was against the great weight and preponderance of the evidence.

Special Issue No. 7:
Do you find from a preponderance of the evidence that monies deposited by George C. Dewey, M.D., P.A. into the George C. Dewey Defined Contribution Plan were profits and/or proceeds of the professional association?
The jury answered, "We do not."

Special Issue No. 9:

From a preponderance of the evidence, do you find that the George C. Dewey Defined Contribution Pension Plan is the separate property of George C. Dewey?

The jury answered, "We do not.

Retirement and pension plans are regarded as a mode of employee compensation earned during a given period of employment. *Cearley v. Cearley*, 544 S.W.2d 661, 662 (Tex. 1976); *Whorrall v. Whorrall*, 691 S.W.2d 32, 37-38 (Tex. App.—Austin 1985, writ dism'd). It is also well established that an employee spouse's accrued benefits in a retirement and pension plan which have been earned during marriage, but which have not vested and matured at the time of divorce, constitute a contingent interest in property and a community asset subject to division upon divorce. *Cearley*, 544 S.W.2d at 666; *May v. May*, 716 S.W.2d 705, 707 (Tex. App.—Corpus Christi 1986, no writ).

Appellant's contention that the Defined Contribution Plan belonged to appellant's separate property professional association is without merit. The record reveals that the professional association was appellant's employer and all rights to receipt of the plan's benefits were in appellant as an employee, not the professional association. Moreover, the pre-marital agreement merely states the Defined Benefit-Investment Fund Pension Plan is appellant's separate property, and does not mention appellant's Defined Contribution Plan. We find that the Defined Contribution Plan was not a continuation of the plan listed in the pre-marital agreement, but an entirely different plan. Therefore, the Defined Contribution Plan constituted community property subject to division on divorce.

Appellant relies on case law involving real property and stock acquisitions to support the proposition that since the Defined Contribution Plan was commenced prior to the parties' marriage, it was appellant's separate property. The inception of title doctrine simply does not apply in cases involving retirement or pension benefits, and appellant has cited no cases involving pension plans in support of his proposition. The Defined Contribution Plan was clearly a form of deferred "employee" compensation. In fact, only upon reaching the normal retirement age, separation from service from the professional association, or upon becoming 100 percent disabled, would he be allowed to withdraw from the plan. The only pertinent time period, therefore, concerns that in which the parties were married. Any benefits in the pension plan which accrued on appellant's behalf during the marriage was community property subject to division on divorce. TEX. CONST. art. XVI, § 15. Thus, the date the "professional association" originated the plan is irrelevant.

We conclude the trial court did not err in characterizing the Defined Contribution Plan as community property. We further conclude that the record, as a whole, reveals that there is sufficient evidence to support the jury's answers to special issues No. 7 and No. 9. Appellant's seventh and ninth points of error are overruled.

Appellant contends in his eighth point of error that the trial court erred in failing to reimburse appellant's separate estate for contributions made to the Defined Contribution Plan from appellant's separate property. Specifically, appellant argues that a portion of a $29,700 deposit to such plan made on April 29, 1986, came from an insurance policy which was owned by appellant's separate property professional association.

Since the professional association was appellant's employer, the source of the funds placed in the Defined Contribution Plan is immaterial. The professional association and appellant are legally distinct entities. If the professional association borrowed the money from an insurance policy to fund the pension plan, as argued in appellant's brief, then it is the professional association, and not appellant, who is liable for the debt. Appellant, in receiving the benefits, was simply being compensated for his work, which was clearly community property. Thus, appellant has not met his burden of pleading and

proving that expenditures were made from his separate property for the benefit of the community and that they were reimbursable. *Cf. Vallone v. Vallone*, 644 S.W.2d 455, 459 (Tex. 1983); *Jensen v. Jensen*, 665 S.W.2d 107, 110 (Tex. 1984). Appellant's eighth point of error is overruled.

Appellant contends in his fourth and fifth points of error that the trial court erred in awarding appellee $20,000 in cash payable by appellant. Appellant complains that the award impermissibly invaded appellant's separate estate and thereby contravened the statutes and public policy of this state which prohibit alimony. Appellant's tenth point of error contends that the trial court abused its discretion in dividing the community estate because the division is so unequal as to be manifestly unjust.

In reviewing the actions of the trial court, there is a presumption that the trial court exercised its discretion properly. *Murff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981); *Bell v. Bell*, 513 S.W.2d 20, 22 (Tex. 1974). The trial court has wide discretion in dividing the parties' community estate and that division should be corrected on appeal only where a clear abuse of discretion has been shown. *Murff*, 615 S.W.2d at 698; *Mata v. Mata*, 710 S.W.2d 756, 760 (Tex. App.—Corpus Christi 1986, no writ).

The trial court may order appellant to pay appellee "cash" even though community property did not consist of any cash. *Weaks v. Weaks*, 471 S.W.2d 454, 455 (Tex. Civ. App.—Beaumont 1971, writ dism'd). Moreover, the mere fact that the community estate is not divided equally does not constitute an abuse of discretion as long as there is a reasonable basis for that division. *Mata*, 710 S.W.2d at 760; *Voronin v. Voronin*, 662 S.W.2d 102, 106-07 (Tex. App.—Austin 1983, writ dism'd). Factors to be considered include: 1) the relative earning capacity and business experience of the parties; 2) the educational background of the parties; 3) the size of separate estates; 4) the age, health and physical condition of the parties; 5) the fault in breaking up the marriage; 6) the benefits the innocent spouse would have received had this marriage continued; and 7) the probable need for future support. *Zamora v. Zamora*, 611 S.W.2d 660, 662 (Tex. Civ. App.—Corpus Christi 1980, no writ); *Erger v. Erger*, 590 S.W.2d 186, 188 (Tex. Civ. App.—Fort Worth 1979, writ dism'd); *Cooper v. Cooper*, 513 S.W.2d 229, 233-34 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

At the outset, we find that the $20,000 cash award to appellee was entirely referable to community assets available upon dissolution of the marriage. The accumulated value of the Defined Contribution Plan and the Bon Aire residence alone were in excess of the $20,000 cash award to appellee. The fact that there is still an indebtedness on some of these community assets is irrelevant. Their total equity value is still in excess of $20,000.00. We conclude, therefore, that the award neither impermissibly invaded appellant's separate estate, nor constituted alimony in contravention of statutes and public policy.

We further find the trial court did not abuse its discretion in dividing the community property. Appellant was a radiologist with an annual gross income in excess of $200,000. His separate property professional association generated approximately $336,000 per year and offered him numerous fringe benefits, most of which were granted at his own discretion because he was the association's only employee. Appellant's separate estate was extremely large and included among others, a separate property residence, bank accounts, pension plan benefits accrued prior to marriage, and an I.R.A. Appellee, on the other hand, was a charge nurse earning around $18,000 per year (although her most recent tax records reflected earnings of only $9,707) and was in poor health. In addition, the jury found appellant was at fault in breaking up the marriage by finding him guilty of such cruel treatment towards appellee, that further living together was insupportable. Appellant's fourth, fifth and tenth points of error are overruled.

The judgment of the trial court is AFFIRMED.

Notes, Comments, Questions

1. Often times, even an enforceable premarital agreement does not accomplish the goal of the proponent. What would you have changed in the agreement to fulfill the doctor's goals?

2. In the more recent case, *In re Marriage of McNelly*, 2014 WL 2039855, Cause No. 14-13-00281-CV (Tex. App.—Houston [14th Dist.] May 15, 2014, pet. denied) (mem. opinion) word choice and descriptions made a difference of over 1 million dollars. The premarital agreement provided that funds acquired in the future and deposited into joint bank accounts would become and remain community property. The husband sold his separate business interest, as identified on schedules attached to the premarital agreement, for 1.3 million dollars. He deposited 100k into Wells Fargo joint savings and checking accounts. He deposited 600k into a joint account at Charles Schwab and 600k into a joint account at Fidelity Brokerage account. The trial court found the all the deposits to be community property. The court of appeals reversed; it determined that even though a brokerage firm might provide "banking type" services, a brokerage firm is not equivalent to a bank within the meaning of the parties' agreement. Neither the Schwab or Fidelity accounts were community property, but rather remained husband's separate. The division of property was reversed and remanded.

BECK
v.
BECK
814 S.W.2d 745
(Tex. 1991)

CORNYN, JUSTICE.

This is a suit to determine the enforceability of a premarital agreement, entered into in 1977, under section 5.41 of the Texas Family Code[1] and article XVI, section 15, of the Texas Constitution. The trial court granted summary judgment to Lillian Beck, holding that the premarital agreement at issue was enforceable under the 1948 amendment to article XVI, section 15, of the Texas Constitution.[2] The court of appeals affirmed the trial court's judgment. 792 S.W.2d 813. We affirm the judgment of the court of appeals, but for different reasons.

Audrian and Lillian Beck entered into a premarital agreement on October 27, 1977, pursuant to section 5.41(a) of the Texas Family Code,[3] which purported to authorize premarital agreements. Lillian's attorney drafted the agreement. Audrian's attorney reviewed the agreement, which Audrian and Lillian executed in his office. Paragraph four of the agreement provides:

[1] Act of May 14, 1969, 61st Leg., R.S., ch. 888, § 1, 1969 Tex.Gen.Laws 2707, 2729, amended by Act of June 15, 1973, 63rd Leg., R.S., ch. 577, § 31, 1973 Tex.Gen.Laws 1596, 1608 (current version at TEX.FAM.CODE ANN. §§ 5.42, .43, .56 (Vernon Supp.1991)).

[2] TEX. CONST. art. XVI, § 15 (1876, amended 1948).

[3] "Before marriage, persons intending to marry may enter into a marital property agreement as they may desire." Act of May 14, 1969, 61st Leg., R.S., ch. 888, 1969 Tex.Gen.Laws 2707, 2729, amended by Act of June 18, 1987, 70th Leg., R.S., ch. 678, 1987 Tex.Gen.Laws 2530, 2531-32 (current version at TEX.FAM.CODE ANN. §§ 5.42, .43, .56 (Vernon Supp.1991)).

"Notwithstanding that under the laws of the State of Texas the income from respective separate properties of Audrian and Lillian will be community property, they hereby agree that all the properties of every kind and nature, real and personal, held or standing in the name of only one of them shall be considered as a separate property of the one of them in whose name such property is held or stands, and that only properties, whether real or personal, held or standing in their joint names shall be considered as community property."

Audrian died on March 3, 1981. His will was admitted to probate on April 10, 1981. The probate court issued letters testamentary to Ronald Beck, Audrian's only child by a previous marriage, and appointed him independent executor of Audrian's estate.

Ronald, in both his individual capacity and in his capacity as independent executor of Audrian's estate, brought suit in the district court against Lillian on March 2, 1984. In his first amended petition, he requested, among other things, a declaratory judgment that the premarital agreement was unenforceable under the 1948 amendment to article XVI, section 15, of the Texas Constitution. The underlying dispute between Ronald and Lillian is whether Audrian's estate owns a one-half interest in the income generated by Lillian's separate property. The disputed property includes income from rental properties and bank accounts, as well as "income and earnings from [Lillian's] separate estate."

In the trial court, Ronald and Lillian both filed motions for partial summary judgment on the issue of the enforceability of the premarital agreement under the Texas Constitution. The trial court granted Lillian's motion for summary judgment. The court of appeals affirmed, holding that the agreement was enforceable under the 1948 amendment to article XVI, section 15, as an "exchange" of each spouse's community interest in future income from separate property. 792 S.W.2d at 816.

* * *

The court of appeals held that we construed only the "partition" language of the 1948 amendment in our decision in *Williams* and did not reach the issue of whether the agreement could be upheld as an "exchange" of each spouse's community interest. We disagree. In *Williams*, we simply stated that the premarital agreement violated the Texas Constitution and did not distinguish between a "partition" and an "exchange" of property. *Id*. Therefore, the court of appeals' holding, based on the distinction between a "partition" and an "exchange," was erroneous.

Having determined that the premarital agreement is unenforceable under the 1948 amendment, we must decide whether the retroactive application of the 1980 constitutional amendment to article XVI, section 15, of the Texas Constitution can uphold the premarital agreement. The 1980 amendment specifically provided in pertinent part:

> Spouses may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned by one of them, or which thereafter might be acquired, shall be the separate property of that spouse.

Tex. H.R.J. Res. 54, 66th Leg., R.S., 1979 Tex. Gen. Laws 3227, 3227.

Ronald contends that the premarital agreement at issue is not enforceable under Williams. Lillian argues that we can apply the 1980 amendment because it was the law in effect when the trial judge rendered judgment. *See Sadler v. Sadler*, 769 S.W.2d 886, 886 (Tex. 1989); *Chiles v. Chiles*, 779 S.W.2d 127, 129 (Tex. App.—Houston [14th Dist.] 1989, writ denied); *Daniel v. Daniel*, 779 S.W.2d 110, 113 n. 3 (Tex. App.—Houston [1st Dist.] 1989, no writ). We agree with Lillian that the agreement is enforceable, but for different reasons.

This court has previously held that the legislature has the power to cure statutes that are invalid under the Texas Constitution by proposing a constitutional amendment that is adopted by the citizens

of Texas. *Hutchinson v. Patching*, 103 Tex. 497, 129 S.W. 603 (1910). By passing a constitutional amendment that specifically refers to the invalid statute, the legislature can expressly validate not only the statute, but all actions taken in reliance on the validity of that statute. *Id*. at 501-02, 129 S.W. at 605; *accord Ex parte Southern Ry. Co*., 556 So.2d 1082, 1090 (Ala.1989); . . .

The legislature may also impliedly validate an invalid statute by passing a constitutional amendment to cure it. This power is termed the doctrine of implied validation. It permits a constitutional amendment to impliedly validate a statute that was originally beyond the legislature's power to enact if it does not impair the obligation of a contract or impair vested rights. Annotation, *Removal or Suspension of Constitutional Limitation As Affecting Statute Previously Enacted*, 171 A.L.R. 1070, 1072-73 (1947). . . .

In deciding whether the 1980 amendment to article XVI, section 15, of the Texas Constitution impliedly validated section 5.41 of the Texas Family Code and all agreements entered into pursuant to this statute, we must first ascertain whether the legislature intended to apply the amendment retroactively. *See* McKnight at 475. To do so, we look to the language of the amendment, its legislative history, its purpose and the circumstances of its enactment. *Cf.* TEX. GOV'T CODE ANN. § 311.023 (Vernon 1988) (Statute Construction Aids).

The language of the statute itself is silent regarding any intended validation of section 5.41 or premarital agreements executed before 1980. However, the legislative history of the amendment, its purpose and the circumstances of its enactment persuade us that the legislature intended to cure section 5.41 and validate contracts entered into before the amendment became effective.

The legislative history of the 1980 amendment is enlightening. In a public hearing on House Joint Resolution 54,[4] held on February 28, 1979, before the House Committee on Constitutional Amendments, one witness testified:

The idea here is just to make it a simple change to allow people to do what they wanted to do all along, and then find out under Texas law or what happens with the IRS later, that surprise, you can't do that. [Emphasis added.]

This testimony demonstrates that one purpose of the amendment was to uphold the intentions of spouses who entered into premarital agreements before 1980. Further, other testimony during the public hearing and the floor debate in the Texas House of Representatives on April 10, 1979, indicates that the legislators sought to supersede the effect of this court's decision in *Williams* and the federal tax court's ruling in *Estate of Castleberry v. Commissioner of the Internal Revenue Service*.[5] Finally, the circumstances of the passage of the amendment less than two years after *Williams* and *Castleberry* indicate the legislature's intent to apply the constitutional amendment to agreements entered into before 1980. *See* Note, *The 1980 Texas Marital Property Amendment: An Analysis of Its Meaning and Effect*, 33 BAYLOR L. REV. 307, 317 n. 71 (1981).

* * *

The existence of any vested rights depends on whether the contract was void or voidable when Ronald and Lillian executed it in 1977. Audrian did not have a vested right in one-half of Lillian's income by operation of law, because Lillian had a voidable interest in the contract that the 1980 constitutional amendment impliedly validated. The voidable nature of this interest arises from an exception

[4] Tex.H.R.J.Res. 54, 66th Leg., R.S., 1979 Tex.Gen.Laws 3227, 3227.

[5] 68 T.C. 682 (1977), *rev'd*, 610 F.2d 1282 (5th Cir.1980). This case held that one-half of the income from a wife's separate property must be included in her husband's gross estate for federal estate tax purposes.

to the general rule that contracts violating the law are void. 15 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1762, at 201-02 (1972) (quoting *Doherty v. Bartlett*, 81 F.2d 920, 926 (1st Cir.1936)) [hereinafter WILLISTON, LAW OF CONTRACTS]. . . .

* * *

Because Lillian is a member of the class intended to be protected by our earlier community property laws, the legislature and the citizens of Texas may, and did, validate premarital agreements such as this. The legislature and citizens could validate this premarital agreement because it was voidable when the parties entered into it. Because the contract was voidable, Audrian's community property rights in one-half of the income generated by Lillian's separate property never arose by operation of law.

We do not consider our statement in *Williams* that the agreement was "void" to be controlling here. The issue whether the premarital agreement was void or voidable was not before us in *Williams*. Nor was the question of implied validation, as the 1980 amendment had not yet been adopted. The only issue before this court was whether a premarital agreement waiving homestead rights and the exempt personal property set aside was constitutional. *Williams*, 569 S.W.2d at 868; *see also* McKnight at 450. This case, on the other hand, turns on the legal effect of the agreement when it was executed in 1977. Therefore, our prior classification of the agreement as "void," rather than "voidable," is not controlling under these facts. *See Wiener v. Zwieb*, 105 Tex. 262, 269, 141 S.W. 771, 774 (1911).

We hold that the 1980 amendment to article XVI, section 15, of the Texas Constitution demonstrates an intention on the part of the legislature and the people of Texas to not only authorize future premarital agreements, but to impliedly validate section 5.41 of the Texas Family Code and all premarital agreements entered into before 1980 pursuant to that statute. The legislature and the people of Texas have made the public policy determination that premarital agreements should be enforced. If we refuse to enforce Audrian's and Lillian's premarital agreement, we would thwart, rather than advance, our state's public policy enforcing these contracts. This, we decline to do.

Accordingly, we affirm the judgment of the court of appeals.

COOK, JUSTICE, concurring. [Concurring opinion deleted]

Questions

1. What do you believe JUSTICE CORNYN was alluding to when he said, ". . . Lillian is a member of the class intended to be protected by our earlier community property laws, . . . ?"

2. Could this reasoning affect application of the *Beck* result across genders?

3. What effect does *Beck* have on other clauses of TEX. CONST. art. XVI, § 15?

FANNING
v.
FANNING
828 S.W.2d 135 (Tex. App.—Waco 1992),
aff'd in part, *rev'd in part*, 847 S.W.2d 225 (Tex. 1993)

CUMMINGS, JUSTICE.

Whitney Fanning appeals the final decree of divorce in which the trial court awarded the vast majority of the Fannings' assets and the custody of their three children to Nita Fanning. Because the court failed to enforce a premarital agreement and an enforceable partition agreement, we reverse that part of the judgment divesting Whitney Fanning of title to his separate property and dividing the community property contrary to the agreement of the parties. However, we affirm that part of the judgment awarding custody of the children to Nita Fanning and ordering Whitney Fanning to pay $3,000 per month for the support of the children.

THE PREMARITAL AGREEMENT

Whitney Fanning and Nita Kissel entered into a premarital agreement on August 15, 1980, pursuant to section 5.41(a) of the Texas Family Code,[1] which purported to authorize premarital agreements. Both parties were practicing attorneys when the premarital agreement was executed. They were married on September 27, 1980.

In point two, Whitney Fanning contends that the trial court erred in setting aside the premarital agreement because (1) the court erroneously concluded that the agreement was unconstitutional and void, (2) the court erroneously concluded that the agreement did not operate to partition or exchange the future income from separate property or the community interest in income from personal efforts, (3) Nita Fanning failed to satisfy the burden of proof required by section 5.46 of the Texas Family Code, and (4) the evidence was legally or factually insufficient to support the court's failure to enforce the premarital agreement.

Paragraph six of the agreement provides

> 6.01) During their marriage, all income and revenue (other than that which is part of the property itself) from the separate property of each party hereto is the community property of the parties if so defined by Texas law. However, the parties understand that the 66th Texas legislature approved H.J.R. 54, to be submitted to the voters on November 1980, by the terms of which spouses may, by agreement between themselves, provide that the income from separate property owned by either of them, or thereafter acquired, shall be the separate property of the spouse owning such separate property. If such amendment to Article XVI, Section 15, of the Texas Constitution is approved by the voters, the parties agree that as soon as legally possible all income from their respective estates shall be the separate property of the spouse from whose separate estate such income is derived.
>
> 6.02) The parties agree that each may, from time to time, designate certain banks as his or her agent to assist in carrying out this Agreement by administering accounts in the name of the re-

[1] "Before marriage, persons intending to marry may enter into a marital property agreement as they may desire." Act of June 2, 1969, 61st Leg., R.S., ch. 888, § 1, 1969 Tex.Gen.Laws 2707, 2729, amended by Act of June 1, 1987, 70th Leg., R.S., ch. 678, § 1, 1987 Tex.Gen.Laws 2530, 2530-32 (current version at TEX.FAM.CODE ANN. §§ 5.41-.50 (Vernon Supp.1992)).

spective party, by the name of the party adding "as separate property," or otherwise, to the end that all funds which are deposited to the separate accounts of the parties hereto and income therefrom will be identified as the separate property of the party in whose name such funds are held. As received, the respective parties shall deposit funds received that are the income or revenue from their respective separate property into one of their respective several or separate property accounts created in their respective and on deposit (if not before) such funds shall be the separate property of the spouse whose separate property produced such income or revenue, if so provided by this Agreement. The parties hereto hereby instruct any bank holding such funds on deposit as provided in this paragraph that such funds are the separate property of the party in whose name such deposit was made as provided in this paragraph.

VALIDITY OF THE PREMARITAL AGREEMENT

When this premarital agreement was executed in August 1980, it was void to the extent that it attempted to recharacterize income or other property acquired during the marriage as separate property. *See Williams v. Williams*, 569 S.W.2d 867, 870 (Tex. 1978).[2] Furthermore, income and revenue from separate property was community property because it was not acquired by "gift, devise or descent." *See* TEX. CONST. art. XVI, § 15. However, article XVI, section 15, of the Texas Constitution was amended in November 1980 to allow "persons about to marry and spouses" to partition or exchange community property "then existing or to be acquired" in the future. *Id*. The 1980 amendment also provided that "the spouses may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned by one of them, or which thereafter might be acquired, shall be the separate property of that spouse. . . ." TEX. CONST. art. XVI, § 15 (1980, amended 1987).[3]

The Texas Supreme Court held in *Beck* that the 1980 constitutional amendment impliedly validated section 5.41 of the Texas Family Code and all agreements entered into before November 4, 1980, pursuant to that statute. *Beck*, 814 S.W.2d at 749. In *Beck*, the parties agreed that "all the properties . . . held or standing in the name of only one of them shall be considered as a separate property of the one of them in whose name such property is held or stands." *Id*. at 746. Apparently, the supreme court found that the agreement was validated by the clause authorizing the "partition . . . or exchange . . . of community property . . . to be acquired." *See id*. at 747.

Because paragraph 6.02 of the Fannings' premarital agreement was substantially similar to the agreement upheld in *Beck*, that portion of the agreement was enforceable. Therefore, the court erred in setting aside paragraph 6.02 of the premarital agreement.

Unlike the agreement upheld in *Beck*, however, paragraph 6.01 of the Fannings' premarital agreement deals with income from separate property, regardless of whether it was deposited into an account designated as the separate property of one of the spouses. *See id*. at 746. Although the portion of the constitutional amendment validating the partition and exchange of property "then existing or to be acquired" applies to "persons about to marry and spouses," the portion of the amendment validating writ-

[2] *But see* Beck v. Beck, 814 S.W.2d 745, 749 (Tex. 1991) (agreement entered under the 1948 amendment to article XVI, section 15, of the Texas Constitution was "voidable" rather than "void").

[3] Non-substantive changes were made to this clause by constitutional amendment in 1987. Article XVI, section 15, of the Texas Constitution now provides, "spouses also may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned or which thereafter might be acquired by only one of them, shall be the separate property of that spouse. . . ." TEX.CONST. art. XVI, § 15.

ten agreements concerning income or property derived from separate property applies only to spouses. *See* TEX. CONST. art. XVI, § 15.[4]

Section 5.41 of the Texas Family Code, as it existed at the time the Fannings entered into the premarital agreement, appeared to allow persons intending to marry to enter into enforceable agreements concerning their property as they saw fit.[5] The scope of section 5.41 was addressed by the Texas Supreme Court in *Williams*:

> This statute should be construed as broadly as possible in order to allow the parties as much flexibility to contract with respect to property or other rights incident to the marriage, provided the constitutional and statutory definitions of separate and community property or the requirements of public policy are not violated. *Williams*, 569 S.W.2d at 870.

Because the Texas Constitution remains the ultimate authority on the character of marital property, a premarital agreement entered into pursuant to section 5.41 may not violate the constitutional definitions of separate and community property. *See Arnold v. Leonard*, 273 S.W. 799, 802 (Tex. 1925). We note that the Texas Supreme Court in *Beck* addressed only the retroactive application of the 1980 amendment, rather than the scope of premarital agreements authorized by that amendment. *See Beck*, 814 S.W.2d at 748.

The 1980 amendment did not authorize persons intending to marry to enter into agreements that the income from one spouse's separate property would thereafter be the owner's separate property.[6] Therefore, we hold that the trial court correctly concluded that paragraph 6.01 of the premarital agreement was unenforceable to the extent the parties merely agreed that "as soon as legally possible all income from their respective separate estates shall be the separate property of the spouse from whose estate such income is derived."

According to section 5.44 of the Texas Family Code, "A premarital agreement becomes effective on marriage." TEX. FAM. CODE ANN. § 5.44 (Vernon Supp.1992). As a result, some commentators have suggested that, by statutory definition, a premarital agreement is between spouses who are authorized to enter into agreements concerning income or property derived from separate property.[7] However, the constitutional distinction between partition and exchange agreements and agreements concerning income from separate property cannot be redefined by the legislature. *See Arnold*, 273 S.W. at 802. Therefore, section 5.44 provides no basis for validating paragraph 6.01 of the premarital agreement.

---

[4] This constitutional distinction between partition and exchange agreements and agreements concerning income from separate property was reflected by the 1981 and 1987 amendments to the Texas Family Code, enacted by the legislature to implement the 1980 amendment to article XVI, section 15, of the Texas Constitution. Although section 5.53 of the Texas Family Code authorizes agreements between spouses concerning income or property derived from separate property, the Texas Uniform Premarital Agreement Act does not expressly authorize such an agreement between "prospective spouses." *See* TEX.FAM.CODE ANN. §§ 5.41-.50, 5.53 (Vernon Supp.1992).

[5] *See* Cameron, Hoffman & Ytterberg, *Marital and Premarital Agreements*, 39 BAYLOR L. REV. 1095, 1101-02 (1987).

[6] *See* Featherston & Springer, *Marital Property Law in Texas: The Past*, *Present and Future*, 39 BAYLOR L. REV. 861, 884 (1987).

[7] *See* Mercing, *The Uniform Premarital Agreement Act: Survey of its Impact in Texas and Across the Nation*, 42 BAYLOR L. REV. 825, 844 (1990).

Arguably, a premarital agreement could partition or exchange income from separate property as property to be acquired in the future.[8] However, the language of paragraph 6.01 indicates that the parties were not contemplating a partition or exchange of property to be acquired during the marriage. Instead, paragraph 6.01 expressly refers to the portion of the 1980 amendment that authorized agreements concerning income or property derived from separate property. Because they were clearly attempting to implement the portion of the 1980 amendment that applied only to spouses, we hold that paragraph 6.01 was not validated by the constitutional amendment authorizing the partition and exchange of property to be acquired in the future. Therefore, the income from separate property remained community property unless otherwise recharacterized by a valid provision of the premarital agreement or an enforceable partition agreement executed during the marriage. As in *Williams*, the invalid provision is severable from the valid portions of the agreement because the invalid provision does not constitute the agreement's main or essential purpose. *See Williams*, 569 S.W.2d at 871.

Paragraph two of the premarital agreement provided that the property described in Schedule A "is and shall remain the separate property of Future Husband," and that the property described in Schedule B "is and shall remain the separate property of Future Wife." The "incomes and revenues from Whitney E. Fanning practice of law" were designated as his separate property. Likewise, "all incomes derived from future Wife's law practice" were designated as her separate property. In *Huff v. Huff*, 554 S.W.2d 841, 842-44 (Tex. Civ. App.—Waco, 1977, writ dism'd), this court held that section 5.41 of the Texas Family Code authorized such an agreement. Furthermore, as a partition or exchange of property to be acquired in the future, this agreement was impliedly validated by the 1980 constitutional amendment. *See* TEX. CONST. art. XVI, § 15. Therefore, the court erred in finding that during the marriage all income earned by Whitney Fanning in the practice of law was community property. The court also erred in concluding that the provision of the premarital agreement providing for the exchange of future earnings from the practice of law was "unconstitutional and therefore void at the time of its execution." However, to the extent that either spouse earned income from personal efforts other than the practice of law, the court correctly concluded that the premarital agreement, "did not operate to partition and/or exchange the community property interests in the parties' income from personal efforts."

In point five, Whitney Fanning argues that the court erred in refusing to make an equal division of the community property. Paragraph ten of the premarital agreement provides:

> In the event the parties marriage is dissolved by divorce or annulment by any court, wherever located, each party is to retain his or her separate estate as his or her separate property following the dissolution. *All community property is to be divided equally between the parties according to its value*. To effectuate this provision, Future Husband and Future Wife relinquish and disclaim any right they may have to seek a division of their property other than in accordance with this paragraph, and agree to indemnify the other for the value of any property that may be awarded by a court in excess of the value that would result if division were in accordance with this paragraph." (Emphasis added).

In determining the validity of paragraph ten, we again construe the former section 5.41 of the Texas Family Code[9] "as broadly as possible in order to allow the parties as much flexibility to con-

[8] Section 5.41 of the Texas Family Code, as amended in 1987, defines property as "an interest, present or future, legal or equitable, vested or contingent, in real or personal property, *including income and earnings*." TEX.FAM.CODE ANN. § 5.41(2) (Vernon Supp.1992) (emphasis added).

[9] Section 5.43(a)(3) of the Texas Family Code now authorizes parties to a premarital agreement to contract with respect to "the disposition of property on separation [or] marital dissolution. . . ." TEX.FAM.CODE ANN. § 5.43(a)(3) (Vernon Supp.1992). However, as in Beck, 814 S.W.2d at 746, we apply the law in effect at the time the agreement

tract . . . , provided the constitutional and statutory definitions of separate and community property or the requirements of public policy are not violated." *See Williams*, 569 S.W.2d at 870. Article XVI, section 15, of the Texas Constitution provides that "the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse." TEX. CONST. art XVI, § 15. By definition, a partition or exchange of community property results in the recharacterization of community property. Because an agreement to equally divide the community property involves the disposition of community property upon dissolution rather than the recharacterization of community property as separate property, the 1980 amendment to the constitution does not appear to authorize such an agreement. However, article XVI, section 15, also authorizes the legislature to more clearly define "the rights of the spouses, in relation to separate and community property. . . ." *Id*. This is exactly what the legislature was attempting to do in the former section 5.41 of the Texas Family Code, as well as in the Uniform Premarital Agreement Act, which replaced section 5.41 in 1987. Therefore, paragraph ten of the premarital agreement was constitutionally authorized by section 5.41.[10]

An agreement to equally divide community property also appears to encroach upon the trial court's statutory duty to "order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party. . . ." *See* TEX. FAM. CODE ANN. § 3.63(a) (Vernon Supp.1992). However, because section 5.41 had more clearly defined "the rights of the parties," the trial court, according to section 3.63(a), must give "due regard" to the terms of a premarital agreement authorized by the constitution. *See* TEX. CONST. art. XVI, § 15; TEX. FAM. CODE ANN. § 3.63(a) (Vernon Supp.1992). Therefore, the court erred to the extent that it failed to equally divide any community property of the parties.

ENFORCEABILITY OF THE PREMARITAL AGREEMENT

The court expressly found that "[O]n or about August 15, 1980, the parties executed an Agreement in Contemplation of Marriage." However, the court did not find that the agreement was executed involuntarily or that it was unconscionable. *See* TEX. FAM. CODE ANN. § 5.46 (Vernon Supp.1992). Because Whitney Fanning requested additional findings of fact related to the court's failure to enforce the premarital agreement, the judgment may not be supported upon appeal by a presumed finding that the agreement was unenforceable under section 5.46. *See* TEX. R. CIV. P. 299.

The premarital agreement, with the exception of paragraph 6.01, was both valid and enforceable. Because the trial court erred in setting the premarital agreement aside, points two and five are sustained.

---

was executed. The retroactive application of sections 5.46 and 5.55 of the Texas Family Code is distinguishable because the enforcement provisions of the statute are procedural in nature. *See* TEX.FAM.CODE ANN. §§ 5.46, .55 (Vernon Supp.1992).

[10] Act of June 2, 1969, 61st Leg., R.S., ch. 888, § 1, Tex.Gen.Laws 2707, 2729, (amended 1987).

THE PARTITION AGREEMENTS

Whitney and Nita Fanning executed partition agreements on August 14, 1981, and May 14, 1986, pursuant to section 5.42 of the Texas Family Code,[11] which purported to authorize the partition or exchange of community property. Each partition agreement recharacterized property listed on attached exhibits as the separate property of the designated spouse. In points one and three, Whitney Fanning contends that the court erred in setting aside the 1986 partition agreement and in refusing to enforce the 1981 partition agreement.

VALIDITY OF THE PARTITION AGREEMENTS

The court concluded that neither partition agreement operated "to partition and/or exchange the community property interest in future income from the separate estates of the parties." In fact, neither partition agreement provides "that the income or property from all or part of the separate property then owned or which thereafter might be acquired by only one of them, shall be the separate property of that spouse." *See* TEX. CONST. art XVI, § 15.

However, both of the partition agreements provide that:

> There shall be from this day no community property interest in the above described real and personal property and we shall each hold the above described real and personal property as our sole and separate property in the manner indicated to the exclusion of the other spouse."

This provision extended the partition and exchange of the property listed on the attached exhibits to property "to be acquired" in the future, as authorized by the 1980 constitutional amendment. *See* TEX. CONST. art. XVI, § 15. Therefore, as in *Beck*, the future income from the separate-property assets listed on the attached exhibits remained the separate property of the designated spouse. *See Beck*, 814 S.W.2d at 746.

The court also concluded that neither partition agreement operated "to partition and/or exchange the community property interest in the parties' income from personal efforts." Although such an agreement was authorized by the 1980 constitutional amendment, as the partition or exchange of community property "to be acquired" in the future, neither partition agreement attempted to recharacterize the parties' income from personal efforts as separate property. *See* TEX. CONST. art XVI, § 15.

The 1986 partition agreement designated Whitney Fanning's law practice as his separate property. However, because the 1986 partition agreement did not expressly designate the income from his law practice as his separate property, the court correctly concluded that neither partition agreement operated to partition or exchange the community-property interest in the parties' income from personal efforts. *See Dewey v. Dewey*, 745 S.W.2d 514, 517 (Tex. App.—Corpus Christi 1988, writ denied). This is of little consequence, however, because the premarital agreement had previously effected a par-

[11] When the 1981 partition was executed, section 5.42(a) of the Texas Family Code provided: "At any time, the spouses may partition between themselves, in severalty or in equal undivided interests, all or any part of their community property. They may exchange between themselves the interest of one spouse in any community property for the interest of the other spouse in other community property. A partition or exchange must be in writing and subscribed by both parties." Act of June 2, 1969, 61st Leg., R.S., ch. 888, § 1, 1969 Tex.Gen.Laws 2707, 2729, amended by Act of May 22, 1981, 67th Leg., R.S., ch. 782, § 2, 1981 Tex.Gen.Laws 2964, 2965. When the 1986 partition was executed, section 5.42 of the Texas Family Code provided: "At any time, the spouses may partition or exchange between themselves any part of their community property, then existing or to be acquired, as they may desire. Property or a property interest transferred to a spouse by a partition or exchange agreement becomes his or her separate property." Act of May 22, 1981, 67th Leg., R.S., ch. 782, § 2, 1981 Tex.Gen.Laws 2964, 2965, amended by Act of June 1, 1987, 70th Leg., R.S., ch. 678, § 1, 1987 Tex.Gen.Laws 2530, 2531-32 (current version at TEX.FAM.CODE ANN. § 5.52 (Vernon Supp.1992)).

tition or exchange of the community-property interest in the primary source of the parties' income from personal efforts—"all incomes and revenues from [the] Whitney E. Fanning practice of law."

ENFORCEABILITY OF THE PARTITION AGREEMENTS

The court concluded as a matter of law that the 1986 partition agreement was unconscionable. The court also found that:

> Prior to the execution of the Partition Agreement dated May 12, 1986, Nita Kissel Fanning was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; and Nita Kissel Fanning did not voluntarily and expressly waive, in writing, the right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and Nita Kissel Fanning did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

Whitney Fanning argues that the evidence was legally or factually insufficient to support the court's conclusion of law that the agreement was unconscionable or the court's findings of fact related to the disclosure of property or financial obligations. Concisely stated, Whitney Fanning contends that Nita Fanning failed to carry her burden of proof under section 5.55 of the Texas Family Code. Section 5.55 provides that:

> (a) A partition or exchange agreement is not enforceable if the party against whom enforcement is sought proves that:
>
> (1) that party did not execute the agreement voluntarily; or
>
> (2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:
>
> (A) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
>
> (B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the party beyond the disclosure provided; and
>
> (C) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.
>
> (b) An issue of unconscionability of a partition or exchange agreement shall be decided by the court as a matter of law."

TEX. FAM. CODE ANN. § 5.55 (Vernon Supp.1992).

In response, Nita Fanning argues that section 5.55 does not apply to the 1986 partition agreement. Prior to September 1, 1987, the enforcement of marital agreements was governed by section 5.45.[12] When the legislature amended the Texas Family Code in 1987, it did not expressly provide that the amendatory provisions should be given retrospective application. However, the general rule is that, in the absence of an express intention to the contrary, legislation dealing with a procedural matter applies to pending litigation to the extent that subsequent steps in the case are to be taken under the new rule. *Brooks v. Texas Employers Ins. Ass'n*, 358 S.W.2d 412, 414 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.). Section 5.55 simply sets forth the revised procedural scheme for challenging the enforceability of a partition or exchange agreement. Therefore, Nita Fanning had the burden of proof under section 5.55 because the provisions of former section 5.45 no longer applied. *See Daniel v. Daniel*, 779 S.W.2d 110, 113 (Tex. App.—Houston [1st Dist.] 1989, no writ).

[12] Act of May 22, 1981, 67th Leg., R.S., ch. 782, § 2, 1981 Tex.Gen.Laws 2964, 2965, amended by Act of June 1, 1987, 70th Leg., R.S., ch. 678, § 1, 1987 Tex.Gen.Laws 2530, 2531-32 (current version at TEX.FAM.CODE ANN. § 5.55 (Vernon Supp.1992)).

Although section 5.55(b) provides that the issue of unconscionability shall be decided by the court as a matter of law, the legislature and the courts have not defined "unconscionable" in the context of marital-property agreements. *See* TEX. FAM. CODE ANN. § 5.55(b) (Vernon Supp.1992). Instead, the issue of unconscionability must be addressed on a case-by-case basis, looking to the entire atmosphere in which the agreement was made. *See Pearce v. Pearce*, 824 S.W.2d 195, 199 (Tex. App.—El Paso, 1991, no writ). In *Chiles v. Chiles*, 779 S.W.2d 127, 129 (Tex. App.—Houston [14th Dist.] 1989, writ denied), the court held that a factual finding that an agreement was unfair to one spouse did not satisfy the burden of proof required by the statute.

In *Wade v. Austin*, 524 S.W.2d 79, 86 (Tex. Civ. App.—Texarkana 1975, no writ), the court addressed unconscionability of a contract under section 2.302 of the Texas Business and Commerce Code:

> In determining whether a contract is unconscionable or not, the court must look to the entire atmosphere in which the agreement was made, the alternatives, if any, which were available to the parties at the time of the making of the contract; the non-bargaining ability of one party; whether the contract is illegal or against public policy, and, whether the contact is oppressive or unreasonable. At the same time, a party who knowingly enters a lawful but improvident contract is not entitled to protection by the courts. . . . A contract is not unenforceable on the ground that it yields a return disproportionate to the expenditures in time and money, where there has been no mistake or unfairness and the party against whom it is sought to be enforced has received and enjoyed the benefits.

As in *Wade*, we will focus upon the circumstances at the time the agreement was executed rather than the disproportionate effect of the agreement. *See id*. Mr. Fanning testified that severe marital problems developed in April and May 1986. On the night before the agreement was signed, Mrs. Fanning had played tennis as a substitute in a mixed-doubles tennis league. When she returned home, Mr. Fanning would not talk to her, and he was "pouting." She testified that, when she asked him what was wrong, he expressed his concern about going to prison in connection with a criminal investigation against the district attorney of McLennan County. According to Mrs. Fanning, her husband wanted to make sure that she did not take all the money he had accumulated and "run off with someone else" while he was in prison—a possibility that he envisioned because she had played tennis with another man that night.

Mrs. Fanning testified that Mr. Fanning assured her that he would never use the agreement against her; and that he threatened to divorce her and take the children if she did not sign the partition agreement. At that time, Mr. Fanning had won ten consecutive custody cases for fathers. Because Mrs. Fanning considered his threats to be valid, she believed that her only alternative was to sign the agreement. *See Matthews v. Matthews*, 725 S.W.2d 275, 279 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (threatening to permanently deprive spouse of custody of the children constituted duress in the execution of a partition agreement).

That night, Mr. Fanning got out of bed and went to his law office to prepare the partition agreement. He called her the next day and told her to come to the office to sign the agreement. Although she remembered signing the partition agreement, she did not remember signing the accompanying deeds. She testified, however, that she would have signed whatever he put in front of her that day. A witness called by Mrs. Fanning testified that Mr. Fanning "just doesn't take no for an answer." According to the witness, when Mr. Fanning "wants to do something, he wants to do it and he wants to do it his way." Even the psychologist who testified on Mr. Fanning's behalf characterized him as manipulative and that, given his competitiveness, his manipulative tendencies, and his aggression, "he could get very angry and be retaliatory."

Considering the circumstances, the alternatives, and Nita Fanning's bargaining ability, we hold that the court did not err in concluding that the 1986 partition agreement was unconscionable when it was executed. Next, we must determine if the evidence is legally or factually sufficient to support the court's findings related to the disclosure of Mr. Fanning's property or financial obligations.

On direct examination, Mrs. Fanning testified that "At no time did [she] have a disclosure nor did [she] waive in writing any disclosure, which [she] since learned was a requirement." She believed that her husband wanted to keep her "ignorant of everything for [her] own protection" during the criminal investigation against the district attorney. She also testified that, because the district attorney's house had been searched, her husband was afraid that their house would be searched and that there was no safe place in Waco to keep anything.

Mrs. Fanning also testified that she did not have any knowledge of how much money was in an account, how much money her husband was making, or how much property he actually owned. Furthermore, Mr. Fanning's own psychologist described him as secretive. We find the evidence legally and factually sufficient to support the court's findings related to Mr. Fanning's failure to disclose his property or financial obligations. Therefore, we overrule point of error one.

The court expressly found that "On or about August 14, 1981, the parties executed a Partition Agreement." However, the court did not find that the 1981 partition agreement was executed involuntarily or that it was unconscionable. *See* TEX. FAM. CODE ANN. § 5.55 (Vernon Supp.1992). Because Whitney Fanning requested additional findings of fact related to the court's failure to enforce the 1981 partition agreement, the judgment may not be supported upon appeal by a presumed finding that the agreement was unenforceable under section 5.55. *See* TEX. R. CIV. P. 299.

The 1981 partition agreement was both valid and enforceable. Because the trial court erred in refusing to enforce the 1981 partition agreement, point three is sustained.

* * *

Notes, Comments & Questions

1. The Texas Supreme Court reviewed the Fanning case and in a Per Curiam opinion at 847 S.W.2d 225, determined that in addition to other matters, "the case must [as the lower court ruled] be remanded to the trial court, but we conclude that the issues to be reconsidered should not be so narrowly confined. The trial court should not, in the interest of justice, be required to enforce the premarital agreement but should have the opportunity to reconsider Nita's other challenges to its enforceability. Nita's failure to request, and the trial court's failure to make, findings regarding duress and unconscionability may well have been premised on the reasoning that those claims need not be addressed if the agreement was unconstitutional. We have broad discretion to remand a case in the interest of justice, TEX. R. APP. P. 180, and have often done so when 'it appears from the record that the losing party might be able to recover under some other established legal theory that was not developed at the first trial.' *Westgate*, *Ltd. v. State*, 843 S.W.2d 448, 455 (Tex. 1992) (citing authorities)." . . .

2. *Fanning v. Fanning* exemplifies the reality of marital property cases—such are seldom one dimensional.

3. The Waco Court of Appeals mentions that Mrs. Fanning believed that signing the agreement was her only alternative when faced with Mr. Fanning's threat to divorce her and obtain custody of the children. Following this observation, the court cites *Matthews v. Matthews*, 725 S.W.2d 275, 279 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). Take the time to look up and review *Mat-*

thews. Were Mrs. Fanning and Mrs. Matthews so similarly situated that each should have been considered under duress at time of signing?

4. What do you think of the action taken by the Texas Supreme Court?

5. For more on the issue of unconscionability, *see Fazakerly v. Fazakerly*, 996 S.W.2d 260 (Tex. App.—Eastland 1999, pet. denied); *Marsh v. Marsh*, 949 S.W.2d 734 (Tex. App.—Houston [14th Dist.] 1997, no writ).

SHESHUNOFF
v.
SHESHUNOFF
172 S.W.3d 686
(Tex. App.—Austin 2005, pet. denied)

PEMBERTON, JUSTICE.

The principal issue in this case concerns the enforceability of a marital property agreement. *See* TEX. FAM.CODE ANN. § 4.105 (West 1998). Applying section 4.105 to the defensive theories that were timely raised in this case, we affirm the district court's judgment enforcing the agreement.

BACKGROUND

The Marital Property Agreement

Appellant Alexander Sheshunoff and Appellee Gabrielle Sheshunoff were married in 1971. Before their marriage, the couple entered into an agreement governing various rights and obligations relating to their marital property, and they devised a new one in 1990. Beginning in 2002, the couple, each with assistance of several attorneys, accountants, and other professional advisors, began negotiating an elaborate thirty-seven page Marital Property Agreement that addressed the couple's respective rights to their substantial marital assets. They eventually executed the Agreement in February 2003. In April 2003, Ms. Sheshunoff filed for divorce and sought the benefit of the agreed-upon property division.

The circumstances surrounding the formation of the Agreement are at the root of the present controversy. According to Mr. Sheshunoff, the Agreement shifted large amounts of the couple's marital assets to Ms. Sheshunoff and large amounts of marital liabilities to him for tax and estate planning purposes. Mr. Sheshunoff asserts that, throughout the negotiations, he had understood and intended that this arrangement was solely to achieve tax and estate planning benefits and that neither party had any intention to actually divorce. Mr. Sheshunoff claims that Ms. Sheshunoff and her lawyers misled him to believe that she shared this intent when, in fact, she was plotting to file for divorce (and avail herself of the highly favorable property division) once she persuaded him to sign the agreement. Ms. Sheshunoff denies these allegations.

* * *

DISCUSSION

Mr. Sheshunoff brings five issues on appeal. First, he contends that the district court erred in granting its partial summary judgment foreclosing his involuntariness defense; he does not complain of the court's ruling regarding unconscionability and lack of disclosure. In his second issue, Mr. Sheshunoff argues that the district court abused its discretion in striking his amended pleadings. In his third

issue, Mr. Sheshunoff asserts that the district court erred in severing and referring his reformation claims to arbitration because Ms. Sheshunoff had waived her right to seek arbitration and had failed to exhaust her remedy of mediation as a precedent to arbitration. In his fourth issue, Mr. Sheshunoff complains that the district court erred in striking his jury demand, while in his fifth issue he contends that the district court erred in granting final summary judgment because he had raised genuine issues of material fact regarding his stricken pleadings and severed claims.[6]

Partial Summary Judgment

In his first issue, Mr. Sheshunoff challenges the district court's granting of partial summary judgment foreclosing his involuntary-execution defense to the Marital Property Agreement. Specifically, he argues that (1) he has raised a fact issue with regard to the common-law defenses of fraudulent inducement and duress; and (2) this evidence also raises a fact issue regarding involuntary execution under section 4.05 of the family code.

* * *

The involuntary execution defense

Our disposition of Mr. Sheshunoff's first issue requires us to evaluate Mr. Sheshunoff's summary-judgment evidence against the standard of "involuntary execution" in section 4.105 of the family code. The parties dispute the meaning of "involuntary execution" and the extent to which it can be proven by evidence of common-law defenses like fraud or duress. We accordingly first clarify the nature of this statutory defense before turning to Mr. Sheshunoff's summary-judgment evidence.

Overview of section 4.105

Section 4.105 of the family code provides:

> (a) A partition or exchange agreement is not enforceable if the party against whom enforcement is requested proves that:
>
> (1) the party did not sign the agreement voluntarily; or
>
> (2) the agreement was unconscionable when it was signed and, before execution of the agreement, that party:
>
> (A) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
>
> (B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
>
> (C) did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party.
>
> (b) An issue of unconscionability of a partition or exchange agreement shall be decided by the court as a matter of law.
>
> (c) The remedies and defenses in this section are the exclusive remedies or defenses, including common law remedies or defenses.

See TEX. FAM.CODE ANN. § 4.105(a). There is no dispute on appeal that the Marital Property Agreement is a "partition or exchange agreement" within the meaning of section 4.105.

Language parallel to that in section 4.105 appears in section 4.006 of the family code, which governs enforceability of premarital, or "antenuptial," agreements. *See* TEX. FAM.CODE ANN. § 4.006 (West 1998). Subsections (a) and (b) of each provision track the language of the Uniform Premarital

[6] [Footnote omitted.]

Agreement Act. * * * These portions of the Uniform Act evolved from a debate between commissioners who desired certainty in the enforcement of marital property agreements and those who urged that such agreements should be routinely scrutinized for substantive fairness. * * * The former view dominated the debate: the Act provided that a premarital agreement that was voluntarily executed would be enforced, even if unconscionable, as long as the opposing party knew or should have known of the other party's assets, or waived such disclosure. *Id*. The commissioners considered that the voluntariness of a premarital agreement may turn, in part, upon whether the agreement was entered into knowingly, in the sense that the parties understood the terms or basic effect of the agreement. *Id*.

Before the Texas Legislature adopted our version of the Uniform Act, Texas law had required a party seeking to enforce a marital property agreement to prove, by clear and convincing evidence, that the other party had given informed consent and that the agreement had not been procured by fraud, duress, or overreaching. Act of June 18, 1987, 70th Leg., R.S., ch. 678, § 1, sec. 5.46, 1987 Tex. Gen. Laws 2530, 2530-31; *see Williams v. Williams*, 720 S.W.2d 246, 248 (Tex. App.—Houston [14th Dist.] 1986, no writ).[7] Dissatisfaction with this difficult burden of proof led to the legislature's adoption of the Uniform Act in 1987. * * * By shifting the burden of proof to the party opposing enforcement and by adopting the Uniform Act's concept that voluntarily executed marital property agreements should be enforced even if unconscionable (unless inadequate disclosure can be proven), the Texas Legislature manifested a strong policy preference that marital property agreements should be enforced whenever persons who are married or intend to marry voluntarily enter into them. *See Beck v. Beck*, 814 S.W.2d 745, 749 (Tex.1991) (public policy dictates that premarital agreements should be enforced), *cert. denied*, 503 U.S. 907, 112 S.Ct. 1266, 117 L.Ed.2d 494 (1992); *Grossman v. Grossman*, 799 S.W.2d 511, 513 (Tex. App.—Corpus Christi 1990, no writ) (premarital agreements are presumptively valid). Barring constitutional impediments, we must defer to these legislative policy pronouncements. *See Battaglia v. Alexander*, No. 02-0701, 177 S.W.3d 893, 914, 2005 WL 1252326, *17, 48 Tex. Sup. J. 720, 2005 Tex. LEXIS 419, at *62 (May 27, 2005).

As originally enacted, sections 4.006 and 4.105, like the Uniform Act, contained only subsections (a) and (b). *See* Act of June 1, 1987, 70th Leg., R.S., ch. 678, § 1, secs. 5.46, .55, 1987 Tex. Gen. Laws 2530, 2530-31. In 1993, however, the legislature departed from the Uniform Act and added subsection (c) to each. *See* Act of April 30, 1993, 73d Leg., R.S., ch. 136, §§ 1, 2, 1993 Tex. Gen. Laws 283, 283. This amendment apparently responded to *Daniel v. Daniel*, in which our sister court in Houston held that, absent explicit legislative provision to the contrary, the involuntary execution and unconscionability defenses should be construed to "simply provide[ ] an additional statutory remedy for persons challenging property agreements executed pursuant to the Family Code" and not "to replace all common law defenses." 779 S.W.2d 110, 114 (Tex. App.—Houston [1st Dist.] 1989, no writ). Thus, the *Daniel* court concluded that parties could assert *both* the statutory defenses under section 4.105 *and* common-law contractual defenses against the enforcement of partition and exchange agreements. *Id*. at 114. In subsection (c), the legislature supplied the explicit legislative intent found lacking by the Daniel court, providing that the "remedies and defenses in this section are the exclusive remedies or defenses, including common law remedies or defenses." * * *

Involuntary execution and common-law defenses

While maintaining that proof of fraud and duress is also evidence of involuntary execution, Mr. Sheshunoff asserts that involuntary execution "is a broader, less specific defense" than fraud and duress and that he accordingly does not necessarily have to prove each common-law element of either defense to prove involuntary execution. In contrast, Ms. Sheshunoff seems to construe subsection (c) of section 4.105 to foreclose the possibility that proof of a common-law defense like duress or fraud

[7] [Footnote omitted.]

could also be proof of involuntary execution, though elsewhere she has appeared to concede that proof of duress might be proof of involuntary execution.

To ascertain the relationship between involuntary execution and fraud or duress, we first examine the meaning of "voluntarily" in section 4.105. Neither the family code nor the Uniform Act defines "voluntarily," nor does the legislative history of either provide much guidance regarding the intended meaning of the term. We can obtain some guidance from dictionary definitions.[8] The ordinary meaning of "voluntarily," as reflected in dictionary definitions, entails (1) intentional action, as opposed to inadvertent or accidental action, (2) that is the product of the exercise of free will.[9]

The official comments accompanying the Uniform Act suggest that common-law concepts including duress, lack of capacity, fraud, and undue influence, along with the parties' relative bargaining power and knowledge regarding the meaning and effect of the agreement, could bear upon the ultimate determination of voluntariness. *See Marriage of Bonds*, 99 Cal.Rptr.2d 252, 5 P.3d at 824-25 (concluding that "the question is viewed as one involving such ordinary contract defenses as fraud, undue influence, or duress, along with some examination of the parties' knowledge of the rights being waived, or at least knowledge of the intent of the agreement"); *Marriage of Shirilla*, 319 Mont. 385, 89 P.3d 1, 3 (2004) ("The party seeking to avoid a premarital agreement may prevail by establishing that the agreement was involuntary, and that evidence of lack of capacity, duress, fraud, and undue influence, as demonstrated by a number of factors uniquely probative of coercion in the premarital context, would be relevant in establishing the involuntariness of the agreement."). Some courts, moreover, have equated voluntariness under the Uniform Act with "procedural fairness," which takes account of such factors as coercion, duress, undue influence, and the parties' relative bargaining power and sophistication. *See Marriage of Bonds*, 99 Cal.Rptr.2d 252, 5 P.3d at 826-27.

Texas courts have construed "voluntarily" under sections 4.105 and 4.006 in a generally consistent manner. In *Nesmith v. Berger*, for example, we assumed without deciding that the appellant's definition of "voluntarily," derived from common-law duress concepts, controlled our inquiry under section 4.006: "an action is taken by design, intentionally, purposefully, by choice, of one's own accord, or by the free exercise of will." 64 S.W.3d 110, 113-16 (Tex. App.—Austin 2001, pet. denied) (*citing Prigmore v. Hardware Mut. Ins. Co. of Minn*., 225 S.W.2d 897, 899 (Tex. Civ. App.—Amarillo 1949, no writ)).[10] We applied this definition to an involuntary execution claim predicated on a husband's threat not to go on a planned honeymoon unless his wife first signed a premarital agreement. *Id*. at 111-15. Citing evidence of the parties' mutual desire to enter into such an agreement, the wife's mo-

---

[8] [Footnote omitted.]

[9] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY defines "voluntarily" as "in a voluntary manner: of one's own free will: spontaneously," and "voluntary" as "proceeding from the will: produced in or by an act of choice," "performed, made or given of one's own free will," "done by design or intention: not accidental," and "acting of oneself: not constrained, impelled, or influenced by another." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2564 (1986). Similarly, the AMERICAN HERITAGE DICTIONARY defines "voluntary" as "[a]rising from one's own free will: acting on one's own initiative," "normally controlled by or subject to individual volition," "[c]apable of exercising will, volitional," and "[a]cting or performed without external persuasion or compulsion." AMERICAN HERITAGE DICTIONARY 1436 (1973).

Some definitions, moreover, indicate that voluntariness implies knowledge of "essential facts." BLACK'S LAW DICTIONARY defines "voluntarily" as "[d]one by design or intention, intentional, proposed, intended or not accidental, intentionally and without coercion," and "voluntary" as "[u]nconstrained by interference; unimpelled by another's influence; spontaneous; acting of oneself. Done by design or intention. Proceeding from the free and unrestrained will of the person. Produced in or by an act of choice. Resulting from free choice. The word, especially in statutes, often implies knowledge of essential facts." BLACK'S LAW DICTIONARY 813 (7th ed.1999).

[10] [Footnote omitted.]

tives for entering into the agreement, bargaining over terms, and both parties' subsequent compliance with the agreement, we overruled a great weight and preponderance challenge to the trial court ruling enforcing the agreement. *Id*. We concluded that "[i]n light of the bargaining that accompanied every step of the relationship between the parties before and during their marriage, we cannot say that [the husband's] proposed bargain to finalize the terms of the long-contemplated agreement before leaving on a honeymoon exerted such undue influence as to deprive [the wife] of her free will in signing the agreement." *Id*. at 115 (emphasis added); *see also Marsh v. Marsh*, 949 S.W.2d 734, 740-43 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (in reviewing unconscionability defense, considering whether evidence of threats, fraud, overreaching, duress, or misrepresentations, as well as parties' relative sophistication, experience, and bargaining power).[11]

In *Nesmith*, we relied in part on the Fort Worth court's analysis in *Matelski v. Matelski*, 840 S.W.2d 124, 128-29 (Tex. App.—Fort Worth 1992, no writ). *Matelski*, like some other decisions from our sister courts, simply equates involuntary execution with common-law duress.[12] *See Osorno v. Osorno*, 76 S.W.3d 509, 510-11 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (as matter of law, no duress in premarital agreement based on threat by party to commit act they have legal right to do).[13]

The ordinary meaning of "voluntary," the legislative history and application of the Uniform Act, and the manner in which Texas courts have construed the term compel us to agree with Mr. Sheshunoff—although the presence of such factors as fraud, duress, and undue influence may bear upon the inquiry, Mr. Sheshunoff does not have to prove each element of these common-law defenses to establish the ultimate issue of involuntary execution. *See Daniel*, 779 S.W.2d at 114 & n.4 (observing that involuntary execution "alleviates the need for proof of all elements required in common law defenses," such as knowledge or reliance elements of fraud). We implied as much in Nesmith, where we looked not to the elements of common-law defenses but directly to the controlling issue of whether the party resisting enforcement executed the agreement voluntarily. *See Nesmith*, 64 S.W.3d at 114-15. This approach is consistent with the text of section 4.105, which refers not to common-law concepts but solely to whether the party signed the agreement voluntarily. TEX. FAM.CODE ANN. § 4.105(a)(1); *see Office of the Attorney Gen. of Tex. v. Lee*, 92 S.W.3d 526, 528 (Tex. 2002).[14]

Ms. Sheshunoff contends that the legislature's addition of subsection (c) renders irrelevant the history and application of the involuntary execution defenses under the Uniform Act. We disagree. Subsection (c) was intended to clarify merely that, contrary to *Daniel*, parties cannot assert common-law defenses in addition to the defenses enumerated in section 4.105. It does not prohibit us from considering as potential evidence of involuntary execution proof of conduct that Mr. Sheshunoff asserts constitutes fraud or duress.

---

[11] [Footnote omitted.]

[12] The *Matelski* court described the elements of duress as follows:

> There can be no duress unless there is a threat to do some act which the party threatening has no legal right to do. Such threat must be of such character as to destroy the free agency of the party to whom it is directed. It must overcome his will and cause him to do that which he would not otherwise do, and that which he was not legally bound to do. The restraint caused by such threat must be imminent. It must be such that the person to whom it is directed has no present means of protection.

Matelski v. Matelski, 840 S.W.2d 124, 129 (Tex.App.-Fort Worth 1992, no writ) (*quoting Dale v. Simon*, 267 S.W. 467, 470 (Tex.Com.App.1924, judgm't adopted)).

[13] [Footnote omitted.]

[14] [Footnote omitted.]

In sum, we conclude that section 4.105 sets out the exclusive remedies available to prevent enforcement of a postmarital agreement, and that, although common-law defenses may inform our analysis of "voluntariness," they will not necessarily control.

* * *

. . . Mr. Sheshunoff advances two theories of involuntary execution: (1) he was forced into signing the Agreement; and (2) he was misled into signing it in the belief that Ms. Sheshunoff would not actually seek a divorce and avail herself of her rights to the agreed-upon property division.

To support his first involuntary execution theory, Mr. Sheshunoff presented an affidavit in which he claims that Ms. Sheshunoff threatened him that, unless he signed the Marital Property Agreement, "she would withdraw her loan guarantee" she had advanced his company, Alex Sheshunoff Management, L.P., "and have the Bank of America immediately call the line of credit," leading to dire consequences for the company. He attaches copies of the loan documents, which demonstrate that (1) Ms. Sheshunoff, along with Mr. Sheshunoff, was a guarantor on a $1 million loan agreement between Bank of America and Alex Sheshunoff Management Services, L.P.;[17] and (2) the promissory note provided that Bank of America "will have no obligation to advance funds" on the company's revolving line of credit if "any guarantor seeks, claims, or otherwise attempts to limit, modify, or revoke such guarantor's guarantees of this Note or any other loan with Lender." However, this evidence shows, at most, that Ms. Sheshunoff threatened to withdraw her loan guarantee and that her doing so would have entitled Bank of America to cut off the line of credit. Mr. Sheshunoff offers no proof, and only the conclusory statement in his affidavit, regarding the likelihood that Bank of America in fact would have exercised this contractual right, at Ms. Sheshunoff's behest or otherwise.[18] Absent such proof, the jury could not reasonably infer—and could only speculate—that Ms. Sheshunoff's alleged threat to withdraw the loan guarantee presented the sort of imminent threat that Texas law has considered capable of overwhelming free will and rendering Mr. Sheshunoff's execution of the Marital Property Agreement involuntary. *See Wright v. Sydow*, No. 14-03-00222-CV, 173 S.W.3d 534, 544, 2004 WL 3153293, *5, 2004 Tex.App. LEXIS 10541, at *15 (Tex. App.—Houston [14th Dist.] 2004, pet. denied); *King v. Bishop*, 879 S.W.2d 222, 223 (Tex. App.—Houston [14th Dist.] 1994, no writ); *Charping v. Light*, 578 S.W.2d 462, 464 (Tex. Civ. App.—Austin 1979, no writ) (quoting *Dale v. Simon*, 267 S.W. 467, 470 (Tex. Com. App.1924, judgm't adopted)). It is thus no evidence.[19]

As for Mr. Sheshunoff's second theory of involuntary execution, he does not dispute that he and his team of lawyers and advisors knew that the Agreement explicitly provided for the property division he now characterizes as "draconian" and that it would be effective if the parties divorced. Nor, significantly, does Mr. Sheshunoff claim that he was misled concerning the presence of these terms in the Agreement or that they were concealed from him.[20] Rather, Mr. Sheshunoff contends only that he was misled concerning Ms. Sheshunoff's subjective intent to avail herself of her rights under the Agreement. Although not singularly determinative, it is significant that our sister courts have held that this type of conduct, even if proven, would not constitute fraud under Texas law. *See In re GTE Mobilnet of S. Tex. Ltd. P'ship*, 123 S.W.3d 795, 799-800 (Tex. App.—Beaumont 2003, orig. proceeding) (alleged misrepresentations that company would not enforce contractual arbitration clause known to parties could not constitute fraudulent inducement as matter of law). Similarly, we would impermissibly deviate from the statutory language—and the legislature's manifest intent to facilitate enforcement of

[17] [Footnote omitted.]

[18] [Footnote omitted.]

[19] [Footnote omitted.]

[20] [Footnote omitted.]

marital property agreements—by holding that a party who executes a marital property agreement with knowledge and understanding of its terms nonetheless did so "involuntarily" because he or she believed the other party would not enforce the agreement.

We accordingly conclude that Mr. Sheshunoff has failed to raise a fact issue regarding his involuntary execution defense. Our conclusion is not altered by Mr. Sheshunoff's assertions that Ms. Sheshunoff, as his spouse, owed him a fiduciary duty to be truthful during their negotiations. *See Buckner v. Buckner*, 815 S.W.2d 877, 880 (Tex. App.—Tyler 1991, no writ). Assuming without deciding that such a duty would apply under the circumstances of this case,[21] the Texas Legislature enacted section 4.105 with the understanding that married spouses owing fiduciary duties to one another would negotiate and execute marital property agreements. *See* TEX. GOV'T CODE ANN. § 311.023 (West 2005) (court to consider laws on same or similar subjects when construing statutes); *Argonaut Ins. Co. v. Baker*, 87 S.W.3d 526, 530-31 (Tex. 2002) (quoting *Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990) ("A statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it.")). Notwithstanding these duties, the legislature manifested the strong policy preference that voluntarily made marital property agreements be enforced. We have concluded that Mr. Sheshunoff has not raised a fact issue regarding the sort of involuntary execution the legislature could have intended to bar enforcement of marital property agreements. That conclusion would control even in the face of the fiduciary duties Mr. Sheshunoff claims.

We accordingly hold that the district court did not err in granting Ms. Sheshunoff's motion for partial summary judgment. We overrule Mr. Sheshunoff's first issue.

* * *

Questions

1. Describe a situation in which the signing of a premarital agreement would be unconscionable.

2. Do you think the defense of involuntary signing is frequently used? Why? Why not?

3. In the case of *Orsono v. Orsono*, 76 S.W.3d 509 (Tex. App. - Houston [14th Dist.] 2002, no pet.) the court determined that just because the female opponent to the premarital agreement was forty, unmarried, and pregnant, such did not establish that she had involuntarily signed the agreement.

---

[21] [Footnote omitted.]

IZZO
v.
IZZO
2010 WL 1930179
(Tex. App.-Austin 2010, pet. denied)

HENSON, JUSTICE.

Appellant John Thomas Izzo appeals from the final decree in his divorce proceeding from appellee Sharon Diane Izzo. He also appeals from the trial court's order sustaining Sharon's challenge to a post-marital property agreement between the parties. We affirm both the divorce decree[1] and the order finding the post-marital property agreement unenforceable.

BACKGROUND

The parties met in the spring of 2002, approximately one month after John started his own law practice. Sharon, who was working as a counselor at the time, owned a residence on Anacacho Cove in Round Rock (the "Anacacho Cove residence"), and had invested an inheritance of around $180,000 to $200,000 in mutual funds. At the hearing on her challenge to the post-marital property agreement (the "enforceability hearing"), Sharon testified that in the fall of 2002, John advised her that "investing in real estate or real property was much better than mutual funds" and that her money "would be better used and invest[ed] in a piece of property where a law firm would be situated." John testified that this discussion took place because Sharon was concerned that mutual funds were a risky investment, leading him to suggest that she invest in real estate instead. On March 12, 2003, Sharon and John formed an entity called Federalist Investments, L.L.C. ("Federalist") for the purpose of purchasing land and constructing an office building that would house John's law firm, with the remaining office space being leased to tenants. Sharon invested $80,000 in exchange for 80,000 shares in Federalist, and John invested $5,000 in exchange for 5,000 shares. Federalist then purchased real property on South Mays in Round Rock (the "South Mays property") for approximately $180,000, and constructed an office building on the site at a construction cost of approximately $525,000. The parties were married on April 26, 2003. Construction on the South Mays property was completed in 2005.

* * *

In the summer of 2006, John directed an associate at his firm to draft a post-marital property agreement dividing the property owned by the parties. The agreement included a sales provision stating that Sharon would transfer her 80,000 shares in Federalist to John in exchange for an $80,000 note, to be paid over the course of ten years at a rate of 4.2% interest. As a result, John would be the sole owner of Federalist, which in turn owned the South Mays property. The agreement further designated the Anacacho Cove residence as Sharon's separate property. With respect to the parties' marital estate, the agreement designated all of the community property as John's separate property, with the exception of personal property subject to Sharon's sole control and her counseling practice worth approximately $7,500. John would receive his law practice, which he valued at approximately $778,000 shortly after the agreement was executed, personal property subject to his sole control, and both of the Gabriels Overlook lots. At the time the agreement was executed, the down payment and all subsequent payments on the Gabriels Overlook lots had been made with community funds. Thus, the terms

[1] The portion of the opinion which addresses the division of property has, for the most part, been removed in the editing process. The enforceability of the post-marital agreement is the focus of the case as edited.

of the agreement gave John over $800,000 in community property, while Sharon would receive approximately $7,500 in community property.

* * *

John filed for divorce in November 2007 and sought to enforce the terms of the post-marital property agreement. Sharon filed a counter-petition for divorce, alleging, among other things, involuntariness, unconscionability, and breach of fiduciary duty. The trial court conducted a bifurcated trial on the enforceability of the agreement and ultimately issued an order sustaining Sharon's challenge to the agreement.

* * *

John now appeals from both the order sustaining Sharon's challenge to the enforceability of the post-marital property agreement and the final decree of divorce.

STANDARD OF REVIEW

The party challenging the enforceability of a marital property agreement bears the burden of proving the agreement was involuntary or unconscionable. *See* Tex. Fam. Code Ann. § 4.105 (West 2006); *Pletcher v. Goetz,* 9 S.W.3d 442, 445 (Tex. App.—Fort Worth 1999, pet. denied) (op. on reh'g). Whether a party executed an agreement voluntarily is a question of fact dependent upon all the circumstances and the mental effect on the party claiming involuntary execution. *Martin v. Martin,* 287 S.W.3d 260, 263 (Tex. App.—Dallas 2009, pet. denied). As a reviewing court, we may not substitute our judgment for that of the trial court with respect to the resolution of factual issues committed to the trial court's discretion. *Walker v. Packer,* 827 S.W.2d 833, 839 (Tex. 1992). In resolving factual issues, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Raymond v. Rahme,* 78 S.W.3d 552, 556 (Tex. App.—Austin 2002, no pet.).

The trial court has broad discretion in dividing the marital estate at divorce. *See Murff v. Murff,* 615 S.W.2d 696, 698 (Tex. 1981). On appeal, we presume that the trial court exercised this discretion properly and will reverse the cause only where there is a clear abuse of discretion. *See Bell v. Bell,* 513 S.W.2d 20, 22 (Tex. 1974). . . .

DISCUSSION

While John raises 57 points of error on appeal, these points can be generally summarized as two distinct issues. First, he argues that the trial court erred in finding the post-marital property agreement to be unenforceable, challenging each of the findings of fact and conclusions of law issued in support of this determination. Second, he argues that the trial court's division of property in the final decree of divorce was "grossly disproportionate" and a clear abuse of discretion. In support of this argument, John challenges the trial court's finding that his law firm had a value of at least $500,000 at the time of the divorce.

* * *

I. Post-Marital Property Agreement

Chapter 4 of the Texas Family Code governs premarital and post-marital property agreements. *See* Tex. Fam. Code Ann. §§ 4.001-.206 (West 2006). Section 4.102 allows spouses to enter into agreements for the partition or exchange of community property into separate property. *Id.* § 4.102. In challenging the enforceability of the parties' post-marital agreement, Sharon invoked family code section 4.105, which states:

(a) A partition or exchange agreement is not enforceable if the party against whom enforcement is requested proves that:

(1) the party did not sign the agreement voluntarily; or

(2) the agreement was unconscionable when it was signed and, before execution of the agreement, that party:

(A) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

(B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

(C) did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party.

(b) An issue of unconscionability of a partition or exchange agreement shall be decided by the court as a matter of law.

(c) The remedies and defenses in this section are the exclusive remedies or defenses, including common law remedies or defenses.

Id. § 4.105.

In sustaining Sharon's challenge, the trial court found that she had satisfied her burden of proof on both of the available grounds for invalidating an agreement under section 4.105—involuntariness and unconscionability. *See id.* Because only one ground is necessary to satisfy section 4.105, the trial court's order may be affirmed if Sharon has satisfied her burden of proof on either involuntariness or unconscionability.

Involuntary Execution

A partition or exchange agreement under family code section 4.105 is not enforceable if the party challenging enforcement establishes that he or she did not sign the agreement voluntarily. *Id.* While section 4.105 does not define "voluntarily," courts have "generally construed it to mean an action that is taken intentionally or by the free exercise of one's will." *Martin,* 287 S.W.3d at 263. "Generally, whether a party executed an agreement voluntarily . . . is a question of fact dependent upon all the circumstances and the mental effect on the party claiming involuntary execution." *Id.*

Because the existence of a fiduciary relationship between the parties is relevant to our analysis of whether the property agreement was executed involuntarily, particularly the mental effect on Sharon as the party claiming involuntary execution, we will begin our analysis by reviewing the trial court's finding that a fiduciary duty arose between the parties when John acted as Sharon's attorney, investment advisor, and custodian of her funds prior to the marriage.

At the time the parties formed Federalist for the purpose of developing commercial property, Sharon was employed as a counselor, and there is no indication that she had any professional background in real estate development or finance. John was a practicing attorney and had previously worked for two or three years at a commercial real estate company. According to Sharon, the formation of Federalist came about when John suggested that she move her investments out of mutual funds and into a commercial property venture with him. Specifically, Sharon testified:

[H]e said that investing in real estate or real property was much better than mutual funds because you never knew what the market was going to do and real estate was much more stable

> and that my money would be better used and investing in a piece of property where a law firm would be situated would give me much better return for my money.

John also testified that he came to Sharon with the idea of investing her inheritance in commercial property rather than mutual funds. He further testified that his plan was to utilize the commercial property to house his law firm and lease out the remainder of the building. John disagreed, however, with Sharon's testimony that he told her real property would yield a better return than mutual funds, stating, "I simply told her that I thought real estate was safer." At any rate, based on John's advice, Sharon invested $80,000 in Federalist in exchange for an 80% interest. John received a 20% interest, despite having invested only $5,000, or approximately 6% of the original capital. The formation documents for Federalist were drawn up by Heselmeyer, who was then an associate in John's law firm. Federalist's articles of organization identify John as the organizer of the entity.

An attorney-client relationship may be implied from the actions of the parties, *see Bright v. Addison,* 171 S.W.3d 588, 596 (Tex. App.—Dallas 2005, pet. denied), and does not depend on the payment of a fee, *see Prigmore v. Hardware Mut. Ins. Co.,* 225 S.W.2d 897, 899 (Tex. Civ. App.—Amarillo 1949, no writ). In organizing Federalist and managing the drafting of the formation documents, John provided Sharon with the legal services typically related to entity formation. Sharon, by signing the formation documents created at John's direction, manifested her intent to receive those services. . . .

Based on this record, there is sufficient evidence to support the trial court's finding of fact that John became Sharon's attorney, investment advisor, and custodian of her assets prior to the parties' marriage. As a result, we also agree with the trial court's conclusion that John owed Sharon a fiduciary duty that arose prior to the parties' marriage. *See Meyer v. Cathey,* 167 S.W.3d 327, 330 (Tex. 2005) (holding that fiduciary duties arise as matter of law in certain formal relationships, including attorney-client and trustee relationships); *Western Reserve Life Assurance Co. v. Graben,* 233 S.W.3d 360, 373 (Tex. App.—Fort Worth 2007, no pet.) (upholding finding of existence of fiduciary relationship between investment advisor and clients in light of formal relationship of principal and agent).

Significantly, the fiduciary duty John owed to Sharon in acting as her attorney and investment advisor is independent from the general fiduciary duty that he owed to Sharon as her spouse, a duty which this Court has previously held to be insufficient, standing alone, to raise a fact issue on involuntary execution of a marital property agreement. *See Sheshunoff v. Sheshunoff,* 172 S.W.3d 686, 701 (Tex. App.—Austin 2005, pet. denied) (stating that despite fiduciary duty between spouses, "the legislature manifested the strong policy preference that voluntarily made marital property agreements be enforced"). Nevertheless, it is worth noting that even if the only fiduciary responsibility in this case arose from the general duty between spouses, such a duty would remain relevant to our analysis of the statutory affirmative defenses to enforcement of a post-marital property agreement. *See Marsh v. Marsh,* 949 S.W.2d 734, 740 n. 4 (Tex. App.—Houston [14th Dist.] 1997, no writ) (noting that statutory defenses for both premarital and post-marital agreements are identical, but that "in post-marital agreements a fiduciary duty exists that is not present in premarital agreements between prospective spouses"); *see also* Thomas M. Featherston, Jr. & Amy E. Douthitt, *Changing the Rules by Agreement: The New Era in Characterization, Management, and Liability of Marital Property,* 49 BAYLOR L. REV. 271, 314 (1997) ("Both the formalities required and the rules of enforcement for marital agreements are essentially the same as for premarital agreements . . . . On the other hand, [post-marital] agreements may be particularly susceptible to charges of involuntariness and unconscionability, because of the relative positions of the parties."). The fiduciary duty between spouses extends to a duty to disclose material information in business transactions, as one Texas court has held that where spouses signed an agreement covering the disposition of their stock in a company for which one of the spouses was a founder, officer, and director, the spouse with "an insider's knowledge of the affairs and prospects" of the company had a fiduciary duty to deal fairly with the other spouse in acquiring from

her any rights in the stock, including a duty to disclose the true value of the company. *Miller v. Miller,* 700 S.W.2d 941, 945-46 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (citing *Johnson v. Peckham,* 132 Tex. 148, 120 S.W.2d 786, 787-88 (Tex. 1938) (holding that partner has "absolute duty to disclose" to co-partner, whose interest he was purchasing, all important information as to value)). The existence of a duty to disclose material facts is even more compelling in the present case, where John was acting in a fiduciary capacity separate and apart from his fiduciary obligation as Sharon's spouse.

Having determined that John owed Sharon a fiduciary duty as her attorney and investment advisor in addition to the fiduciary duty that generally exists between spouses, we now review the evidence for support of the trial court's conclusion that John breached this duty. The fiduciary obligation imposes a duty to exercise good faith and candor, to disclose all relevant information, and to refrain from using the relationship to benefit the fiduciary's personal interest, except with full knowledge and consent of the principal. *See, e.g., Kinzbach Tool Co. v. Corbett-Wallace Corp.,* 138 Tex. 565, 160 S.W.2d 509, 512 (Tex. 1942); *Chien v. Chen,* 759 S.W.2d 484, 495 (Tex. App.—Austin 1988, no writ); *see also Goffney v. Rabson,* 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (stating that fiduciary relationship between attorneys and clients requires "absolute perfect candor, openness and honesty, and the absence of any concealment or deception"). In this case, John advised Sharon to invest $80,000 in Federalist, a real estate development company in which he would own a minority interest. At a later date, once Federalist's property holdings had dramatically increased in value, John persuaded Sharon to sign a marital property agreement requiring her to sell her interest in Federalist to him for the $80,000 she had originally invested. As the trial court accurately pointed out, this arrangement turned Sharon's $80,000 investment into an interest-free loan that provided great financial benefit to John.

The record reflects that at the time Sharon contributed $80,000 to Federalist, both she and John viewed that contribution as an investment. Both parties testified that Sharon invested in Federalist because she wanted to transfer her inheritance out of mutual funds and into real estate. According to Sharon's testimony, John persuaded her to invest in Federalist by explaining that her money would be safer there than in mutual funds. After convincing Sharon to invest her funds in this manner, John later pressured her to sign an agreement that would retroactively transform her investment into an interest-free loan for the time period beginning with the capitalization of Federalist in early 2002 and ending with the execution of the agreement in August 2006. The promissory note that resulted from the marital property agreement was a ten-year, unsecured note with an annual interest rate of 4.2%, a rate the trial court described as "unconscionably low." Sharon testified at the enforceability hearing that with respect to her initial investment in Federalist, it "was [John's] idea to turn it into a loan." She further stated that she signed the post-marital agreement, which provided for the sale of her interest in Federalist, because she was afraid that if she did not, she would lose the $80,000 that she had initially invested. The parties' marital therapist also testified to her understanding that Sharon thought she was in danger of losing her $80,000 investment in Federalist.

This evidence supports the trial court's finding of fact that "[a]t some point [Sharon] became convinced that she would be lucky to get her original investment back, and allowed [John] to treat her investment as a loan." . . .

* * *

In inducing Sharon to believe that she was at risk of losing her initial $80,000, John failed to disclose the value of Federalist, which at that time had approximately $300,000 worth of equity in the South Mays property. He then purchased Sharon's shares with an $80,000 note at a low rate of interest that was not secured by a security interest in the company. In entering into this business arrangement with John, Sharon relied on him to exercise the good faith and candor required of a fiduciary. . . .

"A layman would be expected to rely upon one who was an attorney when a new business was started, particularly where they were long-time friends and an attorney-client relationship had previously existed."). While acting as a fiduciary in connection with Sharon's investment in Federalist, John persuaded her to execute an agreement that provided a financial windfall to him at Sharon's expense. As such, we cannot conclude that John exhibited the good faith and candor required of a fiduciary in conducting this transaction. Therefore, we hold that the evidence is sufficient to uphold the trial court's finding that John breached his fiduciary duty to Sharon.

John's formal fiduciary relationship with Sharon as her attorney and investment advisor, his subsequent breach of fiduciary duty, and the benefits he received as a result of that breach, particularly the transformation of Sharon's investment in the real property venture into an interest-free loan for his benefit, trigger a presumption of undue influence in connection with the marital property agreement. "Whenever a fiduciary receives a benefit or makes a profit from transactions with his principal . . ., a presumption of fraud, unfairness or undue influence arises." . . .

This Court has suggested that "common-law concepts including duress, lack of capacity, fraud, and undue influence, along with the parties' relative bargaining power and knowledge regarding the meaning and effect of the agreement, could bear upon the ultimate determination of voluntariness." *Sheshunoff,* 172 S.W.3d at 695-96 (citing *In re Marriage of Bonds,* 24 Cal.4th 1, 99 Cal.Rptr.2d 252, 5 P.3d 815, 824 (Cal. 2000) . . . (Thus, any exercise of undue influence by John in his capacity as a fiduciary bears directly on our determination of whether there is sufficient evidence to support the trial court's finding that Sharon did not execute the agreement voluntarily. As a result, we will first review the evidence of any undue influence exercised by John before addressing the parties' relative bargaining power and whether Sharon had adequate knowledge of the meaning and effect of the agreement. . . .

"In deciding whether there has been undue influence, the court should consider three factors: (1) the existence and exertion of an influence; (2) whether the influence operated to subvert or overpower the person's mind when executing the document; and (3) whether the person would have executed the document but for the influence." *Wils v. Robinson,* 934 S.W.2d 774, 780 (Tex. App.—Houston [14th Dist.] 1996), *writ granted, judgm't vacated w.r .m.,* 938 S.W.2d 717 (Tex. 1997). In this case, Sharon testified that she did not want to sign the marital property agreement, ultimately signing it only in response to John's insistence that she had to do so in order to save the marriage and his representations that it was necessary to secure her investment. During the time John was acting as a fiduciary in connection with the investment of Sharon's funds, he threatened to dissolve the marriage unless she signed an agreement that divested her of that investment in a manner that provided him with a substantial financial benefit. This type of arrangement, in which the fiduciary greatly benefits to the detriment of the principal, clearly suggests the existence and exertion of an influence. *See Pace,* 574 S.W.2d at 796.

The testimony of both Sharon and Brown supports the notion that John's influence operated to overpower Sharon's mind when executing the document and that she would not have executed it but for the influence. *See Wils,* 934 S.W.2d at 780. Brown testified that when Sharon came to her office, she was in a state of great mental distress over John's insistence that she sign the agreement, crying and repeating, "You don't understand, I just have to sign this." Brown explained that she advised Sharon not to sign the agreement and asked her why she would sign an agreement that appeared to favor John, and Sharon responded, "You don't understand, I have to sign it to make the pressure stop at home." As previously noted, Sharon also testified that she did not want to sign the agreement, and that she only did because of John's pressure and influence.

Sharon explained in her testimony that she feared the loss of her entire $80,000 investment in Federalist, and that John assured her that she could get the money back if she would just sign the agreement. She further testified that she did not understand the sales provision of the agreement, stating, "[W]hat I didn't understand was how Federalist Investments worked, about the shares and my ownership in that and in exchange for paying me back the money. I didn't really understand all of that as well as everything that was his earnings and my earnings." This testimony supports the trial court's finding that John, while acting as a fiduciary, led Sharon to believe that she had to sign the agreement in order to protect her $80,000 in invested funds, despite the fact that Federalist had over $300,000 in equity in the South Mays property at the time and was collecting $5,000 in rent from tenants each month. It further suggests that in pressuring her to sign the agreement out of fear of losing her $80,000 investment, John failed to disclose to Sharon that the agreement actually divested her of the substantial gain that had already materialized from that investment. These actions surpass mere persuasion or entreaty, reaching the level of undue influence. . . .

The evidence also supports a finding that Sharon lacked meaningful bargaining power. The agreement was drafted by an attorney in John's law firm, at John's direction. Sharon, after seeking advice from one attorney who refused to sign the agreement, took the agreement to Brown and explained that because of the pressure from John, she would have to sign the agreement regardless of its contents. Brown testified that Sharon showed up at her office with no appointment, that Brown was unable to evaluate the conscionability of the agreement because she had very little knowledge of the value of the property at issue, and that she advised Sharon not to sign the agreement. Despite her reservations, Brown ultimately signed the agreement as Sharon's counsel, noting that Sharon was extremely upset and insistent that she had to have an attorney's signature in order to satisfy John's demands. Brown did not attempt to negotiate any aspects of the agreement on Sharon's behalf, nor did she charge Sharon for her time reviewing the agreement. Thus, Sharon did not have the advantage of meaningful representation by counsel at the time the agreement was signed.

In addition, as previously discussed, Sharon testified that she did not understand the meaning or effect of the agreement, stating, "[W]hat I didn't understand was how Federalist Investments worked, about the shares and my ownership in that and in exchange for paying me back the money. I didn't really understand all of that as well as everything that was his earnings and my earnings." Sharon's testimony that she did not understand the meaning or effect of the agreement is supported by Heselmeyer's testimony at the enforceability hearing that Sharon lacked the basic financial knowledge needed to run rudimentary accounting software. Specifically, Heselmeyer stated that in 2003, Sharon had briefly attempted to manage the financial books and records for John's law firm, but that she was unable to do so because she did not "have the knowledge base to do that." When asked, "[S]he didn't have the computer skills or the financial skills to get in there and run even something as rudimentary as QuickBooks?" Heselmeyer answered, "I would agree with that."

Sharon was also unaware of the value of John's law practice, preventing her from fully understanding the effect of the agreement's provision confirming it as John's separate property. By John's own testimony at the enforceability hearing, he did not provide Sharon with any documents reflecting the value of his law practice or any of the properties at issue in the post-marital property agreement at the time the document was executed, nor did he provide any such documents to Brown, the attorney signing the agreement on Sharon's behalf. Sharon testified that she received no financial documents of any kind in connection with the agreement, and that she attempted to ask both John and Heselmeyer about the substance of the agreement, but received no answers. . . .

Given the evidence of John's breach of a fiduciary duty, the existence of undue influence, Sharon's lack of bargaining power, and her inadequate understanding of the meaning and effect of the agreement, we hold that the totality of the circumstances provides sufficient evidence to uphold the

trial court's finding that Sharon did not sign the agreement voluntarily. *See Sheshunoff,* 172 S.W.3d at 696-97 (observing that "undue influence, along with the parties' relative bargaining power and knowledge regarding the meaning and effect of the agreement, could bear upon the ultimate determination of voluntariness"); *Vela v. Marywood,* 17 S.W.3d 750, 762 (Tex. App.—Austin 2000, pet. denied) ("Although the face of the affidavit reflects it was signed knowingly and voluntarily, we must consider the surrounding circumstances to determine if [appellant]'s signature on the document was procured by misrepresentation, fraud, or the like."); *see also Martin,* 287 S.W.3d at 264-65 (holding that fact issue existed on voluntariness where husband provided no financial disclosures related to businesses subject to property agreement and pressured wife to sign agreement by claiming that "family would be financially ruined" without it).

* * *

CONCLUSION

We affirm both the trial court's order finding the marital property agreement unenforceable and the final decree of divorce.

Questions

1. To your mind, what are the facts that most clearly distinguish this case from *Sheshunoff*?

2. Do you believe it would have changed the outcome if the Husband in *Izzo* had not been an officer and director of the "Federalist?

MOORE
v.
MOORE
383 S.W.3d 190
(Tex. App.—Dallas 2012, no pet.)

Opinion by JUSTICE NEILL.

Appellant Gary Moore appeals a final decree of divorce. In four issues, Gary complains the trial court erred in (1) failing to enforce a premarital agreement, (2) valuing the business entities of the community estate, (3) failing to make particularized findings as to the value of community assets, and (4) not conditioning the award of appellate attorneys' fees on success of the appeal. For the following reasons, we affirm the trial court's judgment.

Gary and Caroline F. Moore married on June 25, 2004. Gary filed for divorce about three years later. In his petition for divorce, he sought to enforce a premarital agreement. Caroline answered, filed a counter-petition for divorce, and alleged numerous grounds for invalidating the premarital agreement, including involuntary execution. The trial court bifurcated the proceedings to first determine enforceability of the premarital agreement. Following a two-day trial, the trial court found the agreement was not voluntarily signed and concluded it was unenforceable. A trial on the division of property followed, after which the trial court valued seven business entities owned by the community at $2,798,246.06. The trial court awarded Caroline $1,399,123.03 as her community interest in those entities. Husband appeals.

Because Gary challenges the sufficiency of the evidence to support the trial court's determination that Caroline did not sign the premarital agreement voluntarily, we will first review the evidence presented concerning the events that led to and surrounded the execution of the agreement. Caroline and Gary became engaged in April of 2008 and married about two months later on June 25, 2008 while on a trip to Martha's Vineyard. When they first met, Gary told Caroline he was having financial problems and he had been "digging himself out of a hole" for several years. After they were engaged, Gary asked Caroline how she felt about a "prenup." Gary told Caroline he wanted a premarital agreement to protect Caroline from "loans, liens, and lawsuits."

Caroline testified she did not oppose having a premarital agreement, and they began discussing terms of an agreement in May. Gary told Caroline that he was going to have his long-time business lawyer, Marty Barenblat, prepare the agreement and that it would be a "collaborative process" between Gary, Caroline, and Barenblat. Caroline spoke to Barenblat about the agreement, but he never told her he had a conflict of interest.

After Gary realized the premarital agreement could be subject to attack if Caroline did not have her own lawyer, he suggested she hire an attorney at his expense. Initially, Caroline suggested two family law attorneys, but Gary told her both were too expensive. Barenblat and Gary then suggested Caroline hire Mickey Hunt, an attorney that offices in the same building as Barenblat.

On June 16, nine days before the wedding, Caroline met with Hunt for the first time. Hunt reviewed the premarital agreement that Barenblat had drafted. The agreement he reviewed contained blanks where the value of Gary's property would be provided. The agreement also referenced schedules to be attached, but no such schedules were yet attached. Hunt told Caroline she needed to get the values and the schedules, otherwise, she would have no way of knowing what rights she was giving up. After a one-hour meeting, Caroline left Hunt's office with the understanding that Hunt and Barenblat would make changes to the agreement that satisfied his concerns.

The next day, Hunt met with Barenblat to inform him of the changes he wanted. Barenblat told him he would have to get back to him, but he never did. Instead of making the requested changes, Barenblat removed all reference to any values in the agreements and added schedules that did not include values.

On June 18, Caroline was preparing for the trip to Martha's Vineyard. She had planned to pick up the agreement from Barenblat that day so she could take it with her to Gary's home in Big Spring, Texas the following day. They were going to spend one night in Big Spring and then go to Martha's Vineyard. She called Barenblat that morning to see if the agreement was ready. He told her he was still making revisions that her attorney had requested. Caroline called again at about 6 p.m. Barenblat told her the document was complete and that her attorney had approved it and said it was okay for her to sign it. Barenblat told her she could not pick up the agreement because he had already sent it to Big Spring.

The following day, June 19th, Caroline drove to Big Spring. When she got there, she asked Gary if he had received the agreement. Gary told her he had not received it, but that it was going to be sent to Martha's Vineyard. The following day, Gary and Caroline flew to Martha's Vineyard. Caroline testified that in the four days leading up to their wedding, Gary went to the reception desk periodically to see whether any documents had arrived, but nothing had. Caroline assumed he was looking for the premarital agreement.

Four to five hours before the wedding, Gary produced the final draft of the premarital agreement that Barenblat prepared. Caroline had assumed the agreement had just arrived in Martha's Vineyard, but she later discovered Gary had received the agreement in Big Spring and it was in his suit case the

entire time. The agreement was a completely new clean copy with nothing to show what changes had been made. Caroline thought the reason the agreement looked different was because of changes that her attorney had requested. Caroline did notice that the schedules of Gary's assets were now attached and did not contain values. She had assumed her attorney had determined this was acceptable. Gary also presented to her a waiver of disclosure. Caroline panicked because she did not understand the documents and tried to call Hunt, but she was unable to reach him. Gary then called Barenblat. Gary told Caroline that Hunt had approved the document and said it was okay for her to sign. Gary and Caroline executed the agreement and initialed each page. Caroline said she would not have executed the document if she had not been told her lawyer had approved it. Caroline and Gary married a few hours later.

Caroline later discovered that Hunt never reviewed the changes that were made, never reviewed the final draft, and never told Barenblat that it was okay for her to sign. Indeed, Hunt testified at the hearing that he would not have even given Barenblat permission to speak to his client about the agreement.

At trial, Gary denied hiding the agreement and denied that Caroline tried to call Hunt on their wedding day. Barenblat testified and claimed that Hunt both approved the agreement and told him he could tell Caroline she could sign the agreement.

After hearing the evidence, the trial court found Caroline did not sign the agreement voluntarily and refused to enforce it. In his first issue, Gary contends the evidence is legally and factually insufficient to support the trial court's involuntariness finding. Gary and Caroline agree voluntariness is a fact finding, but disagree as to the proper standard of review. Gary contends it is an ordinary sufficiency of the evidence standard of review while Caroline argues the proper standard is abuse of discretion.

The Texas Family Code grants trial judges vast power and broad discretion over many important matters. *See Tucker v. Thomas,* 405 S.W.3d 694, 699, 2011 WL 6644710 (Tex. App.—Houston [14th Dist.] 2011, no pet.). When the Legislature seeks to limit or restrict a family court's discretion, it generally says so. *Id.* Thus, we generally construe the family law as vesting the trial court with discretion, unless the legislature has said otherwise. *See id.*

Texas has adopted the Uniform Premarital Agreement Act. Under that Act, premarital agreements are presumptively binding and enforceable under Texas law. *See* TEX. FAM. CODE ANN. § 4.002 (West 2006). However, the Act also provides that a premarital agreement is not enforceable if the party against whom enforcement is requested proves that he or she did not sign the agreement voluntarily. *See* TEX. FAM. CODE ANN. § 4.006(a)(1) (West 2006). Given the express language of the Act, we conclude a trial court does not have discretion to invalidate a premarital agreement in the absence of legally and factually sufficient evidence of involuntariness. [foot note re: discretion, deleted] Therefore, we will consider Gary's challenge to the involuntariness finding under the legal and factual sufficiency standards of review.

In an appeal from a bench trial, a trial court's findings have the same force and dignity as a jury's verdict upon questions. *Anderson v. City of Seven Points,* 806 S.W.2d 791, 794 (Tex. 1991). A trial court's findings may be reviewed for legal and factual sufficiency under the same standards that are applied in reviewing evidence to support a jury's answers. *Ortiz v. Jones,* 917 S.W.2d 770, 772 (Tex. 1996). The test for legal sufficiency is whether the evidence would allow reasonable and fair-minded people to reach the verdict under review. *City of Keller v. Wilson,* 168 S.W.3d 802, 827 (Tex. 2005); *State v. State Street Bank & Trust Co.,* 359 S.W.3d 375, 377-78 (Tex. App.—Dallas 2012, no pet.). We may sustain a no-evidence point only if the record reveals the complete absence of a vital fact, the evidence conclusively proves the opposite of a vital fact, or if the only evidence of a vital fact is barred

from consideration or is no more than a scintilla. *State Street,* 359 S.W.3d at 378. When reviewing the factual sufficiency of the evidence, we consider and weigh all of the evidence. *See Pool v. Ford Motor Co.,* 715 S.W.2d 629, 635 (Tex. 1986) (op. on reh'g); *State Street,* 359 S.W.3d at 378. We may set aside a finding only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Id.*

The Uniform Premarital Agreement Act does not define voluntariness and there are relatively few Texas cases discussing the meaning of the term as used in the Act. Texas courts have construed "voluntarily" to mean an action that is taken intentionally or by the free exercise of one's will. *Martin v. Martin,* 287 S.W.3d 260, 263 (Tex. App.—Dallas 2009, pet. denied). The parameters of involuntary execution of a premarital agreement may not be clear in every case and will tend to depend on the circumstances. *Sheshunoff v. Sheshunoff,* 172 S.W.3d 686, 698 (Tex. App.—Austin 2005, pet. denied). In determining whether any evidence of involuntariness existed, this Court has considered (1) whether a party has had the advice of counsel, (2) misrepresentations made in procuring the agreement, (3) the amount of information provided and (4) whether information has been withheld. *See Martin,* 287 S.W.3d at 264-66. Evidence of fraud and duress may also provide proof of involuntariness. *Sheshunoff,* 172 S.W.3d at 697-98. However, fraud and duress are not themselves defenses to a premarital agreement. *See id.*

At trial, Caroline presented evidence that before she married Gary, he misrepresented his financial condition and claimed he wanted her to sign a premarital agreement to protect her from "loans, liens, and lawsuits." Gary first attempted to use his own lawyer to assist them to write the agreement in a "collaborative effort." When he realized this could subject the agreement to attack, he suggested she retain a lawyer at his expense. Gary, however, rejected the lawyers Caroline requested and directed her to a lawyer of his own choice. He then made it effectively impossible for Caroline's lawyer to review the final draft by misrepresenting to her that he did not have the agreement when they went to Martha's Vineyard and then hiding the agreement for several days until just hours before their wedding. The draft Caroline was presented at that time was the first version of the document that did not contemplate a value of Gary's estate being provided. The document also required her to verify Gary had given her full disclosure of the nature, extent, and value of his assets. Gary also requested Caroline to sign a document waiving further disclosure. Caroline panicked, tried to call her lawyer, and could not reach him. Gary then told Caroline that Hunt had approved the agreement and told her it was okay for her to sign. Caroline testified she was concerned but signed because of Gary's assurances and would not have done so but for such assurances. The trial court could find based on this evidence that Caroline did not sign the agreement voluntarily.

Gary directs us to some evidence that is contrary to the trial court's finding, including evidence that Caroline did not have to marry Garry that day, that she was willing to sign *a* premarital agreement, and that she read the agreement and could see for herself that it did not include information about Gary's assets. Giving this evidence due consideration, we cannot conclude it is so compelling or overwhelming as to negate or override the trial court's involuntariness finding.

Furthermore, we reject Gary's additional arguments. First, Gary asserts Caroline was required to prove "an express direct threat or coercion" to establish involuntariness. Gary relies on cases showing what evidence courts have held did constitute evidence of involuntariness in post-nuptial cases. *Martin,* 287 S.W.3d at 265-66; *Izzo v. Izzo,* 03-09-00395-CV, 2010 WL 1930179, at *3, 10-12 (Tex. App.—Austin May 14, 2010, pet. denied) (mem. op.); *Myers v. Myers,* No. 03-05-00231-CV, 2006 WL 3523792, at *2 (Tex. App.—Austin Dec. 8, 2006, no pet.). These cases do not purport to limit the kinds of evidence that might show involuntariness. Rather, each case depends upon its own facts and circumstances.

Gary next contends recitations in the agreement prevent Caroline from proving involuntariness. The agreement recited that Caroline's attorney reviewed the agreement, that Caroline read and understood the agreement, and Caroline was signing the agreement voluntarily. According to Gary, we are required to presume the recitations in the agreement were true even though the evidence showed the recitations were false.

Unless prevented by trick or artifice, one who signs a contract "must be held to have known what words were used in the contract and to have know their meaning, and he must also be held to have known and fully comprehend the legal effect of the contract." *Nguyen Ngoc Giao v. Smith & Lamm, P.C.,* 714 S.W.2d 144, 146 (Tex. App.—Houston [14th Dist.] 1986, no pet.). As an initial matter, we conclude there was evidence of artifice that prevented Caroline from getting legal advice about the final draft of the agreement. Moreover, Gary relies on ordinary breach of contract cases and waiver of reliance provisions in fraudulent inducement cases. The family code has expressly provided that a premarital agreement is not enforceable if it is not voluntarily signed. Gary cannot preclude Caroline from making this showing by including recitations in the very agreement that she alleges was not voluntarily signed.

Finally, Gary contends we cannot consider evidence that he and Barenblat both told Caroline that Hunt had reviewed and approved the agreement because Caroline's reliance on any representations by opposing counsel is not "justified." Gary's cases either clearly do not support his proposition or they are readily distinguishable. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests,* 991 S.W.2d 787, 794-95 (Tex. 1999) (discussing attorney's liability for negligent misrepresentation and noting attorney may be liable if he invites reliance on a known party for a known purpose); *Chapman Children's Trust v. Porter & Hedges, L.L.P.,* 32 S.W.3d 429, 443 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (discussing attorney's liability for negligent misrepresentation). Here, Caroline did not sue Barenblat and we are not determining Barenblat's liability. Moreover, the false statements Barenblat made did not concern any legal advice or legal claim or any fact that concerned a legal claim or position. Rather, the statement was a direct false factual representation that Caroline's attorney had reviewed and approved the agreement and told her she could sign it. Regardless, the question is not whether Caroline can prove each element of fraud or fraudulent inducement. Instead, considering evidence of fraud or fraudulent inducement, we look directly to the controlling question of whether the document was signed involuntarily. *See Sheshunoff,* 172 S.W.3d at 697 (fraud, duress, and undue influence may bear upon voluntariness question, but party claiming involuntary execution need not prove each element of these common law defenses); *Daniel v. Daniel,* 779 S.W.2d 110, 114 & n. 4 (Tex. App.—Houston [1st Dist.] 1989, no pet.) (observing that involuntary execution "alleviates the need for proof of all elements required in common law defenses" such that party need not prove knowledge or reliance as would be required to show fraud). Having reviewed all the evidence in the light most favorable to Caroline, we conclude that there is legally and factually sufficient evidence to support the trial court's involuntariness finding. We resolve the first issue against Gary.

Gary's remaining issues concern division of the community estate and, in particular, the trial court's valuation of certain business entities. At trial, the evidence showed the community had an interest in seven entities that operate movie theaters, Orlando Premiere Cinema, L.L.C., El Paso Premiere Cinema, L.P., Galveston Island Cinema L.L.C., Café Bistro, Eastern Shore Premiere Cinema, L.L.C., Tannehill Premier, L.L.C., and Burleson Premier Cinema, LLC.

Gary presented the testimony of valuation expert Jim Penn. Penn, using an income approach, valued the community's interest in five of the entities to be $1, and the remaining two to be $358,000. In making his valuation, Penn predicted future income based on past revenues and various contracts that the entities had entered into, including a management fee contract in which the entities paid a man-

agement fee to Gary's separate property company, Premiere Cinema Corporation (PCC). Some of these contracts required the community property entities to pay all their profits to PCC.

Caroline's expert "Morris Schulman" also using an income approach, predicted income based on past revenue, but calculated costs based on industry standards. Schulman valued five of the entities at $13,437,407. Adjusting for the community's percentage interest in these entities would result in a value of $11,126.933. Following the close of evidence, the trial court sought additional valuation evidence. Specifically, the trial court directed Gary to reduce the management fee the entities pay to PCC to make it consistent with industry standards. The trial court then ordered the parties to recalculate the value of the entities based on the reduced fee. Penn's adjusted values were basically unchanged, but Schulman's recalculation reduced his valuation of the five entities to $8,063,647. Adjusting for the community's ownership interest in the entities would result under Schulman's recalculation in a value of $6,653,154. After hearing the evidence, the trial court did not accept either expert's valuation in full and valued the community's interest between the experts' opinions at $2,798,246.

Gary asserts the evidence is legally and factually insufficient to support the trial court's valuation. He contends Schulman's opinion was not reliable and therefore constitutes no evidence. He further asserts the trial court was required to accept Penn's valuation because it was the only "competent" evidence of fair market value. Caroline responds that Gary waived any complaint that Schulman's testimony was not reliable and the record as a whole supports the trial court's value determination.

* * *

Reviewing Gary's complaints, it is evident his complaint requires a review of the underlying methodology and foundational data that Schulman used in forming his opinion. In particular, Gary does not complain that Schulman did not express a basis for his opinion—or that the basis that Schulman did offer was contradicted by the facts. Rather, relying on his own expert's testimony, Gary asserts Schulman should have used additional or different data. We conclude he was required to object to make this complaint. *See Graves v. Tomlinson,* 329 S.W.3d 128, 146 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (at bottom, Graves asks this Court to "evaluate the underlying methodology, technique, or foundational date used by the expert.").

In the alternative, Gary contends even if Schulman's testimony is "some evidence" there is no evidence of the "number chosen" by the trial court. However, when conflicting evidence of value exists, a trial court is permitted to assign a value within the range of evidence. *McIntyre v. McIntyre,* 722 S.W.2d 533, 536 (Tex. App.—San Antonio 1986, no writ). A trial court is also permitted to blend all the evidence to arrive at a value. *Id.*

Here, the trial court's valuation finding fell within the numbers offered by the expert testimony. The trial court could have properly concluded there were flaws in both expert's valuations and assumptions. Penn used actual revenues and modest growth rates, even though Gary testified the theaters were new and it usually took a few years for a theater to become profitable. Penn also used costs that could be manipulated in Gary's sole discretion, apparently without question. Schulman's testimony, on the other hand, did not account for the debt and projected revenues based on optimistic market conditions. However, the trial court's ultimate valuation was well below Schulman's opinion and was supportable by the evidence even considering the debt and giving "due allowance" for the factors presented by Gary. *See Morgan v. Morgan,* 657 S.W.2d 484, 490 (Tex. App.—Houston [1st Dist.] 1983, pet. dism'd). Viewing all the evidence, we conclude the trial court's value determination is supported by legally and factually sufficient evidence. We resolve the second issue against Gary.

* * *

We affirm the trial court's judgment.

HOLMES
v.
BEATTY
290 S.W.3d 852
(Tex. 2009)

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

After decades of debate in the bench, bar, and the Legislature about the ability of spouses to obtain rights of survivorship in community property, Texas citizens changed the constitution to confirm that right. The 1987 amendment provides that "spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse." TEX. CONST. art. XVI, § 15. Two years later, the Legislature enacted Probate Code sections 451 through 462 to address the formalities necessary to the create a survivorship arrangement. *See* TEX. PROB. CODE §§ 451-62. Today we are asked to determine how these sections operate with respect to rights of survivorship in certain brokerage accounts and securities certificates issued from those accounts. We conclude that the account agreements and certificates at issue here created rights of survivorship. Accordingly, we reverse and render in part and affirm in part the court of appeals' judgment.

I. Factual and Procedural Background

Thomas and Kathryn Holmes married in 1972. During their marriage, Thomas and Kathryn amassed over ten million dollars in brokerage accounts and acquired securities certificates issued from those accounts. Kathryn died in 1999. Her will appointed Douglas Beatty, her son from a previous marriage, as the independent executor of her estate. Thomas died approximately nine months later. His son, Harry Holmes II ("Holmes"), also from a previous marriage, was appointed independent executor of his estate. The accounts and certificates were variously listed as "JT TEN"; "JT TEN *defined as* 'joint tenants with right of survivorship and not as tenants in common' "; "JTWROS"; and "Joint (WROS)." If those acronyms and definitions establish a right of survivorship, then Thomas acquired 100% upon Kathryn's death, and upon his death, the holdings would have passed under his will, which left nothing to Kathryn's children. If those designations were insufficient to create survivorship interests then, as community property, only 50% would have passed to Thomas, with the remaining 50% of the accounts and certificates passing under Kathryn's will, which left nothing to Thomas's children.

Beatty sought a declaration that all of the assets were community property; Holmes countered that the assets passed to Thomas through survivorship, and then to Thomas's beneficiaries following his death. On competing motions for summary judgment, the trial court concluded that some of the assets were held jointly with survivorship rights and others were community property. In two opinions, the court of appeals affirmed in part, reversed and rendered in part, and remanded for further proceedings. 233 S.W.3d 475, 494; 233 S.W.3d 494, 522-23. Holmes and Beatty petitioned this Court for review, which we granted. 52 Tex. Sup.Ct. J. 149 (Dec. 4, 2008). Because these two appeals involve "substantially similar facts, arguments, and briefing," we have consolidated them into a single opinion and judgment. *Hubenak v. San Jacinto Gas Transmission Co.,* 141 S.W.3d 172, 179 (Tex. 2004).

II. Development of Rights of Survivorship in Community Property in Texas

A. The *Hilley* Era

Texas has not always allowed spouses to create rights of survivorship in community property. In *Hilley v. Hilley,* 161 Tex. 569, 342 S.W.2d 565, 568 (1961), we held that it was unconstitutional for spouses to hold community property with rights of survivorship. The dispute in *Hilley* concerned

whether stock purchased with community funds and "issued in the names of the husband and wife 'as joint tenants with rights of survivorship and not as tenants in common' " actually conferred rights of survivorship. *Id.* at 566. We reasoned that because this property was acquired during marriage with community funds and thus "by definition became community property," it was required to pass either under the decedent's will or under the intestacy statutes, absent a written agreement signed by the spouses partitioning the stock from their community property, thereby making it separate property. *Id.* at 568. We noted that to hold otherwise would directly contravene the constitution's community property provision. *Id.* (citing TEX. CONST. art. XVI, § 15; Act of May 12, 1949, 51st Leg., R.S., ch. 242, § 1, 1949 Tex. Gen. Laws 450, 450, *repealed by,* Act of June 2, 1969, 61st Leg., R.S., ch. 888, § 6, 1969 Tex. Gen. Laws 2707, 2733 (former TEX. REV. CIV. STAT. art. 4610)).

After *Hilley,* the Legislature amended the Probate Code in an attempt to recognize survivorship rights in community property. Act of April 27, 1961, 57th Leg., R.S., ch. 120, § 1, 1961 Tex. Gen. Laws 233, *amended by* Act of May 22, 1969, 61st Leg., R.S., ch. 641, § 3, 1969 Tex. Gen. Laws 1922, 1922 ("It is specifically provided that any husband and his wife may, by written agreement, create a joint estate out of their community property, with rights of survivorship."). In *Williams v. McKnight,* 402 S.W.2d 505, 508 (Tex. 1966), we considered the amendment's constitutionality. Citing *Hilley,* we held that any statutory attempt to grant survivorship rights in community property would be unconstitutional. *Id.* ("Constitutional limitations are as binding upon the Legislature as they are upon the Judiciary."). We reaffirmed that the only way for a couple to create survivorship rights was to partition their community property into separate property, then execute survivorship agreements for that separate property. *Id.* at 508. This process came to be known among practitioners as the "Texas Two_Step." *See, e.g.,* Robert N. Virden, *Joint Tenancy with Right of Survivorship & Community Property with Right of Survivorship,* 53 TEX. B.J. 1179, 1179 (1990). Subsequent decisions echoed this result. *See, e.g., Allard v. Frech,* 754 S.W.2d 111, 115 (Tex. 1988) ("This holding is based on a firmly rooted principle of community property law which requires the actual partition of community property before a valid joint tenancy with the right of survivorship can be created."); *Maples v. Nimitz,* 615 S.W.2d 690, 695 (Tex. 1981) (same).

B. The 1987 Constitutional Amendment and Subsequent Legislation

In 1987, the Legislature passed, and the Texas voters approved, a constitutional amendment authorizing rights of survivorship in community property. Tex. S.J. Res. 35, 70th Leg., R.S., 1987 Tex. Gen. Laws 4114, 4114-15. The amendment provided that "spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse." TEX. CONST. art. XVI, § 15. Two years later, the Legislature passed Senate Bill 1643, which added Part 3 to Chapter XI of the Probate Code concerning non-testamentary transfers. Act of May 26, 1989, 71st Leg., R.S., Ch. 655, § 2, 1989 Tex. Gen. Laws 2159, 2159-63. This new section governs "[a]greements between spouses regarding rights of survivorship in community property." TEX. PROB. CODE § 46(b).

Probate Code sections 451 and 452 are at issue in this case. Section 451 states: "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." *Id.* § 451. Section 452 lays out these requirements:

> An agreement between spouses creating a right of survivorship in community property must be in writing and signed by both spouses. If an agreement in writing is signed by both spouses, the agreement shall be sufficient to create a right of survivorship in the community property described in the agreement if it includes any of the following phrases:
>
> 1. (1) "with right of survivorship";

2. "will become the property of the survivor";

3. "will vest in and belong to the surviving spouse"; or

4. (1) "shall pass to the surviving spouse."

An agreement that otherwise meets the requirements of this part, however, shall be effective without including any of those phrases.

Id. § 452. The Legislature stated that these agreements do not change the nature of community property: "Property subject to an agreement between spouses creating a right of survivorship in community property remains community property during the marriage of the spouses." *Id.* § 453.

With this constitutional amendment and legislation, the Legislature hoped to finally resolve the battle over survivorship rights in community property. The proponents[2] urged that these sorts of agreements were common in other states and simplified the transfer of certain assets to surviving spouses. *See* GERRY W. BEYER, 10 TEXAS PRACTICE SERIES: TEXAS LAW OF WILLS § 60.1 (3d ed. 2002). As Professor Beyer noted, a community property survivorship agreement "is a simple, convenient and inexpensive method for many married people to achieve an at-death distribution of their community property that is in accord with their intent." *Id.* § 60.9.

* * *

The purpose of the amendment and accompanying legislation, then, was to provide "[a] simple means . . . by which both spouses by a written instrument can provide that the survivor of them may be entitled to all or any designated portion of their community property without the necessity of making a will for that purpose." Senate Judiciary Comm., Resolution Analysis, Tex. S.J. Res. 35, 70th Leg., R.S. (1987). As the committee observed, "many banks and savings and loans associations have often failed to provide forms by which their customers can create effective joint tenancies out of community property." *Id.* The amendment addressed these concerns by removing the constitutional hurdles to creating rights of survivorship in community property.

* * *

IV. Conclusion

The 1987 constitutional amendment and accompanying legislation sought to facilitate the creation of rights of survivorship in community property and eliminate the constitutional hurdles spouses faced when attempting to establish such rights. The Holmeses' account agreements clearly indicated their intent to create rights of survivorship in those accounts. The rights were not lost when the Holmeses later obtained some of their investments in certificate form. Pursuant to these survivorship agreements, each of the accounts and certificates at issue in this case passed to Thomas upon his wife's death, and then by will to Thomas's beneficiaries when he died. If the Holmeses had wished an alternate devise, they could have made appropriate provisions in their respective wills. As they did not, we reverse and render in part and affirm in part the court of appeals' judgment. TEX.R.APP. P. 60.2(a), (c).

[2] The primary sponsor for the amendment and legislation was the Family Law Section of the State Bar of Texas. *See* GERRY W. BEYER, 10 TEXAS PRACTICE SERIES: TEXAS LAW OF WILLS § 60.1 (3d ed. 2002).

Notes, Comments, Questions

1. This case finally puts the stamp of approval on a process to create joint tenancies with rights of survivorship out of community property.

2. Would you label this case as a "strict" or "liberal" in its construction of the applicable portion of TEX. CONST. art XVI, § 16.

3. How might this case and the case of *Beck v. Beck*, read earlier in this chapter, be used together?

4. Please prepare an answer to Bar Question 3—July 2010.

Bar Questions can be accessed by going to ble.texas.gov and selecting BAR EXAM from the menu that runs horizontally across top of page. Once that is accessed, select Questions from Past Exams and scroll down to referenced exam date. In order to get the most out of this exercise, do not access Selected Answers prior to preparing your answer.