Dividing the Estate Upon Divorce

AUTHOR OF ARTICLE
Richard R. Orsinger
Attorney at Law
310 S. St. Mary's Street, 26th Floor
San Antonio, Texas 78205
(210) 225-5567
richard@ondafamilylaw.com
http://www.orsinger.com

AUTHOR OF POWERPOINT
Honorable David Farr
Harris County Civil Courthouse
201 Caroline, 16th Floor
Houston, Texas 77002
David_Farr@Justex.net

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About David Farr
Judge, 312th Family District Court

State District Judge David Farr was elected to preside in the 312th Family District Court in November 2010. Following an appointment by Texas Gov. Rick Perry, he previously served as the judge in the 312th from November 2007 until December 2008. He is also served as the former Associate Judge in the 257th Family District Court from January 2002 until November 2007. Judge Farr has served as the Administrative Judge of the Harris County Family Trial Division since May 2011 and has served in numerous leadership positions and on boards as appointed by the Texas Supreme Court on matters involving the Texas Department of Family and Protective Services system.

Judge Farr is a graduate of Texas A&M University and the Texas Southern University Thurgood Marshall School of Law. He has a wife, Betsy, and three children. He also serves as a Colonel in the Texas Army National Guard and currently serves as the Staff Judge Advocate for the 36th Infantry Division. He has previously served on peace-keeping and combat assignments on numerous active duty deployments to Bosnia-Herzegovina, Kosovo, New Orleans (Hurricane Katrina) and in Baghdad, Iraq. In that capacity, Judge Farr is a graduate of the U.S. Army's Air Assault School, Judge Advocate General's Corps Officer and Advanced Courses, the Command and General Staff College and is a certified Military Judge and graduate of the U.S. Army's Military Judge's School.

Judge Farr is board certified in Family Law, a combat veteran of the Global War on Terror and a member of the Texas Aggie Former Students Association and was a member of the Texas A&M Corps of Cadets. He is a former board member for both the Houston Bar Association's Family Law Section and the Gulf Coast Family Law Specialists. Judge Farr is a former adjunct professor at the South Texas College of Law and is currently on the Adjunct Faculty at the University of Houston Law Center. Judge Farr also has Master Status with the Burta Rayburn Inns of Court.

CURRICULUM VITAE OF RICHARD R. ORSINGER

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

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

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

Organizations and Committees:

Chair, Family Law Section, State Bar of Texas (1999-2000)
Chair, Appellate Practice & Advocacy Section, State Bar of Texas (1996-97)
Chair, Continuing Legal Education Committee, State Bar of Texas (2000-02)
Vice-Chair, Continuing Legal Education Committee, State Bar of Texas (2002-03)
Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-2015 and appointed through 2018); Chair, Subcommittee on Rules 16-165a
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-2004)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member and Civil Appellate Law Exam Committee (1990-2006; Chair 1991-1995); Family Law Advisory Commission (1987-1993)
Member, Supreme Court Task Force on Jury Charges (1992-93)
Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
Member, Board of Directors, Texas Legal Resource Center on Child Abuse & Neglect, Inc. (1991-93)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Associate, American Board of Trial Advocates
Fellow, American Academy of Matrimonial Lawyers
Director, San Antonio Bar Association (1997-1998)
Member, San Antonio, Dallas and Houston Bar Associations

Honors Received:

Texas Center for the Judiciary, Exemplary Non-Judicial Faculty Award (2014)
Texas Bar Foundation *Dan Rugeley Price Award* for "an unreserved commitment to clients and to the practice of our profession" (2014)
Recipient of the Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in CLE (2013)
State Bar of Texas Family Law Section Best Family Law CLE Article (2009)
Recipient of the Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in CLE (2009)
State Bar of Texas *Certificate of Merit*, June 2004
Texas Academy of Family Law Specialists' *Sam Emison Award* (2003)
Association for Continuing Legal Education's Award for Best Program (*Enron, The Legal Issues*) (Co-director, March, 2002)
State Bar of Texas *Presidential Citation* "for innovative leadership and relentless pursuit of excellence for continuing legal education" (June, 2001)
State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)
State Bar of Texas *Certificate of Merit*, June 1997
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1996
State Bar of Texas *Certificate of Merit*, June 1995

Professional Recognition:

Listed as San Antonio Scene's Best Lawyers in San Antonio (2004 - 2016)
Listed in Martindale-Hubbell/ALM - Top Rated Lawyers in Texas (2010 - 2016)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2014)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2013)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2012)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2010 - 3rd Top Point Getter)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2009)
Listed as Family Lawyer of the Year by BEST LAWYERS (2012)
Listed as Family Lawyer of the Year by BEST LAWYERS (2011)
Listed as Texas' Top Family Lawyer, Texas Lawyer's *Go-To-Guide* (2007)
Listed as one of Texas' Top 100 Lawyers, and Top 50 Lawyers in South Texas, *Texas Monthly* Super Lawyers Survey(2003-2015)
Listed in the BEST LAWYERS IN AMERICA: Family Law (1987-2017); Appellate Law (2007-2017)

Books, Journal and Magazine Articles:

—Editor-in-Chief of the State Bar of Texas' TEXAS SUPREME COURT PRACTICE MANUAL (2005)
—Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)
— Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)
—*A Guide to Proceedings Under the Texas Parent Notification Statute and Rules*, SOUTH TEXAS LAW REVIEW (2000) (co-authored)
—*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal*, 41 SOUTH TEXAS LAW REVIEW 111 (1999)
—*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994 and Feb., 1995)
—Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)
—*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)
—*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage That Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)
—*A New Day: Same Sex Marriages: Emerging Gender Identity Issues*; IN CHAMBERS FALL 2015; Texas Center for the Judiciary, p 10.

Continuing Legal Education Administration:

Course Director, State Bar of Texas:
- Practice Before the Supreme Court of Texas Course (2002 - 2005, 2007, 2009, 2011, 2013, 2015, and 2017)
- *Enron, The Legal Issues* (Co-director, March, 2002) [Won national ACLEA Award]
- Advanced Expert Witness Course (2001, 2002, 2003, 2004)
- 1999 Impact of the New Rules of Discovery
- 1998 Advanced Civil Appellate Practice Course
- 1991 Advanced Evidence and Discovery
- Computer Workshop at Advanced Family Law (1990-94) and Advanced Civil Trial (1990-91) courses
- 1987 Advanced Family Law Course. Course Director.
- 1987 Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada

SELECTED CLE SPEECHES AND ARTICLES

State Bar of Texas' [SBOT] **Advanced Family Law Course**: Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001); Private Justice: Arbitration as an Alternative to the Courthouse (2002); International &

Cross Border Issues (2002); Discovery Issues Facing Associate Judges and Title IV-D Masters (2002); Premarital and Marital Agreements: Representing the Non-Monied Spouse (2003); Those Other Texas Codes: Things the Family Lawyer Needs to Know About Codifications Outside the Family Code (2004); Pearls of Wisdom From Thirty Years of Practicing Family Law (2005); The Road Ahead: Long-Term Financial Planning in Connection With Divorce (2006); A New Approach to Distinguishing Enterprise Goodwill From Personal Goodwill (2007); The Law of Interpreting Contracts: How to Draft Contracts to Avoid or Win Litigation (2008); Effect of Choice of Entities: How Organizational Law, Accounting, and Tax Law for Entities Affect Marital Property Law (2008); Practicing Family Law in a Depressed Economy, Parts I & II (2009); Troubling Issues of Characterization, Reimbursement, Valuation, and Division Upon Divorce (2010); Separate & Community Property: 30 Rules With Explanations & Examples (2010); The Role of Reasoning in Constructing a Persuasive Argument (2011); Negotiating a Family Law Case (2012) New Appellate Rules for CPS Cases (2012); Court-Ordered Sanctions (2013); Different Ways to Trace Separate Property (2014); Probate & Family Law - What a Family Lawyer Can Learn from the Texas Estates Code (2015); Dividing Ownership Interests in Closely-Held Business Entities: Things to Know and to Avoid (2016)

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

SBOT's **Advanced Evidence & Discovery Course**: Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997); Evidence Grab Bag (1998); Making and Meeting Objections (1998-99); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000); Predicates and Objections (2001); Building Blocks of Evidence (2002); Strategies in Making a Daubert Attack (2002); Predicates and Objections (2002); Building Blocks of Evidence (2003); Predicates & Objections (High Tech Emphasis) (2003); Court-Imposed Sanctions in Texas (2012)

SBOT's **Advanced Civil Appellate Practice Course**: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002); New Appellate Rules and New Trial Rules (2003); *Supreme Court Trends* (2004); Recent Developments in the *Daubert* Swamp (2005); Hot Topics in Litigation: Restitution/Unjust Enrichment (2006); The Law of Interpreting Contracts (2007); Judicial Review of Arbitration Rulings: Problems and Possible Alternatives (2008); The Role of Reasoning and Persuasion in the Legal Process (2010); Sanctions on Review (Appeal and Mandamus) (2012)

Other CLE: SBOT Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991), Offering and Excluding Evidence (1995), New Appellate Rules (1997), The Communications Revolution: Portability, The Internet and the Practice of Law (1998), Daubert With Emphasis on Commercial Litigation, Damages, and the NonScientific Expert (2000), Rules/Legislation Preview (State Perspective) (2002); College of Advanced Judicial Studies: Evidentiary Issues (2001); El Paso Family Law Bar Ass'n: Foreign Law and Foreign Evidence (2001); American Institute of Certified Public Accounts: Admissibility of Lay and Expert Testimony; General Acceptance Versus Daubert (2002); Texas and Louisiana Associations of Defense Counsel: Use of Fact Witnesses, Lay Opinion, and Expert Testimony; When and How to Raise a Daubert Challenge (2002); SBOT In-House Counsel Course: Marital Property Rights in Corporate Benefits for High-Level Employees (2002); SBOT 19th Annual Litigation Update Institute: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Raising a Daubert Challenge (2003); State Bar College Spring Training: Current Events in Family Law (2003); SBOT Practice Before the Supreme Court: Texas Supreme Court Trends (2003); SBOT 26th Annual Advanced Civil Trial: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Challenging Qualifications, Reliability, and Underlying Data (2003); SBOT New Frontiers in Marital Property: Busting Trusts Upon Divorce (2003); American Academy of Psychiatry and the Law: Daubert, Kumho Tire and the Forensic Child Expert (2003); AICPA-AAML National Conference on Divorce: Cutting Edge Issues–New Alimony Theories; Measuring Personal Goodwill (2006); New Frontiers` - Distinguishing Enterprise Goodwill from Personal Goodwill; Judicial Conference (2006); SBOT New Frontiers in Marital Property Law: Tracing, Reimbursement and Economic Contribution Claims In Brokerage Accounts (2007); SBOT In-House Counsel Course: When an Officer Divorces: How a Company can be Affected by an Officer's Divorce (2009); Fiduciary Litigation Trial Notebook Course: Family Law and Fiduciary Duty (2010); SBOT Handling Your First Civil Appeal The Role of Reasoning and Persuasion in Appeals (2011-2012); New Frontiers in Marital Property Law: A New Approach to Determining Enterprise and Personal Goodwill Upon Divorce (2011); AICPA-AAML National Conference on Divorce: Business Valuation Upon Divorce: How Theory and Practice Can Lead to Problems In Court & Goodwill Upon Divorce: Distinguishing Between Intangible Assets, Enterprise Goodwill, and Personal Goodwill (2012); SBOT Anatomy of Fiduciary Litigation: Voir Dire and Jury Questionnaires; History of Texas Supreme Court Jurisprudence, 170 Years of Texas Contract Law (2013); SBOT Exceptional Legal Writing: The Role of Reasoning and Persuasion in Legal Argumentation (2013); Family Law Update - 2013, Judicial Conference (2013); Family Law and Fiduciary Duty, Fiduciary Litigation Course (2013); Two Hot Topics in Family Law: Same-Sex Marriage; Mediated Settlement Agreements, 2014 Judicial Conference, Texas Center for the Judiciary (2014); SBOT Advanced Personal Injury Course, Court-Ordered Sanctions (2014); Texas Center for the Judiciary, Same-Sex Marriage and Gender Identity Issues (2015); History of Texas Supreme Court Jurisprudence, The Rise of Modern American Contract Law (2015); New Frontiers In Marital Property Law, Distributions from Business Entities: Six Possible Approaches to Characterization (2015); Texas Center for the Judiciary - Same-Sex Marriage & Gender Identity Issues (2016)

Continuing Legal Education Webinars: *Troubling Issues of Characterization, Reimbursement, Valuation, and Division Upon Divorce*; Texas Bar CLE, Live Webcast, April 20, 2012, MCLE No. 901244559 (2012); *Family Law Update - 2013*, Texas Center for the Judiciary Video

Table of Contents

Dividing the Estate Upon Divorce

Richard R. Orsinger
Board Certified in Family Law
& Civil Appellate Law by the
Texas Board of Legal Specialization

I. INTRODUCTION. This article has two parts. The first part is an overview of the legal aspects of a court's powers and obligations in dividing the property and debts in a divorce or annulment. The second part is organized like an encyclopedia, in alphabetical order. The title selected for each section is representative of the topic discussed. Cross-references to sections are italicized. The following abbreviations are used: Texas Family Code ("TFC"), Texas Business Organizations Code ("TBOC"), Texas Estates Code ("TEC"), Internal Revenue Code ("IRC"), Texas Civil Practice and Remedies Code ("TCP&RC"), Texas Rules of Civil Procedure ("TRCP"), the State Bar of Texas' Texas Family Law Practice Manual ("TFLPM").

II. DUTY TO DIVIDE PROPERTY. TFC § 7.001 provides that "the court shall 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 and any children of the marriage." TFC § 7.002(a) provides that the court must also "order a division of the following real and personal property, wherever situated, in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage...." The provision goes on to include, in property to be divided, property acquired by a spouse while domiciled in another state and that would have been community property had the spouse been domiciled in Texas at the time of acquisition, as well as property acquired in exchange for such property. TFC § 7.002(b) provides that the court must award to a spouse property acquired by that spouse while domiciled in another state and that would have been separate property had the spouse been domiciled in Texas at the time of acquisition, and property acquired in exchange for such property. TFC § 7.002(c) requires the court to confirm to a spouse income and earnings partitioned to that spouse by written agreement of the spouses. TFC § 7.003 requires the court to determine the rights of both spouses in various forms of deferred compensation and tax-sheltered funds, including a pension, retirement plan, annuity, individual retirement account, employee stock option plan, stock option, "or other form of savings, bonus, profit-sharing, or other employer plan or financial plan of an employee or a participant, . . . in the nature of compensation or savings." TFC § 7.004 says that the court "shall specifically divide or award the rights of each spouse in an insurance policy."

In interpreting a forerunner to TFC § 7.001, the Supreme Court in *Hailey v. Hailey*, 331 S.W.2d 299, 302-03 (Tex. 1960) wrote:

> [T]he statute puts the duty on the trial court to make a partition of the community property whenever the pleadings of either party show the existence of such property. The trial court shall consider all the facts and circumstances shown by the evidence and then partition the community property, both personal and real estate, in such manner as may be just and right. The trial court's discretion in so partitioning the property is subject to review by the appellate courts. The trial court has the duty to determine if the community property is subject to partition in kind. If he determines that it is then he shall equitably divide the community property between the parties. If it is not subject to partition in kind the trial court can appoint a receiver and order so much of the property as is incapable of partition to be sold and the

> proceeds divided between the parties in such portions as, in the discretion of the court, may be a just, fair and equitable partition, having in mind the rights of the parties and the children.

In *Walston v. Walston*, 971 S.W.2d 687, 693 (Tex. App.--Waco 1998, pet. denied), the appellate court held that it was an abuse of discretion for the trial court to leave the spouses as 50-50 owners of community property personal property. In *In re Marriage of Edwards*, 79 SW3d 88, 94-94 (Tex. App.--Texarkana 2002, no pet.), the appellate court held that the trial court erred in ordering property sold without first finding that partition in kind could not be accomplished.

If a spouse in a Texas divorce is a non-resident of Texas, and the court has no personal jurisdiction over that spouse, the court may not adjudicate the spouses' rights in any property they may own, whether the property is located inside or outside of Texas. *Dawson–Austin v. Austin*, 968 S.W.2d 319, 321, 327-28 (Tex. 1998). See TFC § 6.308, Exercising Partial Jurisdiction.

III. WHAT IS DIVISIBLE UPON DIVORCE? TFC § 7.001 says that, in a decree of divorce or annulment, the court "shall order a division of the estate of the parties. . . ." The "estate of the parties" includes community property but not separate property. *Eggemeyer v. Eggemeyer*, 554 S.W. 2d 137, 139 (Tex. 1977). Also, substantive due process of law prohibits a divorce court from taking the separate property of one spouse and awarding it to the other spouse. *Id.* at 140. Under TFC § 7.002(a), the court is also required to divide property acquired by a spouse while domiciled outside of Texas, if that property would have been community property had the spouse been domiciled in Texas at the time it was acquired. Under TFC § 7.002(b), the court *cannot* divide property acquired by a spouse while domiciled outside of Texas, if that property would have been separate property had the spouse been domiciled in Texas at the time it was acquired.

IV. OUT-OF-STATE PROPERTY. TFC §§ 7.001 and 7.002 direct the court in a divorce to divide property "wherever situated." This includes real and personal property located outside of Texas. A Texas court cannot, by operation of its decree alone, pass title to land located outside of Texas. *Fall v. Easton*, 215 U.S. 1 (1909); *McElreath v. McElreath*, 345 S.W.2d 722 (Tex. 1961); *Kaherl v. Kaherl*, 357 S.W.2d 622 (Tex. Civ. App.--Dallas 1962, no writ). The court can, however, order a spouse over whom it has personal jurisdiction to sign and file documents that have the effect of passing title under the law of the state or country where the land is situated. *Fall v. Easton*, *supra* at 8; *Kaherl*, *supra* at 724. *See Lozano v. Lozano*, 975 S.W.2d 63, 68–69 (Tex.App.—Houston [14th Dist.] 1998, pet. denied) (in this turnover proceeding, the court distinguished between ordering transfer of out-of-state title and ordering that all indicia of title be handed over to a receiver). A Texas court's judgment can be "domesticated" in the state or country where the land is situated, after which the legal process of that government can be activated to transfer title. Personal property is considered to be "located" at the domicile of the owner. So a Texas court with personal jurisdiction over both spouses can "pass title" to personal property, wherever it may be located. As a practical matter, an ex-spouse may encounter difficulties in trying to transfer record ownership of a vehicle that is licensed or titled in another state or nation, until the Texas decree is domesticated in that other jurisdiction.

V. FEDERAL PREEMPTION. There are a number of areas in which Federal law has been held to preempt state marital property and divorce law. In those situations, the divorce court can only go as far as the Federal law allows in dividing the asset in a divorce. *See Mansell v. Mansell*, 490 U.S. 2023 (1989) (finding preemption to the portion of military retirement pay waived in order to receive V.A. benefits); *Ridgway v. Ridgway*, 454 U.S. 46 (1981) (provisions of the Servicemen's Group Life Insurance Act of 1965, giving an insured service member the right to freely designate and alter the beneficiaries named under the contract,

prevail over and displace a constructive trust for the benefit of the service member's children imposed upon the policy proceeds by a state-court divorce decree); *McCarty v. McCarty*, 453 U.S. 210 (1981) (federal law preempted power of state court to divide military retirement benefits in a divorce); *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) (federal law preempted power of state court to divide railroad retirement benefits on divorce); *Yiatchos v. Yiatchos*, 376 U.S. 306, (1964) (preemption as to Servicemen's Group Life Insurance, but claim of fraud could undo preemption); *Free v. Bland*, 369 U.S. 663 (1962) (savings bond survivorship provisions in treasury regulations preempted inconsistent Texas community property law); *Wissner v. Wissner*, 338 U.S. 655 (1950) (National Service Life Policy benefits are the sole property of the beneficiary, and are not community property); *McCune v. Essig*, 199 U.S. 382 (1905) (veteran's right, under federal statute, to designate beneficiary of life insurance could not be controlled by state court); *Ex parte Burson*, 615 S.W.2d 192 (Tex. 1981) (Veterans Administration disability payments are not property and cannot be divided upon divorce); *Eichelberger v. Eichelberger*, 582 S.W.2d 395 (Tex. 1979) (railroad retirement preempted); *Perez v. Perez*, 587 S.W.2d 671 (Tex. 1979) (military readjustment benefits held to be separate property due to gratuitous nature under federal statute); *United States v. Stelter*, 567 S.W.2d 797 (Tex. 1978) (ex-wife could not garnish ex-husband's retired pay, under federal statute); *Valdez v. Ramirez*, 574 S.W.2d 748 (Tex. 1978) (joint survivor annuity permitted by Civil Service Retirement Act preempted contrary state law); *Ex parte Johnson*, 591 S.W.2d 453 (Tex. 1979) (federal statute precluded division of V.A. disability benefits upon divorce); *Arrambide v. Arrambide*, 601 S.W.2d 197 (Tex. Civ. App.--El Paso 1980, no writ) (federal law prohibits division of VA disability payments upon divorce).

VI. JUST AND RIGHT DIVISION. "The trial court has wide discretion in dividing the estate of the parties and that division should be corrected on appeal only when an abuse of discretion has been shown." *Murff v. Murff*, 615 S.W.2d 696, 698 (Tex.1981); *Hedtke v. Hedtke*, 248 S.W. 21 (Tex. 1923). The community property does not have to be equally divided. *Murff*, *supra* at 699; *Chacon v. Chacon*, 222 S.W.3d 909, 915 (Tex. App.–El Paso 2007, no pet.) ("Community property does not need to be divided equally, but the division must be equitable"). "The division of the community estate need not be equal, but it should be equitable.... The trial court must have some reasonable basis for an unequal division of property." *K.T. v. M.T.*, No. 02-14-00044-CV, *10 (Tex. App.–Fort Worth Aug. 13, 2015, no pet.) (citations omitted) (reversing disproportionate division). The trial court can consider the disparity of incomes or of earning capacities of the parties, the spouses' capacities and abilities, benefits which the party not at fault would have derived from continuation of the marriage, business opportunities, education, relative physical conditions, relative financial condition and obligations, disparity of ages, size of separate estates, and the nature of the property. *Murff*, *supra* at 699. That list is not exclusive. The court can consider fault in the break-up of the marriage, but "[t]he division should not be a punishment for the spouse at fault." *Young v. Young*, 609 S.W.2d 758, 762 (Tex. 1980). The court can consider whether a party wasted community assets. *Schlueter v. Schlueter*, 975 S.W.2d 584, 589 (Tex.1998). The court can consider attorneys' fees incurred or paid in the divorce. *Carle v. Carle*, 234 S.W.2d 1002, 1005 (Tex. 1950). In *Murff*, it was proper for the court to compare the differences between the spouses' retirement benefits, including the amounts contributed, the expectancy of receiving the benefits, and "other relevant information." *Murff*, *supra* at 699. In *Hedtke v. Hedtke*, 248 S.W. 21, 22 (Tex. 1923), the Supreme Court wrote:

> While the court, in ordering the divorce, should not be unmindful of the benefits which the spouse not at fault would have derived from a continuance of the marriage, through the estate of the other spouse, its power is not limited to providing compensation for such benefits. Instead the court is to do complete equity as between the husband and wife and the children, having due regard to all obligations of the spouses and the probable future necessities of all concerned.

In *Golias v. Golias*, 861 S.W.2d 401, 403 (Tex. App.--Beaumont 1993, no writ), the court of appeals held that the trial court did not abuse its discretion in awarding 79 percent of the community estate to the wife. The court cited several other cases upholding similar property awards. *Oliver v. Oliver*, 741 S.W.2d 225, 228-229 (Tex. App.--Fort Worth 1987, no writ) (80%); *Rafidi v. Rafidi*, 718 S.W.2d 43, 45-46 (Tex. App.--Dallas 1986, no writ) (85-90%); *Morrison v. Morrison*, 713 S.W.2d 377, 380 (Tex. App.--Dallas 1986, writ dism'd) (83%); *Jones v. Jones*, 699 S.W.2d 583, 586 (Tex. App.--Texarkana 1985, no writ) (86%); *Campbell v. Campbell*, 625 S.W.2d 41, 43 (Tex. App.--Fort Worth 1981, writ dism'd) (96%); *Huls v. Huls*, 616 S.W.2d 312, 317 (Tex. App.--Houston [1st Dist.] 1981, no writ) (85%). On the other hand, a disproportionate division was reversed in *Smith v. Smith*, 143 S.W.3d 206, 214 (Tex. App.–Waco 2004, no pet.), where the record reflected "no reasonable basis for the disproportionate division of community assets and liabilities." See *Abuse of Discretion*.

VII. RECONSTITUTING THE COMMUNITY ESTATE. Under TFC § 7.009, if the court or jury finds that a spouse has committed actual or constructive fraud on the community, the trial court must calculate the depletion of the community estate due to the fraud and add that number back in, so as to create a "reconstituted estate." TFC § 7.009(b)(1). The reconstituted estate is to be divided in a manner that is just and right. *Id.* at § 7.009(b)(2). The court may grant the wronged spouse "an appropriate share of the community estate remaining after the actual or constructive fraud," or award a money judgment to the wronged spouse, or both. *Id.* at § 7.009(c).

VIII. APPELLATE REVIEW. The trial court's division of property in a divorce is subject to appellate review for an abuse of discretion. *Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981); *Hailey v. Hailey*, 331 S.W.2d 299, 303 (Tex. 1960). In the context of a divorce property division, an abuse of discretion is shown when "the disposition made of some property is manifestly unjust and unfair." *Hedtke v. Hedtke*, 248 S.W. 21, 23 (Tex. 1923). Where a court mischaracterizes separate property as community property and awards it to the other spouse, the error automatically requires reversal because the court has no power to divest a spouse of separate property. *Shestawy v. Shestawy*, 150 S.W.3d 772, 780 (Tex. App.--San Antonio 2004, pet. denied); *Barnard v. Barnard*, 133 S.W.3d 782, 790 (Tex. App.--Fort Worth 2004, pet. denied); *McElwee v. McElwee*, 911 S.W.2d 182, 189 (Tex. App.--Houston [1st Dist.] 1995, writ denied). Where the court erroneously characterizes community as separate property, reversal is not warranted unless it appears that the court would have made a different division if the property had been properly characterized. *Cook v. Cook*, 679 S.W.2d 581, 585 (Tex. App.--San Antonio 1984, no writ); *Smith v. Smith*, 620 S.W.2d 619, 625 (Tex. Civ. App.--Dallas 1981, no writ). Where it is claimed that the court did not fairly divide community property, the question is whether the overall property division is an abuse of discretion. It is presumed on appeal that the trial court properly exercised its discretion. *Murff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981). "In family law cases, the abuse of discretion standard overlaps with the traditional sufficiency of evidence standard of review; as such, legal and factual sufficiency are not independent grounds of reversible error, but instead 'constitute factors relevant to our assessment of whether the trial court abused its discretion.'" The appellate court engages in a two-pronged inquiry to determine whether the trial court (1) had sufficient information on which to exercise its discretion and (2) erred in its application of that discretion. *Stamper v. Knox*, 254 S.W.3d 537, 542 (Tex. App.--Houston [1st Dist.] 2008, no pet.). In assessing the evidence, the appellate court determines whether the evidence would enable reasonable people to reach the judgment under review. *Corrick v. Corrick*, No. 01-09-00656-CV, at *4 (Tex. App.–Houston [1st Dist.] Feb. 17, 2011, no pet.) (mem. op.), citing the non-family-law case of *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). In conducting a legal sufficiency review, the court of appeals considers favorable evidence, if a reasonable fact finder could, and disregards contrary evidence, unless a reasonable fact finder could not. *Id.* In conducting a factual sufficiency

review, the appellate court considers and weighs all the evidence that was before the trial court to determine if the challenged finding is so weak as to be clearly wrong and manifestly unjust. *Raymond v. Raymond*, 190 S.W.3d 77, 82 (Tex. App.--Houston [1st Dist.] 2005, no pet.), citing the non-family-law case of *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). If there is evidence in the appellate record, the appellate court proceeds to determine whether, based on the elicited evidence, the trial court made a reasonable decision. *Boyd v. Boyd*, 131 S.W.3d 605, 611 (Tex. App.–Fort Worth 2004, no pet.). The appellate court will reverse the ruling of the trial court only if the record demonstrates that the trial court clearly abused its discretion, and the error materially affected the just and right division of the community estate. *Sink v. Sink*, 364 S.W.3d 340, 343 (Tex. App.--Dallas 2012, no pet.). A trial court does not abuse its discretion if there is "some evidence of a substantive and probative character" to support the decision. *Moroch v. Collins*, 174 S.W.3d 849, 857 (Tex. App.--Dallas 2005, pet. denied). In *McElwee v. McElwee*, 911 S.W.2d 182, 189 (Tex. App.--Houston [1st Dist.] 1995, writ denied), the court articulated a de minimis test for error in mischaracterizing the community estate:

> If the trial court mischaracterizes community property as separate property, then the property does not get divided as part of the community estate. If the mischaracterized property has value that would have affected the trial court's just and right division, then the mischaracterization is harmful and requires the appellate court to remand the entire community estate to the trial court for a just and right division of the properly characterized community property. If, on the other hand, the mischaracterized property had only a de minimis effect on the trial court's just and right division, then the trial court's error is not an abuse of discretion.

Accord, *Vandiver v. Vandiver*, 4 S.W.3d 300 (Tex. App.--Corpus Christi 1999, pet. denied). This de minimis standard was questioned in *Witte v. Witte*, 14-05-00768-CV (Tex. App.--Houston [14th Dist.] Feb. 21, 2008, writ denied) (memo. op.) (Justice Edelman's plurality opinion said that reversing for error that had more than a de minimis effect on the property division was too light a burden and lowered the manifestly unjust standard).

IX. REMAND AFTER APPEAL. If the appellate court finds reversible error that materially affects the overall division of property, it cannot render a new property division. *McKnight v. McKnight*, 543 S.W.2d 863, 866 (Tex. 1976). In *Jacobs v. Jacobs*, 687 S.W.2d 731, 733 (Tex.1985), the Supreme Court described when remand of the property division to the trial court is required:

> Whether the trial court abuses its discretion in dividing the property, as in *McKnight*, or commits reversible error in defining what property is properly a part of the community estate and therefore subject to division, as in the present case, the principle to be applied is the same. Once reversible error affecting the "just and right" division of the community estate is found, the court of appeals must remand the entire community estate for a new division.

If the appellate court reverses the dissolution of marital bonds, the parties are restored to being married and the property division is undone and the extent and value of the community estate must be determined as of the date of the retrial. *Dzierwa v. Cerda*, No. 04–13–00407–CV, *4 (Tex. App–San Antonio Aug. 6, 2014, no pet.) (mem. op.). If only the property division is reversed while the dissolution of marriage is affirmed, the estate is fixed at the time of the original divorce and on retrial the trial court can determine and value the estate either as of the date of the original divorce or the date of retrial. *Parker v. Parker*, 897 S.W.2d 918, 932 (Tex. App.–Fort Worth 1995, writ denied).

X. TOPICS IN ALPHABETICAL ORDER.

ABUSE OF DISCRETION (IN PROPERTY DIVISION). If a divorce litigant appeals a divorce property division, the standard of appellate review is abuse of discretion. *Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981); *Cockerham v. Cockerham*, 527 S.W.2d 162, 173 (Tex.1975). Generally stated, an abuse of discretion occurs when the trial court acts without reference to any guiding principles or acts arbitrarily or unreasonably. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). In *Mann v. Mann*, 607 S.W.2d 243, 245 (Tex. 1980), the Supreme Court articulated the test as whether the property division was "manifestly unfair so as to constitute an abuse of discretion." The Court cited *Hedtke v. Hedtke*, 248 S.W. 21, 23 (1923), which said "that the court pronouncing a decree of divorce is invested with wide discretion in disposing of any and all property of the parties, separate or community, and that its action, in the exercise of such discretion, should be corrected on appeal only where an abuse of discretion is shown in that the disposition made of some property is manifestly unjust and unfair." In *Bell v. Bell*, 513 S.W.2d 20, 22 (Tex. 1974), the Supreme Court reversed a court of civil appeals' reversal of a trial court's property division. The court of civil appeals reversed because the trial court had not taken into consideration two separate property corporations that increased in value during marriage, but the Supreme Court believed that the corporations had been considered. Some cases have focused on the adjudication process rather than the outcome, saying that making an adjudication without adequate information is an abuse of discretion. *See Osojie v. Osojie*, 2009 WL 2902743 (Tex. App.--Austin 2009, no pet.) (mem. op.). Property divisions have been reversed when no evidence of value was introduced. *Gonzalez v. Gonzalez*, 331 S.W.3d 864, 869 (Tex. App.–Dallas 2011, no pet.); *In re E.M.V.*, 312 S.W.3d 288, 291 (Tex. App.--Dallas 2010, no pet.) (same); *Sandone v. Miller-Sandone*, 116 S.W.3d 204, 208 (Tex. App.--El Paso 2003, no pet.) (same).

ANNUITIES. An annuity is a contract (normally purchased from an insurance company) providing for payments over time on a regular basis. An annuity purchased during marriage is community property unless the purchase price is traced to separate property. A community property annuity contract can be awarded to either spouse unless the annuity contract prohibits the assignment. If outright assignment is prohibited, the contributing spouse can be made a *Constructive Trustee* for the other spouse. There can be a penalty and also possibly tax consequences for cashing in an annuity early. An insurance company representative should be consulted about any changes in the annuity ownership. Some retirement benefits are in the form of an annuity (for example, the TIAA CREF retirement annuity often used by universities). The character of a retirement annuity is likely governed by the time-allocation rule in *Taggart* and *Berry*. See *Berry v. Berry*.

AGREEMENT INCIDENT TO DIVORCE. See *Settlement Agreements*.

ATTORNEYS' FEES. Traditionally the award of fees in a divorce were considered to be part of the property division. *Carle v. Carle*, 234 S.W.2d 1002, 1005 (Tex. 1950). TFC § 6.502(a)(4) authorizes a court in a divorce to order a spouse to pay reasonable attorney's fees and expenses as part of the temporary orders. TFC § 6.708 provides that, "[i]n a suit for dissolution of marriage, the court may award reasonable attorney's fees and expenses," and that the court can order the fees and expenses and post-judgment interest to be paid directly to the attorney, who may enforce the order in his/her own name. Apart from the case law and statute, attorneys fees incurred by a spouse during marriage are a community liability that can be collected out of non-exempt sole management community property of the contracting spouse, and joint management community property. For a discussion on how to protect an award of fees from discharge in bankruptcy, see *Domestic Support Obligation.*

Trial Fees. "The reasonableness of the fee is a question of fact and must be supported by the evidence.... Expert testimony as to the reasonableness of the attorneys' fees is required to support an award of attorney's fees." *Phillips v. Phillips*, 296 S.W.3d 656, 671 (Tex. App.–El Paso 2009, pet. denied). "To support a request for reasonable attorney's fees, testimony should be given regarding the hours spent on the case, the nature of preparation, complexity of the case, experience of the attorney, and the prevailing hourly rates." *Hardin v. Hardin*, 161 S.W.3d 14, 24 (Tex. App.--Houston [14th Dist.] 2004, no pet.). However, "evidence on each of these factors is not necessary to determine the amount of an attorney's fee award." *Sandles v. Howerton*, 163 S.W.3d 829, 838 (Tex. App.--Dallas 2005, no pet.). And "[t]he court may also consider the entire record and the common knowledge of the lawyers and judges." *In re M.A.N.M.*, 231 S.W.3d 562, 567 (Tex. App.–Dallas 2007, no pet.). A trial court cannot order a party to pay fees in excess of the amount actually incurred. *Brooks v. Brooks*, 480 S.W.2d 463, 466 (Tex. Civ. App.--Eastland 1972, no writ) ("[T]he fee awarded by the trial court exceeded the contractual arrangement by approximately $2,500. We hold that the award of $20,000 to appellee as attorney's fees is excessive in the amount of $2,500.").

Appellate Fees. The trial court in a divorce (not the appellate court) can award fees for prosecuting or defending an appeal of the divorce decree. *Dickson v. McWilliams*, 543 S.W.2d 868, 871 (Tex. Civ. App.--Houston [1st Dist.] 1976, no writ). The award or denial is reviewed under an abuse of discretion standard, including sufficient proof of reasonable fees for the appeal. Trial lawyers sometimes fail to prove up appellate fees at trial. Absent evidence of what fees would be reasonable on appeal, the trial court cannot award appellate fees. *Mills v. Mills*, 559 S.W.2d 687, 689 (Tex. Civ. App.--Fort Worth 1977, no writ). The award of appellate fees must be conditioned upon the party's success on appeal. *Keith v. Keith*, 221 S.W.3d 156, 171 (Tex. App.--Houston [1st Dist.] 2006, no pet.).[1] Interest on the appellate fee award starts not on the date the judgment is signed but rather on the date that the notice of appeal is filed. *See Southwestern Bell Co. v. Vollmer*, 805 S.W.2d 825, 834 (Tex. App.--Corpus Christi 1991, writ denied); *Republic Nat'l Life Ins. Co. v. Beard*, 400 S.W.2d 853, 859-60 (Tex. Civ. App.--San Antonio 1966, writ ref'd n.r.e.). The Supreme Court does not acquire jurisdiction until a petition for review is timely filed with the clerk of the Supreme Court, *see Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 702 (Tex. 1990), so interest should run from that date.

The trial court can award appellate attorney's fees under TFC § 6.709, Temporary Orders During Appeal, provided this is done no later than the 30th day after the appeal is perfected.

BERRY v. BERRY. The seminal case on characterizing a retired spouse's rights under a defined benefit retirement plan (i.e., a pension) is *Taggart v. Taggart*, 552 S.W.2d 422 (Tex. 1977). In *Taggart*, the husband began employment prior to marriage and retired before divorce. The Supreme Court held that the community portion of the husband's pension was determined by the number of months of employment during marriage divided by the total number of months of work that entitled him to benefits. *Id.* at 424. *Taggart* was revisited in *Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983), which addressed the problem arising when a spouse continues to work and accrue a retirement benefit after divorce. The Court in *Berry* said that, in order to protect the employee's separate property interest resulting from post-divorce labors, the divorce court should divide only the value of the community estate's interest in the retirement benefits as of the time of divorce. *Id*. at 947. The *Berry* court specifically said that it was not overruling the *Taggart* time-allocation formula "for determining the extent of the community interest in retirement benefits" when the value of the community's interest at the time of divorce was not an issue, like when divorce follows retirement. *Id.* at 947.

BONUSES. An employment-related bonus is compensation for personal services and is community property if earned and received during marriage. TFC § 7.003 tells courts to "determine the rights of both spouses in

a....bonus." Since a bonus is deferred compensation, it is possible that the bonus could be earned before, but paid after, a change in the employee's marital status. The Fourteenth Court of Appeals has held that, where a bonus is received during marriage for work done prior to marriage, or is received after divorce for work done during marriage, the characterization of the bonus is a question of fact, not a question of law. *Sprague v. Sprague*, 363 S.W. 3d 788, 801-02 (Tex. App.--Houston [14th Dist.] 2012, pet. denied) (bonus awarded during marriage for work done before marriage can be separate property); *Loya v. Loya*, 473 S.W.3d 362, 369 (Tex.App.--Houston [14th Dist.] 2015, pet. pending) (bonus awarded after divorce that partially compensates work done during marriage can be partially community property). At the time this Article was written, the Texas Supreme Court was considering whether to grant review in the *Loya* case, Cause No. 15-0763.

BUSINESS. From a legal standpoint, there are 4 kinds of businesses: sole proprietorship, corporation, partnership, and limited liability company. For tax purposes, there are 3 kinds of businesses: sole proprietorship, corporation, partnership. Each type of entity is discussed under a separate topic. Also see *Restrictions on Transferability*.

In dividing a business interest in a divorce, the court usually has three choices: (i) leave the ex-spouses as co-owners; (ii) award the business to one spouse and offsetting assets or a money judgment or promissory note to the other spouse; or (iii) order the business sold and the proceeds divided. When the business is wholly-owned as community property of the spouses, courts sometimes expand the remedies to include: (iv) ordering the redemption of one spouse's ownership interest; (v) ordering the entity to be dissolved; (vi) ordering a split-off; (vii) imposing a constructive trust on certain assets of the business; and (viii) ordering a change in the type of entity (e.g., conversion from partnership to LLC). When the entity identity is disregarded (based on alter ego, fraud, etc.), the court has the additional option of (ix) treating individual assets (that are not separate property) as part of the community estate. These additional remedies can be implemented by ordering the spouse who controls the entity to take the steps necessary to achieve the desired outcome, and enforcing that obligation by contempt powers. The court cannot act directly on the entity or its assets unless the entity is a party to the divorce.

BUY-SELL AGREEMENTS. Buy-sell agreements are terms in an entity's organizational paperwork, or in agreements between a business's owners, that give the other owners or the company the right to purchase an owner's ownership interest under certain circumstances. The triggering events usually involve an attempt to transfer an ownership interest in the business to a third party, or termination of employment by death, disability, retirement, or discharge, or an award of an ownership interest to the non-owning spouse in a divorce.

Examples. In buy-sell agreement no. 1, shares can be offered for sale, but the other owners have a right of first refusal on the same terms. In buy-sell agreement no. 2, shares cannot be transferred, and upon the shareholder's death, disability, or termination of employment the corporation must buy the shares for $1.00 per share. In buy-sell agreement no. 3, upon exit the departing owner's interest can be purchased by other owners at book value, excluding all intangibles. In buy-sell agreement no. 4, the exit price is fair market value. In buy-sell agreement no. 5, the exit price is fair value. In buy-sell agreement no. 6, the exit price is set by an appraiser whose opinion of value is binding. In buy-sell agreement no. 7, the company must designate an appraiser and the selling owner designates a different appraiser and the two appraisals are averaged to determine the exit price. Buy-sell agreements often provide for the purchase price to be paid over time, on terms favorable to the business.

Divorce Clause. Often a buy-sell agreement will contain a divorce clause saying that, if some or all of the owner-spouse's interest is awarded to the other spouse, then the owner-spouse has an option or obligation to buy the other spouse's interest at a set or determinable price, failing which the other owners and ultimately the entity have the option to purchase at the same price.

Tax Aspects. From a tax standpoint, if the option to purchase the other spouse's community property interest in the business is exercised by a spouse, IRC § 1041 may keep the transaction from being taxed. If other owners exercise the option to purchase, it is questionable whether IRC § 1041 applies. If the entity exercises the option to purchase, the Treasury Regs. under IRC § 1041 allow the spouses to choose to have the transaction taxed as a capital gain to the departing spouse or a constructive dividend to the spouse retaining the business interest. If they do not choose, Section 1041-protection depends on whether the entity assumed an obligation of the remaining spouse to buy-out the departing spouse. See *Tax Consequences of Property Division*.

Enforceability. There are limits imposed on buy-sell agreements, which are restraints on alienation. *Tenneco Inc. v. Enterprise Products Co.*, 925 S.W.2d 640, 646 (Tex. 1996) ("Sound corporate jurisprudence requires that courts narrowly construe rights of first refusal and other provisions that effectively restrict the free transfer of stock"). In *Earthman's, Inc. v. Earthman*, 526 S.W.2d 192, 201-202 (Tex. Civ. App.--Houston [1 Dist.] 1975, no writ), the court ruled that a buy-sell provision did not allow a corporation to ignore an award of shares of stock to the wife in a divorce. In *Miller v. Miller*, 700 S.W.2d 941, 945-46 (Tex.App.—Dallas 1985, writ ref'd n.r.e.), the appellate court held that a buy-sell agreement between spouses respecting corporate stock was not enforceable because it was a constructive fraud on the wife.

C CORPORATIONS. What is noteworthy about C Corporations in a divorce property division is the fact that the income of the C Corporation is taxed to the corporation. If the corporation distributes earnings and profits to the shareholders in the form of dividends, the dividends are not deductible to the C Corporation and are taxed to the shareholders. So the same earnings are taxed twice ("double taxation"). See *Corporate Shares*. In awarding a non-controlling interest in a C Corporation to a spouse, there is no concern about *Phantom Income* because the shareholder is taxed only on distributions that the C Corporation actually makes. An award of shares of a C Corporation to the non-shareholder spouse in a divorce is not a taxable event. See *Section 1041*. However, awarding assets from inside a C Corporation to either spouse (whether by *Piercing the Veil*, finding a *Resulting Trust*, or imposing a *Constructive Trust*) could trigger tax problems for the shareholder spouse.

CAPITAL ACCOUNT (OF A PARTNER). In dividing a partnership interest upon divorce, it is essential to consider the partnership's capital accounts. Put in simple terms, a partner's capital account reflects the cumulative total of four things: (i) capital contributed by the partner, plus (ii) the partner's share of profits; less (iii) distributions to the partner; less (iv) the partner's share of losses. This rule on capital accounts applies to both general partnerships and limited partnerships. TBOC § 153.003.

The important thing to know about capital accounts is that, upon winding up a partnership, any capital accounts that are out-of-balance must be brought into balance before liquidating distributions are made in proportion to capital percentages. That is, if one partner's capital account is higher than her percentage capital interest and another partner's capital account is lower than her percentage capital interest, the partner whose capital account is lower must forego distributions or even put money back into the partnership until her capital account is brought into parity with her capital interest, and the partner whose capital account is higher than

her percentage capital interest will disproportionately receive distributions that reduce her capital account until her capital account is brought into parity with her capital interest. ***This feature of partnership accounting means that a partner's claim on partnership assets in liquidation is not just a function of her capital interest; it is a function of her capital interest as adjusted by her capital account.*** In a sense, a capital account lower than the partner's capital interest is a "loan" from other partners that must repaid no later than winding up, and a capital account that is proportionately higher than the partner's capital interest is a "loan" to the other partners that must be repaid no later than winding up. While each partnership agreement is different, many partnership agreements do not provide that a capital account must be brought into balance with the capital interest at any time prior to winding up. Thus, if the partnership agreement allows it, a partner can take more than her share of money out of a partnership simply by taking distributions that reduce her capital account below her proportionate capital interest.

The role of the capital account can be important where the partnership interest is separate property but community funds have been contributed to the partnership. Some or all of the capital account may reflect the community estate's reimbursement claim against the partner-spouse's separate estate for making capital contributions to a separate property entity using community property.

CHARGING ORDER. A charging order is an order of a court directed to a partnership or LLC, directing the entity to pay distributions that would ordinarily go to a partner or member to a judgment creditor of that partner or member instead. TBOC § 152.308. The creditor is entitled to receive only what the judgment debtor becomes entitled to receive. *Id.* at § 152.308(b). That means that a judgment creditor cannot force a distribution. Under TBOC § 153.308, the charging order is a lien on the judgment debtor's partnership interest, but a lien that cannot be foreclosed. A charging order is the exclusive remedy a judgment debtor has against a partner's interest in a partnership. The judgment creditor has no claim against the assets of the partnership. TBOC § 152.308(f). The same is true of a charging order against a member's interest in an LLC. TBOC § 101.112.

A divorce court can award a partnership interest or member interest (of an LLC) to one spouse and a money judgment to the other spouse, while at the same time imposing a charging order on that ownership interest to assist in collecting the judgment. The charging order could be for 100% of the distributions, or 50% of the distributions, or all distributions up to a point and pro rata thereafter. The charging order should be delivered to and acknowledged by the entity. See Matia E. Garcia, *Charging Orders*, State Bar of Texas' 13th Annual Collections & Creditors' Rights Course ch. 8 (2015).

CHARITABLE FOUNDATION. Under Texas law, a charitable foundation is a non-profit corporation. A non-profit corporation can have members, and usually has directors and officers, but they cannot receive the income of the non-profit corporation in the form of dividends or otherwise. TBOC § 22.053. The members are not liable for corporate debts. TBOC § 22.152. Upon winding up, any assets remaining after the payment of debts must be given to tax-exempt charitable entities. TBOC § 22.04(a)(2). Since a spouse-member can receive no financial benefit from membership (other than possibly a job with the entity), and can receive nothing upon winding up, the member interest in a non-profit corporation has no value. There is no case law on whether a divorce court can award a member interest in a non-profit corporation to the non-member spouse.

CHARITABLE PLEDGES. Ordinarily, a promise to make a gift in the future is not enforceable in Texas. *Fleck v. Baldwin*, 172 S.W.2d 975, 978 (Tex. 1943) ("A gift cannot be made to take effect in the future, for

the reason that a promise to give is without consideration"). However, a charitable pledge (promise to make a future gift to a charity) is enforceable under Texas law if the charity provided consideration or if the charity detrimentally relied on the promise. *Hopkins v. Upshur*, 20 Tex. 89 (1857); *Rouff v. Washington & Lee University*, 48 S.W.2d 483, 487 (Tex. Civ. App.--Galveston 1932, writ refused). The court in a divorce may have to decide whether a charitable pledge is binding, even though the charity is not a party and the court's decision is not binding on the charity. If the court determines that the pledge is binding, then the court should treat the pledge like any other liability. If not, then the pledge need not be allocated to either spouse, and if it is allocated, the allocation has no legal consequences. Even if the pledge is non-binding, the divorce court can consider the impact of a charitable pledge as a factor in dividing the estate. Sometimes the spouses may want their name included or excluded or changed on a pledge. Although the court has no authority to require the charity to changes its records, the Court can direct both spouses to take all reasonable steps to induce the charity to make the change.

CLAIMS AGAINST AN ENTITY. An entity can be sued for damages in contract or tort, or under a statutory cause of action. The recovery would be community property to the extent that the injury was suffered by the community estate; the recovery would be separate property if the injury was to the separate estate. Possible contract claims would be a suit on a note or a suit on the entity's payable-to-owner account. Possible tort claims would include conversion, fraud, and conspiracy. *Fraud on the Community* is not a tort. *Schlueter v. Schlueter*, 975 S.W.2d 584, 588-89 (Tex. 1998). A possible statutory claim would be for unlawful interception of a communication or email. Tex. Civ. Prac. & Rem. Code § 123.001-ff. An asset of an entity might be brought into the community estate as a result of a *Resulting Trust* claim or a *Constructive Trust* remedy, or *Piercing the Entity Veil*.

CLAIMS AGAINST THIRD PARTIES. A claim or cause of action against third parties can be separate or community property, or a mixture of the three marital estates. The community portion of such a claim can be awarded to either spouse in a divorce. However, where the claim is a claim for facilitating a fraud on the community, or receiving a community property asset in fraud of the community, special rules apply. See *Fraud on the Community*.

COMMUNITY PROPERTY. Community property is property acquired by a spouse during marriage, other than by gift, devise, descent, partition, or spousal income agreement. Tex. Const. art. XVI, § 15; TFC § 3.002. Community property must be divided in a divorce. TFC § 7.001. The court must also divide property acquired when the spouse was domiciled outside of Texas, but that would have been community property if the spouse had been domiciled at the time of acquisition. TFC § 7.002(a)(1). The same rule applies to property that can be traced to such property. TFC § 7.002(a)(2). See *Separate Property*.

CONCLUSIONS OF LAW. After a non-jury trial, a party (typically the loser who wishes to appeal) can request findings of fact and conclusions of law. TRCP 296. Upon such a request, the trial court is supposed to set out the legal conclusions that led to the judgment. The conclusions of law should reflect the ultimate issues in the case, much like the definitions and instructions in a jury charge. A court's conclusions of law need not "set out in minute detail every reason or theory by which it arrived at its final conclusion." *Limbaugh v. Limbaugh*, 71 S.W.3d 1, 5 (Tex. App.–Waco 2002, no pet.) ("detailed conclusions of law are required only in complicated cases involving multiple grounds of recovery or defense"). TFC § 6.711 provides that, upon request, the court must characterize assets, liabilities, claims, and offsets, and their values. Those are really findings of fact rather than conclusions of law, but the findings on character and value may be affected by conclusions of law made by the court. See *Findings of Fact*.

CONFLICT OF LAWS. As a general proposition, Texas courts apply Texas law in a Texas divorce. A conflict of laws problem arises for real property situated outside of Texas, and personal property acquired by a spouse while domiciled in another state or nation. Under traditional conflict of laws principles, the ownership rights in out-of-state real property are governed by the law of the situs of the realty, and the ownership rights in personal property are governed by the law of the domicile of the owner at the time of acquisition. *Bell v. Bell*, 180 S.W.2d 466, 469 (Tex. Civ. App.–El Paso 1944, writ ref'd w.o.m.) (as to realty); *Tirado v. Tirado*, 357 S.W.2d 468, 471 (Tex. Civ. App.–Texarkana 1962, writ dismissed) (as to personalty). TFC § 7.001 and § 7.002(a) say that the assets subject to division in a Texas divorce are (i) assets that are community property under Texas law, (ii) assets acquired while domiciled elsewhere that would have been community property if acquired while the spouse was domiciled in Texas, and (iii) assets that can be traced to category (ii) assets. TFC § 7.002(b) says that the Texas court cannot divide property acquired while domiciled elsewhere that would have been separate property if acquired by the spouse while domiciled in Texas. TFC § 7.002 is effectively a conflict of laws rule that says to apply the Texas' concepts of community and separate property to all assets in a Texas divorce.

CONSTRUCTIVE TRUST. A "constructive trust" is not really a trust–it is an equitable remedy. The court imposes a constructive trust when equitable title or an ownership interest in property ought to be, as a matter of equity, recognized in someone other than the holder of legal title. The court declares ownership to be in the successful claimant, and orders the title-holder to transfer the property to the claimant. If the decree relates to land situated in Texas, the decree itself can operate as a muniment of title to transfer ownership. In *Omohundro v. Matthews*, 341 S.W.2d 401, 405 (Tex. 1960), the Supreme Court described the doctrine in this way:

> A constructive trust does not, like an express trust, arise because of a manifestation of intention to create it. It is imposed by law because the person holding the title to property would profit by a wrong or would be unjustly enriched if he were permitted to keep the property.

See Mills v. Gray, 147 Tex. 33, 210 S.W.2d 985, 988-99 (1948).

Constructive trust is a broad equitable concept, and it has many potential uses in divorce proceedings. If a breach of some duty can be proved, and the result is that money or property is owned by a spouse as separate property, or is owned by a third party or an entity or trust when it rightfully should belong to the community estate or to the other spouse's separate estate, then constructive trust may be an available remedy. In *Andrews v. Andrews*, 677 S.W.2d 171 (Tex. Civ. App.--Austin 1984, no writ), a court imposed a constructive trust amounting to a 50% ownership interest in a house acquired before marriage in husband's name alone, where the couple had lived together for the preceding seven years and husband surprisingly and unilaterally took title in his name alone. In *Barnett v. Barnett*, 67 S.W.3d 107 (Tex. 2001), the Supreme Court said that, where community property was transferred to a third party in fraud of the community, a court can impose a constructive trust on half of that property. Constructive trusts can also be used to implement the property division. See *Constructive Trustee*.

CONSTRUCTIVE TRUSTEE. In some instances it is not possible or not desirable to award a particular asset to the spouse does not hold title to the asset. The court can transfer a beneficial interest in an asset to the other spouse by naming the spouse holding legal title as constructive trustee for the benefit of the other spouse. This step establishes a fiduciary duty on the part of the ex-spouse who is constructive trustee, owed to the other ex-spouse, as to that asset. An example would be "non-qualified" retirement benefits or "non-

qualified" stock options awarded to the non-employee spouse. Unlike "qualified" plans (which must be transferred on the plan's books to the non-employee spouse pursuant to a *QDRO*), typically the right to received benefits under a non-qualified plan cannot be transferred to the non-employee spouse. To get around this, the court can provide in the divorce decree that the employee-ex-spouse will receive the non-employee ex-spouse's share of the benefit as a constructive trustee for the non-employee ex-spouse, and that the benefit, when received, must be turned over by the employee-ex-spouse to the non-employee ex-spouse. This is often done with employee stock options, where the employee-ex-spouse is denominated as constructive trustee and must exercise the options at the direction of the non-employee ex-spouse. TFC § 9.011 provides:

> Sec. 9.011. RIGHT TO FUTURE PROPERTY.
>
> (a) The court may, by any remedy provided by this chapter, enforce an award of the right to receive installment payments or a lump-sum payment due on the maturation of an existing vested or nonvested right to be paid in the future.
>
> (b) The subsequent actual receipt by the non-owning party of property awarded to the owner in a decree of divorce or annulment creates a fiduciary obligation in favor of the owner and imposes a constructive trust on the property for the benefit of the owner.

CONTRACTS. Contractual rights acquired during marriage are community property, unless the consideration paid is proved to have been separate property. Apart from certain exceptions (like personal service contracts), contracts are assignable unless the contract prohibits assignment.

CONTROL (OF A BUSINESS). It is important to realize that a fractional ownership interest in a business is worth more than its percentage share (if it has control of the business), and less than its percentage share (if it does not have control). In the typical divorce trial, the evidence relates to the value of the entire community property interest in the business, as does the value found by the judge. But if the entire community property interest is not awarded to one spouse in the divorce, but is instead divided between the spouses, the values of the two divided interests are not equivalent to their percentage ownership interests multiplied by enterprise value, if only one ex-spouse has control of the business, or can align with other owners to assert control of the business. The values of the controlling and non-controlling fractional interests were probably not valued or testified to by the experts, and thus are unknown to the court. To avoid an unintended injustice when evidence is lacking about the value of controlling and non-controlling fractional interests, it is better for the court not to make such a division in kind unless the value of the fractional interests can be determined from the evidence.

CO-OWNERS. Leaving former spouses as co-owners of an asset after divorce makes them co-tenants, each with an undivided interest. The rights and duties of co-tenants are governed by the law of co-tenancy, which is both antiquated and complicated. If co-owned land needs to be divided post-divorce, it will be necessary to bring a partition action, which is a cumbersome proceeding. *In re Lewis*, 223 S.W.3d 756, 759-60 (Tex. App.--Texarkana 2007, orig. proceeding). Leaving former spouses as co-owners of a business avoids the need to value the business at the time of divorce, but it can create problems regarding the post-divorce *control* of the business. If both ex-spouses have equal control, an impasse can develop that may require a lawsuit to appoint a receiver. If one ex-spouse is given control of the business, there can be abuse of control, leading to minority oppression and the filing of a derivative action or a suit for breach of fiduciary duty. Even the controlling ex-spouse can be dissatisfied with having to deal with an unhappy ex-spouse minority owner. If

there are other owners, splitting the community property interest that has control may cause both ex-spouses to lose control of the business to third parties, or one ex-spouse can join other minority owners in a voting block to exercise control. This encourages the development of factions which, as Alexander Hamilton cogently described in Federalist Paper No. 10 (Nov. 29, 1778), can have destructive effect and should be avoided. In *Walston v. Walston*, 971 S.W.2d 687, 693 (Tex. App.--Waco 1998, pet. denied), the appellate court held that it was an abuse of discretion for the trial court to leave the spouses as 50-50 owners of all community property personal property. *Accord, In re Marriage of Edwards*, 79 S.W.3d 88, 96 (Tex. App.--Texarkana 2002, no pet.).

COPYRIGHT. In *Rodrigue v. Rodrigue*, 218 F.3d 432 (5th Cir. 2000), the Fifth Circuit ruled that the Copyrights Act of 1976 did not preempt the Louisiana community property regime. The court concluded that the copyright was community property that could be divided upon divorce. However, Federal law does give the author the exclusive right to manage the copyright, and that right cannot be assigned by the divorce court. *Id.* at 436–39. See J. Wesley Cochran. *It Takes Two to Tango!: Problems with Community Property Ownership of Copyrights and Patents in Texas*, 58 BAYLOR LAW REV. 407-466 (2006).

CORPORATE ASSETS. Because a corporation has a separate legal identity from its shareholders, all assets of a corporation belong to the corporation and not to the shareholders. *Legrand-Brock v. Brock*, 246 S.W.3d 318, 322 (Tex. App.--Beaumont 2008, pet. denied), citing *Bryan v. Sturgis Nat'l Bank*, 90 S.W. 704, 705 (Tex. Civ. App. 1905, writ ref'd) ("The accumulated earnings or surplus funds of a corporation constitute a part of its assets, and belong to the corporation, and not to the stockholders, until they have been declared and set apart as dividends"); *Thomas v. Thomas*, 738 S.W.2d 342, 343 (Tex.App.--Houston [1st District] 1987, writ denied). A divorce court cannot award corporate assets to either spouse, absent *Piercing the Entity Veil*, *Resulting Trust*, or *Constructive Trust*.

CORPORATE LIABILITIES. Corporate debts are debts of the entity. Ordinarily shareholders are not liable for corporate debts. However, shareholders can become liable for corporate debts by personally guaranteeing them or under the doctrine of *Piercing the Entity Veil*. A contingent community property liability arising from a spouse's personal guarantee of corporate debt is assignable in a property division, and should in most instances be assigned to the partner-spouse who will have a role in managing the corporation after divorce. A corporation can owe a debt to a spouse, which then is an asset of the spouse(s) that may be community property (depending on whether separate or community property funds were loaned). Sometimes the debt is reflected in a promissory note(s), and some just in a general ledger account called "loans from shareholders" or the like.

CORPORATE SHARES. A spouse's ownership interest in a corporation (i.e., shares) can be community property. Absent restrictions on transfer of ownership and excepting licensed professions, community property shares can be awarded in a divorce to either spouse. Because a corporation is an entity for legal purposes, all corporate assets belong to the entity, and cannot be awarded to either spouse.

CORPORATE TAX LIABILITY. A corporation is an entity for tax purposes. A corporation is taxed either as a *C Corporation* or an *S Corporation*. A C Corporation is treated as an entity for all tax purposes. It is taxed on its earnings and profits (E&P). When a C Corporation distributes its E&P to shareholders, the corporation gets no deduction, and the shareholders are taxed at the dividend tax rate, presently either 15% or 20%. This results in double-taxation of the same profits. C Corporation stock is a capital asset that subjects the shareholder to capital gain tax when it is sold or liquidated.

An *S Corporation* for tax purposes is treated in some ways as an entity and in some ways not as an entity. For example, an *S Corporation*'s profits and losses are taxed not to the corporation but to the shareholders. So, profits are taxed only once; there is no double taxation. On the other hand, when shares in an *S Corporation* are sold or redeemed, there is a capital gain or loss to be recognized by the shareholder, and that gain or loss can be affected by the entity's undistributed E & P.

An ex-spouse who receives shares in a *C Corporation* in a divorce will be taxed in the future only on distributions of earnings and profits (dividends) actually paid by the corporation. An ex-spouse who receives shares in an *S Corporation* in a divorce will be taxed in the future on the income of the corporation, regardless of whether or not that corporate income is actually distributed to the ex-spouse. See *Phantom Income* and *Tax Consequences of Property Division*. Compare with *S Corporations*.

COVENANT NOT TO COMPETE. A covenant not to compete is a contractual obligation prohibiting a former owner or former employee of a business from competing with the business. These contracts are designed to safeguard trade secrets, sensitive financial information, a list of suppliers, customer lists, and other intangible aspects of the business, and the best way to protect all of this is to prohibit any competition with the company. The right to work in a field of one's own choosing is separate property of a spouse, and a divorce court cannot enjoin a divorcing spouse from competing after divorce. *Ulmer v. Ulmer*, 717 S.W.2d 665, 667 (Tex. Civ. App.--Texarkana 1986, no writ).

Although there is no case law in point, it is commonly accepted that payments received in exchange for a covenant not to compete are community property to the extent allocable to not competing during marriage, and separate property to the extent allocable to not competing before marriage or after divorce. Some business valuators equate the value of a covenant not to compete to personal goodwill, which in Texas is not part of the community estate. See *Goodwill.* In any event, where a covenant not to compete has been signed during marriage, post-divorce payments should be awarded to the contracting spouse, leaving the question of whether those payments are separate or community property to be decided separately. To the extent that the payments are really disguised sales price, they would have the same character as the business interest sold.

CREDITORS' CLAIMS. A divorce decree cannot not diminish or limit the rights of creditors to go against what was previously marital property to satisfy debts. "Texas courts have consistently held that a division of the community estate may not prejudice the rights of a creditor to satisfy a community debt." *Blake v. Amoco Fed. Credit Union*, 900 S.W.2d 108, 111 (Tex. App.–Houston [14th Dist.] 1995, no writ). *Accord, Stewart Title Co. v. Huddleston*, 598 S.W.2d 321, 323 (Tex. Civ. App.--San Antonio 1980), *aff'd*, 608 S.W.2d 611 (Tex. 1980) (per curiam). *Rush v. Montgomery Ward*, 757 S.W.2d 521, 523 (Tex. App.--Houston [14th Dist.] 1988, writ denied); *Anderson v. Royce*, 624 S.W.2d 621, 623 (Tex. App.--Houston [14th Dist.] 1981, writ ref d n.r.e.); *Inwood National Bank of Dallas v. Hoppe*, 596 S.W.2d 183, 185 (Tex. Civ. App.--Texarkana 1980, writ ref d n.r.e.); *Dorfman v. Dorfman*, 457 S.W.2d 417, 423 (Tex. Civ. App.--Texarkana 1970, no writ). A contract creditor of a spouse can collect a contractual debt incurred during marriage from the contracting spouse's separate property or sole management community property, as well as from joint management community property, but not from the non-contracting spouse's sole management community property or separate property. TFC §3.202(b). A tort creditor can collect a tortious debt incurred during marriage from the tortfeasor-spouse's separate property and from all non-exempt community property. TFC § 3.202(d). Premarital liabilities of a spouse can be collected from that spouse's separate property, and his sole management as well as joint management community property, but not from the other spouse's sole

management community property or separate property. TFC § 3.202(b)(1). The court can determine the order in which assets subject to creditors' claims will be used to satisfy those claims. TFC § 3.203.

DAMAGES. A damage recovery for injury to or loss of real or personal property has the same marital property character as the asset damaged, or lost, under the principle of mutation. A damage recovery for bodily injury is separate property except to the extent that it is a recovery for lost earning capacity during marriage and medical expenses incurred during marriage. TFC§ 3.001(3); *Graham v. Franco*, 488 S.W.2d 390, 395 (Tex. 1972). Money already received is divisible like other cash. Future payments can be divided if, as and when received, or valued and awarded to one spouse with offsetting property or a money judgment to the other spouse.

DEBTS. The divorce court should allocate the responsibility to pay community property debts. *Cole v. Cole*, 532 S.W.2d 102 (Tex. Civ. App.--Dallas 1975, no writ). "The parties' liabilities are factors to be considered in making a just and right division." *Vannerson v. Vannerson*, 857 S.W.2d 659, 673 (Tex. App.–Houston [1st Dist.] 1993, writ denied) (a trial court is permitted to impose the entire tax liability on one spouse). The rights of creditors of a spouse cannot be diminished in a decree of divorce. See *Creditors' Claims*. "Whether a spouse is liable to a third-party creditor for the debt of the other spouse is a separate analysis from determining whether certain debts and liabilities of the spouses can be considered in dividing the community estate." *Bush v. Bush*, 336 S.W.3d 722, 740 (Tex. App.–Houston [1st Dist.] 2010, no pet.). "A divorce court can order a spouse to pay community debts for which the spouse is not personally liable, but absent such an order the creditors cannot go against the non-liable spouse except where that spouse acts as agent for the other spouse, or where the other spouse incurs a debt for necessaries. See TFC § 3.201(a). Attorneys' fees incurred in a divorce are, as a matter of law, not necessaries. *Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651, 656 (Tex. 2013). In *Siefkas v. Siefkas*, 902 S.W.2d 72, 75 (Tex. App.–El Paso 1995, no pet.), the appellate court affirmed the trial court's order requiring the husband to pay the second mortgage on the community homestead, rejecting his claim that it was prohibited alimony.

Collateralized Debt. Where a debt is secured by a lien or security interest in a marital asset, the better choice is to award the debt to the party receiving the collateral. That way the desire to continue to own the collateral provides an incentive to pay the debt. Awarding the collateral to one spouse and the debt to the other spouse eliminates that incentive. Furthermore, separating the debt from the asset also creates a situation where post-divorce litigation may be required, in the event of non-payment. The separation of debt from collateral can also result in an ex post facto forfeiture of an asset upon non-payment, upsetting the assumptions the court may have made in dividing the estate at the time of divorce.

Uncollateralized Debt. If a debt is not collateralized, the creditor may move to collect against any non-exempt property that is subject to that type of creditor's claim. In a property division, the court may want to award the non-debtor spouse assets that are exempt from creditors' claims, or assets that are the non-debtor spouse's sole management community property.

When No Personal Liability. If a spouse is not personally liable on a contractual debt, then that spouse's maximum exposure to the creditor for the debt is the subsequent loss of joint management community property or the sole management community property of the debtor-spouse that is awarded to the non-debtor spouse in the divorce. If the debt is a tort claim arising during marriage, all non-exempt former community property is subject to collection. The court can order a spouse who is not personally liable for a community debt to pay that debt, as part of the property division. Whether creditors are third-party-beneficiaries who can

enforce such an order on their own behalf is unclear. But an aggrieved spouse can enforce such an order, as between the spouses. To facilitate this remedy, the court can include in the decree an order for the spouse awarded the debt to indemnify the other spouse for losses resulting from the failure to pay.

Contingent Liabilities. Contingent liabilities (such as personal guarantees) may not be due at the time of divorce, but they may be activated after the divorce. Therefore they are not negatively valued the same as primary liabilities, but they have a negative value nonetheless. Perhaps the liability should be shared on an if, as-and-when basis.

Indemnification. If a debt is allocated to one spouse, the court may wish to order that spouse to indemnify the other spouse in case the creditors come against property awarded to the other spouse. If the indemnity obligation is uncollateralized, it is not worth much, since the indemnity will trigger only after the indemnifying spouse has defaulted on paying the debt, at a time when the debtor-spouse is likely judgment-proof. However, if the indemnity obligation is collateralized, especially with exempt assets awarded to the debtor-spouse, it provides an incentive for the debtor-spouse to pay the debt. See *Indemnification*.

Ordering Payment of Debt. The court has the power to order a community debt paid out of community funds. If funds are not available, the court can order that non-exempt community property be sold to pay the community debt. Payment at the time of divorce would be advisable in situations where one spouse's non-payment of a debt after divorce might result in creditors foreclosing on assets awarded to the other spouse in the property division.

DEFINED CONTRIBUTION PLAN. TFC § 7.002 requires the court in a divorce to divide retirement and other benefits. This includes a defined contribution plan. A defined contribution plan is "a plan which provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 26 U.S. Code § 414(i), Definitions and Special Rules. With a defined contribution plan, the employer, or employee, or both, typically make contributions on a regular basis. The contributions are deductible and income tax on earnings inside the plan is deferred until the earnings are withdrawn. The plan administrator keeps track of the account balance or value of each account. Defined contribution retirement plans are characterized based on the assets in the plan on the date of marriage, the appreciation of those separate property assets during marriage, the income earned on those separate property assets during marriage, the character of assets deposited into the plan during marriage, and the appreciation and earnings of those assets that were contributed during marriage. *Smith v. Smith*, 22 S.W.3d 140, (Tex. App.–Houston [14th Dist.] 2000, no pet.); *accord*, *McClary v. Thompson*, 65 S.W.3d 829 (Tex. App.–Fort Worth 2002, pet. denied); *Iglinsky v. Iglinsky*, 735 S.W.2d 536, 538 (Tex. App.–Tyler 1987, no writ). Separate property inside a defined contribution plan can be traced. TFC § 3.007(c). Most employees that have a defined contribution plan (except for highly-compensated executives), have a "qualified" plan that is governed by ERISA, which requires the plan administrator to transfer some or all of the assets in the plan to the employee's spouse (alternate payee) if ordered in a divorce decree. To be effective, the order directing such a transfer must be a qualified domestic relations order (QDRO). See *QDRO*.

Ordinarily, when a person withdraws funds from a tax-deferred account, s/he must pay an income tax on the amount withdrawn. If the withdrawal occurs before age 59-1/2, there is an additional 10% penalty for early withdrawal. However, the alternate payee under a qualified plan can "roll over" the funds s/he receives from the plan into a tax-sheltered account (like an IRA or 401(k) plan), and no income tax will be triggered. To

avoid a tax, the transfer should be made directly from the plan administrator to the IRA or 401(k) plan trustee. As noted, if the alternate payee is under age 59-1/2, and s/he takes her/his distribution individually, then a 10% early withdrawal penalty is assessed by the IRS. However, federal law gives the alternate payee an at-the-time-of-divorce option to be "cashed out" of a qualified plan without incurring an early distribution penalty. ERISA § 206(d)(3); IRC § 414(p). This exclusion applies only to a distribution from the qualified plan. If the alternate payee "rolls over" the plan assets to an IRA or other tax sheltered plan, the early-withdrawal exemption is lost. See *QDRO*. So the alternate payee should decide before the divorce decree and QDRO are signed whether or not the money from the plan will be rolled over or cashed out. The court may consider the early-withdrawal penalty and the income tax to be paid upon withdrawal (or its deferred) as a factor in the property division. TFC § 7.008, "Consideration of Taxes."

DISABILITY BENEFITS. The marital property character of disability benefits is governed by TFC § 3.008(b), which says that disability benefits have the character of the lost earnings that the benefits replace. Accordingly, post-divorce disability benefits must be awarded to the spouse whose lost income is being compensated. Veterans' Administration disability payments are not divisible. See *VA Disability Payments*. Military retirement disability payments are also not divisible upon divorce. See *Retirement Benefits (Military).*

DOMESTIC SUPPORT OBLIGATION. "Domestic support obligation" ("DSO") is a term of art used in bankruptcy law to describe a support order issued in a family law proceeding that is protected from discharge in a bankruptcy. Under 11 U.S.C. § 101(14A):

> The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—
>
> (A) owed to or recoverable by—
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
> (ii) a governmental unit;
>
> (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
>
> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—
> (i) a separation agreement, divorce decree, or property settlement agreement;
> (ii) an order of a court of record; or
> (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
>
> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

Section 523(a)(5) of the U.S. Bankruptcy Code makes a "domestic support obligation" non-dischargeable in a Chapter 7 or a Chapter 13 bankruptcy. However, if the court-ordered payment does not qualify as a DSO, it may still be entitled to special treatment under Section 523(a)(15), if the order was "incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record . . . ." Under Section 523(a)(15), such an order is not dischargeable in a Chapter 7 bankruptcy, but it is dischargeable in a Chapter 13 bankruptcy.

In *In Interest of H.D.V., Jr.*, No. 05-15-00421-CV, 2016 WL 4492702, at *6 (Tex. App.–Dallas Aug. 26, 2016, n.p.h.), the husband complained about the trial court declaring a judgment for the wife's attorneys' fees to be a DSO. The husband claimed that the wife's attorneys' fees were not in the nature of alimony, maintenance, or support. The appellate court affirmed, saying that a majority of courts addressing the issue has held that an award *directly to an attorney* in a divorce decree is a domestic support obligation, and that the trial court "could have properly concluded the fee award was a debt in the nature of support under the bankruptcy code." *Id.* at *9.

EMBRYOS (FROZEN). In *McQueen v. Gadberry*, No. ED 103138, 2016 WL 6777902 (Mo. Ct. App. Nov. 15, 2016), the trial court ruled that "frozen pre-embryos are marital property of a special character, and awarded the pre-embryos to Gadberry and McQueen jointly, and ordered that 'no transfer, release, or use of the frozen [pre-]embryos shall occur without the signed authorization of both [Gadberry] and [McQueen].'" Thus, under the court's order, joint consent of the ex-spouses would be required for the embryos to be used. In *Roman v. Roman*, 193 S.W.3d 40 (Tex. App.--Houston [1st Dist.] 2006, pet. denied), *cert. denied*, 552 U.S. 1258 (2008), the parties' embryo agreement provided that the frozen embryos would be discarded in the event of divorce. The appellate court ruled that the parties' contract controlled, and that the trial court abused its discretion in awarding the embryos to the wife. Texas' Uniform Parentage Act, TFC ch. 160, does not specify what to do with frozen embryos upon divorce. To date no Texas appellate court has ruled what to do with frozen embryos in a divorce absent an agreement.

EMPLOYEE STOCK OPTIONS. Stock options can be purchased as an investment. Such options are separate or community property according to the consideration paid. Stock options can also be acquired as compensation for employment. The SEC says this about employee stock options:

> Many companies use employee stock options plans to compensate, retain, and attract employees. These plans are contracts between a company and its employees that give employees the right to buy a specific number of the company's shares at a fixed price within a certain period of time. The fixed price is often called the grant or exercise price. Employees who are granted stock options hope to profit by exercising their options to buy shares at the exercise price when the shares are trading at a price that is higher than the exercise price.

<https://www.sec.gov/answers/empopt.htm>. In a Texas divorce, employee stock options are characterized using a time-allocation approach, based on the portion of the vesting period that occurs during marriage compared to the total vesting period. TFC § 3.007(d). Dividing employee stock options in a divorce can be a problem when they are not assignable, and are not vested and not exercisable by the time of divorce. In that situation, the court can either value the options and award them to the employee spouse with offsetting property or money judgment or promissory note to the other spouse, or the court can divide the options if, as and when received. The employee-spouse can be declared to be the *Constructive Trustee* for the non-

employee spouse, with a duty to exercise the options at the direction of the non-employee spouse and to turn the proceeds over to the non-employee spouse.

EMPLOYMENT AGREEMENTS. Post-divorce income of a spouse is not property that can be divided in a divorce. *Butler v. Butler*, 975 S.W.2d 765, 768 (Tex. App.--Corpus Christi 1998, no pet.). Sometimes employment compensation arrangements can involve future payments that may or may not be compensation for future labors. In *Loaiza v. Loaiza*, 130 S.W.3d 894, 909 (Tex. App.–Fort Worth 2004, no pet.), the court held that the spouse's right to receive future payments, under his written employment agreement as a professional athlete, "did not accrue until he performed his services," thus making the payments non-marital property. In *Cunningham v. Cunningham*, 183 S.W.2d 985 (Tex. Civ. App.--Dallas 1944, no writ), the court held that the wife was not entitled to her husband's future insurance renewal commissions because the right to receive commissions was contingent on the customers renewing their policies and the husband's continued employment by the agency. In *Murray v. Murray*, 276 S.W.3d 138, 143 (Tex. App.--Fort Worth 2008, pet. dism'd), the appellate court held that the income stream from a multi-level marketing network was community property divisible on divorce to the extent that the income stream existed on the date of divorce but not as to income attributable to adding future customers to the network in the future.

ESTATE PLANS. Estate planning techniques evolve over time. At the present time, the popular techniques are joint contractual wills, trusts, and family limited partnerships (FLPs). Joint wills entered into after September 1, 1979, are enforceable in Texas if established by written agreement, or if stated in the will. The power of a divorce court to alter rights and obligations under joint contractual wills is not clear. Trusts are revocable or non-revocable. A revocable trust can be terminated by the settlor, and creates no vested rights in beneficiaries, and the prevailing view is that a court in the divorce of the settlor-spouse can ignore the revocable trust and divide any community property assets held in the revocable trust. See *Land v. Marshall*, 426 S.W.2d 841 (Tex. 1968). Non-revocable trusts vest ownership of the trust principal and income in the trustee, and the assets held in trust are not subject to the divorce court's authority, absent fraud, piercing the veil, etc. See *Trusts*. An FLP is a partnership in which the partners are all family members. FLPs are subject to the rules governing partnerships. The assets of a partnership are not marital property, and thus cannot be divided by the court in a divorce (absent fraud). TBOC §§ 154.001 & 1154.002. Management rights that belong to a spouse-partner are separate property. TBOC § 152.203(a). See *Partnerships*.

When an estate planner has been too aggressive in putting the family's wealth into a trust or partnership, one or both spouses may want to "unwind" the estate plan in their divorce. If one or both spouses are a trustee or general partner, there is a conflict of interest between that spouse and the children and grandchildren that are contingent beneficiaries or limited partners. Any unwinding will require the appointment of a guardian ad litem for under-age beneficiaries or partners, which the divorce court can do under Tex. Property Code § 115.014, once the trustee, the beneficiaries, or partnership and partners have been joined as parties in the divorce. Unwinding an estate plan in a divorce can be messy and expensive and can have tax consequences.

EXEMPT PROPERTY. The exemptions that protect assets from being taken by creditors to satisfy debts are set out in Tex. Prop. Code ch. 41 and 42. The only real property that is exempt from creditor's claims are the homestead and plots for burial of the dead, covered in Chapter 41. The personal property that is exempt from creditors' claims is set out in Chapter 42 and includes particular types of personalty totaling no more than $50,000 for an individual, or $100,000 for a family. Tex. Prop. Code § 42.001(a). Without regard to the foregoing dollar limits, the following personal property is exempt from creditors' claims: current wages for personal services, Sec. 42.001(b)(1); professionally prescribed health aids, Sec. 42.001(b)(2); alimony and

child support, Sec. 42.001(b)(3); a bible or sacred text, Sec. 42.001(b)(4); workers' compensation benefits, Tex. Labor Code Sec. 408.201; property held in a spendthrift trust for the benefit of the judgment debtor, Texas Property Code Sec. 112.035; insurance benefits, Tex. Ins. Code Sec. 1108.001 & 1108.051; retirement benefits, IRAs, and HSAs, Tex. Prop. Code Sec. 42.0021; and College Savings Plans, Tex. Prop. Code Sec. 42.0022. Also, artwork on consignment to a dealer is not subject to the claims of creditors of the dealer. Occupations Code Sec. 2101.003. Community property assets that are exempt from creditors' claims are divisible in a divorce, but "a divorce court cannot order that exempt property be liquidated and paid to creditors. a party cannot be required to pay unsecured creditors from homestead proceeds." *Walston v. Walston*, 971 S.W.2d 687, 695 (Tex. App.–Waco 1998, pet. denied) (involving homestead); *McIntyre v. McIntyre*, 722 S.W.2d 533, 537 (Tex. App.--San Antonio 1986, no writ) (involving homestead); *Poston v. Poston*, 572 S.W.2d 800, 803 (Tex. Civ. App.--Houston [14th Dist.] 1978, no writ) (involving homestead); *Delaney v. Delaney*, 562 S.W.2d 494, 495 (Tex. Civ. App.--Houston [14th Dist.] 1978, writ dism'd) (involving homestead). The Tex. Gov't Code § 821.005 exemption relating to teacher retirement benefits does not preclude dividing such benefits in a divorce. *Chacon v. Chacon*, 222 S.W.3d 909, 917 (Tex. App.--El Paso 2007, no pet.).

FAMILY LIMITED PARTNERSHIP. A family limited partnership ("FLP") is an estate-planning device designed to pass wealth from an older generation to younger generations while minimizing estate taxes. The idea is to put the older generation's wealth into a limited partnership in exchange for the general partner and limited partner interests, with the expectation that the older generation will retain control that comes from ownership of the general partner interest, while giving limited partnership interests to the children and grandchildren over time. The general partner ("GP") interest is small (typically a 1% ownership interest or less). Because the limited partner interests have no control, the gifts to them are subject to valuation discounts for lack of control and lack of marketability, reducing the value of the interests given. When the older generation dies, they bequeath their GP interest, and any limited partner interest they may still own on death, to their heirs. While the GP interest that is included in their estates has a control premium, the estate owns such a small percentage of the partnership that the value of the GP interest is very small. The problem with a FLP in a divorce occurs when too much of the community estate has been transferred into the FLP, removing it from the estate of the parties. The court can divide the spouses' partnership interests, but management rights are separate property and cannot be altered by the court. So if, in the estate plan, one spouse and not the other is the GP with control of the partnership, that control remains in place despite the divorce. If the spouses have equal control, that sets up the likelihood of an impasse in management. If a significant part of the community estate has been put into the FLP, one or both spouses may want to reverse the transaction, but ordinarily they cannot do so without the consent of the other limited partners, absent a finding of fraud that vitiates the transfer. If some of the limited partners are minors, and one or both spouses sue to alter or set aside the conveyances into the partnership, the spouses will have to sue themselves as general partner, which creates a conflict of interest so that the court will have to appoint a guardian ad litem to protect the interests of limited partners who are minors. If the limited partner interests are held by trustees, then the trustees will need to be named as parties to the divorce, and if either parent is a trustee that conflict of interest will require a guardian ad litem for the child who is a beneficiary of the trust which is a limited partner.

FINDINGS OF FACT. After a non-jury trial, a party (typically the loser who wishes to appeal) can request Findings of Fact and *Conclusions of Law*. TRCP 296. The trial court is supposed to set out the findings of fact that led to the judgment. The findings of fact should be confined to the ultimate issues in the case, much like the questions in a jury charge. *In re Edwards*, 79 S.W.3d 88, 94-95 (Tex. App.--Texarkana 2002, no pet.). "A

court need not make findings of fact on undisputed matters." *Limbaugh v. Limbaugh*, 71 S.W.3d 1, 5 (Tex. App.–Waco 2002, no pet.). And a court need not make finding on evidentiary issues. *Grossnickle v. Grossnickle*, 935 S.W.2d 830, 838 (Tex. App.--Texarkana 1996, writ denied). "The distinction between an ultimate or controlling issue and an evidentiary issue has been defined in the following manner: An ultimate fact issue is one that is essential to the right of action.... Such an issue seeks a fact that would have a direct effect upon the judgment.... In contrast, an evidentiary issue is one that the jury may consider in deciding the controlling issue, but that is not a controlling issue itself." *Limbaugh v. Limbaugh*, 71 S.W.3d 1, 6 (Tex. App. –Waco 2002, no pet.). TFC § 6.711 provides that, upon request, the court must characterize assets, liabilities, claims, and offsets, and their values. This Family Code provision ensures that the appellant will have the information necessary to show errors in fact-finding and to show the effect of a particular error on the overall property division. See *Conclusions of Law*.

FINES (CRIMINAL AND CIVIL). Where one or both spouses are subject to a criminal penalty or civil fine for illegal or improper behavior, there are public policy reasons that a court cannot make the innocent spouse pay the penalty or fine. In *Winkle v. Winkle*, 951 S.W.2d 80, 87 n. 1 (Tex. App.—Corpus Christi, 1997, pet. denied), the appellate court suggested that a trial court cannot allocate a Federal civil penalty in a manner that differs from what Federal law provides.

529 PLANS. A "529 Plan" is a tax deferred college savings plan, existing under the authority IRC § 529. Contributions to the plan are not tax deductible, but earnings on the plan assets are not taxable if expended for permitted purposes. Federal law provides that the money from a 529 plan can be used without tax and penalty for tuition, fees, books, supplies, and equipment required for study at any accredited college, university, or vocational school in the United States, and in some situations room and board. The assets in a 529 Plan belong to the parent(s) who contributed the assets to the plan. For this reason, the assets can be withdrawn by the parents from the 529 plan, although that triggers a tax penalty. If the Plan was funded with community property, the court in a divorce can split the plan between the spouses. Some argue that the court can order that the funds be used only for the purposes outlined by Federal law, but the ability of the court to restrict the future use of community property assets for the benefit of an adult child can be questioned.

FOUNDATIONS. See *Charitable Foundation.*

401 K PLANS. "A 401(k) plan is a qualified plan that includes a feature allowing an employee to elect to have the employer contribute a portion of the employee's wages to an individual account under the plan. The underlying plan can be a profit-sharing, stock bonus, pre-ERISA money purchase pension, or a rural cooperative plan. Generally, deferred wages (elective deferrals) are not subject to federal income tax withholding at the time of deferral, and they are not reported as taxable income on the employee's individual income tax return." <https://www.irs.gov/retirement-plans/plan-sponsor/401k-plan-overview>. The community property portion of the 401(k) is divisible in a divorce, either by awarding the contents to the spouse who is beneficiary of the plan and awarding different property to the other spouse, or by awarding part of the contents of the plan to the other spouse through a *QDRO*. The receiving spouse can avoid taxation in such a situation by effecting a "rollover," where the assets are transferred directly from the plan trustee to the trustee of an IRA or other qualified plan of the receiving spouse. If the contents of the 401(k) plan are transferred out of the plan but not to an IRA or other qualified plan, the full value of the proceeds will be taxed as income. If the withdrawal is made by a spouse who is under age 59-1/2, there is an additional 10% penalty for early withdrawal. If the non-beneficiary spouse receives an interest in the 401(k) plan in a divorce, and

withdraws the assets from the plan *at the time of divorce,* then the 10% penalty does not apply even to a recipient under age 59-1/2.

FRANCHISE AGREEMENTS. Franchise agreements can vary from a fast food restaurant to a car dealership, with values ranging from the tens of thousands to the millions. Some business valuation experts would say that the goodwill of a franchise operation is in its brand, which is not personal to the franchisee and therefore is not personal goodwill. However, it is possible that the particular business-owner-franchisee has relationships with customers that are strong enough that the customer would remain with the business even if the brand is changed. *See In re Ziegler*, 69 Wash. App. 602, 849 P.2d 695 (1993), where the court of appeals split on the question of whether the goodwill of a State Farm Insurance agency belonged to the enterprise or was personal to the franchisee-owner. With a McDonald's restaurant on a busy intersection, the goodwill is likely all enterprise goodwill. With a car dealership in a small community in the owner's name, much of the goodwill may be personal to the franchisee-owner. Some franchise agreements bar transferability, while other allow transfer with approval from the franchisor and the payment of a fee.

FRAUD ON THE COMMUNITY. When a spouse fraudulently dissipates community property it is called "fraud on the community." The fraud is "actual" if done with the intent of depriving the other spouse of his/her interest in the property. The fraud is "constructive" if the transfer is "unfair" to the other spouse. See State Bar of Texas Pattern Jury Charges (Family and Probate) ch. 206 (2016). The claim is not a tort, and the recovery is not damages. *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998). In *Chu v. Hong,* 249 S.W.3d 441, 444 (Tex. 2008), the Supreme Court said that the primary remedy for fraud on the community would be a corrective division of the remaining community estate, or a money judgment against the wrongdoing spouse. However, where the community property wrongfully transferred is still in the hands of a third party, the court can impose a constructive trust on the property and bring it back into the community estate. *Barnett v. Barnett*, 67 S.W.3d 107 (Tex. 2001). For a more detailed discussion, see Richard R. Orsinger, *Selected Fiduciary Issues in Family Law Cases*, State Bar of Texas' Fiduciary Litigation Course, ch. 10, pp. 6-14 (2013).[2]

FURNITURE AND FURNISHINGS. Community property personal property is divisible upon divorce. Where the parties cannot agree on a division of furniture and furnishings, dividing those items can be an emotional process for the parties, and there are few objective considerations to guide the court. A court can avoid involvement in the process by ordering the parties to select items on an alternating basis. Or, the court can order one spouse to divide the personal property into two portions, and allow the other spouse to choose the portion s/he wants. Or, the furniture and furnishings can be appraised (usually amounting to nominal value) and divided equitably based on those values.

GIFTS. Property received by a spouse as a gift during marriage is separate property. TFC § 3.001(2). While a divorce court cannot, absent fraud or constructive fraud (see *Bohn v. Bohn*, 455 S.W.2d 401, 405 (Tex. App.–Houston [1st Dist.] 1970, writ dism'd), divest a spouse of a gift, if an asset is partly the separate property of each spouse, or partly separate property and partly community property, the court can order that the asset be sold and the separate property portion of the proceeds returned to the owner-spouse(s) and the community property portion of the proceeds can be divided by the divorce court.

GOODWILL. For purposes of a divorce involving a business, there are two types of goodwill: enterprise goodwill and personal goodwill. See Orsinger, *Distinguishing Personal Goodwill From Enterprise Goodwill*, State Bar of Texas' New Frontiers in Marital Property Course (2006).[3] Enterprise goodwill is the goodwill of the business that would remain with the business if it were sold. Personal goodwill is goodwill of the owner

who sells the business, that is so identified with the owner that it will not remain with the business after the owner leaves. Personal goodwill is not community property that can be divided upon divorce. *Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972). Goodwill of a business is not considered part of the marital estate unless it exists independently of the owner's skills, and the estate is otherwise entitled to share in the asset. *Hirsch v. Hirsch*, 770 S.W.2d 924, 927 (Tex. App.--El Paso 1989, no writ); *Finn v. Finn*, 658 S.W.2d 735, 740-41 (Tex. App.--Dallas 1983, writ ref'd n.r.e.); *Geesbreght*, 570 S.W.2d 427, 436 (Tex. Civ. App.--Fort Worth 1978, writ dism'd). However, goodwill that exists independently of the owner's personal skills and personal relationships is subject to division. *Finn*, 658 S.W.2d at 740-41. Because enterprise goodwill is inherent in the business itself, the enterprise goodwill remains with the business when the business is awarded to a spouse. If the other spouse is to receive compensation for that award of enterprise goodwill, it would have to be in the form of offsetting property or a money judgment or promissory note. The Supreme Court, in *Salinas v. Rafati*, 948 S.W.2d 286, 291 (Tex. 1997), said: "*Geesbreght* and *Nail* illustrate the considerations involved in determining whether an estate includes goodwill. Neither establishes an absolute rule." There is a third kind of goodwill, which is goodwill that has been purchased or sold. Under established accounting practices, when a business is acquired by another business, the purchase price in excess of what can be assigned to tangible assets and identifiable intangible assets must be recorded on the acquiring company's balance sheet as goodwill. This form of purchased goodwill is part of enterprise goodwill. "Once a professional practice is sold, the good will is no longer attached to the person of the professional man or woman. The seller's actions will no longer have significant effect on the good will. The value of the good will is fixed and it is now property that may be divided as community property." *Austin v. Austin*, 619 S.W.2d 290, 292 (Tex. Civ. App.–Austin 1981, no writ). If the purchase agreement includes a covenant not to compete from the seller, then the portion of the purchase price allocable to the covenant may be separate property to the extent it is payment for a spouse's not competing after divorce. See *Covenant not to Compete*.

GUARANTEES. A guarantee ("personal guarantee") is a promise to pay the debt of another if that debt is not paid when due. The debt is a "contingent" liability, since the guarantor's duty to pay is triggered only upon default by the underlying debtor. Personal guarantees create difficulties in a divorce because they might or might not require payment by the guarantor. If a guarantee is ignored for purposes of determining the net community estate but the debt later has to be paid, the guarantor ended up receiving less property than the court envisioned at the time of divorce. If the guaranteed debt is subtracted in the property division but the debt never eventually has to be paid, then the guarantor ended up receiving more property than the court envisioned in the divorce. In some situations, a sharing of the conditional liability may be the fairest way to allocate the risk between the spouses.

HOME. The court can award a community property home to either spouse upon divorce. The court also can order the home sold and the proceeds divided. *Laster v. First Huntsville Props. Co.*, 826 S.W.2d 125, 131 (Tex. 1991); *Trigg v. Trigg*, 18 S.W. 313, 317 (Tex. 1891). However, a court cannot order that the family homestead be sold and the proceeds used to pay general creditors, as that would violate the exemption protecting the homestead from creditors' claims. *Delaney v. Delaney*, 562 S.W.2d 494, 496 (Tex. Civ. App.--Houston [14th Dist.] 1978, writ dismissed). Although it is no longer commonly done, the Supreme Court in *Eggemeyer v. Eggemeyer*, 554 S.W.2d 147, 140-41 (Tex. 1977), confirmed the power of the divorce court to order that a spouse can continue to live at the family's homestead after divorce, even when the property is the other spouse's separate property, if done "for the support of the children." That power would not extend past the children attaining majority. Regarding valuing the family home in *Quijano v. Quijano*, 347 S.W.3d 345, 352 (Tex. App.--Houston [14th Dist.] 2011, no pet.), the trial court valued the home at the tax appraisal

district value, less the mortgage and less closing costs. The appellate court declined to reverse for various reasons.

HOMESTEAD. The homestead of a person or family is exempt from forced sale except for liens securing debts that fit one of the categories recognized in Texas Constitution art. 16 § 50, and Tex. Prop. Code Sec. 41.001. These include liens securing debts incurred for purchase money, ad valorem taxes on the property, work and material used in constructing improvements, an "owelty of partition . . . including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding," the refinance of a lien (including a federal tax lien) resulting from the tax debt of both spouses, a home equity loan, and a reverse mortgage. Tex. Const. art. 16 § 50; Tex. Prop. Code § 41.001(b). Notwithstanding the protection against forced sale, a court in a divorce can order a community property homestead sold and the proceeds divided between the spouses. *See Kirkwood v. Domnan*, 16 S.W. 428, 429 (Tex. 1891) (involving a post-divorce partition of a community property home not divided at the time of divorce). However, the court cannot order that the proceeds from sale of the homestead be used to pay general creditors. *Delaney v. Delaney*, 562 S.W.2d 494, 496 (Tex. Civ. App.-- Houston [14th Dist.] 1978, writ dismissed). A court cannot attach a lien in a spouse's separate property homestead to secure a judgment awarded to the other spouse, unless the judgment is for a reimbursement claim against that particular property. See *Lien (Equitable).*

The United States Supreme Court, in *U.S. v. Rodgers*, 461 U.S. 677, 685-86 (1983), commented that the Texas Constitution creates for–

> each spouse in a marriage a separate and undivided possessory interest in the homestead, which is only lost by death or abandonment, and which may not be compromised either by the other spouse or by his or her heirs. It bears emphasis that the rights accorded by the homestead laws vest independently in each spouse regardless of whether one spouse, or both, actually owns the fee interest in the homestead. Thus, although analogy is somewhat hazardous in this area, it may be said that the homestead laws have the effect of reducing the underlying ownership rights in a homestead property to something akin to remainder interests and vesting in each spouse an interest akin to an undivided life estate in the property.

The Texas Commission of Appeals said that a homestead right "contains every element of a life estate, and is therefore at least in the nature of a legal life estate, or, in other words, a life estate created by operation of law." *Sargeant v. Sargeant*, 15 S.W.2d 589, 593 (Tex. 1929); *accord*, *Thompson v. Thompson*, 236 S.W.2d 779, 787 (Tex. 1951). In *Wierzchula v. Wierzchula*, 623 S.W.2d 730, 732 (Tex. Civ. App.--Houston [1st Dist.] 1981, no writ), the court said that in a divorce action a lien could be placed on a spouse's separate property homestead "to secure the payment of the amount awarded to the other spouse for the spouse's homestead interest." *Accord, Wren v. Wren*, 702 S.W.2d 250, 252 (Tex. App.--Houston [1st Dist.] 1985, no writ).

In *In re Miller*, 58 B.R. 192 (Bankr.S.D.Tex. 1985), the bankruptcy judge ruled that an equitable lien created by a divorce decree was an implied vendor's lien, enforceable against a homestead. The lien arose at the time of rendition of the decree of divorce, and did not have to be abstracted in order to be perfected. However, a number of courts have held that such a lien can be avoided in bankruptcy.

HOT ASSETS. Any property division that involves a distribution of a business entity's assets should take into consideration the tax implications of "hot" assets. The award of assets in an entity that holds hot assets may convert long-term capital gain to ordinary income or in certain cases may force the partner to recognize

ordinary income offset by a non-utilizable capital loss upon the disposition. There are three categories of hot assets: goods, services, and recapture items. See IRC § 751. It is not likely that a court would order a partnership to redeem a partnership interest, except where the partnership is wholly-owned by the spouses so that the rights of third parties are not adversely affected.

INDEMNIFICATION. When a divorce decree orders that a liability will be paid by a particular spouse, the rights of the creditor are not affected. See *Creditors' Rights*. If the other spouse was personally liable for the debt before the divorce, s/he remains liable for the debt after the divorce. Even if the other spouse was not personally liable for the debt, if the spouse who incurred the debt is ordered to pay the debt but fails to do so, the creditor may go against the non-exempt community property awarded to the other spouse that was previously subject to the creditor's claims. To help the other spouse recoup losses sustained if the spouse defaults on payment of the debt as ordered by the court, the court can award a right of indemnity. The TFLPM, Form 23-1, pp. 128-129, Section 20 (2016) provides:

> . . . IT IS ORDERED that if any claim, action, or proceeding is hereafter initiated seeking to hold the party not assuming a debt, an obligation, a liability, an act, or an omission of the other party liable for such debt, obligation, liability, act, or omission of the other party, that other party will, at that other party's sole expense, defend the party not assuming the debt, obligation, liability, act, or omission of the other party against any such claim or demand, whether or not well founded, and will indemnify the party not assuming the debt, obligation, liability, act, or omission of the other party and hold [him or her/him/her] harmless from all damages resulting from the claim or demand.
>
> Damages, as used in this provision, includes any reasonable loss, cost, expense, penalty, and other damage, including without limitation attorney's fees and other costs and expenses reasonably and necessarily incurred in enforcing this indemnity.
>
> IT IS ORDERED that the indemnifying party will reimburse the indemnified party, on demand, for any payment made by the indemnified party at any time after the entry of the divorce decree to satisfy any judgment of any court of competent jurisdiction or in accordance with a bona fide compromise or settlement of claims, demands, or actions for any damages to which this indemnity relates.
>
> IT IS ORDERED that each party will give the other party prompt written notice of any litigation threatened or instituted against either party that might constitute the basis of a claim for indemnity under this decree.

INFORMAL SETTLEMENT AGREEMENT. See *Settlement Agreements*.

INHERITANCE. Property acquired during marriage by inheritance is separate property. Tex. Const. art. XVI, § 15; TFC § 3.001(2). Because separate property is not divisible in a divorce, inherited property must be left with the spouse who inherited it. Not everything distributed from an estate to an heir is necessarily part of the inheritance. Under Texas law, legal title vests in estate beneficiaries immediately upon the death of the donor. TEC § 101.001(a)(1) (applies when there is a will); *Hurt v. Smith*, 744 S.W.2d 1, 6 (Tex. 1987): ("property bequeathed to the charities . . . vested in the charities immediately upon...death..."). The argument is sometimes made that income earned on the inherited property is community property beginning at the

moment of death. So there may be a contest over the character and divisibility of cash distributions from an executor or administrator of a decedent's estate to a married beneficiary or heir.

INSURANCE (CASUALTY). TFC § 7.004 requires the court in a divorce to "specifically divide or award the rights of each spouse in an insurance policy." Insurance is a contractual right, and this contractual right is community property if it was acquired during marriage other than by gift, devise or descent, absent a partition agreement or tracing to separate property. Notwithstanding the marital property character of the policy, insurance proceeds under a casualty policy compensating for damage or loss to property has the same character as the property damaged or lost. TFC § 3.008(a). The court should assign casualty insurance coverage to the party receiving the property insured. TFC § 7.005 controls what to do with insurance coverage not specifically awarded in a divorce.

INSURANCE (DISABILITY). TFC § 3.008(b) says that disability insurance payments are community property to the extent they replace earnings lost during marriage and are separate property to the extent they replace earnings lost before marriage or after divorce. The right to receive post-divorce disability payments must be awarded to the disabled spouse. TFC § 7.005 controls what to do with insurance coverage not specifically awarded in a divorce.

INSURANCE (LIABILITY). TFC § 7.004 requires the court in a divorce to "specifically divide or award the rights of each spouse in an insurance policy." The standard liability insurance in Texas is through homeowners insurance and that coverage follow ownership of the home. Persons who rent rather than own a home can get basic liability insurance coverage through renters insurance. That coverage follows the lease. Insurance coverage in excess of homeowners and renters insurance policy limits can be obtained through excess liability insurance ("umbrella policy"). While there is no case law on point, it is doubtful that a divorce court can alter the contractual rights of spouses in excess liability coverage. TFC § 7.005 controls what to do with insurance coverage not specifically awarded in a divorce.

INSURANCE (LIFE). TFC § 7.004 requires the court in a divorce to "specifically divide or award the rights of each spouse in an insurance policy." Life insurance is a contract where the insurance company agrees to pay a specified sum to a beneficiary designated by the policy owner, upon the death of a person (or persons). If the policy is community property, it can be awarded to either spouse in a divorce. *Womack v. Womack* 172 S.W.2d 307 (Tex. 1943). Term life insurance is usually valued at zero, regardless of its actuarial value based on the age and health of the insured. Whole life and universal life policies can have a cash value, which is most commonly used as the value of the policy for purposes of the property division. A loan against a life insurance policy is not a true loan; it is really a credit for early receipt of the payment due on death. TFC § 7.005 controls what to do with insurance coverage not specifically awarded in a divorce. See *Life Insurance Trusts.*

IRAs. An individual retirement account ("IRA") is a savings or investment account that is tax sheltered, in that contributions are deductible and earnings on assets in the account are tax deferred until they are withdrawn. An IRA can be divided just like an ordinary financial account. If funds are withdrawn from an IRA, there will be an income tax on the withdrawal. All of the funds and the value of all assets withdrawn will be considered taxable income. If the funds are withdrawn before age 59-½, a 10% early withdrawal penalty is also assessed. An IRA in the name of one spouse can be awarded to the other spouse, without triggering a tax, as long as the transfer of funds or assets is from the old IRA trustee to the new IRA trustee. A *QDRO* is not necessary or appropriate for an IRA, because an IRA is not a qualified plan.

***JENSEN* CLAIM.** In *Jensen v. Jensen*, 665 S.W.2d 107, 109 (Tex. 1984), the court held that "the community will be reimbursed for the value of time and effort expended by either or both spouses to enhance the separate estate of either, other than that reasonably necessary to manage and preserve the separate estate, less the remuneration received for that time and effort in the form of salary, bonus, dividends and other fringe benefits, those items being community property when received." The elements of a "*Jensen* claim" are: (i) the value of time and effort expended by either or both spouses; (ii) to enhance the separate estate of either; (iii) other than that reasonably necessary to manage and preserve the separate estate; (iv) less the remuneration received. Subsequent to *Jensen* the Legislature adopted a different undercompensation claim that has different elements, in TFC § 3.402(a)(2). See *Under-Compensation Claim (Statutory)*. There is no case law saying whether the common law claim co-exists with the statutory claim, but the view among CLE authors is that the common law claims continue to exist as an alternative recovery.

JOINT ACCOUNTS. The Texas Estates Code § 113.102, effective January 1, 2014, provides that a jointly-held account belongs to the parties in proportion to the net contributions by each party to the sum on deposit, unless there is clear and convincing evidence of a different intent. The divisibility of funds or assets held in a joint account is a tracing issue. The division of the community property contents of a joint financial account is not subject to particular restrictions.

JUDGMENT AGAINST AN ENTITY. In *Keller v. Keller*, 141 S.W.2d 308 (Tex. Comm'n App. 1940, opinion adopted), where the husband made an advancement to a corporation during marriage, the community estate owned a claim for that money and the spouses "were entitled to share equally upon payment by the corporation." However, in *In re Marriage of Morris*, 12 S.W.3d 877, 885 (Tex. App.–Texarkana 2000, no pet.), it was not proper for the court to require the husband to pay wife $5,000 owed to him by his corporation, absent alter ego and absent joining the company as a party to the divorce.

JUDGMENT AGAINST A SPOUSE. "[T]he courts have generally held that the trial court may require one party to make monetary payments to the other after a divorce, so long as a division was referable to the rights and equities of the parties in and to the properties at the time of the dissolution of the marriage. In such a case, the courts have held that the division is not an allowance of permanent alimony in violation of the established public policy." *Price v. Price*, 591 S.W.2d 601, 603 (Tex. Civ. App.–Tyler 1979, no writ) *Accord, Benedict v. Benedict*, 542 S.W.2d 692 (Tex. Civ. App.--Fort Worth 1976, writ dism'd); *Garrett v. Garrett*, 534 S.W.2d 381 (Tex. Civ. App.--Houston (1st Dist.) 1976, no writ). "Periodic payments or a lump sum payment after a divorce are not alimony if they are referable to the rights and equities of the parties in properties at the time of the divorce." *Wierzchula v. Wierzchula*, 623 S.W.2d 730, 733 (Tex. Civ. App.–Houston [1st Dist. 1981, no writ). *Accord, Hanson v. Hanson*, 672 S.W.2d 274, 278 (Tex. App.–Houston [14th Dist.] 1984, writ dism'd).

JUDGMENT AGAINST A THIRD PARTY. Claims of fraud on the community are not tort claims, and the spouse cannot recover actual or exemplary damages for fraud on the community. *Schlueter v. Schlueter*, 975 S.W.2d 584, 588-89 (Tex. 1998). A spouse can sue a third party for conversion to recover community property held by the third party, for "if a third party steals community property, surely either spouse or both can seek recovery in tort for it." *Chu v. Hong*, 249 S.W.3d 441, 445 (Tex. 2008). Where the third party wrongfully received community property, *Schlueter* and *Chu v. Hong* do not prohibit the wronged spouse from recovering the property from the third party. While *Chu v. Hong* discussed the remedy of money damages, the equitable remedy of constructive trust is also available to recover community property in the hands of a third party. *See Barnett v. Barnett*, 67 S.W.3d 107, 112 (Tex. 2001) (wife has a remedy to impose a constructive trust on one

half of the proceeds of the community property life insurance policy that passed to husband's mother upon husband's death).

JURISDICTION (PERSONAL). A Texas court must have personal jurisdiction over both spouses in order to divide property in a divorce. *Dawson-Austin v. Austin*, 968 S.W.2d 319, 327 (Tex. 1998) ("We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny"). TFC § 6.305 sets out the parameters for the court acquiring jurisdiction over a non-resident spouse.

JUST AND RIGHT DIVISION. See page 3, Paragraph VI above.

LABOR. The fruits of a spouse's labor are community property. *Graham v. Franco*, 488 S.W.2d 390, 392 (Tex. 1972) ("that property is community which is acquired by the work, efforts or labor of the spouses or their agents, as income from their property ..."). That income is divisible like any other community property. Salary earned during marriage but received after divorce is divisible community property. *Keller v. Keller*, 141 S.W.2d 308 (Tex. Comm'n App. 1940, opinion adopted).

LEASES (REAL ESTATE). A community property real estate lease can be awarded in a divorce. *See Buchan v. Buchan*, 592 S.W.2d 367 (Tex. Civ. App.--Tyler 1979, writ dism'd) (husband awarded judgment to offset his leasehold interest in wife's separate property residence awarded to wife in divorce).

LEASES (VEHICLE). A spouse who leases a vehicle has a contractual right to use the vehicle subject to fulfilling the obligations under the lease. The lessee has no present ownership right in the vehicle. The lease can be assignable or not, as specified in the lease. If assignable, the court can award the lease to either spouse, but the original lessee will likely remain liable on the lease after the transfer. In most instances the obligation to make payments under the lease matches or exceeds the benefits under the lease, so that a leased vehicle has no net value to the community.

LIABILITIES. See *Debts*.

LIEN (EQUITABLE). If the court gives one spouse a money judgment against the other spouse as part of the property division, the court can impose an equitable lien on community property assets to secure that judgment. *Siefkas v. Siefkas*, 902 S.W.2d 72, 76 (Tex. App.–El Paso 1995, no writ); *Bowden v. Knowlton*, 734 S.W.2d 206, 208 (Tex. App.--Houston [1st Dist.] 1987, no writ). "An equitable lien is not an estate in the thing to which it attaches, but merely an encumbrance against the property to satisfy a debt." *Karigan v. Karigan*, 239 S.W.3d 436, 439 (Tex. App.–Dallas 2007, no pet.). If the property is the community property homestead, homestead protections remain in effect, but the lien can secure "an owelty of partition . . . resulting from a division or an award of a family homestead in a divorce proceeding." Tex. Prop. Code § 41.001(a)(4); *Lettieri v. Lettieri*, 654 S.W.2d 554 (Tex. App.--Fort Worth 1983, writ dism'd). The statutory language suggests that the owelty would be limited to the spouses' interests in the homestead, and not other property. The late, great SMU Law School Professor Joseph W. McKnight wrote:

> Texas courts have generally acknowledged that in a suit for divorce a lien may be placed upon a spouse's homestead in order to secure the payment of a money judgment awarded to the other spouse for his or her homestead interest.

Where a spouse is awarded real estate and agrees to pay the other spouse for his/her interest in the property, an implied vendor's lien arises to secure payment. *McGoodwin v. McGoodwin*, 671 S.W.2d 880, 882 (Tex. 1984); McKnight, *Family Law: Husband and Wife*, 38 SW. L.J. 131, 154 (1984). When the asset in question is a spouse's separate property, such a lien can be imposed to secure a judgment for reimbursement relating to that asset. *Heggen v. Pemelton*, 836 S.W.2d 145, 147 (Tex. 1992). The court cannot impose an equitable lien on separate property to secure a judgment "imposed by the court simply to ensure a just and right division." *Id.* Where the property is separate property homestead, an equitable lien can be imposed only if the reimbursement claim is for paying the kind of claim that can be enforced against a homestead (vendor's lien, builder and mechanic's lien, tax lien). *Id.* at 147-48.

TFC § 3.406 provides that a court can "impose an equitable lien on the property of a benefited marital estate to secure a claim for reimbursement against that property by a contributing marital estate." That statutory provision is subject to the constitutional limitations outlined above.

LIEN (VENDOR'S). A vendor's lien is enforceable against a homestead. Tex. Const. art. XVI, § 50. Where one spouse agrees to make future payments to the other spouse in exchange for that spouse's interest in a homestead, an implied vendor's lien arises in one half of the property. *McGoodwin v. McGoodwin*, 671 S.W.2d 880, 882-83 (Tex. 1984). Some intermediate appellate courts say that an implied vendor's lien does not arise from a court-ordered (not agreed) property division. *Id*. at 883, n.1.

LIFE INSURANCE TRUSTS. The typical life insurance trust is a non-revocable trust in which the trustee is owner of a life insurance policy payable upon the death of one or both spouses, payable to their children. Usually there are no other assets in the trust than the policy itself, and perhaps some cash to be used to pay policy premiums. Generally the spouses make annual gifts to the trust to pay policy premiums. Because the trustee owns the policy, the policy is not marital property. Absent agreement by the trustee and the beneficiaries, the divorce court cannot replace the trustee or alter the beneficiary designations.

LIMITED LIABILITY COMPANIES (LLCs). An LLC is an entity. The owners of an LLC are called "members," and they own "membership interests." The company agreement can label membership interests as "shares," "units" or some other name. The rules governing the ownership and operation of the LLC are contained in a "company agreement." TBOC §§ 101.001(1) & 101.052. The LLC owns its assets and the members are not liable for LLC debts, except for personal guarantees and *Piercing the Entity Veil*. The LLC can elect to be taxed like a *C Corporation* or like an *S Corporation*.

LLC ASSETS AND LIABILITIES. The assets of an LLC belong to the LLC, or to the particular series of the LLC, and not to the members. TBOC § 101.106(b). See TBOC § 101.112(f) (a creditor of a member has no right to exercise legal or equitable remedies against the assets of the LLC). As a consequence, a court cannot award assets of an LLC in a divorce, absent a *Resulting Trust*, a *Constructive Trust*, or *Piercing the Entity Veil* of the LLC.

LLC TRANSFEREE'S INTEREST. Under TBOC § 101.108, a transferee of an LLC member interest is "entitled, to the extent assigned, to the same rights and powers granted or provided to a member of the company by the company agreement or" the TBOC. The transferee is bound to the same restrictions and obligations imposed on members, and is similarly liable for obligations to make contributions to the company, except for obligations which cannot be ascertained from the company agreement and which the transferee had no knowledge when s/he became a member. TBOC § 101.110(b). This differs from transferees of a

partnership interest, who are not liable for any obligation to contribute capital to the partnership. *See* TBOC § 152.404. The assignor of the interest is entitled to continue to exercise all rights and powers not assigned. TBOC § 101.111(a). The assignor is not released by the assignment from liability to the company. TBOC § 101.111(b).

LLC MANAGEMENT RIGHTS. Under TBOC § 101.106, a member's interest in an LLC may be community property, but a member's right to participate in management and conduct of the business is not community property. Under TBOC § 101.1115, on divorce of a member, the member's spouse is, "to the extent of the spouse's membership interest, if any, . . . an assignee of the membership interest."

LLC MEMBERSHIP INTEREST. Membership interests in an LLC (or LLC series) can be freely transferred, subject to any transfer restrictions or buy-sell agreements that apply. If a spouse's membership interest is community property, it can be divided and awarded in a divorce as the court sees fit, subject to any *Transfer Restrictions* and *Buy-Sell Agreement*. When a membership interest in an LLC is sold, it is recognized as a capital gain or loss of the seller.

LLC SERIES. Texas has joined a dozen other states in allowing an LLC to have different "series" of owners. *See* TBOC § 101.601, subch. M. The series are subparts of the LLC, but each series is completely distinct from other series. Each series has its own membership interests, assets, liabilities, and management rights. *See* TBOC § 101.502 (assets); § 101.606 (liabilities); § 101.608 (management); § 101.613 (distributions). *See* Philip D. Weller, *Transactions in Series LLCs*, State Bar of Texas Advanced Real Estate Law Course ch. 4 (2014). To date, the IRS has recognized the series (pl.) as distinct from one another for tax purposes. In a divorce, each series should be characterized, valued and divided independently from other series.

LIMITED PARTNERSHIPS. As with all partnerships, the assets of a limited partnership are owned by the partnership, not the partners. TBOC §§ 154.001 & 154.002. As a consequence, a court cannot award assets of a limited partnership in a divorce, absent a *Resulting Trust* or *Constructive Trust*, or *Piercing the Entity Veil* of the partnership. (Note: several cases hold that Piercing the Veil does not apply to partnerships. See *Piercing the Entity Veil*.) The partners in a limited partnership own either a general partner interest or a limited partner interest, or both. The general partner exercises control over the partnership, subject to any powers afforded the limited partners. A partnership interest can be community property, but a partner's management rights (if any) are separate property. If a partnership interest is awarded to the non-partner spouse, the non-partner spouse receives a *Transferee's Interest*.

LOTTERY WINNINGS. Lottery winnings won during marriage are community property. *Dixon v. Sanderson*, 72 Tex. 359, 10 S.W. 535, 536 (1888); *Stanley v. Riney*, 907 S.W.2d 636 (Tex. App. – Tyler 1998, no writ). If they are on hand at the time of divorce, they can be divided like any other community property. If payments are to be received after the divorce, they can be divided if, as, and when received, or they can be awarded to one spouse with offsetting property or a money judgment to the other spouse.

MEDIATED SETTLEMENT AGREEMENT. See *Settlement Agreements.*

MINERAL INTERESTS. In Texas, the owner of the fee simple interest in land owns all minerals in the earth beneath the land. Sometimes the fee simple interest is intact, but more often the fee simple interest has been severed (or partially-severed) into two parts: the surface interest and the mineral interest. Transactions involving the exploitation of minerals usually involve a mineral lease. Under a mineral lease, the mineral

interest is divided into two parts--the landowner/lessor's part and the lessee's part. In a mineral lease, the landlord/lessor usually retains a lessor's royalty interest and the rest of the mineral interest is transferred to the lessee under the lease. The landowner/lessor may transfer some or all of his retained royalty interest to others. The lessee can (and often does) break up the lessee's interest into subparts, which are then assigned to others. Possible subparts include an overriding royalty interest, a net profits interest, production payments, and the working interest. A mineral lease may expire, and if it does, the lessee's mineral interest under the lease (and its subparts) revert to the lessor or his assigns.

A. MINERAL LEASE. The fee simple interest in Texas land includes all oil and gas and other minerals in place in the geological strata under the land. The oil and gas and other minerals can be sold by the landowner signing a mineral lease, which divides the fee simple interest into a surface estate and a mineral estate. In a mineral release transaction, the lessee acquires a fee simple determinable, and the lessor has a possibility of reverter. Michael P. Pearson, *A Primer on Production Payments*, State Bar of Texas' 28th Annual Advanced Oil & Gas Energy Resources Law Course, ch. 11, p. 43 (2010) ("Pearson"). The lessor's interest under the lease can be carved up into different interests, and the lessee's interest under the lease can be carved up into different interests.

B. LESSOR'S ROYALTY INTEREST. The lessor under a mineral lease usually retains a "lessor's royalty interest," which is a real property interest consisting of the right to take an in-kind share of the oil, gas, or other minerals removed from the property. Pearson, p. 4. Royalties are almost always paid in dollars and not in kind. At the present time, a typical royalty interest retained in a Texas lease is 25%. A community property lessor's royalty interest can be divided in a divorce.

C. WORKING INTEREST. The rights of the lessee under a mineral lease is called the "working interest." The working interest owner controls and must pay the cost of drilling wells and the cost of operating successful wells. The working interest owner must also pay the royalties due to the owner of the lessor's royalty interest. The working interest owner is entitled to the revenues from sale of the minerals. A working interest should be awarded to the spouse who is in the oil business, since the costs that must be paid can be substantial, perhaps in excess of revenues, especially if there is an active drilling program.

D. OVERRIDING ROYALTY INTEREST. An overriding royalty interest ("ORRI") is carved out of the leasehold interest. The ORRI can be created by outright conveyance or by a reservation in an assignment of the lease. M.C. Cottingham Miles, *An Overview of Overriding Royalty Interests*, State Bar of Texas' 32nd Annual Advanced Oil, Gas & Energy Resources Law Course, ch. 21, p. 1 (2014). The ORRI is a non-possessory real property interest, with no power to develop, operate or produce oil and gas under the lease, but with the right to receive part of the oil or gas produced under the lease. The holder of an ORRI has no obligation to pay expenses relating to the lease. Ordinarily the ORRI ends when the lease expires. *Id*. A community property ORRI can be awarded to either spouse in a divorce. A divorce court might be able to carve an ORRI out of the community property working interest and award it to one of the spouses.

E. PRODUCTION PAYMENTS. A production payment is an interest carved out of the lessee's interest under a mineral lease, that entitles the holder to a specified amount of the production under the lease. The production payment interest terminates when that given volume of production has been provided to the holder of the interest. The holder of the production payment right is not obligated to pay costs of development, operation, or production. Pearson, p. 3. A community property production payment interest is divisible upon divorce.

"MOTHER HUBBARD" CLAUSE. A "Mother Hubbard" clause, in a divorce decree-related agreement or is a residuary clause or a "catch-all" clause that awards "all other assets," or all assets in a category, to a spouse. A frequently-used catch-all or "Mother Hubbard" clause in a decree of divorce is: "All property is awarded to the party in possession or control." In *Jacobs v. Cude*, 641 S.W.2d 258 (Tex.App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.), a decree that awarded "all community property not mentioned above" to the husband included husband's retirement benefits. In *Tharp v. Tharp*, 772 S.W.2d 467, 468 (Tex. App.–Dallas 1989, no writ), awarding "the remainder of the marital estate of the parties " was held to award retirement benefits. In *Carter v. Massey*, 668 S.W.2d 450, 452 (Tex. App.--Dallas 1984, no writ), a catch-all clause awarding "all personal property in the possession" of a spouse was interpreted to include insurance policies, because "possession" included the power to control. In *Carreon v. Morales*, 698 S.W.2d 241 (Tex.App.–El Paso 1985, no writ), awarding property in "possession or control" was held to award retirement benefits. In However, in *Smith v. Smith*, 733 S.W.2d 915, 917 (Tex. App.–Houston [1st Dist.] 1987, writ refused n.r.e.), the court held that retirement or vacation and sick pay benefits were not in a spouse's "possession." In *Yeo v. Yeo*, 581 S.W.2d 734, 737 (Tex. Civ. App.--San Antonio 1979, writ refused n.r.e.), the phrase "in his possession or claimed by him" was held not to award retirement benefits. In *Dessommes v. Dessommes*, 505 S.W.2d 673 (Tex. Civ. App.--Dallas 1973, writ ref'd n.r.e.), the court held that retirement benefits were not in a spouse's "possession," saying: "We do not believe that 'possession' can properly be interpreted as including such intangible contract rights as these. The term is ordinarily understood as referring to property over which the parties have physical control or, at least, a power of immediate enjoyment and disposition." *Id.* at 676. *Accord*, *Dunn v. Dunn*, 703 S.W.2d 317, 319 (Tex. App.–San Antonio 1985, writ refused) (retirement not in "possession"; a bank check is not in "possession" for purposes of property division). In *Acosta v. Acosta*, 836 S.W.2d 652, 653 (Tex. App.–El Paso 1992, writ denied), language in a decree of divorce awarding "any retirement benefits" that a spouse "may have" awarded to that spouse a future lump sum disbursement of the spouse's retirement annuity along with several thousand shares of company stock. In *Stephens v. Marlowe*, 20 S.W.3d 250, 253–55 (Tex. App.--Texarkana 2000, no pet.), form-book language awarding to a spouse "[a]ny and all sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights related to any ... retirement plan ...," awarded to that spouse funds received from a class-action suit relating to that spouse's retirement plan. In *Archibald v. Archibald*, No. 01-08-00015-CV, *2 (Tex. App.–Houston [1st Dist.] June 4, 2009, no pet.) (mem. op.), form book decretal language, awarding a spouse "other benefits existing by reason of the husband's past, present, or future employment," included a post-divorce settlement of the husband's claims related to past-due overtime benefits. In *Thompson v. Thompson*, 500 S.W.2d 203 (Tex. Civ. App.--Dallas 1973, no writ), a release of claims was held not to award retirement benefits. The Supreme Court spoke on the subject in *Buys v. Buys*, 924 S.W.2d 369, 372 (Tex. 1996), where it drew the distinction between "possession" residuary clauses and other more expansive residuary clauses. The court ruled that an residuary clause awarding "all other properties" included retirement benefits. The Supreme Court seems to have tacitly approved of the "possession" cases of *Dunn*, *Yeo* and *Dessommes*. In *Sheshtawy v. Sheshtawy*, 150 S.W.3d 772, 775-76 (Tex. App.–San Antonio 2004, pet. denied), the appellate court reversed the trial court for awarding the wife 60% of "any and all patents existing or applied for during the marriage," on the ground that there was no evidence in the record as to what patents were existing or applied for.

NEWLY-DISCOVERED EVIDENCE. One of the grounds for granting a new trial is newly-discovered evidence. TRCP 324(b). The decision whether to grant a new trial because of newly-discovered evidence is within the trial court's sound discretion, and will not be disturbed absent an abuse of that discretion. In *Sheshtawy v. Sheshtawy*, No. 14-07-00227-CV, *2 (Tex. App.–Houston [14th Dist.] Nov. 13, 2008, no pet.) (mem. op.), the court said: "It is incumbent upon a party who seeks a new trial on the ground of newly-

discovered evidence to first, satisfy the court that the evidence has come to his knowledge since the trial; second, that it was not owing to the want of due diligence that it did not come sooner; third, that it is not cumulative; and fourth, that it is so material that it would probably produce a different result if a new trial were granted." *Wheeler v. Wheeler*, 713 S.W.2d 148, 150 (Tex. App.–Texarkana 1986, writ dism'd).

OUT-OF-STATE PERSONAL PROPERTY. TFC § 7.001 provides that the court in a divorce shall divide the estate of the parties in a divorce or annulment. No geographical limitation on the scope of this directive is stated. TFC § 7.002 provides that the court in a divorce shall divide real and personal property, *wherever situated*, that was acquired by a spouse while domiciled elsewhere but that would have been community property had the spouse been domiciled in Texas at the time of acquisition. The jurisdiction to divide the estate of the parties in a divorce "rests with the courts of the matrimonial domicile ...." *McElreath v. McElreath*, 345 S.W.2d 722, 724 (Tex. 1961). It is accepted that a court with personal jurisdiction over the spouse in a divorce can award personal property of a spouse wherever it may be located.

OUT-OF-STATE REALTY. TFC § 7.001 provides that the court in a divorce shall divide the estate of the parties in a divorce or annulment. No geographical limitation on this directive is stated. TFC § 7.002 provides that the court in a divorce shall divide real and personal property, *wherever situated*, that was acquired by a spouse while domiciled elsewhere but that would have been community property had the spouse been domiciled in Texas at the time of acquisition. So it is contemplated that the court should divide the estate of the parties, wherever those assets are located. The complication with out-of-state realty is that a divorce court cannot, by operation of its decree, pass title to land situated outside of Texas. *McElreath v. McElreath*, 345 S.W.2d 722, 733 (Tex. 1961). The situation was summarized nicely in *Matter of Marriage of Glaze*, 605 S.W.2d 721, 724 (Tex. Civ. App.–Amarillo 1980, no writ):

> [A] Texas court does not have, and cannot acquire, in rem jurisdiction over real estate lying outside the state of Texas. *See Kaherl v. Kaherl*, 357 S.W.2d 622 (Tex. Civ. App.--Dallas 1962, no writ). When a party is properly before a Texas court, however, the court has in personam jurisdiction over the person and can sometimes do indirectly what it cannot do directly. In a divorce case, where the parties own out-of-state real property, the trial court can consider the existence and value of that realty in dividing the community property of the parties and can, in the exercise of its equitable powers, order one party to execute a conveyance of the out-of-state property to the other party. *Brock v. Brock*, 586 S.W.2d 927, 930 (Tex. Civ. App.--El Paso 1979, no writ).... [Footnotes omitted.]

Doctrines like comity and forum non convenions may limit the Texas court's authority over out-of-state realty (and personal property) in some situations.

PARTITIONED PROPERTY. Community Property that is partitioned and exchanged belongs to the receiving spouse as separate property. Tex. Const. art. XVI, § 15. Such a partition and exchange can be done in a premarital agreement or a marital property partition and exchange agreement. TFC § 4.102. (The Texas Family Code provisions governing premarital agreements do not mention partition and exchange, because the statute was taken from the Uniform Premarital Agreement Act, a uniform act that did not specifically address community property; but the constitutional provision provides the authority for premarital partitions). Spouses can agree that income arising from separate property will be separate. Tex. Const. art. XVI, § 15; TFC § 4.103. Separate property cannot be awarded to the other spouse in a divorce. *Eggemeyer v. Eggemeyer*, 554 S.W. 2d 137, 139-40 (Tex. 1977).

PARTNERSHIP ASSETS. Under TBOC §154.001, "[a] partner is not a co-owner of partnership property." Under TBOC §154.002, "[a] partner does not have an interest that can be transferred, voluntarily or involuntarily, in partnership property." Thus, partnership assets cannot be awarded by a divorce court to either spouse. This has long been the law of Texas. *See McKnight v. McKnight*, 5423 S.W.2d 863 (Tex. 1976). The case of *Gonzales v. Maggio*, (Tex. App.--Austin, August 18, 2016, n.p.h.), involved two lawyer spouses who divorced. The parties agreed to a winding up of the partnership, which had no written partnership agreement. The trial court awarded each spouse 50% of the proceeds from cases settled prior to the divorce, and that division of cash was affirmed on appeal as being incidental to the winding up process. However, the TC also awarded each spouse a percentage interest in the future fees from ongoing cases. The appellate court reversed, saying that the award of a percentage of the fees from the ongoing cases was an improper award of partnership assets to a spouse. A partnership may voluntarily convey its assets, subject to any restrictions contained in the partnership agreement, and may pledge or mortgage any of its assets. TBOC § 10.251(a) & (b). If the court awards to the non-partner spouse, a money judgment backed up with a *charging order*, the partnership might choose to convey money or property to discharge the judgment.

PARTNERSHIP CAPITAL ACCOUNT. A partner's "capital account" is not an asset or liability of the partnership; it is instead in the nature of a conditional claim for or against the partner, an obligation owed by or to other partners. The capital account reflects the partner's right to receive funds or assets upon liquidation of the partnership. The capital accounts of a Texas partnership are maintained in accordance with Section 152.202 of the TBOC. Stated in simple terms, a partner's capital account reflects the cumulative total of four things:

(i) capital contributed by the partner, plus
(ii) the partner's share of profits; less
(iii) the partner's share of losses; less
(iv) distributions to the partner.

This rule on capital accounts applies to both general partnerships and limited partnerships. TBOC § 153.003.

Upon winding up a partnership, any capital accounts that are out-of-balance with capital ownership percentages (see *Partnership Interest*) must be brought into balance before liquidating distributions are made in proportion to capital percentages. That is, if one partner's capital account is higher than her percentage capital interest, while another partner's capital account is lower than her percentage capital interest, the partner whose capital account is lower must forego distributions or if need be put money back into the partnership until her capital account is brought into parity with his capital interest, and the partner whose capital account is higher than her percentage capital interest will disproportionately receive distributions that reduce her capital account until her capital account is brought into parity with her capital interest.

This feature of partnership accounting means that a partner's claim on partnership assets in liquidation is not just a function of her capital interest; it is a function of her capital interest adjusted by her capital account.

In a sense, a capital account lower than the partner's proportional capital interest is a "loan" from other partners that must repaid no later than winding up, and a capital account that is higher than the partner's proportional capital interest is a loan to certain other partners that must be repaid by them no later than winding up. While each partnership agreement is different, many partnership agreements do not require that a capital account be brought into parity with the capital interest at any time prior to winding up. Thus, if the

partnership agreement allows it, a partner can take more than his share of money out of a partnership simply by taking distributions that reduce his capital account below his proportional capital interest. Under some partnership agreements, the partners share the power to decide when a capital account must be brought into balance. In *Nieto v. Nieto*, No. 04–11–00807–CV * 11-12 (Tex. App.–San Antonio May 1, 2013, pet. denied) (memo. op.), the trial court disregarded an unexplained distribution of capital from a partnership to the husband, and valued the husband's interest as if the distribution had never occurred, while at the same time awarding the distribution to the husband. The appellate court affirmed.

PARTNERSHIP ENTITY. "A partnership is an entity distinct from its partners." TBOC §152.101. A partnership is owned by its partners. Each partner owns a "partnership interest" which "is personal property for all purposes." TBOC §154.001(a). The partnership interest "may be community property under applicable law." TBOC §154.001(b). However, the right to participate in management cannot be community property. TBOC § 152.203(a).

All partnership assets belong to the entity. As for liabilities, however, a general partnership is not entirely an entity. In a general partnership, the partnership is liable for partnership debts but so are all of the partners. In a limited partnership, the partnership and the general partners are liable for partnership debts, but limited partners are not. See the following discussion.

PARTNERSHIP INTEREST. There are normally two types of ownership interests in a partnership: a "capital interest" and a "profits interest." A "capital interest" entitles the partner to receive both a share of future profits and losses, and payments upon withdrawal from the partnership or distributions upon partial or total liquidation ("winding up") of the partnership. See *Central State, Southeast and Southwest Areas Pension Fund, v. Creative Development Co.*, 232 F.3d 406, 425 (Dennis, J., dissenting); Alan J. Tarr, *Tax Planning for Domestic & Foreign Partnerships, LLCs, Joint Ventures & Other Strategic Alliances*, Tax Law and Estate Planning Course Handbook Series p. 19 (Practicing Law Institute, 2007) [available on Westlaw at 747 PLI/Tax 9]. A "profits interest" entitles the partner to receive a share of earnings and profits, but no right to payment upon withdrawal or winding up. Mark Winfield Brennan, *The Receipt of a Profits Interest in a Partnership as a Taxable Event After Campbell and Mark IV*, 57 MO. L. REV. 273, 276 (1992).

TBOC §154.104 provides that a partnership agreement "may provide rights to any person, including a person who is not a party to the partnership agreement, to the extent provided by the partnership agreement."

An essential feature of being a general partner is the right to withdraw from the partnership, TBOC 152.501(b)(1), and receive fair value for the partnership interest, TBOC § 152.602. Shareholders in corporations ordinarily have no such right.

PARTNERSHIP LAW VS. PARTNERSHIP AGREEMENT. Texas partnerships are governed by Chapter 151, 152 and 154 of the TBOC. These chapters are largely default provisions that apply if the partnership agreement does not provide otherwise. See TBOC § 152.002.[4] Partners have tremendous flexibility in designing their rights and responsibilities, compared to the more rigid corporate form, which is hemmed in by mandatory statutory requirements. Because the partnership agreement controls most issues, and since partnership agreements vary from case to case, determining rights, powers, and duties under a partnership agreement is frequently a matter of contract interpretation and not statutory interpretation. *See Driveway Austin GP, LLC v. Turbo Partners*, 409 S.W.3d 197, 202-03 (Tex. App–Amarillo 2013, judgm't vacated w.r.m.) (extent to which partnership agreement allowed amendment by majority vote was a question of

determining the intent of the parties). Some divorces involving a partnership interest may require the court to interpret the partnership agreement using the rules of contract interpretation.

PARTNERSHIP MANAGEMENT RIGHTS. TBOC § 154.001(b) provides that a partner's right to participate in managing the affairs of a partnership cannot be community property. That means that the court in a divorce cannot award management rights to the partner's spouse. One wonders whether the portion of the value of a community property partnership interest that is attributable to management rights may be separate property and thus not part of the value of the community estate. No Texas appellate court has adjudicated that proposition.

PARTNERSHIP TRANSFEREE'S INTEREST. A community property interest in a partnership can be divided in a divorce, subject to certain constraints. Assets of a partnership do not belong to a spouse, and cannot be awarded by the court. TBOC §154.001 ("[a] partner is not a co-owner of partnership property"); TBOC §154.002 ("[a] partner does not have an interest that can be transferred, voluntarily or involuntarily, in partnership property"). A spouse's management rights in the partnership are separate property, and cannot be divested in a divorce. TBOC § 152.203(a). When a partner's interest in a partnership is awarded to the other spouse in a divorce, the interest that is transferred is a "transferee interest."

"After the transfer, the transferor continues to have the rights and duties of a partner other than the interest transferred." TBOC §152.403. "A transferee of a partner's partnership interest is entitled to receive, to the extent transferred, distributions to which the transferor otherwise would be entitled." TBOC §152.404(a). The transferee is also entitled to receive "the net amount otherwise distributable to the transferor" upon winding up of the partnership, to the extent transferred. TBOC §152.404(b). The transferee has no liability as a result of the transfer, unless the transferee becomes a partner. TBOC §152.404(c). The transferee can, "for a proper purpose," require "reasonable information or an account of a partnership transaction and make reasonable inspection of the partnership books." TBOC §152.404(d). If the partnership is winding up, the transferee can require an accounting. TBOC §152.404(d). The partnership does not have to give effect to a transferee's rights until is receives notice of the transfer. TBOC §152.404(e). TBOC §152.406 provides that, "on the divorce of a partner, the partner's spouse, to the extent of the spouse's partnership interest, if any, is a transferee of the partnership interest."

TBOC Section 152.405 very importantly says:

> A partnership is not required to give effect to a transfer prohibited by a partnership agreement.

TBOC §152.406(c) says that "[t]his chapter does not impair an agreement for the purchase or sale of a partnership interest at any time, including the death or divorce of an owner of the partnership interest."

A transferee is not liable for capital calls. However if the transferor does not make the capital contribution required of the transferee's interest, the transferee's interest is subject to the penalties contained in the partnership agreement, including dilution of the transferee's ownership percentage. See TBOC § 153.202. See also Cliff Ernst, *Planning, Drafting and Implementing Capital Call Provisions*, Univ. of Texas School of Law Partnerships, Limited Partnerships and LLC, pp. 23-37 (July 2009).[5]

PATENTS. State law, not federal law, typically governs ownership rights in a Federal patent. *Akazawa v. Link New Tech.*, 520 F.3d 1354, 1357 (Fed. Cir. 2008). In *Alsenz v. Alsenz*, 101 S.W.3d 648, 653 (Tex.

App.–Houston [1st Dist] 2003, pet. denied), the court said: "it is unquestionable that, if patents are taken out during the marriage, the patents and the income they generate would be community property." See J. Wesley Cochran. *It Takes Two to Tango!: Problems with Community Property Ownership of Copyrights and Patents in Texas*, 58 BAYLOR LAW REV. 407-466 (2006). In *Sheshtawy v. Sheshtawy*, 150 S.W.3d 772, 774-75 (Tex. App.–San Antonio 2004, pet. denied), the court held that Federal law did not preempt Texas community property law as to ownership of patents. A nationwide survey is given at annot., 80 A.L.R.5th 487.

PENALTIES. A divorce court does not have the authority to allocate fines and civil penalties as part of the property division. *See Winkle v. Winkle*, 951 S.W.2d 80, 87 n. 1 (Tex. App.--Corpus Christi 1997, pet. denied) (Federal penalties for violation of U.S. Customs laws must be paid according to Federal law, not the divorce court's discretion).

PENSIONS. Pensions are a form of deferred compensation. Texas courts allocate the pension to the community estate to the extent the benefit is attributable to employment during marriage and to the separate estate to the extent that the benefit is attributable to employment before marriage or after divorce. *Taggart v. Taggert*, 552 S.W.2d 422 (Tex. 1977). A pension is essentially an annuity (a right to regular payments over time) and payments to be received in the future have a present value. Where the pension is not vested at the time of divorce, the present value is made more uncertain because of the risk that the pension may be forfeited, if the employee-spouse dies or employment is terminated before the pension vests. Because of this uncertainty, courts often divide the community property portion of future pension payments "if, as, and when" they are received. *Cearley v. Cearley*, 544 S.W.2d 661, 666 (Tex. 1976) ("The administration of justice will best be served if contingent interests in retirement benefits are settled at the time of the divorce, even though it may be necessary in many instances for the judgment to make the apportionment to the nonretiring spouse effective if, as, and when the benefits are received by the retiring spouse. We approve this method of apportionment and award of contingent interests in military retirement benefits because of the uncertainties affecting the accrual and maturity of such benefits. This method will forego the difficulty of computing a present value and will fairly divide the risk that the pension may fail to mature."). See *Retirement Benefits*. If the spouse will continue to work and accrue a pension benefit after the divorce, the pension must be characterized and valued as of the date of divorce and only that value can be divided by the court. See *Berry v. Berry*, *Retirement (Military)*.

PERSONAL INJURY CLAIMS AND RECOVERY. A personal injury claim is a chose in action that is property. The component of a personal injury claim that relates to bodily injury, pain and suffering, and mental anguish are separate property. Claims for lost earnings or diminished earning capacity are community property to the extent of lost earnings during marriage, but are otherwise separate property. *Day v. Day*, 896 S.W.2d 373, 376 (Tex. App.–Amarillo 1995, no writ) (discussing chose in action); TFC § 3.001(3) (recovery for personal injury is separate property except recovery for lost earning capacity during marriage); *Graham v. Franco*, 488 S.W.2d 390, 396 (Tex. 1972) (recovery for disfigurement, physical pain and suffering, is separate property; recovery for medical expenses and lost earning capacity during marriage is community property). A value can be put on the recovery and offsetting property awarded to the other spouse, or the recovery can be divided if, as and when received. If the latter, then at the time the money is recovered the parties will have to allocate the recovery between separate and community portions, or the dispute over character will have to be litigated.

PETS. Animals are personal property, and community property animals can be awarded in a divorce like any other community property. See **[Sup ct case on damages]**. In most instances the sentimental value of a pet

is not reflected in the fair market value of the animal. In the case of race horses, show horses, breeding bulls and show dogs, there may be an ascertainable market value, based on a sales price or discounted future earnings stream. It most instances however, a pet has no fair market value. Apart from the valuation question, the court can consider the sentimental value of a pet in dividing the estate of the parties, subject to abuse of discretion review on appeal. Malicious injury by one spouse to a pet favored by the other spouse could result in a disproportionate division of property to the other spouse, and possibly money damages for intentional infliction of severe emotional distress, if that tort is pled and proven. The offspring of a separate property animal is, if born during marriage, community property.

PHANTOM INCOME. "Phantom income" occurs with a "pass-through" tax entity (an *S Corporation*, a partnership, or an LLC that elects to be taxed like a partnership) when the management decides to retain earnings without distributing them, even though the income on those earnings must be reported on the owners' personal tax returns. *See Cleaver v. Cleaver*, 935 S.W.2d 491, 495 (Tex. App.–Tyler 1996, writ denied); *Thomas v. Thomas*, 738 S.W.2d 342 (Tex. App.–Houston [1st Dist.] 1987, writ denied (involving an S Corporation). This can create a tax liability for the partners or owners on income they did not actually receive in the form of distributions. It is very risky in a divorce to award ownership of a pass-through entity to a spouse who will not be able to control distributions.

PIERCING THE ENTITY VEIL. The entity protection of corporate assets in a divorce does not hold if the fact finder determining that the separate identity of the corporation should be disregarded. *Siefkas v. Siefkas*, 902 S.W.2d 72, 79 (Tex. App.--El Paso 1995, no writ). This concept is called "reverse piercing" in the divorce context. If "reverse piercing" occurs, the assets of the entity are treated as being owned by the spouse, and are presumed to be community property, subject to proof of separate property using tracing techniques. *Zisblatt v. Zisblatt*, 693 S.W.2d 944, 949 (Tex. App.--Fort Worth 1985, writ dism'd). Piercing the veil is available for corporations, *Zisblatt* at 949; *Spruill v. Spruill*, 624 S.W.2d 694, 695-96 (Tex. Civ. App.--El Paso 1981, writ dism'd). Piercing is also available for LLCs. *Spring Street Partners-IV, L.P. v. Lam*, 730 F.3d 427, 443 (5th Cir. 2013) (applying Texas law); *Rimade Ltd. v. Hubbard Enters.*, 388 F.3d 138, 143 (5th Cir. 2004) (applying corporate piercing standards to LLC); *Copeland v. D & J Constr. LLC*, No. 3:13-CV-4432-N-BH, 2015 WL 512590, at *3 (N.D. Tex. Feb. 6, 2015) (evaluation piercing claim against LLC based on both contract and actual fraud claims); *In re Williams*, No. 09-52514, 2011 WL 240466, at *3 (Bankr. W.D. Tex. Jan. 24, 2011) (LLC member may only be held liable for the LLC's breach of contract under traditional veil piercing laws), Several Texas cases say that piercing the veil is not available for limited partnerships, *Peterson Grpo, Inc. v. PLTQ Lotus Grp., L.P.*, 417 S.W.3d 46, 58 (Tex. App.--Houston [1st Dist.] 2013, pet. denied); *Lifshutz v. Lifshutz*, 61 S.W.3d 511 (Tex. App.--San Antonio 2001, pet. denied). If the entity is not a party to the divorce, but reverse piercing applies, the court would not award entity assets to a spouse, but would instead award entity assets to the spouse who receives the interest in the entity and would give offsetting community property or a promissory note or judgment to the other spouse. A court order that removes an asset from a partnership as a result *of Piercing the Entity Veil*, or finding a *Resulting Trust*, or imposing a *Constructive Trust*, will require an adjustment to the entity's accounting receivables to get the asset off of the company's books.

PREMARITAL AGREEMENT. Tex. Const. art. XVI, § 15, and TFC ch. 4, subch. A, permit persons about to marry to enter into a premarital agreement. This agreement can defined rights and obligations relating to their existing and future property, and the disposition of property upon divorce, among other things. In Texas, the usual purpose of a premarital agreement is to keep future property that would ordinarily be community property from being lost to the other spouse in a divorce or upon death. The most effective way to do this is

to partition future income so that it is the separate property of the spouse who earned the income, or whose property generated the income. However, persons about to marry can agree on how their assets will be divided in a divorce (or on death), and many premarital agreements provide for a 50-50 division of the community property, or some other arrangement that is particular to the parties.

An issue that sometimes arises is whether parties who marry in Mexico, and who must and do fill out and sign an Acta de Matrimonio (marriage certificate) that has a check box for the marital property regimen to apply during marriage, have agreed that the law of the Mexican state where they marry will be applied to determine what property is divisible in a Texas divorce. The choice is typically "separacion de bienes," where no community property is acquired, and "sociedad conyugal," which is more or less similar to Texas' community property law. In *Nieto v. Nieto*, No. 04–11–00807–CV * 11-12 (Tex. App.–San Antonio May 1, 2013, pet. denied) (memo. op.), where a couple married in Mexico electing an "Agreement of Separate Properties," the trial court found that there was no premarital agreement in the sense that Texas would recognize, and so held that Texas law governed the divisibility of property in a Texas divorce.

PRIZES. It would be rare for a spouse to receive a prize (such as a Nobel Prize,[6] the Fields Medal (math), Grammy Award, etc.) for achieving a milestone in science, math, music or the like. Such a prize is not compensation in any ordinary sense of the word. However, prize money is taxed as income by the IRS. <https://www.irs.gov/publications/p525/ar02.html#d0e8872>. Although there are no Texas cases in point, it would seem that a prize received during marriage is a gift, and a prize (not incident to employment) that may be received after divorce is not property that can be divided in a divorce. *See Hardin v. Hardin*, 681 S.W.2d 241, 242 (Tex. App.--San Antonio 1984, no writ) (payment from employer to retiring spouse was a gift and was the spouse's separate property.) Issues like an Olympic medal or Super Bowl ring may present a fact question as to separate or community.

PROFESSIONAL DEGREE. While a professional degree is recognized as marital property in some states, this is not true in Texas. *Frausto v. Frausto*, 611 S.W.2d 656, 659 (Tex. Civ. App.–San Antonio 1980, writ dism'd).The professional degree is personal to the spouse and is usually not mentioned in a divorce property division. The Family Code precludes a reimbursement claim for the payment of a student loan of a spouse. TFC § 3.409(5).

PROPRIETORSHIP. See *Sole Proprietorship*.

QDRO. A qualified domestic relations order ("QDRO") is a family-law-related order of a court pertaining to an ERISA-qualified retirement plan that must be recognized and implemented by the administrator of the plan. ERISA is the Employee Retirement Income Security Act of 1974, which governs many private retirement plans in America, but not government employee retirement plans. ERISA contains an anti-assignment provision that protects the retirement plan benefits from claims of the employee's creditors. But in the Retirement Equity Act of 1984, Congress created an exception for alienation pursuant to a QDRO. A QDRO is a domestic relations order (i.e., a decree of divorce, or court order for child support or alimony) that meets certain requirements of federal law and complies with the parameters of the retirement plan. Special terms are used for QDROs. The employee covered by the plan is the "participant." The spouse of the participant (or parent entitled to child support) is the "alternate payee." The QDRO must contain: (i) the name of the plan, (ii) the full names and last known mailing addresses and Social Security numbers of the participant and the alternate payee, (iii) the plan identification number if different from the participant's Social

Security number, (iv) the dollar amount or percentage or fraction of the plan benefit to be paid to the alternate payee, along with the method to be used to calculate such amount, and (v) for a defined benefit plan, the duration of the payment stream awarded to the alternate payee. The QDRO must be approved by the plan administrator before it will be honored, and plan administrators can be persnickety, so lawyers sometimes submit a draft QDRO for preapproval. If not pre-approved, even a signed QDRO can be rejected by a plan administrator, so it may be necessary for the alternate payee to submit a second or third QDRO to the family law court for signature. TFC § 9.101-9.106 establish a procedure for post-decree issuance of QDROs. For further discussion see Charla H. Bradshaw, *Drafting QDROs for Retirement Division, Child Support and Alimony*, State Bar of Texas Advanced Family Law Drafting Court ch. 9 (Dec. 5-6, 2013).

RECEIVERSHIP. "The court in a divorce property division has the power to appoint a receiver to take charge of and sell community property." *Tugman v. Tugman*, No. 13–08–00194–CV, at *4 (Tex. App.--Corpus Christi May 22, 2008, no pet.) (mem. op.) (involving a post-divorce enforcement proceeding). This power does not extend to a spouse's separate property. *Rusk v. Rusk*, 5 S.W.3d 299, 303–05 (Tex.App.–Houston [14th Dist.] 1999, pet. denied). On appeal, the appointment of a receiver in the final property division is reviewed for abuse of discretion. *Sheikh v. Sheikh*, 248 S.W.3d 381, 386 (Tex. App.--Houston [1st Dist.] 2007, no pet.); *Moyer v. Moyer*, 183 S.W.3d 48, 51 (Tex. App.–Austin 2005, no pet.); *accord*, *Ortiz v. Ortiz*, No. 13-15-00556-CV, at *2 (Tex. App.–Corpus Christi Oct. 20, 2016, no pet.) (memo. op.).

In *Hailey v. Hailey*, 331 S.W.2d 299, 303 (Tex. 1960), the Supreme Court wrote:

> The trial court has the duty to determine if the community property is subject to partition in kind. If he determines that it is then he shall equitably divide the community property between the parties. If it is not subject to partition in kind the trial court can appoint a receiver and order so much of the property as is incapable of partition to be sold and the proceeds divided between the parties in such portions as, in the discretion of the court, may be a just, fair and equitable partition, having in mind the rights of the parties and the children.

In *Vannerson v. Vannerson*, 857 S.W.2d 659, 673 (Tex. App.--Houston [1st Dist.] 1993, writ denied), a spouse appealed the appointment of a receiver to sell property incident to a property division. The spouse invoked TCP&RC § 64.001(b), which permits the appointment of a receiver only when the property is in danger of being lost, removed or injured. The appellate court held that that TCP&RC provisions did not apply to a property division incident to divorce, which is governed instead by TFC § 3.63 (now TFC § 7.001). The court repeated the view that appointment of a receiver was permitted "when community property is not subject to partition in kind." *Id.* at 673, citing *Hailey*, *supra* at 303.

The appointment of a receiver in a post-divorce proceeding to enforce a property division was affirmed in *Smith v. Myers*, No. 01-13-00722-CV, at *3 (Tex. App–Houston [1st Dist.] July 1, 2014, pet. denied) (mem. op.). The court cited *Vannerson*. In *Rusk*, *supra* at 306, the court said: "Judicial seizure and court management of any asset should be a last resort."

For further discussion, see John T. Eck, *Receivership and Property Enforcement*, State Bar of Texas' 18th Annual New Frontiers in Marital Property Law (Oct. 3-4, 2013).

RECORDS (FINANCIAL). Financial records are personal property, and community property financial records can be awarded in a divorce. Financial records pertaining to separate property may, by definition, be community property (i.e., received during marriage other than by gift, descent, or devise), but for practical reasons they should be awarded to the spouse who owns the related separate property. Records of a business entity belong to the entity and not to the spouses, so the court has no authority over those records absent fraud or *Piercing the Entity Veil*. Records of a sole proprietorship should be awarded to the person who receives the business and has the burden to fill out tax forms, pay trade creditors, etc. The TFLPM sets out the following form book language for a decree of divorce, Form 23-1, p. 23-1-116, Para. 11.J.6. Preserving Records:

> IT IS ORDERED AND DECREED that each party shall preserve for a period of seven years from the date of divorce all financial records relating to the community estate. Each party is ORDERED to allow the other party access to these records to determine acquisition dates or tax basis or to respond to an IRS examination within five days of receipt of written notice from the other party. Access shall include the right to copy the records.

REIMBURSEMENT. TFC § 7.007 "[i]n a decree of divorce or annulment, the court shall determine the rights of both spouses in a claim for reimbursement ... and shall apply equitable principles to ... (1) determine whether to recognize the claim after taking into account all the relative circumstances of the spouses; and (2) order a division of the claim for reimbursement, if appropriate, in a manner that the court considers just and right, having due regard for the rights of each party and any children of the marriage." After many decades of navigating the complexities of marital property reimbursement rules developed in a succession of cases in courts all over Texas, beginning September 1, 2009, claims for reimbursement were for the first time explicitly recognized in the Family Code. See Family Code Subsections § 3.402(a)(2). A claim for reimbursement is not an ownership claim; it is "a claim against the property of the benefitted estate by the contributing estate." TFC § 3.404. TFC §§ 3.402(a)(1), (3), (4), (5), (6), and (7) provide for reimbursement for the reduction in principal of a debt of another marital estate secured by lien, in contrast to common law reimbursement which allowed reimbursement for payment of principal, interest, insurance, and taxes. TFC § 3.402(9) permits reimbursement for payment of unsecured debts of another marital estate. TFC § 3.402(8) permits reimbursement for "capital improvements" (the term is not defined) to property of another marital estate. TFC § 3.402(a)(2) recognized a claim for under-compensation for work performed for a separate property business. See *Under-Compensation Claim (Statutory)*. Under TFC § 3.406, the court can impose an equitable lien to secure a claim for reimbursement. TFC § 3.409 says that reimbursement is not available for: (i) payment of child support, alimony, or spousal maintenance; (ii) living expenses of a spouse or child of a spouse; (iii) contributions of nominal value; (iv) payments of nominal amount; and (v) payment of a student loan owed by a spouse. Under TFC § 3.402(b), reimbursement claims can be offset by reimbursement claims of the benefitted estate against the contributing estate, or by benefits received by the contributing estate from the benefitted estate or arising from the reimbursement claim itself (like a tax deduction for paying property taxes). It is unresolved whether common law reimbursement claims still exist to the extent they are not precluded by TFC § 3.406, but good arguments can be made that they do.

REOPENING THE EVIDENCE. When the parties rest and close, the evidence is concluded and the trial court must make its decision based on the evidence presented. However, TRCP 270 provides that a court may reopen the evidence if (I) the moving party used due diligence in obtaining the evidence, (ii) the evidence is decisive, (iii) reopening would not cause delay, and (iv) it would work an injustice not to reopen. The court

may reopen the evidence even if neither party makes a motion to reopen. *Maher v. Maher*, No. 01-14-00106-CV, *8-9 (Tex. App.–Houston [1st Dist.] August 30, 2016, no pet.).

RESULTING TRUST. A resulting trust arises by operation of law when title is conveyed to one party while consideration is provided by another. *Cohrs v. Scott*, 338 S.W.2d 127, 130 (Tex. 1960). A resulting trust can arise only when title passes, not at a later time. *Id.*, at 130. In a marital property case, the inception of title rule applies, and if title incepts before it is acquired then the question arises whether the resulting trust must arise at the time of inception of title. (The better argument is "no," because a resulting trust arises from the consideration paid and consideration is not paid for real estate at the time of contracting but rather at the time title is taken.) A resulting trust also arises when a conveyance is made to a trustee pursuant to an express trust, which fails for any reason. *Nolana Development Ass'n v. Corsi*, 682 S.W.2d 246, 250 (Tex. 1984). Ordinarily, the proponent of a resulting trust has the burden of overcoming the presumption of ownership arising from title by "clear, satisfactory and convincing" proof of the facts giving rise to the resulting trust, *Stone v. Parker*, 446 S.W.2d 734, 736 (Tex. Civ. App.--Houston [14th Dist.] 1969, writ ref'd n.r.e.). However, when marital property is in issue, the presumption of community arising from possession prevails over the presumption of ownership arising from title. See TFC § 3.003. If a resulting trust is found to exist, the court should declare true ownership and order a transfer of title to the party who provided consideration.

RETIREMENT BENEFITS. "Retirement benefits earned by the employee spouse during marriage are community property–subject to division upon divorce--even though they are not immediately subject to possession and enjoyment at the time of divorce." *Stavinoha v. Stavinoha*, 126 S.W.3d 604, 610 (Tex. App.--Houston [14th Dist.] 2004, no pet.), citing *Cearley v. Cearley*, 544 S.W.2d 661, 662 (Tex. 1976). "However, post-divorce increases in an individual's retirement benefits that are attributable to the person's continued employment, such as raises, promotions, services rendered, or contributions, are not subject to community property division." *Stavinoha*, *supra* at 610, citing *Berry v. Berry*, 647 S.W.2d 945, 947 (Tex. 1983). "Conversely, post-divorce increases in an employee spouse's retirement benefits that are not attributable to continued employment are subject to community property division." *Stavinoha*, *supra* at 610, citing *Burchfield v. Finch*, 968 S.W.2d 422, 424–25 (Tex. App.--Texarkana 1998, pet denied); *Phillips v. Parrish*, 814 S.W.2d 501, 505 (Tex. App.--Houston [1st Dist.] 1991, writ denied). See *Berry v. Berry*; *Retirement Benefits (Railroad)*; *Retirement Benefits (Military)*. In *Whorrall v. Whorrall*, 691 S.W.2d 32, 37-38 (Tex. App.--Austin 1985, writ dism'd), the court held that that a "special payment" made after divorce to induce a former spouse's early retirement was not community property because it was discretionary, unique, and not earned during his tenure as an employee. Where retirement benefits are not vested by the time of divorce, so that there is uncertainty whether they will actually be received, it is recommended that the retirement payments be divided "if, as and when" they are received. In *Cearley v. Cearley*, 544 S.W.2d 661, 666 (Tex. 1976), the court said: "The administration of justice will best be served if contingent interests in retirement benefits are settled at the time of the divorce, even though it may be necessary in many instances for the judgment to make the apportionment to the nonretiring spouse effective if, as, and when the benefits are received by the retiring spouse. We approve this method of apportionment and award of contingent interests in military retirement benefits because of the uncertainties affecting the accrual and maturity of such benefits. This method will forego the difficulty of computing a present value and will fairly divide the risk that the pension may fail to mature."

RETIREMENT BENEFITS (MILITARY). Under Texas law, military retirement benefits earned from military service during the marriage are community property. *Cearley v. Cearley*, 544 S.W.2d 661, 662 (Tex. 1976); *Taggart v. Taggart*, 552 S.W.2d 422 (Tex. 1977); *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970). In

McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), the U.S. Supreme Court declared that federal law preempted the division of military non-disability retired pay in a divorce. Congress later passed a statute permitting divorce courts to divide military retired pay, provided that the state met the jurisdictional ties specified in the statute. See 10 U.S.C. § 1408 et seq. (the USFSPA). Military retirement benefits remain preempted except to the extent that division is permitted under the USFSPA. *Mansell v. Mansell*, 490 U.S. 581 (1989). The Texas Supreme Court has ruled that, under the USFSPA, military retirement benefits can be community property. *Grier v. Grier*, 731 S.W.2d 931, 933 (Tex. 1987).

Any portion of the military retirement attributable to employment prior to marriage is the employee spouse's separate property. *Bloomer v. Bloomer*, 927 S.W.2d 118 (Tex. App.–Houston [1st Dist.] 1996, writ denied) (involving service on active duty and in the reserves). Any portion of the retirement attributable to employment after divorce is separate. *See Berry v. Berry*, 647 S.W.2d 945, 947 (Tex. 1983) (a non-military case). The right to receive post-divorce cost-of-living increases on the non-employee spouse's share of the retirement is community property that can be awarded on divorce. *Sutherland v. Cobern*, 843 S.W.2d 127, 131 (Tex. App.–Texarkana 1992, writ denied) (a non-military case). Where the military spouse continues to serve after divorce, the community property portion of the military retirement includes only the retired pay attributable to the military rank of the spouse on the date of divorce. All retired pay attributable to subsequent increases in rank are separate property. *Grier v. Grier*, 731 S.W.2d 931, 932 (Tex. 1987).

RETIREMENT BENEFITS (RAILROAD). The Federal Railroad Retirement Act governs railroad retirement. In *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), the U.S. Supreme Court held that Federal law preempted community property claims to railroad retirement benefits. Congress later amended the Act to provide two tiers of benefits. Tier I benefits are calculated according to Social Security benefit formulas. Tier I includes both employment in the railroad industry and employment covered by the Social Security Act. Tier II is based on railroad earnings alone. Preemption continues as to Tier I benefits, but not Tier II benefits.

S CORPORATIONS. When dividing an S Corporation the principal thing to remember is that an S Corporation is a "pass through" entity where the earnings are taxed to the shareholders regardless of whether those earnings are distributed. Consequently, awarding shares in an S Corporation to the non-controlling spouse could create a *Phantom Income* tax problem after the divorce, for which there is no post-divorce remedy (other than a derivative action or suit for breach of fiduciary duty). Another thing to keep in mind is the accumulated adjustments account ("AAA"). The AAA is a cumulative balance of undistributed net income generated by the S Corporation. Distributions from an S Corporation are not taxable to the extent they come from the AAA and do not exceed tax basis. So, it is desirable to receive an interest in an S Corporation with high AAA because the high AAA balance represents future distributions that are non-taxable or at worst taxable at a capital gain rate. The trade-off is that distributions from AAA reduce the shareholder's basis, which increases capital gain at the time of the future sale or liquidation of the interest in the S Corporation.

SALE OF PROPERTY. The divorce court can order an asset sold and the proceeds divided. This applies to real property, personal property, ownership in a business, and intangible rights, with certain exceptions. A sale can be accomplished by requiring the spouses to list the property, and accept an offer to purchase the house at any price above a price set by the court. Or the court can specify that either spouse can apply to the court for a ruling on whether to reduce the asking price, accept an offer or make a counter-offer. Or the court can appoint a receiver to sell the house. See *Receivership*.

Selling a family business avoids having to value the business in the divorce, since the price at which the business is sold is by definition fair market value. However, dissension between the two spouses can scare off legitimate buyers, leaving only "vultures" who are looking for a bargain. If the business is sold by a receiver or business broker, the tendency is to reduce the sale price to make a quick sale for cash, when a longer period of marketing or more strenuous negotiations might lead to a higher sales price or better terms of sale. And neither spouse can be required to sign a covenant not to compete and, if an agreement cannot be reached for the proprietor-spouse to do so, it will depress the sales price. *Ulmer v. Ulmer*, 717 S.W.2d 665 (Tex. Civ. App.– Texarkana 1986, no writ).

SANCTIONS. There are four primary sources of authority for the court to impose sanctions on a party (or attorney for a party): TCP&RC ch. 10 (frivolous pleadings), TRCP 13 (frivolous pleadings), TRCP 215 (discovery abuse), and the inherent power to sanction.

Frivolous Pleadings and Motions. Chapter 10 permits the court to impose sanctions if (1) a pleading or motion is presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation; or if (2) any claim, defense, or other legal contention in the pleading or motion is not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; or if (3) an allegation or other factual contention in the pleading or motion has no evidentiary support or, for a specifically identified allegation or factual contention, is not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; or if (4) a denial in the pleading or motion of a factual contention is not warranted on the evidence or, for a specifically identified denial, is not reasonably based on a lack of information or belief.

Sanctions can be imposed under TRCP 13 if a party or an attorney fails to read what they file before they sign it, or if an attorney fails to make reasonable inquiry before making an assertion in a written filing, or if an attorney makes statements which s/he knows to be groundless and false for purposes of delay, or where a claim or defense is groundless and brought in bad faith, or groundless and brought for the purpose of harassment.

Discovery Abuse. TRCP 215 permits sanctions to be imposed for failing to answer interrogatories, failing to produce requested documents, failing to appear for deposition, destroying evidence, and other behavior that obstructs or thwarts discovery.

Inherent Power. Courts have the inherent power to impose sanctions for behavior that interferes with the core functions of the judiciary (hearing evidence, deciding issues of fact raised by the pleadings, deciding questions of law, entering final judgment, and enforcing that judgment). *Kutch v. Del Mar College*, 831 S.W.2d 506, 509-10 (Tex. App.--Corpus Christi 1992, no writ) (the seminal Texas case on inherent power to sanction). In *In re Reece*, 341 S.W.3d 360, 367 (Tex. 2011), the Supreme Court held that perjury committed in a deposition was not punishable by contempt under the court's inherent power to sanction because false testimony did not rise "to the level of actually obstructing the Court in the performance of its duties."

Constitutional Dimensions. Depending on severity, court-ordered sanctions can implicate constitutional rights. *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991). Under *TransAmerican*, sanctions must be just (not excessive), the court must consider lesser punishment before imposing harsher punishment, the party's hindrance of the discovery process must justify a presumption that its claims or

defenses lack merit, and case-dispositive sanctions can be imposed only for "flagrant bad faith or counsel's callous disregard for the responsibilities of discovery under the rules." *Id.* at 917-18.

Nexus. Sanctions must relate to the harm suffered. "A sanction that relates directly to the offensive conduct is one that is directed against the abuse and toward remedying the prejudice caused to the innocent party." *Baker v. Baker*, 469 S.W.3d 269, 277 (Tex. App.–Houston [14th Dist.] 2015, no pet.). TCP&RC § 10.004 (any attorney's fee sanction awarded for frivolous pleadings and motions must be in the amount of reasonable expenses, including reasonable attorney's fees, incurred because of the filing of the pleading or motion); TRCP 215.1(d) ("to pay . . . the reasonable expenses incurred in obtaining the order, including attorney's fees . . ."; "the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance . . .").

Waiver by Delay. "[T]he failure to obtain a pretrial ruling on discovery disputes that exist before commencement of trial constitutes a waiver of any claim for sanctions based on that conduct." *Remington Arms Co. v. Caldwell*, 850 S.W.2d 167, 170 (Tex. 1993); *Mandell v. Mandell*, 214 S.W.3d 682, 691 (Tex. App.--Houston [14 Dist.] 2007, no pet.).

SEPARATE PROPERTY. Separate property is property of a spouse owned or claimed before marriage, acquired by the spouse during marriage by give, devise or descent; the recovery for personal injuries, except for loss of earning capacity during marriage; property partitioned into separate property or made separate under a spousal income agreement. Tex. Const. art. XVI, § 15; TFC § 3.001. All property *possessed* by a spouse during or on dissolution of marriage is presumed to be community property. TFC § 3.003(a). The degree of proof required for a finding of separate property is clear and convincing evidence. *Id.* § 3.003(b). "Clear and convincing evidence" has been defined as "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TFC § 101.007 (definition used in the parent-child chapters of the Family Code). A divorce court cannot divest a spouse of separate property. *Eggemeyer v. Eggemeyer*, 554 S.W. 2d 137, 139 (Tex. 1977).

SETTLEMENT AGREEMENTS. The parties to a divorce can enter into a written agreement incident to divorce. The agreement is binding on the court only if the court finds that the terms of the written agreement are just and right. If approved by the court, the agreement can be set out in full in the decree of divorce, or can be incorporated by reference into the decree. TFC § 7.006(b). If the court finds that the terms of the agreement are not just and right, the court can request the spouses to submit a different agreement, or the court can set the case for trial. TFC § 7.006(c). If the parties and their attorneys have signed a non-revocable mediated settlement agreement, then the court must render judgment on the agreement. TFC § 6.602(c). If the parties and their attorneys have signed a non-revocable informal settlement agreement, either party is entitled to rendition of judgment based on the agreement. TFC § 6.604(c). However, the court can reject an informal settlement agreement if the court finds that the terms are not just and right, and can require the parties to submit a revised agreement or set the case for trial. TFC § 6.604(e).

SHARES OF STOCK. Community property shares of stock are divisible upon divorce. Absent a transfer restriction, the court can award the shares to either spouse. If the award is to the non-shareholder spouse, the court can order the shareholder spouse to execute and deliver an assignment of the shares. The common practice is for the corporate secretary to retire the old shares and to reissue the same shares under a new certificate number in the name of the new shareholder. A redemption of shares can be accomplished by ordering the spouse with control of the corporation to cause the corporation to redeem part of the community

property shares, awarding the cash to the non-shareholding spouse. This approach would be problematic if the corporation is not a party or if there are third party shareholders. Also, redeeming corporate shares in connection with "cashing" out the community interest of a spouse raises tricky tax issues. See Patrice L. Ferguson & Richard R. Orsinger, *Dividing Ownership Interests in Closely-Held Business Entities: Things to Know and to Avoid*, State Bar of Texas' 2016 Advanced Family Law Course, ch. 26 pp. 30-32 (2016).[7]

The TBOC does not prohibit the transfer of shares to third parties, except for certain licensed professions (like law, medicine, dentistry, veterinary, psychology, etc.). However, the corporation's organizational paperwork, or agreements between shareholders, can restrict the transfer of shares, or can provide the optional right to buy shares before or when they would otherwise be transferred to non-shareholders. Usually the buy-sell agreement gives the shareholder-spouse, and alternatively the other shareholders, and alternatively the corporation, the option to buy any shares awarded in the divorce to the non-shareholder spouse within so many days after the divorce, for a price that could be set by contract, by formula, or by appraisal. See *Buy-Sell Agreements*.

SOCIAL SECURITY BENEFITS. Social Security benefits are not subject to division by a Texas court. *Richards v. Richards*, 659 S.W.2d 746, 749 (Tex. App.–Tyler 1983, no writ) (social security disability benefits); *Jackson v. Jackson*, No. 03-10-00736-CV (Tex. App.--Austin, 8/3/2011, no pet.) (mem. op.) (social security retirement benefits). However, in *Prague v. Prague*, 190 S.W.3d 31, 41 (Tex. App.–Dallas 2005, no pet.), the appellate court held that the fact that husband's social security retirement benefits were greater than wife's supported a disproportionate division of community property in favor of the wife. *Accord*, *Phillips v. Phillips*, 75 S.W.3d 564, 573, (Tex. App.--Beaumont 2002, no pet.); *Jackson v. Jackson*, No. 03-10-00736-CV (Tex. App.--Austin, August 3, 2011, no pet.) (memo. op.).

SOLE PROPRIETORSHIP. A sole proprietorship is not a legally-recognized entity. *Bush v. Bush*, 336 S.W.3d 722, 740 (Tex. App.–Houston [1st Dist.] 2010, no pet.). It is just an aggregation of people and assets associated with a business. The employees work for the person who "owns" the business, and their claims for compensation are against the "owner." *Id.* The assets of the business that are not leased or rented belong to the business "owner," and if s/he is married they are presumptively community property. The liabilities of the business are liabilities of the "owner," and if s/he is married they constitute community property liabilities that must be considered in the property division. *Id.*

In most cases the best way to preserve the value of a sole proprietorship after the divorce is to keep the business-related assets together and award them to the spouse who ran the business before the divorce. To split the business-related tangible assets between the spouses is to a step toward liquidating the business, and the value generated through liquidating the assets would in most instances be less than the value obtained by keeping or selling the assets as part of a going concern.

Most businesses have intangible assets, such as accounts receivable, notes receivable, leases, intellectual property rights, and the like. The intangible value of a business can also include "goodwill," which is value that cannot be assigned to identifiable tangible and intangible assets. In the context of a sole proprietorship, goodwill is the extra value that the assemblage of people and assets has when they are combined into a profitable business ("the whole is greater than the sum of its parts"). The value of goodwill can be realized in only two ways: (i) by keeping the business intact and receiving future profits; or (ii) by selling the business as a going concern. Personal goodwill is not part of the community estate to be divided. *Nail v. Nail*, 486

S.W.2d 761, 764 (Tex. 1972). The court must not confuse the goodwill of the business with compensation for future labor. *Salinas v. Rafati*, 948 S.W.2d 286, 291 (Tex. 1997).

The liabilities of a sole-proprietorship are liabilities of the business proprietor, and for a married proprietor they are debts of the community estate. The proprietor-spouse's non-exempt separate property, and his/her non-exempt sole management community property, and non-exempt joint management community property, are subject to collection for contractual debts. If the non-proprietor spouse is closely associated with the business, s/he could become personally liable for the businesses debts. This was an issue in *Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975), where the husband advanced capital for the wife's business, and let the wife sign his name to checks used to pay debts of the business, and once referred to the business's debts as "my debts," resulting in his being held personally liable for the wife's debts.

SURVIVORSHIP RIGHTS. A right of survivorship is described in TEC § 111.001(a), which provides that two or more persons who "hold" an interest in property jointly "can agree in writing that the interest of one joint owner, will on death, pass automatically to surviving joint owners." Absent such an agreement, the decedent's interest in the jointly-held property passes to his/her heirs. Texas Estates Code § 101.002. A survivorship agreement cannot be inferred from the mere fact of joint ownership. Estates Code § 111.001(b). Until 1987, spouses could not create a right of survivorship in community property. In that year the Texas voters amended the Constitution to permit survivorship agreements between spouses in community property. A right of survivorship can be separate property (owned or claimed before marriage or acquired during marriage by gift, descent, or devise) or community property (acquired during marriage in some other manner). If community property held by both spouses with a right of survivorship is awarded to one spouse exclusively, the right of survivorship is extinguished if the property is conveyed away, unless the survivorship agreement provides otherwise. Tex. Estates Code § 112.054(c). In *Holmes v. Beatty*, 290 S.W.3d 852, 860 (Tex. 2009), the Supreme Court found where the spouses had signed stock brokerage account agreements to hold the contents as community property with a right of survivorship, that survivorship agreement applied to shares of stock that were converted from "street name" in the account to share certificates issued to the spouses.

TAX CONSEQUENCES OF PROPERTY DIVISION. Historically Texas courts held that the calculation of potential future tax liability was too speculative to consider in dividing the community estate. *See e.g Grossnickle v. Grossnickle*, 935 S.W.2d 830 (Tex. App.--Texarkana, 1996, writ denied). In 2005 the Legislature adopted TFC § 7.008, Consideration of Taxes, which provided that in a divorce the court *may* consider: (1) whether a specific asset will be subject to taxation; and (2) if the asset will be subject to taxation, when the tax will be required to be paid. Some of the tax considerations include:

- the timing of when tax liability will occur;
- whether and when a capital gain or loss will be recognized on liquidation of a capital asset;
- whether funds in a tax-shelter will be taxed when they are withdrawn (like an IRA or pension or 401K), and when withdrawal will likely occur (if soon, the tax to be paid is a detriment; if not soon, the tax-deferred accrual of income may be an advantage);
- whether the asset is subject to the 10% tax penalty for early withdrawal and whether the spouse receiving the asset will need to withdraw the funds during the penalty period (before age 59-½);
- whether the future tax liability may be offset by other tax deductible losses;
- whether the asset may generate "phantom income" that must be reported on the ex-spouse's personal tax return even if the income is not actually received;
- determining an ex-spouse's tax rate far in the future;

- the present value of future taxes.

The further into the future the taxes may be triggered, the greater the difficulty in assessing the present impact of the future tax liability, because tax rates and tax laws change, asset values change, the date of taxation is uncertain, an ex-spouse could die before an asset is sold and the heirs will not have to pay capital gain at the time of death, and because it is difficult to choose a discount rate to calculate a present value for an event that will occur far in the future.

Here are some important tax principles that the court may want to consider in ordering a property division:

1. IRC § 1041 eliminates recognition of a capital gain that might otherwise be triggered when a divorce court awards a capital asset to one spouse. Simply dividing the community estate between the spouses will not trigger a capital gain tax.

2. If the divorce court orders that money or assets inside a family corporation be used to buy out one spouse's interest in the business (which the court should only do if the entity veil is pierced or there are no other owners), then the distribution from the entity may be subject to income tax. Treasury Regs under IRC § 1041 permit the spouses to agree that a redemption or liquidation of an ownership interest in a corporation will be taxed either to the "departing spouse" as a capital gain or loss, or to the "remaining spouse" as a constructive dividend. The tax rates on a dividend or a capital gain are presently the same, but a capital gain tax is levied on the amount paid after subtracting the departing spouse's tax basis in the corporation, whereas a dividend tax is levied on 100% of the amount paid. Moreover, a capital gain can be reported on an installment basis over a period of months or years, which may lower the overall tax paid. The situation with partnerships, and entities taxed as partnerships, is more complicated. See Patrice L. Ferguson & Richard R. Orsinger, *Dividing Ownership Interests in Closely-Held Business Entities: Things to Know and to Avoid*, State Bar of Texas' 2016 Advanced Family Law Course, ch. 26 pp. 30-34 (2016).[8]

3. In a redemption or partial liquidation of a community property interest in a corporation, LLC or partnership, a tax at ordinary tax rates (up to 39.6%) can be triggered if the entity owns *Hot Assets*. Hot assets include unrealized receivables, mineral leasehold interests for which intangible drilling and investment costs were deducted, and property subject to depreciation recapture. "Hot assets" can increase the tax that will be triggered upon a redemption or liquidation of the ownership interest.

4. Under the "assignment of income" doctrine, income is taxed to the person whose efforts earned it, even if the right to receive the income is assigned to someone else. A sole practitioner lawyer or doctor spouse who assigns part of the accounts receivables to the other spouse will have to pay the tax on that income when it is received by the other spouse. IRC § 1041 does not protect against the assignment of income doctrine. See Patrice L. Ferguson & Richard R. Orsinger, *Dividing Ownership Interests in Closely-Held Business Entities: Things to Know and to Avoid*, State Bar of Texas' 2016 Advanced Family Law Course, ch. 26 pp. 57-58 (2016).[9]

TAX LIABILITIES. Tax liabilities can be community liabilities (tax on community property income) or liabilities of a spouse's separate estate (tax on separate property income). Community property liabilities should be awarded as part of the property division. *Mullins v. Mullins*, 785 S.W.2d 5, 7 (Tex. App.–Fort Worth 1990, no pet.) ("a court may take tax liability into consideration in the division of property upon divorce, and may even require one party to assume the other's tax liability"); *Able v. Able*, 725 S.W.2d 778,

780 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.); *Vautrain v. Vautrain*, 646 S.W.2d 309, 317 (Tex. App.--Fort Worth 1983, writ dism'd). "A divorce court has authority and discretion to impose the entire tax liability of the parties on one spouse." *Young v. Young*, 168 S.W.3d 276, 286 (Tex. App.–Dallas 2005, no pet.); *Vanerson v. Vannerson*, 857 S.W.2d 659, 673 (Tex. Civ. App.--Houston [1st Dist.] 1993, writ denied) (same). Spouses who file married but filing separately are each liable for only one half of the tax on community property income. But when both spouses sign and file a joint tax return, they both become liable for 100% of the taxes for that year. *Mullins, supra* at 8. Separate property liabilities cannot be awarded to the non-liable spouse. The rights of the IRS and state taxing authorities cannot be impaired in the divorce. See *Creditors' Claims*.

TRADEMARK. The Texas Secretary of State's office has posted the following descriptions on its web site relating to trademarks and service marks.

> A trademark is used in connection with tangible goods or products, while a service mark is used in connection with services. The general term "mark" includes both trademarks and service marks. "Trademark" is defined as a word, name, symbol, or device, or any combination of those terms, used by a person to identify and distinguish the person's goods from the goods manufactured or sold by another; and indicate the source of the goods. Tex. Bus. & Com. Code §16.001(10). A trademark indicates that all goods provided in association with that mark come from the same source.
>
> "Service mark" is defined as a word, name, symbol, or device, or any combination of those terms, used by a person to identify and distinguish the services of one person from the services of another; and indicate the source of the services. Tex. Bus. & Com. Code §16.001(8). A service mark indicates that all services provided in association with that mark come from the same source.[10]

The Secretary of State's description continues:

> You acquire common law ownership rights to a mark simply by using the mark in commerce in connection with the relevant goods or services. You do not have to register your mark to acquire common law rights to it.
>
> * * *
>
> Registering your mark with the Texas Secretary of State provides certain benefits.... If you use your mark in interstate commerce, you can apply to register it with the United States Patent and Trademark Office (USPTO). Registering a mark with the USPTO puts the rest of the country on notice that you claim ownership of the mark and creates a legal presumption that you have the exclusive right to use the mark nationwide in connection with the relevant goods and/or services.

There is very little case law on marital property rights in trademarks. In *In re Marriage of Monique and Jeff Bohbot*, No. B141631 (Cal. App. 2d Dist. 2001) (unpublished) (2001 WL 1471725), the appellate court upheld a trial court's finding that trademarks in that case were community property. In *Maloof-Wolf v. Wolf*, No. 94114, *4 (Ct. App. Ohio 2011) (unpublished) (2011 WL 530116), the court held that the proceeds of a trademark infringement suit were the husband's separate property under the terms of the parties' premarital agreement. It does not seem that there are any Federal restrictions on the award of a community property trademark in a divorce.

TRANSFER RESTRICTIONS. Except for the requirement that businesses in licensed professions can be owned only by licensed professionals, Texas corporate law imposes no restrictions on the transfer of shares from a shareholder to his/her spouse in a divorce. The transfer of a partnership interest to a partner's spouse in a divorce is restricted by TBOC § 152.406 to a transferee's interest. The subject is not mentioned in the LLC provisions of the TBOC. The TBOC prohibits unlicensed individuals from being an owner of an entity that is engaged in a licensed profession (medical, legal, etc.), which effectively bars an assignment of an ownership interest in the entity to an unlicensed spouse. TBOC ch. 301. Apart from these statutory transfer restrictions, business entities are free, in organizational documents, to restrict the transfer of ownership interests, or it can be done by agreement of the owners. *Ritchie v. Ritchie*, 443 S.W.2d 856, 871 (Tex. 2014) ("Shareholders of closely-held corporations may address such problems by entering into shareholder agreements that contain a buy-sell, first refusal, or redemption provisions that reflect their mutual expectations and agreements"). TBOC §21.211, Valid Restrictions on Transfer, authorizes restrictions on the ability to transfer shares of a corporation. In the statute, the term "security" is used, rather than "shares." TBOC § 21.212 says that the restriction can be noted in a filing with the Secretary of State. TBOC § 21.213 says that the restriction is enforceable if (i) it is noted on the certificate or (ii) if the security is uncertificated, the restriction is reasonable and "a notation of the restriction is contained in the notice sent with respect to the security under Section 3.205." Absent such notice, the restriction is not binding on a bona fide purchaser for value without actual notice. TBOC § 21.212(b).

TRUSTS. In Texas, an express trust is created when legal title and beneficial interests in assets are severed, with legal title being held by a trustee and equitable interests being held by one or more beneficiaries. *Interfirst Bank-Houston, N.A. v. Quintana Petroleum Corp.*, 699 S.W.2d 864, 874 (Tex. App.–Houston [1st Dist.] 1985, writ ref'd n.r.e.) ("legal title to the property, as well as the right to possession and control, is vested in the trustees..."). Therefore an express trust is not an entity; it is a relationship.

Beneficial Interest. In common parlance, a beneficial interest in property is the right to receive benefits from property owned by another. The term "beneficial interest" does not appear in the the Texas Trust Code, but it is a useful label. In most instances, a beneficial interest under a trust document is acquired by the beneficiary as a gift (intervivos trust) or under the last will and testament of a deceased person (testamentary trust). If acquired in this manner during marriage, the beneficial interest is the spouse's separate property, and cannot be divested in a divorce.

Property Held in Trust. "Spendthrift trusts are trusts with language prohibiting the voluntary or involuntary alienation of the beneficial interest.... Such a trust protects the beneficiary from his creditors by expressly forbidding alienation of his interest in the trust.... The corpus, the accrued income which has not been paid to the beneficiary, and any future income to be paid to a beneficiary of a spendthrift trust are not subject to the claims of the creditors of the beneficiary while those amounts are in the hands of the trustee.... *In Interest of H.D.V., Jr.*, No. 05-15-00421-CV, 2016 WL 4492702, at *6 (Tex. App.–Dallas Aug. 26, 2016, n.p.h.) (citing Tex. Prop. Code Ann. § 112.035(a)). In a divorce, where the trust is a spendthrift trust, and the trustee has sole discretion whether or not to distribute income or principal, the beneficiary has no ownership interest in the undistributed trust assets, so they are not property of a spouse and cannot be awarded by the court to either spouse. *Lipsey v. Lipsey*, 983 S.W.2d 345, 351 (Tex. App.--Fort Worth 1998, no pet.); *In re Marriage of Burns*, 573 S.W.2d 555, 557 (Tex. Civ. App.--Texarkana 1978, writ dism'd); *Buckler v. Buckler*, 424 S.W.2d 514, 515-16 (Tex. Civ. App.--Fort Worth 1968, writ dism'd). This applies to undistributed trust income as well as undistributed trust principal. When a beneficiary's right to own the principal of a trust outright has matured, and the property is no longer held in trust, then the assets belong to the beneficiary even

if they remain in the possession of the trustee. If the right to receive the trust property was acquired by gift or inheritance, then the property acquired free of trust is separate property. But the income earned on the principal, after the right to possess the principal matures, is community property. *In re Marriage of Long*, 542 S.W.2d 712, 717 (Tex. Civ. App.--Texarkana 1976, no writ); *accord, Sharma v. Routh*, 302 S.W.3d 355, 362-63 (Tex. App.–Houston [14th Dist.] 2009, no pet.).

Trust Distributions. The case law is unclear on whether and when distributions to a married beneficiary from an ancestor-created trust are separate or community property. The argument can be made that assets that were transferred into trust by gift or inheritance would, upon distribution from the trust, be the beneficiary's separate property. But what of appreciation in value of those assets? And mutations? And earnings on those assets? Are they separate or community property once they are distributed to the beneficiary? The court of appeals in *Sharma v. Routh*, 302 S.W.3d 355, 362-63 (Tex. App.–Houston [14th Dist.] 2009, no pet.), identified four different approaches to characterizing income distributions from nonrevocable trusts: (a) "[i]ncome distributions are always community property, even if the recipient has no right to the corpus of the trust, because the recipient's right to receive the income means that the recipient is a trust beneficiary and effectively an owner of the trust corpus (hereinafter 'Rule A')[;] (b) [i]ncome distributions are community property only if the recipient has some potential right to the corpus, even if the right has not yet become a possessory right, because the recipient's potential right to access the corpus means that the recipient is effectively an owner of the trust corpus (hereinafter 'Rule B')[;] (c) [i]ncome distributions are community property only if the recipient has a present possessory right to part of the corpus, even if the recipient has chosen not to exercise that right, because the recipient's possessory right to access the corpus means that the recipient is effectively an owner of the trust corpus (hereinafter 'Rule C')[;] (d) [i]ncome distributions are community property only if the recipient has exercised a possessory right to part of the corpus, because the recipient's exercise of this possessory right means that the recipient is effectively an owner of the trust corpus (hereinafter 'Rule D')." [Footnotes omitted.] The court adopted Rule C. There are a number of other court of appeals opinions on the subject, that support these and perhaps other approaches. The uncertain state of the law was examined in Steve D. Baker, *The Texas Mess Marital Property Characterization of Trust Income*, 5 ESTATE PLANNING & COM. PROP. J. 1 (2013). In *In Interest of H.D.V., Jr.*, No. 05-15-00421-CV, at *6 (Tex. App.–Dallas Aug. 26, 2016, n.p.h.), the trial court awarded wife the Mercedes-Benz automobile she was driving, against the husband's contention that the automobile belonged to a trust created for him by his mother. The appellate court noted that the husband was both trustee and beneficiary, and he had the power to convey trust property, and that his letting wife drive the vehicle was evidence that it had been distributed by the trust.

TUTMA ACCOUNTS. The Texas Uniform Transfers to Minors Act ("TUTMA") (formerly Texas Uniform Gift to Minors Act "TUGMA") is set out in Title 10 of the Texas Property Code. TUTMA custodial property is created by an adult by making a gift to a custodian to hold property for the benefit of a minor under TUTMA. The conveyance must specify that the property will be held by the transferee "as custodian for (name of minor) under the Texas Uniform Transfers to Minors Act." Tex. Prop. Code § 141.010. Once the conveyance is made, the property no longer belongs to the transferor. The property must be distributed to the minor once s/he attain age 21 (as to gifts) or the age of majority (as to transfers from a fiduciary or transfers by an obligor). Property in the name of a parent, held for the benefit of a child under TUGMA or TUTMA, is not marital property.

UNDER-COMPENSATION CLAIM (STATUTORY). TFC § 3.402(a)(2) provides for reimbursement for "inadequate compensation for the time, toil, talent, and effort of a spouse by a business entity under the

control and direction of that spouse." This statutory under-compensation claim varies from the "Jensen claim" announced in *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984). See *Jensen Claim*. The statutory claim is not conditioned, like the *Jensen* claim is, on the spouse's labors enhancing the value of his/her separate estate. Nor does the statute tie the reimbursement claim to the amount of enhancement, which may be part of the common law rule. *See Trawick v. Trawick*, 671 S.W.2d 105, 110 (Tex. App.--El Paso 1984, no writ) ("As previously stated, we are not yet confronted with a claim, jury finding or award exceeding the attributable enhanced value of the specific separate asset, and that is an issue unresolved by *Jensen III*...."). The statute does not say when a business entity is "under the control or direction of that spouse." Does it require exclusive control? Or a majority of voting rights? What if the spouse is a one-third owner with his two brothers? What if the spouse is a limited partner, but nonetheless enhances his separate estate through under-compensated labor? Also, the statute makes no mention of the use of community labor to enhance separate real estate or tangible personal property.

V.A. DISABILITY PAYMENTS. Veterans Administration disability payments have been held to be a gratuity based upon a service-connected disability, rather than an earned property right based upon years of service, and thus are the recipient spouse's separate property. *Hagen v. Hagen*, 282 S.W.3d 899, 903 (Tex. 2009). V.A. disability payments are not divisible in a divorce. See also TFC § 3.008(b) (disability insurance payments and worker's compensation payments have the character as the earnings lost).

VALUATION DATE. The value of community assets is generally determined at the date of divorce, or as close to it as possible. *Handley v. Handley*, 122 S.W.3d 904, 908 (Tex. App.--Corpus Christi 2003, no pet.); *Grossnickle v. Grossnickle*, 935 S.W.2d 830, 837 (Tex. App.--Texarkana 1996, writ denied). However, the nearness in time is left to the discretion of the trial court. *In re Marriage of C.A.S. & D.P.S.*, 405 S.W.3d 373, 385 (Tex. App.–Dallas 2013, no pet.). In *Quijano v. Quijano*, 347 S.W.3d 345, 349-50 (Tex. App.--Houston [14th Dist.] 2011, no pet.), the appellate court approved the trial court's using a 6-month old statement to determine the balance of a financial account. In *Maher v. Maher*, No. 01-14-00106-CV (Tex. App.–Houston [1st Dist.] August 30, 2016, n.p.h.), the appellate court ruled that a clause in a premarital agreement, providing that the estate would be value on the date the divorce was filed, was enforceable.

WATER RIGHTS. Under Texas law, the State of Texas owns the water in rivers, streams, lakes, bays and along the Gulf Coast. Tex. Water Code § 11.021(a). However, a fee simple interest in land carries with it the right to use surface water that flows across the surface of land (before it forms or joins a defined watercourse), and the ground water that flows beneath the surface of land, for purposes of irrigation, Tex. Admin. Code § 297.81, and for other uses, *Edwards Aquifer Authority v. Day*, 369 S.W.23d 814, 820 (Tex. 2012). A conveyance of land includes this water right, unless it is expressly reserved or excepted. Tex. Admin. Code §297.81. However, this water right does not apply where the land is held by a water corporation, water district, river authority, or governmental entity authorized to supply water to others. Those entities can receive the water right only by express written conveyance. *Id.* Water rights are considered to be part of the surface estate in the land, and thus do not follow conveyances of the mineral interest. Water rights can be severed from the fee simple interest, and conveyed separately from the surface interest in the land. There are no Texas cases discussing the separate or community character of water rights, and in preparing this article no cases could be found anywhere in America involving the marital property ownership of water rights, or the divisibility of water rights upon divorce. Falling back on general principles, if the water rights have not been severed from the land (or from the surface interest), they have the same character as the fee simple (or surface) interest in the land. If water rights were acquired independently from the fee simple (or surface) interest, ordinary marital property rules indicate that the water rights are community property unless it is shown that

the water rights were acquired prior to marriage or during marriage by gift, descent, or devise, or in exchange for separate property. The inception of title rule should apply to acquiring water rights the same as any other real estate transaction in which title incepts before title is acquired.

Community property water rights can be awarded to either spouse, although it will diminish the value of the fee simple interest or surface interest to sever some or all of the water rights. If there was no evidence of the value of the water rights separate from the fee simple or surface rights, the effect of such severance on the property division will be unknown, and severing of water rights in such a situation from the remainder of the ownership interest may constitute an abuse of discretion due to the lack of information as to value. See *Abuse of Discretion*.

Water Wells. Water rights traditionally in Texas were valuable in allowing the land to be used for agricultural purposes. With growing population, the need for urban water is exceeding the need for agricultural uses in many parts of the state. In areas utilizing hydraulic fracturing to release oil and gas reservoirs, the need for water for fracking exceeds agricultural needs. Drillers needing water for "fracking" enter into water supply contracts, that permit drilling for and removing water. A water supply contract pertaining to community property water rights can be divided in a divorce.

Disposal Wells. Fracking drillers also need to discard the chemical and hydrocarbon-laden water after fracking. Surface (or mineral) owners of empty hydrocarbon reservoirs, drained in earlier oil plays, can enter into leases for "disposal wells" which are abandoned wells into which the drillers pump the contaminated water. A community property disposal well lease can be awarded in a divorce property division.

WORKERS' COMPENSATION BENEFITS. The marital property character of workers' compensation benefits is governed by TFC § 3.008(b). Workers' compensation benefits are community property to the extent that they replace earnings lost during marriage; they are otherwise separate property. The character is not determined by a time-allocation rule applied to the period of employment, nor does it depend on the date the injury occurred. While workers' comp. benefits are exempt from creditors' claims, Tex. Labor Code § 408.201-202, the author believes that the cases saying that various forms of workers' comp. benefits are divisible community property have been modified by TFC § 3.008(b). *See Rucker v. Rucker*, 810 S.W.2d 793, 795–96 (Tex. App.--Houston [14th Dist.] 1991, writ denied); *Anthony v. Anthony*, 624 S.W.2d 388, 390 (Tex. Civ. App.–Austin 1981, writ dism'd).

ENDNOTES

1. The Dallas Court of Appeals held that the requirement that an award of appellate fees be conditional does not apply in appeals from suits affecting the parent-child relationship. *In re Jafarzadeh*, NO. 05-14-01576-CV (Tex. App.--Dallas Jan. 2, 2015, orig. proceeding) (mem. op.). *Contra, Halleman v. Halleman*, No. 02-11-00238-CV, 245 (Tex. App.--Fort Worth Nov. 3, 2011, no pet.) (mem. op.).

2. http://orsinger.com/PDFFiles/Dividing-ownership-interests-closely-held-business%20entities-things-know-and-to-avoid.pdf.

3. http://orsinger.com/PDFFiles/New_Frontiers_06_Distinguishing_Enterprise_Goodwil_from_Personal_Goodwill.pdf.

4. TBOC § 152.002(a) provides: “Except as provided in Subsection (b), a partnership agreement governs the relations of the partners and between the partners and the partnership. To the extent that the partnership agreement does not otherwise provide, this chapter and the other partnership provisions govern the relationship of the partners and between the partners and the partnership.”

5. http://www.gdhm.com/images/pdf/ce-planning-drafting-implementing-capital-call-provisions.pdf.

6. Albert Einstein awarded his future Nobel Prize in physics to his first wife Mileva in their divorce. <https://www.brainpickings.org/2015/06/12/einstein-divorce>. Economist Robert E. Lucas Jr. awarded half of his future Nobel Prize to his wife in their divorce. <http://articles.latimes.com/1995-10-21/news/mn-59318_1_nobel-prize>.

7. http://orsinger.com/PDFFiles/Dividing-ownership-interests-closely-held-business%20entities-things-know-and-to-avoid.pdf.

8. http://orsinger.com/PDFFiles/Dividing-ownership-interests-closely-held-business%20entities-things-know-and-to-avoid.pdf.

9. http://orsinger.com/PDFFiles/Dividing-ownership-interests-closely-held-business%20entities-things-know-and-to-avoid.pdf.

10. https://www.sos.state.tx.us/corp/tradefaqs.shtml Trademark FAQs.