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## **I. CHARACTERIZATION AND THE JUDICIAL POWER TO DIVIDE MARITAL PROPERTY**

### *A. Marital Estates And The Division Of Marital Property*

The community property system recognizes the spouses' joint ownership in assets acquired during marriage. This concept reflects the societal view of marriage as a partnership to which each spouse makes different but equally valuable contributions. A shared mistaken belief among laypersons and attorneys who do not practice family law, is that at the time of divorce, annulment or upon the death of one of the spouses, the court will equally divide marital property that the spouses held in common during the marriage.<sup>1</sup> This belief arises from the fact that, during the marital relationship, the law regard's the spouses as equal partners in all the property that was acquired through their talents and labors during the marriage.<sup>2</sup>

#### 1. Key terms defined

Accordingly, claims for economic contribution and/or reimbursement arise at the time spouses decide to end their marriage or upon the death of one of the spouses. Before the court can hear a claim for either reimbursement or economic contribution, the marital property must be characterized.<sup>3</sup> There are three estates that the court will look in making the division of the community, the community estate and the separate

estates of the spouses.<sup>4</sup> "The character of property is determined at the earliest moment to which the claimant can claim title. With regard to real estate, this is generally the signing of the purchase contract, not necessarily the date of the deed."<sup>5</sup>

In simple terms, property owned before marriage and property acquired during marriage by gift, devise or descent is a spouse's separate property.<sup>6</sup> The ownership of separate property gives the owner absolute "rights of management, is not [supposed] to be subject to divesture at time of divorce, and it is solely under the testamentary power of the owner."<sup>7</sup> The community is made up of the property, other than separate property, that either spouse acquires during the marriage.<sup>8</sup>

When some of the spouses marital property is characterized as the separate property of one of the spouses, the possibility of reimbursement or economic contribution arises if that spouse can show by clear and convincing evidence that his or her separate property was used to benefit the community, or if the other spouse can prove that the community property was in some way used to benefit the separate property.<sup>9</sup>

## 2. Jurisdiction of the court

In a divorce proceeding, the jurisdiction of the court is invoked once the parties file the petition for divorce, and it is the duty of the court to order the division of the spouses'

community property.<sup>10</sup> The court that enters a decree of divorce is required to divide the spouses' community property in a method that is just and right.<sup>11</sup> At the same time, the court must also carve up quasi-community property and property obtained in exchange for quasi-community property.<sup>12</sup> As a consequence, in making the division of the marital estate when there has been a divorce or annulment, the court will hear claims for economic contribution and reimbursement in order to make a division that is just and right.<sup>13</sup>

*B. Divorce And Property Division*

Case law has held that "the issue of divorce and the issue of property division are neither separable nor severable."<sup>14</sup> Consequently, if the court wishes to grant a new trial on particular property issues, the court has to either grant a new trial on all the issues, as the issues may not be severed, or deal with the order granting the divorce as interlocutory and proceed to consider the property issues in a new trial.<sup>15</sup>

Section 7.001 of the Texas Family Code provides that in a decree of divorce, the court shall order a division of the estate of the parties.<sup>16</sup> Section 7.001 has been interpreted as being mandatory.<sup>17</sup> As a result, "when the jurisdiction of the divorce court is invoked by the pleadings of either spouse, the court must decree a division of the property."<sup>18</sup> The date of the

final judgment granting the divorce is controlling in establishing if the agreement was entered into incident to divorce.<sup>19</sup>

1. Division of the marital estate

Because exact division of the marital estate is extremely rare and very difficult, wide latitude and discretion is given to the trial court and that discretion is set aside only when there has been a case of clear abuse of discretion.<sup>20</sup> As a result, the "court is not required to divide each asset equally [nor is the court]... required to divide each asset."<sup>21</sup> However, "[t]he court is required to make a division of all the community property in a manner that is just and right, having due regard for the rights of each party and the children of the marriage."<sup>22</sup>

2. Inception of title, premarital, and post marital contracts

Still, spouses may contract, either before or during the marriage, to the characterization of marital property.<sup>23</sup> Premarital contracts often provide that a spouse's wages from employment are to be that spouses separate property.<sup>24</sup> Spouses may also enter into agreements that affect their rights and obligations in property, the right to manage and control their property, and the disposition of their property on separation, divorce, or death.<sup>25</sup> In addition, spouses may agree at any time to partition or exchange between themselves any part of their

community property and may agree that income from separate property, which would normally be community property, is to be the separate property of the spouse who owns the property.<sup>26</sup>

In the absence of an agreement characterizing marital property, the property that is possessed by either spouse during or upon the dissolution of marriage is presumed to be community property.<sup>27</sup> It is the plain meaning of the statute, that creates a rebuttable presumption that all property possessed by husband and wife at the dissolution of their marriage is community property and the burden to prove otherwise can only be established by clear and convincing evidence.<sup>28</sup>

## **II. OLD REIMBURSEMENT LAW PRIOR TO EQUITABLE INTEREST STATUTE AND 2001 AMENDMENTS**

### *A. Judicial Doctrine of Equitable Right to Reimbursement*

Prior to 1999 the law was that, "[t]he rule of reimbursement [was] purely an equitable one. It [arose] when the community estate in some way [improved] the separate estate of one of the spouses (or vice versa)."<sup>29</sup> The Texas Supreme court in *Vallone v. Vallone*, "held that right of reimbursement is not an interest in property or an enforceable debt, per se, but an equitable right which arises upon dissolution of the marriage through death, divorce or annulment."<sup>30</sup>

## 1. Key terms defined

Specifically, reimbursement was a course of action in which a spouse could obtain an accounting of the community together with the separate estates of the spouses.<sup>31</sup> Either party to the marriage or the beneficiary of a decedent spouse could raise the issue of reimbursement at divorce or death.<sup>32</sup> The theory of reimbursement came from the idea that the community should be held liable for debts of the community, and "a spouse's separate estate should be responsible for the separate debts of that spouse."<sup>33</sup> The separate debts of a spouse are debts that are created before the marriage and debts created after the marriage when the debtor spouse contracted that the borrower's separate estate would be responsible for repayment.<sup>34</sup> All other debts created in the marriage were community debts and "reimbursement was neither an entitlement nor an automatic right."<sup>35</sup> What's more, reimbursement was not an interest in personal or real property but "an equitable right for a possible claim for money to compensate for an estate's contribution to another estate."<sup>36</sup>

## 2. Discontentment with the doctrine

There was much criticism of the judicial doctrine of equitable reimbursement, which supposedly was designed to reimburse the community for expending its funds or efforts to enhance one spouse's separate property. The judge made rule was criticized as being "subject to ... many offsets and to much



judicial discretion."<sup>37</sup> The judge had to determine in making the valuation of the contribution "how much compensation would be adequate for the services [a spouse] performed, how much time should the owner [of the benefiting estate] be allowed to spend maintaining the separate estate, and how many benefits had the community previously received to offset reimbursement."<sup>38</sup> One of the reasons for the enactment of 1999 statutes was to correct the wrongs imposed by the discretionary use of the reimbursement remedy given that there were many situations in which the reimbursement principal did not adequately compensate the community for resources used to enhance a spouses separate estate.<sup>39</sup>

B. *Examples Of Fact Situations Where Reimbursement Was Allowed Under The Judicial Doctrine Of Equitable Reimbursement*

1. Living expenses

In most cases, where separate funds are spent toward the necessary living expenses of the community, they comprised a gift to the community and no reimbursement or economic contribution would be allowed.<sup>40</sup> Still, the exception for living expenses only applied to the living expenses of the marital family, for which each spouse is obligated to provide.<sup>41</sup> The living expenses of the marital family can come from one of the spouses separate property if necessary to support the necessary

living expense of the community.<sup>42</sup> Thus, the spouses had a duty to expend separate funds for necessary living expenses of the community, such expenditures were considered a gift to the community estate and a spouse had no right to reimbursement for these expenditures.

But if one spouse used "separate property to pay a community debt, [this would prior to the new 1999 statute], create a prima facie right to reimbursement, as the separate property may be said to have enhanced the community estate."<sup>43</sup> At the same time, the lump-sum use of separate property to reduce the community debts did not qualify as a community living expense.<sup>44</sup>

Also, even though both spouses have a duty to furnish support for the community to meet its living expenses, if a spouse could prove that he or she used separate funds to pay for community living expenses when community funds were available to pay for these expenses, the spouse's separate estate may still be entitled to claim reimbursement for these expenditures.<sup>45</sup>

## 2. Child support

Still, support obligations for a child not of the present marriage were not considered community debt where the amount of the obligation was decided without reference to the obligee's spouse's property.<sup>46</sup> However, court-ordered support payments are not subject to a claim for reimbursement by the community

estate.<sup>47</sup> Therefore, as long as the spouse seeking reimbursement was not misled about the other spouse's payment from community funds of court-ordered obligations, did not seek to require the other spouse to meet the obligations out of his or her separate estate, and in the absence of evidence that payment of the obligations benefited the other spouse's separate estate, the community was not entitled to reimbursement for the payment of such obligations.<sup>48</sup>

### 3. Payments of debts, taxes, interest, or insurance

Also, old case law recognized claims for reimbursement of funds expended by an estate to pay debts, taxes, interest, or insurance for the property of another estate, which was to be measured by the amount paid by the contributing estate.<sup>49</sup> However, the benefiting estate was allowed an offset claim against a claim for reimbursement for funds expended by an estate to pay debts, taxes, interest, or insurance for the property of another estate.<sup>50</sup> The amount of the claim was to be measured by the value of any correlated benefit received by the contributing estate "such as ... income received by the [contributing] estate from the property, and any reduction in the amount of any income tax obligation of the [contributing] estate by virtue of the [contributing] estate's claiming tax-deductible items relating to the property, such as depreciation, interest, taxes, maintenance, and other deductible payments."<sup>51</sup>

#### 4. Reimbursement involving improvements to real property

The claim for reimbursement of resources spent by an estate for improvements to real property of another estate was calculated by the increase of value in the receiving estate.<sup>52</sup>

The spouse that is claiming reimbursement must produce evidence concerning "the value of the property before and after the improvements in order to prove the amount of the claim."<sup>53</sup> The benefiting estate was allowed an offset against a claim for reimbursement for improvements to real property of another estate. The offset was to be measured by the value of the associated benefit received by the paying estate.<sup>54</sup>

#### *C. Prohibition Against Divestiture of Separate Property*

Under the new rule, there is a possible fact scenario where a spouse could be divested of separate property. In order to understand the nature of this problem one must first look to the abilities of the court in making a division of the marital estate before the new statutes.

The trial court has a duty in a divorce to order a division of the estate of the parties in a manner that the court deems just and right.<sup>55</sup> However, in making the division of the community property in a divorce suit, the power of the court to divide marital property does not extend to a taking of the fee to the separate real property of one spouse and ordering its

donation to the other.<sup>56</sup>

1. Prohibition against divestiture of separate real property

The character of property as being either separate or community is to be determined under the inception of title doctrine.<sup>57</sup> Under the doctrine, the character of property as separate or community depends on whether the parties were married at the moment the right of ownership originated.<sup>58</sup> All property that a spouse owned or claimed before marriage is that spouse's separate property.<sup>59</sup> In Texas, trial courts have broad discretion in the division of the marital community property, however, that discretion does not extend to separate property.<sup>60</sup> It has been held that a trial court may not divest a party of his separate property by a divorce decree.<sup>61</sup>

The modern case, which set the precedent for this rule, is *Eggemeyer v. Eggemeyer*. In this case, Homer Eggemeyer, was the owner of an undivided one-third interest in a farm that he had received by gift.<sup>62</sup> The trial court in making the division, divested Homer of his separate property and awarded this property to Virginia, his soon to be ex-wife.<sup>63</sup> This case raised the issue of whether a trial court had the power to divest one spouse of separate property and transfer title to the other spouse by decree of divorce.<sup>64</sup>

Writing the majority opinion for the Texas Supreme Court,

Justice Pope, looked first to the intent of the Texas Legislature in interpreting the applicable statute. Justice Pope determined that the intent of the legislature was a codification of prior law, which had prohibited expressly the divestiture of title to real estate.<sup>65</sup> The appellate courts had in the past interpreted the phrase "estate of the parties" to mean community property only.<sup>66</sup> As a result, the estate of the parties, i.e. community property, was divisible. However, "the estate of each spouse," i.e. separate property, was not.<sup>67</sup>

The court also hit upon constitutional problems with the trial court's division. Foremost, prior Supreme Court judgments had held that the definition of separate property as stated in Article XVI, Section 15, of the Texas Constitution, was exclusive.<sup>68</sup> As a result separate property was not subject to alteration or enlargement by the legislature. For the trial court to make one spouse's separate property into the separate property of the other spouse, pursuant to a degree of divorce, was held an unconstitutional enlargement of the definition of separate property.<sup>69</sup>

The second constitutional issue involved Article I, Section 19, of the Texas Constitution. Section 19 prohibits a deprivation of property "except by the due course of the law of the land." Specifically, the court held that "substantive due course" was understood to require a "public purpose" or police

power justification to permit divestiture of property and the court found no such purpose or justification.<sup>70</sup> The court went on further to hold that even though the trial court has broad latitude in the division of community property, the court's discretion does not extend to the taking of the fee to the separate property one spouse and ordering the donation of the fee to the other spouse.<sup>71</sup>

Therefore, while reimbursement did offer some compensation to the contributing estate, that compensation had limits and to divest one spouse of a fee interest in real property and award it to the other, was not within the boundaries of the trial courts divisionary powers.

2. The Court extends the prohibition of divestiture to separate personal property

Soon after *Eggmeyer*, the court was again faced with a separate property issue in the case of *Cameron v. Cameron*.<sup>72</sup> In *Cameron*, the husband had earned military retirement pay and acquired United States Savings Bonds during his marriage.<sup>73</sup> During most of the marriage, the Camerons lived in common-law jurisdictions and not in community property states. In the common-law jurisdictions, the retirement pay and bonds would have been characterized as the husband's non-marital separate property.<sup>74</sup>

In ordering the division, the trial court awarded the wife

35% of the retirement pay and 50% of the bonds. This order was reversed on appeal as the court of civil appeals had applied the inception of title doctrine and characterized the retirement pay as the husband's separate property since it had accrued while he was residing in common law jurisdictions.<sup>75</sup> Applying the same reasoning, the court of appeals determined that a fraction of the bonds were the husband's separate property.<sup>76</sup>

When the case reached The Texas Supreme Court, Justice Pope, again writing for the court as in *Eggemeyer*, reversed the court of appeals. The Supreme Court held that property, wherever located, obtained by a spouse while domiciled outside of Texas that would have been community property if the spouse had been domiciled in Texas at the time of possession, was divisible by the court.<sup>77</sup>

Following a extensive discussion of *Eggemeyer*, and the similar law of other states, the court responded to the wife's argument that *Eggemeyer*, stood only for the narrow rule that separate real property may not be divested, and held "We can find no justifiable reason for treating separate property in a different manner than separate realty in divorce proceedings."<sup>78</sup>

### **III. STATUTORY CHANGES 1999 AND 2001**

#### *A. Nature of the Problem*

Reimbursement has been an issue in family courts for many



years. On September 1, 1999, a key change took place in the division of marital property in Texas with the enactment of an equitable interest statute.<sup>79</sup> The statute was further amended in 2001 with several important changes.<sup>80</sup> The legislature tackled the issue of modifying claims of a contributing marital estate against a benefited marital estate.<sup>81</sup> The reforms of 1999 fashioned an equitable interest in one marital estate of the other marital estate.<sup>82</sup> Between the years 1999 and 2001 a unique committee composed of family lawyers, probate lawyers, and law professors met frequently, cautiously reviewing the pertinent case law and drafting amendments to the 1999 statutes to spell out issues that were not addressed in the 1999 statutes.<sup>83</sup> The culmination of months of hard work by the special committee resulted in the modification of the 1999 equitable interest statute.<sup>84</sup> The amendments are intended to better address the inequities of the Texas case law and clarify the intent of the legislature in the passing of the 1999 equitable interest statute.<sup>85</sup> There was much confusion in the interpretation of the new statute whose purpose was to correct the previous problem of the inequities of case law that did "not fairly recognize the claims of one marital estate for making economic contribution to another marital estate."<sup>86</sup>

1. Specific changes

The 2001 amendments made several changes to the 1999

enactment. Above all, the amendment addresses several issues that were not resolved in the 1999 enactment. One of which is the method of valuating the contribution to the benefited estate. An equitable lien is automatically created upon dissolution of the marriage to secure a claim of economic contribution for the reduction of debts that were the debts of separate property of a spouse for which the community paid down the debt.<sup>87</sup>

The new statute specifically defines the contribution to the value of the benefited estate as "equity in the property."<sup>88</sup> While, the date that determines the amount of economic contribution is reliant on the first date a contributing marital estate causes some type of financial compensation that benefits the other marital estate.<sup>89</sup> Still, the 2001 amendments make clear that claims for economic contribution are applicable uniformly to separate property and community property, and that claims for economic contribution are to be applied to all kinds of property, not only real property.<sup>90</sup>

Also, the petition for compensation of a debt must be for a identifiable lien on the benefited estate. It is important to note that if the payment is of an unsecured debt, the law established for the claim of "economic contribution" created by subchapter E would be inappropriate. Instead, one would make a claim for reimbursement<sup>91</sup> Of particular interest is the amended

Section 3.406 which spells out the types of payments that bring about a claim of economic contribution<sup>92</sup> What's more, the new amendments specifically rule out payments for maintenance, taxes, interest, and insurance.<sup>93</sup>

## 2. Method of measurement for economic contribution

The method for measuring economic contribution is done by dividing the total economic contribution to the total equity in the property and multiplying that amount by the equity at time of divorce to calculate the amount of the claim.<sup>94</sup> A hypothetical fact situation of the purchase of a residence by an individual before marriage will demonstrate the application of the statute.

- Wife purchases house for \$100,000
- Wife makes a down payment of \$35,000
- Wife's original mortgage balance is \$65,000
- The value of the house on the date of marriage is \$120,000
- The Mortgage balance remaining on the date of marriage is \$60,000
- The Mortgage reduction during marriage was \$40,000
- Value of the house on the date of divorce was \$225,000
- The Mortgage balance on day of divorce was \$20,000
- The net equity in the house is \$205,000

The method used to determine the economic contribution of the contributing estate is: \$40,000 [community payments] divided by

the sum of \$40,000 [community payments] plus \$60,000 [equity on the date of marriage] [ $\$40,000/\$100,000$  equals 40%]

This percentage is then multiplied times the current equity of \$205,000. Thus, the community estate has an economic claim of [40% x \$205,000] \$82,000 claim in favor of the community. The separate property interest of the Wife would be \$123,000 [ $\$205,000$  minus \$82,000 or 60% of \$205,000.]<sup>95</sup> Husband will have the ability to impose a lien on the house to secure the payment of the community's economic contribution to the house.<sup>96</sup>

### 3. No ownership interest created

The economic contribution of the community or a spouse's separate estate does not create an ownership interest in the non-contributing spouse's separate property. The inception of title rule will determine the character of property at the time of its acquisition, and the character does not change due to one spouse having the ability to make a claim of economic contribution.<sup>97</sup> Additionally, the use of community property or labor for the advantage of one spouse's separate property does not change the separate property into community property. However, the community may be due reimbursement through the economic contribution that the community or separate property made to the advantage of the benefited spouse's separate property.<sup>98</sup>

4. Not limited to real property

The statute is not limited to real property, but is applicable to almost all forms of property subject to a debt of the separate estate where the debt have been paid on or by the community estate. A very important provision of the 2001 amendment allows one to seek reimbursement for community time, toil, and labor contributed to separate property.<sup>99</sup>

5. Method of enforcing the claim for economic contribution is the "Equitable Lien"

On termination of a marriage, the court must impose an equitable lien on community or separate property to secure a claim arising by reason of an economic contribution under the new statute.<sup>100</sup> An equitable lien is defined as "the right to subject a particular piece of property, or a particular fund, or a part thereof, to the satisfaction of a money demand, and the intention may be expressed, or it may arise by a necessary implication from the terms of the agreement itself construed with reference to the situation of the parties and attendant circumstances when the contract was made."<sup>101</sup>

Newly enacted section 3.407 of the Texas Family Code provides that "[t]he court shall offset a claim for one marital estate's economic contribution in a specific asset of a second marital estate against the second marital estate's claim for economic contribution in a specific asset of the first marital

estate."<sup>102</sup> After determining if a offset claim is justified, the court will then look to section 3.406 (a) in enforcing the offset claim.<sup>103</sup> The statute provides that "[o]n dissolution of a marriage, the court shall impose an equitable lien on property of a marital estate community or separate property to secure a claim for economic contribution in that property by another marital estate."<sup>104</sup>

So, when dividing marital property on divorce, a trial court must impose an equitable lien on one spouse's separate real property to secure the other spouse's right of economic contribution for improvements by the contributing estate to that estate.<sup>105</sup> If the judgment is not paid, the party awarded the judgment secured by the equitable lien has the right to foreclose and sell the property.<sup>106</sup> An equitable lien arises when the divorce decree is rendered.<sup>107</sup> The lien is not limited to the specific property benefited can be imposed on any of the property of the benefited estate.<sup>108</sup> If a spouse defaults on obligations under this provision of the decree, the other spouse may seek judicial foreclosure of the equitable lien and have the property sold to satisfy the judgment.<sup>109</sup>

If there has been either a divorce or annulment, the court is bound "to impose an equitable lien on the property of the benefited estate to secure a claim for economic contribution by the contributing estate."<sup>110</sup> In the situation where there has

been a death of either spouse, "the requirement on the probate court to impose an equitable lien only exists if an application for a claim is made by the surviving spouse, the personal representative of the estate or any other person interested in the estate as defined in the Probate code."<sup>111</sup>

Also, when an equitable lien has been imposed and there is a default, the spouse who holds the lien may seek a judicial foreclosure of the equitable lien and the property will be sold to satisfy the judgment.<sup>112</sup> Prior to the recent codification the rule was that the trial court may impress an equitable lien against one spouse's separate property to secure the other spouse's right of reimbursement for community improvements to that property, but the court could not impose an equitable lien on a spouse's separate property simply to secure a just and right division of the community property.<sup>113</sup> There had to be evidence that established that community funds or labor were used to improve the separate property of the benefiting estate and only the separate property that received the benefit was subject to the lien.<sup>114</sup> Under the new statute all the separate property of the first marital estate can be subject to the lien by the provisions of the offset provision.<sup>115</sup> Is this an unconstitutional divestiture of separate property of the first marital estate?

## 6. Offsetting claims

When there are claims for economic contribution by two or more marital estates, the court must offset the claims.<sup>116</sup> Also, the claims do not need to be made regarding the same specific piece of property.<sup>117</sup> Thus, it looks like the court has power to order in the division of the marital estate, the divesture of separate property of the benefiting estate in order to achieve the offset. As the statute is new it remains to be seen if this divesture is constitutional. However, we know from prior case law that the court does not have the ability to divest one of separate property and that the claim should be instead for reimbursement.<sup>118</sup>

## 7. History of the offset claim

Prior to 1988, Texas courts held that a right of reimbursement [today would be economic contribution and/or reimbursement] may lie for the decrease in principal of a debt when paid by another estate without the necessity of proving the decrease was not offset by another benefit received by the contributing estate.<sup>119</sup> Also before 1988, the majority of Texas courts "held that payments made by one estate to reduce interest on the debt of another estate or to pay for taxes or insurance for property owned by another estate, may give rise to a claim of reimbursement" [today would be economic contribution and/or reimbursement].<sup>120</sup> But, the right to reimbursement arose only in



the event of proof that expenditures did exceed proven offsetting benefits received by the contributing estate.<sup>121</sup>

In *Penick v. Penick*, the Texas Supreme Court addressed the subject of offsetting benefits. "The specific issue [was] whether tax benefits derived by the community estate from a spouse's separate property may be considered an offset against the sum advanced by the community estate to reduce the principal of the debt on the separate property."<sup>122</sup>

The court had problems in adopting a single formula that would balance the equities between each marital estate in every situation.<sup>123</sup> The court determined that the offset claim was similar to an action for quantum meruit.<sup>124</sup> The court held that three factors were determinative in determining if there was a valid claim: "(1) an estate has contributed to another estate, (2) the contributing estate has not received a quid pro quo, and (3) the benefited estate has thereby been unjustly enriched ..."<sup>125</sup> Consequently, the Texas Supreme Court held that the trial court had not erred by considering the tax benefits returned to the contributing community estate and the effect the depreciation deduction had on the value of the husband's separate property.<sup>126</sup>

### *C. Summary and Conclusion*

It is the duty of the trial court in a divorce decree to order a division of the estate of the parties in a manner that

the court deems just and right.<sup>127</sup> In the division of the marital community property in a divorce suit, the court may not take separate interest of one spouse that amounts to a fee interest in real property and award to the other spouse.<sup>128</sup> This prohibition against divestiture of separate realty applies equally to separate personal property.<sup>129</sup> The prohibition against divestiture of title to realty has no application to community property.<sup>130</sup>

Case law had held before the enactment of the new economic contribution statute that the trial court may impress an equitable lien against one spouse's separate property to secure the other spouse's right of reimbursement for community improvements to that property.<sup>131</sup> But the court could not impose an equitable lien on a spouse's separate property simply to secure a just and right division of the community property and only the separate property that received the benefit was subject to the lien.<sup>132</sup> Under the new statute all the separate property of the first marital estate can be subject to the lien by the provisions of the offset provision.<sup>133</sup>

The Texas Supreme Court has held that the definition of separate property as stated in Article XVI, Section 15, of the Texas Constitution, was exclusive.<sup>134</sup> Therefore, separate property is not subject to alteration or enlargement by the legislature.<sup>135</sup> For the trial court to make one spouse's separate

property into the separate property of the other spouse, pursuant to a degree of divorce, is an unconstitutional enlargement of the definition of separate property.<sup>136</sup>

But there is no divestiture of separate property because only if the lien is not paid, then the party awarded the judgment secured by the equitable lien has the right to foreclose and sell the property. So, the spouse who is awarded the lien is entitled to payments on the lien but has no ability to foreclose on the property till there is a default. Thus, there is no divestiture of title, as the spouse who has the lien interest does not receive fee title. Even if the property is sold after the default, the only way the spouse holding the lien would be able to claim title is through purchasing the property. This would be a bargained for arrangement not a division of the marital estates incident to divorce.

While the second constitutional issue falls under Article I, Section 19, of the Texas Constitution.<sup>137</sup> Section 19 prohibits a deprivation of property "except by the due course of the law of the land."<sup>138</sup> The Texas Supreme Court has held that "substantive due course" is understood to require a "public purpose" or police power justification to permit divestiture of separate property and the court found no such purpose or justification for the divestiture and vesting of fee title in separate property from one spouse to another incident to a

divorce decree.<sup>139</sup>

But there is a special relationship that exists between the state and the institution of marriage. As the dissent in *Eggemeyer* states, "[m]arriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature."<sup>140</sup> It is also within the decision making authority of the legislature to prescribe the age at which parties may contract to marry, the procedure essential to constitute a legal marriage and the duties and rights that arise from the marital relationship.<sup>141</sup> Furthermore, when the marriage is over, the acts which may make up grounds for dissolution of the marriage.<sup>142</sup> The *Eggemeyer* case was a split 5-4 decision decided in 1977. So, it remains to be seen if *Eggemeyer* will be overruled or reaffirmed thus determining the constitutionality of the offset claim.

## Endnotes

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<sup>1</sup> See Barbara Anne Kazen, *Division Of Property At The Time Of Divorce*, 49 Baylor L. Rev. 417, 418 (Spring 1997) ("The just and right standard often leads to a disproportionate division of assets and liabilities, determined by circumstances that courts may consider in refusing to divide the estate equally between the parties.")

<sup>2</sup> *Id.*

<sup>3</sup> Allen v. Allen, 704 S.W. 2d 600, 603 (Tex. App.—Fort Worth 1986, no writ) ("The characterization of marital property or community property is not a matter left to the discretion of the trial court, but is subject to the harmless error rule on appeal.")

<sup>4</sup> See Eggemyer v. Eggemeyer, 554 S.W. 2d 137 (Tex. 1977) (all marital property is thus either separate or community. If acquired before marriage by any method, or after marriage by gift, devise or descent, it is separate; otherwise, it is community).

<sup>5</sup> See JOHN J. SAMPSON ET EL., SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED—2001 24 (giving the definition of the inception of title doctrine).

<sup>6</sup> TEX. FAM. CODE ANN. §§ 3.001, 3.002 (Vernon 1999).

### 3.001 SEPARATE PROPERTY

A spouse's separate property consists of:

- (1) the property owned or claimed by the spouse before marriage;
- (2) the property acquired by the spouse during marriage by gift, devise, or descent; and
- (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.

### 3.002 COMMUNITY PROPERTY

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

<sup>7</sup> TEX. FAM. CODE ANN. §§ 3.101, 3.407 (Vernon 1999), (the constitutionality of the new statute will be addressed later in this paper as spouse can under the new economic contribution statute, be divested of their separate property).

### Sec. 3.101 MANAGING SEPARATE PROPERTY

Each spouse has the sole management, control, and disposition of that spouse's separate property.

### Sec. 3.407. OFFSETTING CLAIMS.

The court shall offset a claim for one marital estate's economic contribution in a specific asset of a second marital estate against the second marital estate's claim for economic contribution in a specific asset of the first marital estate.

<sup>8</sup> TEX FAM. CODE ANN. 3.002 (Vernon 1999), ("Community property consists of the property, other than separate property, acquired by either spouse during marriage.")

<sup>9</sup> See Howle v. Howle, 422 S.W. 2d 252 (Tex. Civ. App.—Tyler 1967, no writ), and in probate proceedings Anderson v. Gilliland, 684 S.W. 2d 673 (Tex. 1985). (in Howle, the main question was whether a wife, after a receiving a divorce decree awarding her the use and benefit of the homestead, can in a subsequent suit waive her homestead rights and be awarded her interest or equitable division, the court held she can), ( while in Anderson, the community expended \$20,237.89 to build a home on the property and at the time of Mr. Gilliland's death, this home had enhanced the separate property of Mrs. Gilliland by the sum of \$54,000.00).

<sup>10</sup> Matelski v. Matelski, 840 S.W.2d 124,127 (Tex. App.--Fort Worth 1992, no writ.) (when jurisdiction of trial court is invoked in divorce proceeding by the pleadings of either spouse, the court must decree a division of the

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community property, although lack of community estate to be divided does not nullify a divorce).

<sup>11</sup> TEX. FAM. CODE ANN. § 7.001(Vernon Supp. 1997) ("In a decree of divorce or annulment, 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.")

<sup>12</sup> See TEX. FAM. CODE ANN. §§ 7.001, 7.002 (Vernon Supp. 1999)

§ 7.001. General Rule of Property Division

In a decree of divorce or annulment, 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.

§ 7.002. Division of Property Under Special Circumstances

In addition to the division of the estate of the parties required by Section 7.001, in a decree of divorce or annulment the court shall 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:

- (1) property that was acquired by either spouse while domiciled in another state and that would have been community property if the spouse who acquired the property had been domiciled in this state at the time of the acquisition;
- (2) property that was acquired by either spouse in exchange for real or personal property and that would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition;

<sup>13</sup> *Id.*

<sup>14</sup> See Vautrain v. Vautrain, 646 S.W.2d 309, 314 (Tex. App.-- Fort Worth 1983, writ ref'd n.r.e.) (the issue of divorce is not severable from the issue of property division) See also TEX FAM. CODE ANN. § 7.001 *supra* note 12.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Murff v. Murff, 615 S.W.2d 696, 698 (Tex.1981) ("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.")

<sup>21</sup> See Conroy v. Conroy, 706 S.W.2d 745, 748 (Tex. App. El Paso 1986, no writ) See also Mial v. Mial, 543 S.W. 2d 736, 738 (Tex. Civ. App.-- El Paso 1976, no writ). (the appellate court in Mial v. Mial having reviewed the facts as found by the trial Court, determined that, "There is no finding as to how many of the sixteen years the parties have been married they lived in a community property state. Just because the parties were married sixteen of the twenty-one years ... would not automatically entitle Appellant to a 16/21st interest in her husband's retirement benefits." Thus, the retirement income "was only one of several items to be considered in dividing the community property. The Court is not required to divide each asset equally [nor is it] ... required to divide each asset." However, the Court is "required to make a division of all the community property in a manner that is just and right, having due regard for the rights of each party and the children of the marriage.")

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<sup>22</sup> *Id.*

<sup>23</sup> TEX. CONST. art. XVI § 15.

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

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> TEX. FAM. CODE ANN. § 3.003(a)(Vernon Supp. 1997) ("Property possessed by either spouse during or on dissolution of marriage is presumed to be community property.")

<sup>28</sup> Tarver v. Tarver, 394 S.W.2d 780, 783 (Tex. 1965), ("The plain wording of the statute creates a rebuttable presumption that all property possessed by a husband and wife when their marriage is dissolved is their community property and imposes the burden upon one asserting otherwise to prove the contrary by satisfactory evidence."); TEX. FAM. CODE ANN. § 3.003 (a) (b)

- (a) Property possessed by either spouse during or on dissolution of marriage is presumed to be community property.
- (b) The degree of proof necessary to establish that property is separate property is clear and convincing evidence.

<sup>29</sup> Vallone v. Vallone, 644 S.W.2d 455, 458-459 (Tex. 1982)(rule of reimbursement is purely equitable and arises when community estate in some way improves separate estate of one of spouses, or vice versa).

<sup>30</sup> *Id.*

<sup>31</sup> See STEWART W. GAGNON & CHRISTINA H. PATIERNO, REIMBURSEMENT & TRACING—THE BREAD AND BUTTER TO A GOURMET FAMILY LAW PROPERTY CASE, 49 BAYLOR L. REV. 323, 325 (1997) (the article discusses various theories of marital property reimbursement and the various methods of tracing available to determine the character of an asset or liability, which, in turn, impacts the determination of an equitable right to reimbursement which today would be economic contribution).

<sup>32</sup> *Id.* (probate proceedings a beneficiary of the contributing estate may claim reimbursement).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See HON. BEA ANN SMITH, WHY THE COMMUNITY PROPERTY SYSTEM FAILS DIVORCED WOMEN AND CHILDREN, 7 TEX. J. WOMEN & L. 135,143 (1998) (the article addressed emerging family law issues and the inequalities of the community property system).

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<sup>38</sup> *Id.*

<sup>39</sup> PAMELA E. GEORGE, TEXAS MARITAL PROPERTY RIGHTS 219 (2000).

<sup>40</sup> See Winkle v. Winkle, 951 S.W.2d 80,89-90 (Tex. App.--Corpus Christi 1997, pet. denied) and Matter of Marriage of Long, 542 S.W.2d 712, 717 (Tex. Civ. App.--Texarkana 1976, no writ), (in Winkle, husband was entitled to reimbursement for money taken directly from sale of his separate-property house and applied to purchase and construction of community property house).

<sup>41</sup> Norris v. Vaughan, 152 Tex. 491, 502-503, 260 S.W.2d 676, 682-683 (1953); and Pelzig v. Berkebile, 931 S.W.2d 398, 400-401 (Tex. App.--Corpus Christi 1996, no writ); But see Farish v. Farish, 982 S.W.2d 623, 625 (Tex. App.--Houston [1st Dist.] 1998, no pet.) (holding only that court-ordered child support is not subject to reimbursement claim, but also citing cases pointing out that duty to support one's minor children exists regardless of whether a parent has been ordered to pay child support).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Kotrla v. Kotrla, 718 S.W.2d 853, 856-857 (Tex. App.--Corpus Christi 1986, writ ref'd n.r.e.) ("when separate funds are spent for community living expenses, they are deemed a gift to the community for its well-being and use").

<sup>46</sup> Butler v. Butler, 975 S.W.2d 765 (Tex. App.--Corpus Christi 1998, no pet.) (trial court properly reimbursed the community estate for husband's supporting a child born after the parties' marriage where wife had no knowledge of the child's existence or support payments made, thus she could not have consented or approved of them).

<sup>47</sup> Farish v. Farish, 982 S.W.2d 623,625-626 (Tex. App.-- Houston [1st Dist.] 1998, no pet.) (holding that trial court properly factored into property division claim of reimbursement for husband's payments from community funds of child support, tuition, and health care for children of his previous marriage); Hunt v. Hunt, 952 S.W.2d 564, 568 (Tex. App.--Eastland 1997, no writ) (trial court did not abuse its discretion in failing to reimburse community for contractual alimony payments to husband's ex-wife)

<sup>48</sup> Pelzig v. Berkebile, 931 S.W.2d 398, 400 (Tex. App.--Corpus Christi 1996, no writ) (the court held that no reimbursement would be permitted for husband's payment of child support, college expenses, and alimony payments upon which he and his former wife had agreed, and which were his legal obligations at the time of the parties' marriage); compare Butler v. Butler, 975 S.W.2d 765, 768-769 (Tex. App.--Corpus Christi 1998, no pet.), (reimbursement was allowed because husband's child support obligation came into existence only after parties' marriage, he hid child's existence from wife, and he paid obligations from community funds without wife's knowledge).

<sup>49</sup> See STEWART W. GAGNON & CHRISTINA H. PATIERNO, *supra* note 31.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 334.

<sup>55</sup> See TEX. FAM. CODE ANN. §§ 7.001, 7.002 *supra* note 12.

<sup>56</sup> Powell v. Powell, 822 S.W. 2d 181 (Tex App-- Houston (1st Dist) writ denied, 1991), (trial court cannot divest spouses of rights to separate property, whether real or personal).

<sup>57</sup> See Strong v. Garrett, 148 Tex. 265, 271, 224 S.W.2d 471,474 (1949) (the period of limitation was completed during the husband's marriage to his second wife, Ida Young Strong. The issue to be decided "was the title



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'acquired' during the marriage to Ida Young Strong, and therefore community property ... or was it 'claimed' by Anderson Strong before his marriage, and therefore his separate property ...?" The court held that "[h]ad Anderson Strong entered upon this land as a naked trespasser, without any property right therein, he would have had no basis for a claim of title until the full period of limitation had run." Thus property that is acquired by pure limitation, where the period began before marriage and ended during the marriage relation, is community property).

<sup>58</sup> *Id.*

<sup>59</sup> See TEX. CONST. art. XVI § 15. *supra* note 23.

<sup>60</sup> See Eggemyer, 554 S.W. 2d at 144 *supra* note 4.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 138.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 139.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 140.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 140-141.

<sup>71</sup> *Id.*

<sup>72</sup> Cameron v. Cameron, 641 S.W. 2d 210 (Tex. 1982).

<sup>73</sup> *Id.* at 212.

<sup>74</sup> *Id.* at 220-221.

<sup>75</sup> *Id.* 212.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 220.

<sup>79</sup> See JOHN J. SAMPSON ET EL., *supra* note 5 at 38-39.

<sup>80</sup> See TEX. FAM. CODE ANN. §§ 3.401 to 3.410 (Vernon Supp. 2001).

Sec. 3.401. DEFINITIONS. In this subchapter:

(1) "Claim for economic contribution" means a claim made under this subchapter.

(2) "Economic contribution" means the contribution to a marital estate described by Section 3.402.

(3) "Equity" means, with respect to specific property owned by one or more marital estates, the amount computed by subtracting from the fair market value of the property as of a specific date the amount of a lawful lien specific to the property on that same date.

(4) "Marital estate" means one of three estates:

(A) the community property owned by the spouses together and referred to as the community marital estate;

(B) the separate property owned individually by the husband and referred to as a separate marital estate; or

(C) the separate property owned individually by the wife, also referred to as a separate marital estate.

(5) "Spouse" means a husband, who is a man, or a wife, who is a woman. A member of a civil union or similar relationship entered into in another state between persons of the same sex is not a spouse.

Sec. 3.402. ECONOMIC CONTRIBUTION.

(a) For purposes of this subchapter, "economic contribution" is the dollar amount of:

(1) the reduction of the principal amount of a debt secured by a lien on property owned before marriage, to the extent the debt existed at the time of marriage;

(2) the reduction of the principal amount of a debt secured by a lien on property received by a spouse by gift, devise, or descent during a marriage, to the extent the debt existed at the time the property was received;

(3) the reduction of the principal amount of that part of a debt, including a home equity loan:

(A) incurred during a marriage;

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- (B) secured by a lien on property; and
  - (C) incurred for the acquisition of, or for capital improvements to, property;
- (4) the reduction of the principal amount of that part of a debt:
- (A) incurred during a marriage;
  - (B) secured by a lien on property owned by a spouse;
  - (C) for which the creditor agreed to look for repayment solely to the separate marital estate of the spouse on whose property the lien attached; and
  - (D) incurred for the acquisition of, or for capital improvements to, property;
- (5) the refinancing of the principal amount described by Subdivisions (1)-(4), to the extent the refinancing reduces that principal amount in a manner described by the appropriate subdivision; and
- (6) capital improvements to property other than by incurring debt.
- (b) "Economic contribution" does not include the dollar amount of:
- (1) expenditures for ordinary maintenance and repair or for taxes, interest, or insurance; or
  - (2) the contribution by a spouse of time, toil, talent, or effort during the marriage.

Sec. 3.403. CLAIM BASED ON ECONOMIC CONTRIBUTION.

- (a) A marital estate that makes an economic contribution to property owned by another marital estate has a claim for economic contribution with respect to the benefited estate.
- (b) The amount of the claim under this section is equal to the product of:
- (1) the equity in the benefited property on the date of dissolution of the marriage, the death of a spouse, or disposition of the property; multiplied by
  - (2) a fraction of which:
    - (A) the numerator is the economic contribution to the property by the contributing estate; and
    - (B) the denominator is an amount equal to the sum of:
      - (i) the economic contribution to the property by the contributing estate;
      - (ii) the equity in the property as of the date of the marriage or, if later, the date of the first economic contribution by the contributing estate; and
      - (iii) the economic contribution to the property by the benefited estate during the marriage.
- (c) The amount of a claim under this section may be less than the total of the economic contributions made by the contributing estate, but may not cause the contributing estate to owe funds to the benefited estate.
- (d) The amount of a claim under this section may not exceed the equity in the property on the date of dissolution of the marriage, the death of a spouse, or disposition of the property.
- (e) The use and enjoyment of property during a marriage for which a claim for economic contribution to the property exists does not create a claim of an offsetting benefit against the claim.

Sec. 3.404 APPLICATION OF INCEPTION OF TITLE RULE; OWNERSHIP INTEREST NOT CREATED.

- (a) This subchapter does not affect the rule of inception of title under which the character of property is determined at the time the right to own or claim the property arises.
- (b) The claim for economic contribution created under this subchapter does not create an ownership interest in property, but does create a claim against the property of the benefited estate by the contributing estate. The claim matures on dissolution of the marriage or the death of either spouse.

Sec. 3.405 MANAGEMENT RIGHTS.

This subchapter does not affect the right to manage, control, or dispose of marital property as provided by this chapter

Sec. 3.406. EQUITABLE LIEN.

- (a) On dissolution of a marriage, the court shall impose an equitable lien on property of a marital estate community or separate property to secure a claim for economic

contribution in that property by another marital estate.

(b) On the death of a spouse, a court shall, on application for a claim of economic contribution brought by the surviving spouse, the personal representative of the estate of the deceased spouse, or any other person interested in the estate, as defined by Section 3, Texas Probate Code, impose an equitable lien on the property of a benefited marital estate to secure a claim for economic contribution by a contributing marital estate.

(c) Subject to homestead restrictions, an equitable lien under this section may be imposed on the entirety of a spouse's property in the marital estate and is not limited to the item of property that benefited from an economic contribution.

Sec. 3.407. OFFSETTING CLAIMS.

The court shall offset a claim for one marital estate's economic contribution in a specific asset of a second marital estate against the second marital estate's claim for economic contribution in a specific asset of the first marital estate.

Sec. 3.408. CLAIM FOR REIMBURSEMENT.

(a) A claim for economic contribution does not abrogate another claim for reimbursement in a factual circumstance not covered by this subchapter. In the case of a conflict between a claim for economic contribution under this subchapter and a claim for reimbursement, the claim for economic contribution, if proven, prevails.

(b) A claim for reimbursement includes:

(1) payment by one marital estate of the unsecured liabilities of another marital estate; and

(2) inadequate compensation for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse.

(c) The court shall resolve a claim for reimbursement by using equitable principles, including the principle that claims for reimbursement may be offset against each other if the court determines it to be appropriate.

(d) Benefits for the use and enjoyment of property may be offset against a claim for reimbursement for expenditures to benefit a marital estate on property that does not involve a claim for economic contribution to the property.

Sec. 3.409. NONREIMBURSABLE CLAIMS.

The court may not recognize a marital estate's claim for reimbursement for:

(1) the payment of child support, alimony, or spousal maintenance;

(2) the living expenses of a spouse or child of a spouse;

(3) contributions of property of a nominal value;

(4) the payment of a liability of a nominal amount; or

(5) a student loan owed by a spouse.

Sec. 3.410. EFFECT OF MARITAL PROPERTY AGREEMENTS.

A premarital or marital property agreement, whether executed before, on, or after September 1, 1999, that satisfies the requirements of Chapter 4 is effective to waive, release, assign, or partition a claim for economic contribution under this subchapter to the same extent the agreement would have been effective to waive, release, assign, or partition a claim for reimbursement under the law as it existed immediately before September 1, 1999, unless the agreement provides otherwise.

<sup>81</sup> See JOHN J. SAMPSON ET EL., *supra* note 5 at 38-39.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See TEX. FAM. CODE ANN. *supra* note 80, §§ 3.402, 3.406.

<sup>88</sup> See TEX. FAM. CODE ANN. *supra* note 80, §§ 3.401(3) & 3.403(b)(1).

<sup>89</sup> See TEX. FAM. CODE ANN. *supra* note 80, § 3.403 (b) (2) (B) (ii), (iii).

<sup>90</sup> See TEX. FAM. CODE ANN. *supra* note 80, § 3.402.

<sup>91</sup> See TEX. FAM. CODE ANN. *supra* note 80, §§ 3.403, 3.408.

<sup>92</sup> See TEX. FAM. CODE ANN. *supra* note 80, § 3.402 (mortgage reduction, home equity loan reduction, separate property loan reduction, refinancing payments, and capital improvements).

<sup>93</sup> *Id.*

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<sup>94</sup> See TEX. FAM. CODE ANN. *supra* note 80, § 3.403.

<sup>95</sup> See JOHN J. SAMPSON ET EL., *supra* note 5, at 39.

<sup>96</sup> See TEX. FAM. CODE ANN. *supra* note 80, § 3.408.

<sup>97</sup> See TEX. FAM. CODE ANN. *supra* note 80, § 3.404.

<sup>98</sup> See Jensen v. Jensen, 665 S.W.2d 107, 109 (Tex. 1984) ([Texas] "court ... adopt[s] "reimbursement," rather than "community ownership," theory regarding increase in value during marriage of property owned by a spouse prior to marriage, with effect that community is to be reimbursed for value of time and effort expended by either or both spouses to enhance separate estate of [the other] ...).

<sup>99</sup> See TEX. FAM. CODE ANN. *supra* note 80 § 3.408 (b) (2). (the 1999 amendment only applied to financial contributions and did not apply to reimbursement for the community's time, toil, and labor that was contributed to the separate property. Consequently, the case of Jensen v. Jensen, 665 S.W.2d 107 (Tex. 1984), still controlled and a claim for reimbursement with this cause of action would not succeed).

<sup>100</sup> See TEX. FAM. CODE ANN. *supra* note 80 § 3.406.

<sup>101</sup> Ketch v. Weaver Bros., 261 S.W. 380, 383 (Tex.Civ.App. -Fort Worth 1924), *rev'd on other grounds*, Ketch v. Weaver Bros., 276 S.W. 676 (Tex.Comm'n.App. 1925, holding approved)(giving the definition of an equitable lien).

<sup>102</sup> See TEX. FAM. CODE ANN. *supra* note 80, § 3.407.

<sup>103</sup> See TEX. FAM. CODE ANN. *supra* note 80, § 3.406.

<sup>104</sup> *Id.*

<sup>105</sup> Kimsey v. Kimsey, 965 S.W. 2d 690,697 (Tex. App.-El Paso, 1998 no pet. denied),Day v. Day, 610 S.W.2d 195, 198 (Tex.Civ.App.--Tyler 1980, writ ref'd n.r.e.), *see also* TEX. FAM. CODE ANN. *supra* note 80, § 3.406. (in Kimsey the court held that an equitable lien arises when the divorce decree is rendered, and if not paid, the party awarded the judgment secured by the equitable lien has the right to foreclose and sell the property).

<sup>106</sup> Kimsey, 965 S.W. 2d at 698, Day, 610 S.W. 2d at 198.

<sup>107</sup> Kimsey, 965 S.W. 2d at 698.

<sup>108</sup> See TEX. FAM. CODE ANN. *supra* note 80, § 3.407, *see also* TEX. FAM. CODE ANN. *supra* note 80, § 3.406.

<sup>109</sup> Kimsey, 965 S.W. 2d at 698.

<sup>110</sup> See STEWART W. GAGNON, STATUTORY REIMBURSEMENT: THE EQUITABLE ENIGMA (USUAL & UNUSUAL APPLICATIONS OF THE CLAIM FOR ECONOMIC CONTRIBUTION STATUTE), ADVANCED FAMILY LAW COURSE 4(2001) (Mr. Gagnon examines the new statute and its practical application).

<sup>111</sup> *Id.*

<sup>112</sup> Kimsey, 965 S.W. 2d at 698.

<sup>113</sup> Wilkerson v. Wilkerson, 992 S.W. 2d 719, 723 (Tex. App.-Austin, no writ). (the court may impress an equitable lien against one spouse's separate property to secure the other spouse's right of reimbursement for community improvement to that property, but may not impose an equitable lien on a spouse's separate property to secure a just and right division of the community property).

<sup>114</sup> *Id.* at 724.

<sup>115</sup> See TEX. FAM. CODE ANN. *supra* note 80, § 3.407, *see also* TEX. FAM. CODE ANN. *supra* note 80, § 3.406.

<sup>116</sup> *Id.* *see also* TEX. FAM. CODE ANN. *supra* note 80 § 3.407.

<sup>117</sup> *Id.*

<sup>118</sup> Eggemyer, 554 S.W. 2d at 137, Cameron, 641 S.W. 2d at 210.

<sup>119</sup> See STEWART W. GAGNON & CHRISTINA H. PATIERNO, *supra* note 31 at 329.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

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<sup>123</sup> *Id.* at 331.  
<sup>124</sup> *Id.*  
<sup>125</sup> *Id.*  
<sup>126</sup> *Id.* at 332  
<sup>127</sup> TEX. FAM. CODE ANN. *supra* note 11 § 7.001.  
<sup>128</sup> Powell v. Powell, 822 S.W. 2d 181 (Tex App-- Houston (1st Dist) writ denied, 1991), (trial court cannot divest spouses of rights to separate property, whether real or personal).  
<sup>129</sup> *Id.*  
<sup>130</sup> *Id.*  
<sup>131</sup> Kimsey, 965 S.W. 2d at 698.  
<sup>132</sup> *Id.*  
<sup>133</sup> See TEX. FAM. CODE ANN. *supra* note 80, § 3.407, see also TEX. FAM. CODE ANN. *supra* note 80, § 3.406.  
  
<sup>134</sup> Eggemyer, 554 S.W. 2d at 140.  
<sup>135</sup> *Id.*  
<sup>136</sup> *Id.*  
<sup>137</sup> *Id.* at 141-142.  
<sup>138</sup> *Id.*  
<sup>139</sup> *Id.*  
<sup>140</sup> Eggemyer, 554 S.W. 2d at 147-148 (Steakley, J., dissenting).  
<sup>141</sup> *Id.*  
<sup>142</sup> *Id.*