

THE UNSECURED TEXAS CREDITOR’S POST-DIVORCE CLAIM TO
FORMER COMMUNITY PROPERTY

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I. INTRODUCTION

Can the unsecured creditor of one Texas spouse reach community property awarded to the other spouse at divorce? The question is simple, and the answer can be important to divorcing couples and their creditors. Unfortunately, Texas law provides no clear answer. The Supreme Court of Texas has not spoken directly to the point for more than a century.¹ During that time, marital property law and the rights of married women have changed radically.² Nonetheless, most Texas courts and commentators still assume an unsecured creditor can reach any property after divorce the creditor could have reached before divorce, even if the property has been awarded to the non-liable spouse by agreement or court order.³

This Article proposes a better-grounded answer. A divorce decree should cut off whatever right an unsecured creditor might have to satisfy a judgment from any particular item of community property, unless the creditor takes effective legal action before divorce, or unless the divorce decree defrauds the creditor—a tough proposition to prove.

Part II of this Article describes Texas law governing the liability of married persons and marital property for debts, as well as the general scheme of property division at divorce. Part III reviews and critiques case law touching on post-divorce rights of pre-divorce creditors and examines how other community property jurisdictions deal with the issue. Part IV explains why, absent fraud, an unsecured creditor's inchoate "rights" to community property should not survive a modern Texas divorce decree.

¹ See *Richey v. Hare*, 41 Tex. 336, 336–41 (Tex. 1874).

² See, e.g., Joseph W. McKnight, *Texas Community Property Law: Conservative Attitudes, Reluctant Change*, 56 LAW & CONTEMP. PROBS. 71 (1993).

³ See generally *infra* notes 73–77 and accompanying text.

II. GENERAL PRINCIPLES OF MARITAL LIABILITY TO CREDITORS

A. *The Texas Community Property System*

The state constitution sets out the basic framework for Texas marital property rights.⁴ Property owned before marriage or acquired after marriage by gift or inheritance is separate.⁵ By implication, everything else is community property.⁶ A comparatively recent series of constitutional amendments also lets couples create separate or community property by agreement.⁷

The state legislature apparently cannot alter the constitutionally defined categories of separate property.⁸ However, judicial decisions embellish the basic definitions.⁹ Notably, income from Texas separate property becomes community property,¹⁰ but a swap or “mutation” of separate property retains the original separate-property status.¹¹

⁴ See TEX. CONST. art. XVI, § 15.

⁵ See *id.*

⁶ See, e.g., *Arnold v. Leonard*, 273 S.W. 799, 801 (Tex. 1925) (stating, inter alia, that “[i]f the method [of acquisition] be by gift, devise, or descent to the wife, then the Constitution makes the property belong to the wife’s separate estate. If the method of acquiring during marriage be different, then the property falls without the class of separate estate of the wife, as fixed by the Constitution.”).

⁷ See Tex. H.R.J. Res. 13, § 1, 50th Leg., R.S., 1947 Tex. Gen. Laws 1189, 1189; Tex. H.R.J. Res. 54, § 1, 66th Leg., R.S., 1979 Tex. Gen. Laws 3227, 3227; Tex. S.J. Res. 35, § 1, 70th Leg., R.S., 1987 Tex. Gen. Laws 4114, 4144; Tex. H.R.J. Res. 36, § 1, 76th Leg., R.S., 1999 Tex. Gen. Laws 6607, 6607.

⁸ See, e.g., *Arnold*, 273 S.W. at 801–02. This writer has suggested elsewhere that the *Arnold* line of reasoning is suspect. See, e.g., James W. Paulsen, *Acquiring Separate Property on Credit: A Review and Proposed Revision of Texas Marital Property Doctrine*, 37 ST. MARY’S L.J. 675, 718–20 (2006). That issue is beyond the scope of this article.

⁹ See, e.g., *De Blane v. Hugh Lynch & Co.*, 23 Tex. 25, 29 (1859).

¹⁰ See *id.* This is in keeping with Spanish doctrine but contrary to the rule in California and some other American community property jurisdictions. See generally McKnight, *Texas Community Property Law*, *supra* note 2, at 73.

¹¹ See, e.g., *Dixon v. Sanderson*, 10 S.W. 535, 536 (Tex. 1888) (stating that “[p]roperty purchased with money, the separate property of husband or wife, or taken in exchange for the separate property of either, becomes the separate property of the person whose money purchases or whose property is given in exchange”); *Arnold*, 273 S.W. at 803 (stating that “property remains separate through all mutations and changes”).

B. Management and Liability During Marriage

In Texas, the liability of married persons and their property to creditors is not derived from fundamental law. Though the state constitution is said to define the categories of marital property,¹² that document also says: “laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property”¹³ The Supreme Court of Texas has ruled that this language gives the legislature broad authority to alter management rights and define liability to third parties.¹⁴

By statute, one spouse is personally responsible for the other’s obligations only if the debt is for “necessaries” or if one spouse is acting as the other’s agent.¹⁵ The “necessaries” doctrine, which flows from the duty of mutual support,¹⁶ is said to be virtually “a dead-letter in today’s society.”¹⁷ But at least in theory, a creditor who furnishes one spouse the

¹² See, e.g., *Arnold*, 273 S.W. at 801.

¹³ TEX. CONST. art. XVI, § 15.

¹⁴ See, e.g., *Arnold*, 273 S.W. at 803–05. *Arnold v. Leonard* is best known for its ruling that a statute purporting to make income from the wife’s separate property her separate property violates the state constitution. However, the court found other statutory provisions that declared the spouses’ separate property (and earnings from that property) exempt from liability for the torts of the other spouse to be “separate and distinct” from the constitutionally objectionable provisions. *Id.* at 804. The Supreme Court of Texas observed the state’s long history of making the wife’s separate property and community property subject to the husband’s management and concluded:

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

Id.

¹⁵ TEX. FAM. CODE ANN. § 3.201(a) (West 2006).

¹⁶ *Id.* § 2.501.

¹⁷ JOHN J. SAMPSON ET AL., SAMPSON & TINDALL’S TEXAS FAMILY CODE ANNOTATED § 2.501 *comment* (Aug. 2006 ed.); accord Harry L. Tindall, *Spousal Liability*, State Bar of Tex. Prof. Dev. Prog., Advanced Creditors’ Rights Law Course B, B-3 (1985) (explaining that the “necessaries” rules “are almost completely irrelevant in the real-world, i.e., Safeway won’t sell food on credit.”).

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necessities of life can collect from the other spouse,¹⁸ possibly on a limited or implied agency theory.¹⁹

The Supreme Court of Texas muddied the waters with “loose language”²⁰ in *Cockerham v. Cockerham*,²¹ a case decided only six years after the legislature enacted the state’s modern management and liability scheme. In *Cockerham*, the Supreme Court of Texas intuited the husband’s implied consent to the wife’s business debts from facts that were, at best, ambiguous.²² The state legislature disapproved *Cockerham*’s result²³ by adding a clarifying sentence to the statute: “A spouse does not act as an agent for the other spouse solely because of the marriage relationship.”²⁴

¹⁸ See, e.g., *Daggett v. Neiman-Marcus Co.*, 348 S.W.2d 796, 800 (Tex. Civ. App.—Houston 1961, no writ); *La Mode Ready to Wear, Inc. v. Wallace*, 52 S.W.2d 276, 277 (Tex. Civ. App.—El Paso 1932, no writ).

¹⁹ See, e.g., *Gabel v. Blackburn Operating Corp.*, 442 S.W.2d 818, 820 (Tex. Civ. App.—Amarillo 1969, no writ) (explaining that “[a]lthough a marriage relationship does not make the wife a general agent of the husband, it does confer upon the wife agency to purchase and contract for necessities for which the husband will be liable” (internal citation omitted)); cf. Andrea B. Carroll, *The Superior Position of the Creditor in the Community Property Regime: Has the Community Become a Mere Creditor Collection Device?*, 47 SANTA CLARA L REV. 1, 47 (2007) (arguing that “[d]octrines of agency, well-accepted in every state no matter its marital property scheme, could just as competently handle the problem with less theoretical discord” and suggesting that “such authority, particularly implied, would likely exist for debts incurred for the shelter, food, and clothing of the spouses” (footnote omitted)).

²⁰ J. THOMAS OLDHAM, TEXAS MARITAL PROPERTY RIGHTS 312 (4th ed. 2003) (referring to the court’s use of the phrase “community debt”).

²¹ 527 S.W.2d 162 (Tex. 1975).

²² *Id.* at 171.

²³ The relationship between the *Cockerham* decision and the additional statutory language is widely recognized. See, e.g., Tom Featherston & Allison Dickson, *Marital Property Liabilities: Dispelling the Myth of Community Debt*, TEX. B.J., Jan. 2010, at 16, 19 (stating that “amendments to the Texas Family Code in 1987 should be interpreted as ending the confusion created by the *Cockerham* opinion” and adding “[t]his legislation was intended to place the determination of marital property liability where it belongs—the statutory plan of Section 3.202—and not misguided dicta in an outdated court opinion”); Oldham, *supra* note 20, at 313 (“After *Cockerham*, some courts concluded that a debt incurred by one spouse during marriage was a ‘community debt,’ which to these courts meant it was a joint liability; in other words, both spouses (and all of their property) were personally liable for the contract debts of either spouse incurred during marriage. Creditors were, of course, delighted with this turn of events In an attempt to clarify this situation, Section 3.202 of the Family Code was amended, and Section 3.201 was added. This appears to have worked.”) (internal citation omitted); SAMPSON & TINDALL, *supra* note 17, § 3.201 comment.

²⁴ TEX. FAM. CODE ANN. § 3.201(c) (West 2006).

Put simply, except for necessities, one Texas spouse is personally liable for the other spouse's debts only if two unmarried people would be equally liable under similar circumstances.²⁵

Property liability rules are more complex. The drafters of the Texas Family Code could have said something simple, like: "A spouse's separate property and all community property is liable for that spouse's debts." They did not. Instead, for management and liability purposes only, lawmakers created three classes of community property: the husband's sole-management community property, the wife's sole-management community property, and the couple's joint-management community property.²⁶ This divided community property management scheme is unique to Texas.²⁷

The statutory definitions of these management categories are somewhat counterintuitive. The Texas Family Code does not generally define the spouse's sole- and joint-management community property by reference to title or actual management.²⁸ Rather, unless otherwise agreed, each

²⁵The true rule of personal liability for the acts of one's spouse may now be closer to the language of the original *Cockerham* dissent:

Except for the liability for necessities which each spouse may owe for the support of the other spouse, the separate property of a spouse should be subjected to liability for debts of the other spouse only to the extent and under the same rules of law that would make a non-family party liable.

Cockerham, 527 S.W.2d at 175 (Reavley, J., dissenting).

²⁶TEX. FAM. CODE ANN. § 3.102.

²⁷See, e.g., Elizabeth De Armond, *It Takes Two: Remodeling the Management and Control Provisions of Community Property Law*, 30 GONZ. L. REV. 235, 237 (1995) (stating that "eight of nine community property states have instituted a system of autonomous decisionmaking for the vast majority of transactions with co-owned marital property," naming Texas as the exception (footnote omitted)); McKnight, *Texas Community Property Law*, *supra* note 2, at 73 (stating that "Texas's concepts of sole and joint management of community property are built on the notion of two communities dating from 1913" and that "[n]one of the other eight community property states has followed Texas in removing gender discrimination from the rules of management in this way." (footnotes omitted) (citing WILLIAM A. REPPY, JR. & CYNTHIA SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 14-1 (3d ed. 1991))).

²⁸This discussion should not be taken as suggesting that the legislature's definitions are entirely rational or consistent. For example, after the 1999 constitutional amendment that first authorized spouses to create community property by agreement, the legislature amended the Family Code to provide, *inter alia*, that community property so created would be subject to "the sole management, control, and disposition of the spouse in whose name the property is held." TEX. FAM. CODE ANN. § 4.204(1). Taken in isolation, this and related provisions in Section 4.204 could be read to create a different management scheme for community property created by

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spouse's sole-management property is defined as community property that would have been that spouse's own property if the couple never had married.²⁹ So, if the husband's paychecks are the only source of funds in a checking account on which only the wife has signing authority, the account is the husband's sole-management community property, even though no bank would honor his signature on a check.

Joint-management community property is sole-management property commingled beyond segregation³⁰ or community property of unprovable origin.³¹ A checking account into which both spouses' paychecks have been deposited over a long period of time, as well as anything bought with checks drawn on that account, would be likely candidates for joint-management community property status.

One important qualification is that third parties without notice can rely on appearances.³² So if an item of property is titled in one spouse's name, it can be presumed subject to that spouse's sole management, so far as the outsider is concerned.³³

The Texas Family Code's general rule for property liability is that all property designated as subject to one spouse's "management"—that is, all that spouse's separate property and sole-management community property, as well as all joint-management community property—is liable for that spouse's debts.³⁴ The non-involved spouse's separate property and that spouse's sole-management community property is safe.³⁵ If one spouse commits a tort during marriage, the statutory net widens.³⁶ All the tortfeasor spouse's separate property and all community property is at risk;³⁷ only the non-tortfeasor spouse's separate property is safe.³⁸

agreement than for "naturally occurring" community property. Section 4.204, however, begins with the caveat: "Except as specified in the agreement to convert the property and as provided by Subchapter B, Chapter 3" The referenced subchapter sets out the distinctly different and generally applicable management scheme just described in the text. Accordingly, one might reasonably wonder whether Section 4.204 has any effect at all—or even whether the Texas Legislature reviewed the general management scheme before adding the new statutes.

²⁹ *Id.* § 3.102(a) (in general); *id.* § 3.102(c) (agreements).

³⁰ *Id.* § 3.102(b).

³¹ *Id.* § 3.102(c).

³² *Id.* § 3.104(b).

³³ *Id.*

³⁴ *See id.* § 3.202.

³⁵ *Id.* § 3.202(a), (b).

³⁶ *Id.* § 3.202(d).

³⁷ *Id.*

An example might help. Both husband and wife work. They deposit their earnings into separate bank accounts. They inherit their respective parents' homes, which they maintain as rental properties. They also pool some of their income to buy a vacation home, taking title in both names. They do not keep any records or otherwise recall how much of each spouse's earnings went into the purchase price of the vacation home. The rent houses are each spouse's respective separate property because they are inherited. The bank accounts are their respective sole-management community property because each would have owned the funds on deposit if single. The vacation home is joint-management community property because it was bought with commingled funds.

Now suppose the husband signs and later defaults on a promissory note. The husband's inherited rent house, his bank account, and the vacation home are exposed to the creditor's post-judgment collection efforts. The wife's bank account (sole-management community property) and inherited rent house (separate property) are not.³⁹ However, if the husband is judged negligent in an auto accident, his inherited rent house, the vacation home, and both bank accounts are placed at risk. Only the wife's inherited rent house (her separate property) is safe.

C. *Liability at Marital Dissolution*

The liability rules just outlined apply during the existence of an intact marriage. When the marriage ends, different considerations come into play.⁴⁰ Because applicable rules differ, death and divorce are discussed separately.

1. Death

Death dissolves the marital community.⁴¹ Accordingly, the surviving spouse's community half-interest vests immediately.⁴² The treatment of

³⁸ See *id.* § 3.202(a).

³⁹ However, if the wife co-signs on the note, these items also would be at risk. That is so not because of marital property principles, but because she personally would be liable "by other rules of law." *Id.*

⁴⁰ See *id.* § 7.006.

⁴¹ See, e.g., TEX. PROB. CODE ANN. § 45 (West 2003); *Burton v. Bell*, 380 S.W.2d 561, 565 (Tex. 1964).

⁴² See TEX. PROB. CODE ANN. §§ 37, 45.

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debts is not so easily described.⁴³ The Texas Probate Code provides that “the community estate” of the deceased spouse “passes charged with the debts against it.”⁴⁴ Read literally and in isolation, this language would limit unsecured creditors of the dead spouse only to the decedent’s half of “the community estate”—that is, the entire community estate, not just the two community property management categories available to creditors during life.⁴⁵ Depending on the particular family’s circumstances, an unsecured creditor might fare better or worse after the debtor spouse’s death.⁴⁶

In 1971, the state legislature to some extent addressed this anomaly.⁴⁷ Lawmakers supplemented the Probate Code’s general provision for creditor rights with additional language that accommodated the Texas Family Code’s then-recent divided management language.⁴⁸ Section 156 of the Texas Probate Code states:

The community property subject to the sole or joint management, control, and disposition of a spouse during marriage continues to be subject to the liabilities of that spouse upon death. In addition, the interest that the

⁴³The massively simplified discussion that follows should not be taken as any indication of the difficulties a creditor actually may encounter when trying to navigate the intricate and complex provisions of the Texas Probate Code. For those interested in pursuing the subject further, this writer recommends HELEN BISHOP JENKINS, *ADMINISTRATION OF ESTATES AND GUARDIANSHIPS IN TEXAS* 123–68 (2006).

⁴⁴TEX. PROB. CODE ANN. § 45.

⁴⁵*Cf.* 17 M.K. WOODWARD & ERNEST E. SMITH III, *TEXAS PRACTICE: PROBATE AND DECEDENTS’ ESTATES* § 542 (1971) (referencing Section 45 and commenting that “[a] similar concept is found in what is perhaps the most basic of our probate statutes, Section 37 of the Code. The share owned by the surviving spouse does not pass, but is retained, and it is believed that it will continue to be exempt after dissolution of the marriage if exempt during the marriage.”).

⁴⁶For example, assuming only the husband worked outside the home and could prove all community property traced to those earnings, the husband’s contract creditors could reach all community property during life. However, assuming that only the husband’s one-half ownership interest passes subject to those debts, such a creditor would lose half of all property that would have been available to satisfy a judgment secured during that spouse during his life. Conversely, a creditor with an unsecured debt against the wife could not have reached any community property during life (because it is all the husband’s sole-management property in this scenario), but could reach one-half of that property at the wife’s death.

⁴⁷TEX. PROB. CODE ANN. § 156.

⁴⁸*See, e.g.,* William E. Remy, *Effective Dates of Amendments to the Probate Code and a Brief Summary of the Changes Made*, TEX. B.J., Oct. 1971, at 885, 890 (stating that the addition of Section 156 “was necessary in order to comply with the changes that have been made in the Family Code”).

deceased spouse owned in any other nonexempt community property passes to his or her heirs or devisees charged with the debts which were enforceable against such deceased spouse prior to his or her death.⁴⁹

While this article focuses on divorce, one aspect of Probate Code Section 156 bears mention. While Section 156 generally replicates the Family Code's management categories,⁵⁰ the amended Probate Code does alter the Family Code's liability scheme to some extent. Depending on the particular circumstances, an unsecured creditor might have significantly more—or less—property available to satisfy a judgment after death than during the debtor's lifetime.

Again, examples might help. Assume the husband is sole signer on an unsecured car loan. During the husband's married life, the lender can reach all his sole-management and joint-management community property, but not his wife's sole-management community property.⁵¹ After the husband dies, creditors still can reach his former sole-management community property, as well as all joint-management community property.⁵² However, Section 156 also says the husband's half-interest in "any other nonexempt community property"—that is, the wife's former sole-management community property—is now subject to the contract debt,⁵³ even though that half-interest would not have been at risk during the husband's life.⁵⁴

This reading of the statute has been questioned by able commentators.⁵⁵

⁴⁹TEX. PROB. CODE ANN. § 156.

⁵⁰TEX. FAM. CODE ANN. § 3.102 (West 2006).

⁵¹*See id.* § 3.202(c).

⁵²*See* TEX. PROB. CODE ANN. § 156.

⁵³*Id.*

⁵⁴*See* TEX. FAM. CODE ANN. § 3.202(b)(2); accord 39 ALOYSIUS A. LEOPOLD, TEXAS PRACTICE: MARITAL PROPERTY AND HOMESTEADS § 16.20, at 27 (1993) (stating that "[t]he statutory liability of the deceased spouse is increased by the Probate Code to include that spouse's interest in the sole management community property of the surviving spouse, even though that property is not liable under section 5.61 of the Texas Family Code").

⁵⁵Professor Tom Featherston and Lynda Still have asked: "Did the legislature really intend to impose at least partial liability on an asset of one spouse which was exempt from certain debts during the marriage just because the other spouse died?" Thomas M. Featherston, Jr. & Lynda S. Still, *Marital Liability in Texas . . . Till Death, Divorce, or Bankruptcy Do They Part*, 44 BAYLOR L. REV. 1, 34 (1992). They state that "[t]here does not appear to be a definitive answer" and lay out an argument for non-liability, based on other sections of the Probate Code, but conclude: "[T]he probable result is that the deceased spouse's one-half interest in the surviving spouse's special community property is available to satisfy the decedent's creditors before it passes to the

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Nonetheless, the result just described seems to be what the legislature intended.⁵⁶

By contrast, the Texas Probate Code may significantly disadvantage a tort creditor.⁵⁷ Assume the husband dies from injuries received in an auto accident in which he ultimately is judged at fault. Had he lived, the creditor could have seized all non-exempt community property, however categorized.⁵⁸ Because he died, though, Section 156 shields half the wife's

decedent's heirs or devisees." *Id.* For reasons that will be stated momentarily, this writer concurs.

⁵⁶Though Section 156 was enacted well before the Texas Legislature started to record testimony and floor debate, an unusually good "legislative history" of this particular provision exists. Extensive changes to the Probate Code were enacted at the 1971 legislative session. Those changes were sponsored by the State Bar of Texas and were of interest to many attorneys. Accordingly, William Remy of San Antonio, a council officer of the State Bar's Section of Real Estate, Probate and Trust Law, summarized the legislation in two articles. *See* William E. Remy, *Legislative Item: Proposed Amendments to the Probate Code*, TEX. B.J., Dec. 1970, at 956; Remy, *supra* note 48.

Mr. Remy devoted another article entirely to Section 156. *See generally* William E. Remy, *The Effect of the 1971 Amendments to the Probate Code on Control of Community Property After the Death of a Spouse and for the Payment of Community Debts*, TEX. B.J., Aug. 1971, at 683. In that article, Remy stated that Professor M.K. Woodward of the University of Texas Law School "testified substantially as follows" before the relevant House and Senate committees:

Questions of fundamental policy are presented when one spouse dies The question is whether debts contracted by H alone, without W's joinder, should be subject to payment out of that class of community property consisting of W's earnings and the revenues from her separate property. A variety of solutions can be offered and a reasonable argument made in favor of each. One is that even though all of this special class of community property was exempt from H's debts during his lifetime, his death destroys the exemption entirely, and all of it, including the one-half owned by W, becomes liable for such debts when H dies. A second extreme is a provision continuing the exemption to all of this class of community property, including the part of it owned by H, with the result that H's heirs or devisees are preferred over his creditors. A third and middle course is the one recommended. It would continue the exemption with respect to the one-half of this category of community property owned by W, but would subject H's one-half to the claims of his creditors.

Id. at 685. Remy ended the article by stating: "The Texas Legislature adopted the recommendations made by Professor Woodward." *Id.* For a more direct recital of Professor Woodward's views on the subject, *see* 17 M.K. WOODWARD & ERNEST E. SMITH III, TEXAS PRACTICE: PROBATE AND DECEDENTS' ESTATES § 542 (1971).

⁵⁷TEX. PROB. CODE ANN. § 156.

⁵⁸*See* TEX. FAM. CODE ANN. § 3.202(a), (d).

former sole-management community property from her husband's tort liability.⁵⁹

2. Divorce

In marked contrast to the detailed statutory language governing property management and liability during marriage and at death, the Texas Family Code does not directly address creditors' rights at divorce.⁶⁰ The court must "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."⁶¹ A divorcing couple also may divide their property by agreement.⁶² Such an agreement binds the court unless it finds the terms are not "just and right."⁶³

With but a few other exceptions, and an occasional opportunity to award alimony—or as Texas calls it, "spousal maintenance"⁶⁴—the court's authority is circumscribed only by case law. The most significant restriction is that a divorce court cannot constitutionally award one spouse's separate property to the other.⁶⁵

Because no statute directly addresses the rights of creditors at divorce, practitioners and courts must turn to case law. This article now does so as well.

III. POST-DIVORCE RIGHTS OF UNSECURED CREDITORS: CURRENT VIEWS

A. *General Principles of Law*

The intersection between debt and divorce can be complicated, but judicial decisions have worked out most of the basics. A divorce court should divide both debts and assets, and should take debt into account when

⁵⁹ Of course, if a tort creditor actually reduces a claim to judgment before death, this problem would not arise. *See, e.g.,* Carlton v. Estate of Estes, 664 S.W.2d 322, 323 (Tex. 1983) (per curiam).

⁶⁰ *See* TEX. FAM. CODE ANN. § 7.001–.006.

⁶¹ *Id.* § 7.001.

⁶² *Id.* § 7.006.

⁶³ *Id.* § 7.006(b).

⁶⁴ *See id.* §§ 8.001–.305.

⁶⁵ *See, e.g.,* Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 142 (Tex. 1977).

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dividing assets.⁶⁶ The judge also can make orders—binding between the divorcing couple—that require one spouse to pay the other’s debts,⁶⁷ or to assume full responsibility for a debt jointly incurred.⁶⁸

As a general matter, the divorce court cannot alter a creditor’s substantive rights.⁶⁹ Thus, a secured creditor’s interest in a particular item of property is not affected by divorce.⁷⁰ Nor are an unsecured creditor’s rights against one spouse extinguished just because the divorce court assigns sole responsibility for repayment to the other spouse.⁷¹ Creditors sometimes intervene in divorce proceedings to protect these rights.⁷²

⁶⁶ See, e.g., *Vannerson v. Vannerson*, 857 S.W.2d 659, 673 (Tex. App.—Houston [1st Dist.] 1993, pet. denied) (“The parties’ liabilities are factors to be considered in making a just and right division.”); *Taylor v. Taylor*, 680 S.W.2d 645, 648 (Tex. App.—Beaumont 1984, writ ref’d n.r.e.) (“The trial court, in making a division of the community estate . . . has authority to order the payment or disposition of the community debts.”).

⁶⁷ See *Vannerson*, 857 S.W.2d at 673 (“A divorce court has authority and discretion to impose the entire tax liability of the parties on one spouse.”).

⁶⁸ See, e.g., *Blake v. Amoco Fed. Credit Union*, 900 S.W.2d 108, 112 (Tex. App.—Houston [14th Dist.] 1995, no writ) (stating that a court can “provide that one spouse should pay the debt of the other” but that “the divorce court could not prejudice the creditor’s right to take a judgment against both spouses when dividing responsibility for payment of debts”).

⁶⁹ See, e.g., *Shelton v. Shelton*, No. 01-02-01009-CV, 2003 Tex. App. LEXIS 9466, at *7 (Tex. App.—Houston [1st Dist.] Nov. 6, 2003, no pet.) (mem. op.) (stating that “a trial court, in dividing a community estate, may not disturb or prejudice the rights of a third-party creditor to collect from either of the divorcing parties on a joint obligation”); *Broadway Drug Store of Galveston, Inc. v. Trowbridge*, 435 S.W.2d 268, 269–70 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ) (stating that “[t]he court in a divorce action has no power to disturb the rights which creditors lawfully have against the parties”) (quoting *Swinford v. Allied Fin. Co.*, 424 S.W.2d 298, 301 (Tex. Civ. App.—Dallas 1968, writ dismissed)).

⁷⁰ See, e.g., *Mussina v. Morton*, 657 S.W.2d 871, 873 (Tex. App.—Houston [1st Dist.] 1983, no writ) (holding that absent a valid dispute over the lien or default, a family law court must let a bank commence foreclosure proceedings); *Glasscock v. Citizens Nat’l Bank*, 553 S.W.2d 411, 413 (Tex. Civ. App.—Tyler 1977, writ ref’d n.r.e.) (stating that “the court in a divorce action has no power to disturb the rights which creditors lawfully have against the parties or to award the property to the creditor’s prejudice”).

⁷¹ See, e.g., *Blake*, 900 S.W.2d at 111 (“It is well-settled law in Texas that divorce courts cannot disturb the rights of a creditor to collect from either of the divorcing parties on a joint obligation.”); see also Thomas M. Featherston, Jr. & Amy E. Douthitt, *Changing the Rules By Agreement: The New Era in Characterization, Management, and Liability of Marital Property*, 49 BAYLOR L. REV. 271, 285 (1997) (stating that “such allocation of responsibility does not insulate the nonresponsible spouse from the debts for which such spouse was personally liable to the creditor”).

⁷² For example, *Cockerham* involved the intervention of the trustee of the wife’s bankruptcy estate, representing the wife’s business creditors. See *Cockerham v. Cockerham*, 527 S.W.2d 162,

B. Post-Divorce Property Liability: The Texas “Rule”

While opinions differ,⁷³ the idea that one spouse’s unsecured creditors can reach the same assets after divorce as those creditors could reach beforehand finds support in comparatively recent cases from a majority of the state’s courts of appeals,⁷⁴ as well as comments from respected

164 (Tex. 1975); *see also* Fletcher v. Nat’l Bank of Commerce, 825 S.W.2d 176, 179 (Tex. App.—Amarillo 1992, no pet.) (“A creditor may intervene in a divorce action subject to being stricken out by the court for sufficient cause on the motion of any party.”).

⁷³The discussion that follows focuses on Texas court of appeals decisions that unthinkingly parrot creditor-favoring language that traces to nineteenth-century case law, and by so doing ignore significant amendments to the Texas Constitution in 1948 and 1980, as well as modifications to the Texas management and liability scheme crystalized in adoption of the Texas Family Code in the late 1960s. The writer does not thereby intend to suggest that all Texas courts have ignored ordinary commercial rules and changing concepts of family in their decisions.

One notable early exception is *Security National Bank v. Allen*, 261 S.W. 1057 (Tex. Civ. App.—Amarillo 1924, no writ), discussed in some detail later in this article. *See infra* note 103. More recently, in *Miller v. City Nat’l Bank*, 594 S.W.2d 823 (Tex. Civ. App.—Waco 1980, no writ), the Waco Court of Civil Appeals reversed a trial court judgment that imposed personal liability on an ex-wife for pre-divorce presumptive “community liabilities” incurred by her then-husband. *Id.* at 826. The question of post-divorce continuing liability of property does not seem to have been raised directly, possibly because the bank did not submit a brief. *Id.* at 825. Nonetheless, by emphasizing that the divorce transmuted the couple’s community property into “separate” property, it seems doubtful the court would have approved such an attempt. *See id.* at 826.

Moreover, in addition to this writer, doubts about the vitality of the creditor-favoring doctrine have been expressed by (at least) Professors Joseph McKnight, Thomas Oldham, and William Reppy. Those views will be discussed as appropriate. *See, e.g., infra* notes 128 & 338.

⁷⁴*Mock v. Mock*, 216 S.W.3d 370, 374 (Tex. App.—Eastland 2006, pet. denied) (stating that “community property that was under appellant’s sole or joint management during the marriage may be reached to satisfy debts incurred solely by appellee” and noting “[t]he record does not demonstrate that the community property awarded to appellant did not include property subject to appellee’s sole management or joint management during the marriage”); *Rush v. Montgomery Ward*, 757 S.W.2d 521, 523 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (“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 . . .”); *Villarreal v. Laredo Nat’l Bank*, 677 S.W.2d 600, 607 (Tex. App.—San Antonio 1984, writ ref’d n.r.e.) (stating that “community property reachable by creditors for debts incurred during marriage remains liable after a subsequent divorce . . . and partition of the community estate”); *Mussina v. Morton*, 657 S.W.2d 871, 874 (Tex. App.—Houston [1st Dist.] 1983, no writ) (“The pendency of a divorce does not diminish or limit a creditor’s right to proceed against either or both spouses for payment of community debts incurred prior to the divorce decree.”); *Inwood Nat’l Bank v. Hoppe*, 596 S.W.2d 183, 185 (Tex. Civ. App.—Texarkana 1980, writ ref’d n.r.e.) (“[A] creditor of the community . . . had the right to resort to the entire non-exempt community property, and this right was in no way affected by the

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academicians,⁷⁵ continuing legal education speakers,⁷⁶ practice guides,⁷⁷

divorce decree . . .”); *Glasscock v. Citizens Nat’l Bank*, 553 S.W.2d 411, 413 (Tex. Civ. App.—Tyler 1977, writ ref’d n.r.e.) (“[T]he court in a divorce action has no power to . . . award the property to the creditor’s prejudice . . .”); *Walker v. Walker*, 527 S.W.2d 200, 203 (Tex. Civ. App.—Fort Worth 1975, no writ) (“[A]s to property not exempt, and upon which creditors [without lien] might lawfully levy a writ for the satisfaction of their demands, the court has no power to award same to their prejudice . . .”); *Swinford v. Allied Fin. Co.*, 424 S.W.2d 298, 301 (Tex. Civ. App.—Dallas 1968, writ dism’d, cert. denied, 393 U.S. 923 (1968) (stating, *inter alia*, that “[t]he court in a divorce action has no power to disturb the rights which creditors lawfully have against the parties”); see also *Brister v. Bank of Am., N.A.*, No. 03-00-00610-CV, 2001 Tex. App. LEXIS 5362, at *5–6 (Tex. App.—Austin Aug. 9, 2001, no pet.) (not designated for publication) (quoting *Glasscock*, 553 S.W.2d at 413, for the conclusion that “[t]he court in a divorce action has no power to disturb the rights which creditors lawfully have against the parties,” but in a context in which a personally obligated spouse argued he was relieved from his contract by an assignment of liability in a divorce decree); *Buller v. Beaumont Bank, N.A.*, 777 S.W.2d 763, 771 (Tex. App.—Beaumont 1989) (Brookshire, J., dissenting), *rev’d in part on other grounds*, 806 S.W.2d 223 (Tex. 1991) (“Texas courts have consistently ruled that the community property reachable by the creditors during their marriage remains liable, valid and enforceable after the partition of the community estate . . .”); see also *Williams v. Norwest Bank Mont. N.A. Inv. Mgmt. & Trust*, No. 09-99-096-CV, 1999 Tex. App. LEXIS 6469, at *7 (Tex. App.—Beaumont Aug. 26, 1999, no pet.) (not designated for publication) (citing *Villarreal*, 677 S.W.2d at 607, for the conclusion that “[c]ommunity property reachable by creditors for debts incurred during marriage remains liable after a subsequent divorce of the parties and partition of the community estate”).

⁷⁵See, e.g., ALOYSIUS A. LEOPOLD, 39 TEXAS PRACTICE: MARITAL PROPERTY AND HOMESTEADS § 16.9, at 12 (1993) (“After divorce, the creditors may attempt to reach any property that was subject to satisfaction during the marriage.”); Featherston & Douthitt, *supra* note 71, at 285 (citing *Rush*, 757 S.W.2d at 523, and *Matthews v. Matthews*, 561 S.W.2d 531, 533 (Tex. Civ. App.—Beaumont 1977, no writ), for the conclusion that “the assets that could be used to satisfy a creditor’s claim prior to divorce can still be reached by that creditor after divorce”).

⁷⁶See, e.g., Thomas M. Featherson, Jr., *When the Debtor Is Married or Deceased or the Settlor, Trustee or Beneficiary of a Trust . . .*, State Bar of Tex. Prof. Dev. Prog., Advanced Creditors’ Rights Course E, at E-5 (1996) (stating that “the assets which could be used to satisfy a creditor’s claim prior to divorce can still be reached by that creditor after divorce”); Stewart W. Gagnon, *Handling Debts in a Divorce*, University of Houston CLE, Family Law Practice Seminar, at 6 (2006) (stating that “assets that could have been used to satisfy a creditor’s claim prior to the divorce can still be reached by the creditor after the divorce”); Deborah D. Williamson, *Spousal Liability and Tracing, or “Just the Facts, Ma’am”*, State Bar of Tex. Prof. Dev. Program, Advanced Creditors’ Rights Course Q, Q-27 (1988) (“Community property reachable by creditors for debts incurred during marriage remains liable after a subsequent divorce and partition of the community estate.”).

⁷⁷See, e.g., 1–17 TEXAS FAMILY LAW: PRACTICE AND PROCEDURE B7.05[3] (Matthew Bender 2006) (stating that a “divorce decree’s division of the community estate does not itself prejudice the rights of a creditor to reach community property awarded to either spouse in order to collect on many debts,” and adding: “even after a divorce, a creditor may seek debt repayment

and popular bar review outlines.⁷⁸ These sources, however, shed little light on why such a doctrine ever came to be. For that, it is necessary to exhume some very old case law.

1. The Survival of Antique Doctrine

Much blame for the current confused state of Texas law regarding unsecured creditors' post-divorce rights can be laid at the feet of *Richey v. Hare*.⁷⁹ This early decision was one of the first issued by the newly reconstituted Supreme Court of Texas after the election that marked the effective end of Reconstruction in Texas.⁸⁰ The facts sound almost as if made up for a law school examination.

On April 30, 1873, a creditor (the "Richey" of *Richey v. Hare*) secured a \$365 judgment against G.H. Crutcher.⁸¹ The same day, probably later in the day, G.H. and Jennie Crutcher divorced.⁸² The timing was no coincidence. The Crutchers presented, and the judge approved as part of the divorce decree, their agreement to sell some land held in Mr. Crutcher's name, the proceeds to be divided between the divorcing couple.⁸³ The

personally from either marital partner for many liabilities incurred by one spouse"); TEXAS FAMILY LAW PRACTICE MANUAL § 23.8 (3d ed. 2010) (citing *Broadway Drug Store of Galveston, Inc. v. Trowbridge*, 435 S.W.2d 268, 270 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ), for the conclusion that the court's property award at divorce "cannot prejudice the rights of creditors").

⁷⁸ See, e.g., BARBRI BAR REVIEW, *Community Property—Texas*, at 33–34 (2004) (stating that "[t]he rights of community creditors are not diminished by the parties' divorce" and that to satisfy the obligation "the creditor may reach any assets that could have been reached during the continuation of the marriage . . . even though some of the community assets are awarded to the other spouse in the property division").

⁷⁹ See *Richey v. Hare*, 41 Tex. 336 (1874).

⁸⁰ See, e.g., James R. Norvell, *The Reconstruction Courts of Texas, 1867–1873*, 62 SW. HIST. Q. 141, 156 (1958); George E. Shelley, *The Semicolon Court of Texas*, 48 SW. HIST. Q. 449, 449 (1945).

⁸¹ *Richey*, 41 Tex. at 339.

⁸² The opinion does not specify whether the creditor managed to get the judgment on file before the divorce decree was entered, but that probably is the best way to read the facts. Justice Reeves's opinion does not specify the exact timing of the two judgments, though it does go to some pains to specify that the judgment sale took place before the divorce partition sale. *Id.* at 338. In any event, the timing of the judgment lien was not an issue in litigation. Hare's lawyers apparently conceded that the judgment "attached as a lien on the real estate," *id.* at 337, and the Supreme Court of Texas ruled that the "judgment was a lien on the real estate of the defendant in the county where it was rendered, if not exempt from execution." *Id.* at 340.

⁸³ *Id.* at 338.

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divorce decree described the land as community property homestead.⁸⁴ The creditor, who was looking to the land to satisfy the judgment, agreed with the community property description, but took issue with the homestead assertion.⁸⁵

Five weeks later, the property at issue was sold on the Gainesville courthouse steps—twice.⁸⁶ The sheriff first sold the disputed land to creditor Richey, with proceeds applied against the judgment.⁸⁷ The sheriff then sold the same land to Silas Hare and divided the proceeds between the Crutchers, as provided in the divorce decree.⁸⁸ Hare knew about the first sale.⁸⁹ A trespass to try title suit between pre-divorce creditor Richey and post-divorce purchaser Hare followed.⁹⁰ The trial court ruled for the post-divorce purchaser; the Supreme Court of Texas sided with the pre-divorce creditor.⁹¹

Under the facts, the case was easily decided. Creditor Richey's claim was not unsecured; rather, the creditor's "judgment was a lien on the real estate of the [husband] in the county where it was rendered," assuming the property was not an exempt homestead.⁹² The Supreme Court's opinion painted with a broader brush, though, stating that "[t]he division of property between the husband and wife . . . must be done in subordination to the rights of creditors having claims on the community property, and which may be liable for debts."⁹³

The *Richey* court's expansive language describing the "subordination" of a divorce court's property division order to the "rights" of creditors with "claims" on community property that "may be liable" for debts carried forward into Ocie Speer's influential twentieth-century treatise, *Marital*

⁸⁴ *Id.*

⁸⁵ It is not clear whether the "community property homestead" description came from the court, or was simply suggested by the Crutchers. *See id.* at 338. The creditor offered to prove the property "was not . . . and never had been their homestead," *id.* at 339, and ultimately was given that opportunity. *Id.* at 341.

⁸⁶ *Id.* at 339.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 338–41.

⁹² *Id.* at 340.

⁹³ *Id.* at 340–41.

Rights in Texas.⁹⁴ The narrower factual context that cabined the court's true holding—a creditor's claim already reduced to a judgment lien—was not emphasized.⁹⁵

Richey will be revisited later in this article.⁹⁶ However, two observations are worth making now. First, *Richey* reeks of fraud. While the Crutchers may not have divorced just to avoid paying a \$365 debt, the agreed partition of the disputed land seems designed to prejudice the creditor. The Supreme Court of Texas did not discuss this aspect of *Richey*, with the possible exception of the court's observation: "it cannot be supposed that Crutcher and wife could defeat the payment of this debt by an agreement to divide the community property or its proceeds between themselves."⁹⁷

Second, both the Crutchers' agreement to partition the land and the trial court's approval of that agreement were more dicey in the 1870s than they would be today. While married couples now can divide their community property more or less as they please, such agreements were problematical in the 1870s.⁹⁸ Moreover, when *Richey* was decided, divorce courts generally did not have statutory authority to divest title to real estate.⁹⁹ Hence the Supreme Court of Texas's insistence that the partition "added nothing to the title of Crutcher and wife" and that their respective rights "were as perfect

⁹⁴ See, e.g., 3 SPEER'S MARITAL RIGHTS IN TEXAS § 840 (Edwin Stacey Oakes ed., 4th ed. 1961) [hereinafter SPEER'S MARITAL RIGHTS] (beginning the section on creditors' rights at divorce by stating "[t]he rights of any owner in property, aside from the exempt property, are, in a very important sense, subordinate to the rights of his creditors," citing *Richey*, 41 Tex. at 340, as authority).

⁹⁵ See *id.*

⁹⁶ See *infra* notes 213–227 and accompanying text.

⁹⁷ *Richey*, 41 Tex. at 340.

⁹⁸ It was not until 1890 that the Supreme Court of Texas first decided separated couples could partition their property by agreement, provided the agreement was not "against the policy of the law, and on that account void." *Rains v. Wheeler*, 13 S.W. 324, 326 (Tex. 1890). In particular, the court was concerned with "coercion or other undue influence," and with assuring "the provisions are just and equitable." *Id.* *Rains* is not consistent with later decisions of the Supreme Court of Texas to the effect that an attempt to change community property into separate property by spousal agreement violated the Texas Constitution. See, e.g., *King v. Bruce*, 201 S.W.2d 803, 807 (Tex. 1947).

⁹⁹ See Joseph W. McKnight, *Matrimonial Property*, 27 SW. L.J. 27, 38–39 (1973) (stating that "[u]ntil the supreme court finally resolved the issue in 1960 by holding that only divestiture of separate realty was forbidden, there was great difference of opinion whether community realty was also covered by the ban," adding that "[f]rom an early time the supreme court had allowed partial though not complete divestiture of title to separate realty").

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before the sale as after it was made.”¹⁰⁰ Today, a divorce court would think nothing of making such an order, equal division or otherwise, in the exercise of its “just and right” power over the community estate.¹⁰¹

Richey v. Hare’s prominent treatment in Speer’s treatise assured its continuing vitality well into the twentieth century.¹⁰² *Richey* was not the only important unsecured creditor’s rights decision to issue from Texas appellate courts during this time.¹⁰³ Nonetheless, it makes sense for present

¹⁰⁰ *Richey*, 41 Tex. at 341; cf. *Dorfman v. Dorfman*, 457 S.W.2d 417, 421 (Tex. Civ. App.—Texarkana 1970, no writ) (stating that property division “may be accomplished by any legal device or equitable means, such as partition that does not compel a divestiture of a party’s title to separate real estate, the impress of a lien, or the creation of a trust”).

¹⁰¹ See TEX. FAM. CODE ANN. § 7.001 (West 2006).

¹⁰² SPEER’S MARITAL RIGHTS, *supra* note 94, at 201 n.20 (citing, *inter alia*, *Richey*, 41 Tex. 336).

¹⁰³ The writer does not claim every modern decision favoring unsecured creditors at divorce can be found somewhere in a string of citations tracing back to *Richey*. *Richey* is emphasized in this discussion because it seems to be the principal source of the doctrine, and because *Richey*’s facts suggest productive analysis.

Some decisions that favor unsecured creditors draw support from a 1900 Supreme Court of Texas decision, *Boyd v. Ghent*, 57 S.W. 25 (Tex. 1900), as well as *First Nat’l Bank v. Hickman*, 89 S.W.2d 838 (Tex. Civ. App.—Austin 1935, writ ref’d), a later “writ refused” decision that relied on *Boyd*. See, e.g., *Wood v. Comm’r*, 31 T.C. 528, 534 (1958), *rev’d on other grounds*, 274 F.2d 268 (5th Cir. 1960) (citing *Hickman*, 89 S.W.2d 838); *Steed v. Bost*, 602 S.W.2d 385, 388 (Tex. Civ. App.—Austin 1980, no writ) (citing *Hickman* 89 S.W.2d at 843); *Inwood Nat’l Bank v. Hoppe*, 596 S.W.2d 183, 185 (Tex. Civ. App.—Texarkana 1980, writ ref’d n.r.e.) (citing *Hickman*, 89 S.W.2d 838); *Am. Emp’rs’ Ins. Co. v. Dall. Joint Stock Land Bank*, 170 S.W.2d 546, 550 (Tex. Civ. App.—Dallas 1943, writ ref’d w.o.m.) (citing *Boyd*, 57 S.W. 25, and *Hickman*, 89 S.W.2d at 843).

In *Boyd*, the husband’s creditors properly perfected a judgment lien one day before the couple divorced. *Boyd*, 57 S.W. at 26. The Supreme Court of Texas therefore ruled that the community property passed to the ex-wife charged with the creditors’ liens. *Id.* However, the court further stated that “[t]he judgment . . . was rendered for a community debt . . . , and the land, being their common property, was liable for this debt, and would have been if it had been set apart to the wife in the proceedings for a divorce before the judgment was rendered” *Id.* (emphasis added). Of course, the emphasized part of the court’s statement was dictum, because the creditors had perfected their judgment lien before divorce. See *id.*

The only authority cited by the Supreme Court of Texas to justify the *Boyd* dictum was a 1897 court of civil appeals decision, *Grandjean v. Runke*, 39 S.W. 945 (Tex. Civ. App.—San Antonio 1897, no writ). In *Grandjean*, the husband had incurred debt during marriage. *Id.* at 946. After divorce, the creditors sued both husband and wife. *Id.* *Grandjean* is a cryptic decision, containing only four sentences of legal analysis. See *id.* The San Antonio Court of Civil Appeals did say that because the debt was incurred during marriage, “[u]pon the dissolution of the marriage, [the ex-wife] became jointly liable with her divorced husband for its satisfaction, to the

purposes to skip ahead to the late 1960s, because the 1969 liability provisions of the Family Code and earlier legislation of the same decade were intended to make a clear break with the past; as the principal drafter put it, to “dispose of the accumulation of problems that had arisen under the old statutes.”¹⁰⁴

The most remarkable aspect of case-law developments since the enactment of reform legislation in the 1960s is that there have been no developments worth noting. Despite the drafters’ intent, twentieth-century legislation simply has not influenced court decisions. The point is illustrated by two court of civil appeals decisions, one from each of the

extent of the community property received by her.” *Id.* But the decision ultimately may have hinged on trial error. Because the wife did not secure a statement of facts at trial, the appellate court “conclusively presumed against [her] that every fact necessary to the validity of the judgment which could have been proved under the pleadings was established.” *Id.* So the facts might have established an agreement by the ex-wife to assume some liability, an understanding that the creditors’ forbearance in not pursuing a judgment against the husband before divorce gave rise to a form of estoppel, and so forth.

In a 1924 decision, *Sec. Nat’l Bank v. Allen*, the Amarillo Court of Civil Appeals engaged in similar analysis to distinguish *Grandjean* and *Boyd*. 261 S.W. 1057, 1058–59 (Tex. Civ. App.—Amarillo 1924, no writ). The bank, a creditor of the former husband, sought a personal judgment against the ex-wife or a judgment against community property that had come into her hands through a separation agreement and subsequent divorce. *Id.* at 1057. The Amarillo court rejected the possibility of a personal judgment against the wife because the bank did not prove the debt was for necessities or that the wife was a party to any contract. *Id.* at 1058. The court also rejected the idea that the bank had a lien against the property because there was no proof the lien was perfected against any particular item of property before the separation agreement became effective. *Id.* Nor was there any proof amounting to a fraudulent transfer. *Id.*

While this writer approves the Amarillo court’s reasoning in *Sec. Nat’l Bank v. Allen*, its status as precedent is questionable. A decade or so later, the Austin Court of Civil Appeals pointedly questioned *Allen*. See *Hickman*, 89 S.W.2d at 841. *Hickman* also involved a claim by the ex-husband’s bank creditor against the ex-wife, as well as the former community property in her hands. *Id.* at 838. Unlike the Amarillo court in *Allen*, though, the Austin court regarded the dicta in *Grandjean* and *Boyd* as “correct enunciations of legal principles, deduced from our decisions adjudicating community property rights and liabilities.” *Id.* at 841.

The *Hickman* court also noted that *Allen* “does not appear to have reached the Supreme Court, or to have been cited upon this holding.” *Id.* Comparing this statement and the “no writ” status of *Allen* with the favorable “writ refused” designation in *Hickman*, it is difficult to avoid the conclusion that *Hickman* is closer to the views of the Supreme Court of Texas at that time. See, e.g., THE GREENBOOK: TEXAS RULES OF FORM app. E (Texas Law Review Ass’n ed., 12th ed. 2010) (describing the effect of a post-1927 “writ refused” designation as giving the case “equal precedential value with the Texas Supreme Court’s own opinions”).

¹⁰⁴ Joseph W. McKnight, *Texas Family Code Symposium—Title 1. Husband and Wife*, 5 TEX. TECH L. REV. 281, 381 (1974).

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state's two largest cities, that issued just one year before the legislature codified and expanded management and liability statutes by enacting the Texas Family Code.

Swinford v. Allied Finance Company of Casa View should have been an exceptionally easy and uncontroversial case.¹⁰⁵ Allied Finance was a secured creditor of the Swinfords.¹⁰⁶ Both husband and wife signed the promissory note.¹⁰⁷ The only real question was whether a creditor's lawsuit could proceed against the former wife alone, the ex-husband having filed bankruptcy.¹⁰⁸

For the most part, the Dallas Court of Civil Appeals decision is unexceptional. The court noted then-recent legislation that clarified a married woman's right to make contracts, as well as modified liability statutes.¹⁰⁹ The court also ruled, correctly, that the former wife could be sued to collect on her debts without joining her ex-husband in the lawsuit.¹¹⁰ Unfortunately, the court digressed into an unnecessary discussion of post-divorce property liability.¹¹¹ In the process, the Dallas panel resurrected the "subordinate to the rights of his creditors" language¹¹² and quoted a treatise that still relied on *Richey* for the proposition that community property partitioned at divorce "remains subject to the demands of creditors."¹¹³

Like *Swinford*, the facts in *Broadway Drug Store of Galveston, Inc. v. Trowbridge* compelled an easy result.¹¹⁴ Broadway Drug intervened in the Trowbridges' divorce.¹¹⁵ However, the trial court refused to grant Broadway judgment on its sworn account claim against Mrs. Trowbridge, despite her default.¹¹⁶ Houston's Fourteenth Court of Civil Appeals reviewed recent statutory changes, then reversed and rendered judgment for

¹⁰⁵ 424 S.W.2d 298 (Tex. Civ. App.—Dallas 1968, writ dismissed).

¹⁰⁶ *Id.* at 300.

¹⁰⁷ *Id.* at 301.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 302.

¹¹⁰ *Id.*

¹¹¹ *See id.* at 301.

¹¹² *Id.* at 301.

¹¹³ Compare *id.*, with SPEER'S MARITAL RIGHTS, *supra* note 94, at 201 n.20 (citing, *inter alia*, *Richey v. Hare*, 41 Tex. 336 (1874)).

¹¹⁴ 435 S.W.2d 268 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ).

¹¹⁵ *Id.* at 269.

¹¹⁶ *Id.*

Broadway, as the trial court should have done.¹¹⁷ However, just as in *Swinford*, the court was not content simply to rule on Mrs. Trowbridge's personal liability; rather, the writer launched into a lengthy and unnecessary discussion of post-divorce property liability.¹¹⁸ The Houston court cited *Swinford* and followed the Dallas court's lead by invoking Speer's dated treatise and its summary of the 1874 *Richey* ruling.¹¹⁹ But Justice Sam Johnson did *Swinford* one better: He quoted *Richey* directly, italicizing for emphasis that court's 1874 dictum that division of community property "must be done in subordination to the rights of creditors."¹²⁰

Modern decisions that maintain that community property divided at divorce still is vulnerable to the claims of unsecured creditors commonly cite *Broadway Drug*,¹²¹ *Swinford*,¹²² or both¹²³—thus perpetuating doctrine ultimately derived from the 1874 *Richey* decision. Some courts, however, also point to a post-Family Code decision that actually was examined and commented on by the Supreme Court of Texas.¹²⁴ That decision therefore bears closer examination.

¹¹⁷ See *id.* at 269–70.

¹¹⁸ See *id.* at 270.

¹¹⁹ Compare *id.* at 270, with SPEER'S MARITAL RIGHTS, *supra* note 94, at 201 n.19 (citing *Richey v. Hare*, 41 Tex. 336 (1874)).

¹²⁰ *Broadway Drug*, 435 S.W.2d at 270 (quoting *Richey*, 41 Tex. at 341).

¹²¹ See *Anderson v. Royce*, 624 S.W.2d 621, 623 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); *Walker v. Walker*, 527 S.W.2d 200, 203 (Tex. Civ. App.—Fort Worth 1975, no writ); see also *Villarreal v. Laredo Nat'l Bank*, 677 S.W.2d 600, 607 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.) (citing *Cockerham v. Cockerham*, 527 S.W.2d 162, 171 (Tex. 1975), and *Anderson*, 624 S.W.2d at 623); *Mock v. Mock*, 216 S.W.3d 370, 374 (Tex. App.—Eastland 2006, pet. denied) (citing *Anderson*, 624 S.W.2d at 623).

¹²² *Stewart Title Co. v. Huddleston*, 598 S.W.2d 321, 323 (Tex. Civ. App.—San Antonio), writ ref'd n.r.e., 608 S.W.2d 611 (Tex. 1980) (per curiam); *Broadway Drug*, 435 S.W.2d at 270; see also *Mussina v. Morton*, 657 S.W.2d 871, 874 (Tex. App.—Houston [1st Dist.] 1983, no writ) (citing *Stewart Title*, 598 S.W.2d 321); *Tex. Am. Bank/West Side v. Haven*, 728 S.W.2d 102, 103–04 (Tex. App.—Fort Worth 1987, writ dism'd w.o.j.) (citing *Mussina*, 657 S.W.2d at 873; *Stewart Title*, 598 S.W.2d at 323).

¹²³ See, e.g., *Rush v. Montgomery Ward*, 757 S.W.2d 521, 523 (Tex. App.—Houston [14th Dist.] 1988, writ denied); *Inwood Nat'l Bank v. Hoppe*, 596 S.W.2d 183, 185 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.); *Glasscock v. Citizens Nat'l Bank*, 553 S.W.2d 411, 413 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.).

¹²⁴ See, e.g., *Mussina*, 657 S.W.2d at 874 (citing *Stewart Title*, 598 S.W.2d 321); *Tex. Am. Bank*, 728 S.W.2d at 104 (also citing *Stewart Title*, 598 S.W.2d at 323).

2. The *Stewart Title* Question

Since enactment of the Texas Family Code, the Supreme Court of Texas has touched on the question of the post-divorce property rights of unsecured creditors only once,¹²⁵ in a cryptic *per curiam* opinion refusing writ “no reversible error” in *Stewart Title Co. v. Huddleston*.¹²⁶ *Stewart Title* has been read by some commentators to hold that “the assets that could be used to satisfy a creditor’s claim prior to divorce can still be reached by that creditor after divorce.”¹²⁷ However, the facts of the case—packed into a remarkably dense opinion, the text of which fills only a bit more than two full pages of the *South Western Reporter*—are far from clear. Indeed, other commentators have read *Stewart Title* for an opposite conclusion—that divorce does cut off an unsecured creditor’s rights to former community property.¹²⁸ Accordingly, a detailed explanation of the facts and procedural posture of the *Stewart Title* case is warranted.

Before divorce, Catherine and Edward Huddleston agreed on the division of their property.¹²⁹ The trial court approved the agreement and

¹²⁵ At least one court also has claimed to find support for the proposition that “[c]ommunity property reachable by creditors for debts incurred during marriage remains liable after a subsequent divorce and partition of the community estate” in *Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975). *Anderson*, 624 S.W.2d at 623.

Cockerham actually says nothing of the sort. In *Cockerham*, the bankruptcy trustee did argue that the division of community property at divorce must be done “in subordination to the rights of creditors.” 527 S.W.2d at 172 (citing SPEER’S MARITAL RIGHTS, *supra* note 94, at § 840). However, the Supreme Court of Texas pointedly declined to reach the issue, stating that while the court agreed the husband was not entitled to be paid before the creditors, “we reach this conclusion . . . upon a determination that the award to the husband was improper.” *Id.* Moreover, in *Cockerham*, the bankruptcy trustee/creditor actually intervened in the divorce. *Id.* at 165. Accordingly, creditor rights could be determined and debts paid before any remaining community property was divided. That was, after all, the point of the intervention. *See id.*

¹²⁶ 598 S.W.2d 321.

¹²⁷ Featherston & Douthitt, *supra* note 71, at 285 (citing, inter alia, *Stewart Title*, 598 S.W.2d at 323); *see also* SAMPSON & TINDALL, *supra* note 17, § 3.202 (summarizing the Supreme Court of Texas opinion in *Stewart Title* as one in which the “wife [was] not joined in creditors’ action against ex-husband,” but that “property awarded to her in divorce may be subject to debts incurred during marriage”).

¹²⁸ *See* JOSEPH W. MCKNIGHT & WILLIAM REPPY, JR., TEXAS MATRIMONIAL PROPERTY LAW 11:34 (1999 ed.) (“Prior to *Stewart Title* it had sometimes been concluded that property that could have been seized by a creditor of an obligor spouse during marriage remained subject to seizure after divorce even though, due to the division of property by the divorce court, that interest had become the separate property of the non-obligor ex-spouse.” (emphasis added)).

¹²⁹ *Stewart Title*, 598 S.W.2d at 322.

incorporated it by reference in the divorce decree.¹³⁰ As part of that decree, Catherine and Edward each were awarded a one-half interest in a 19.2-acre parcel of community property real estate.¹³¹

After the divorce, Stewart Title and other creditors sued Edward—but not Catherine—on some pre-divorce so-called “community debts.”¹³² The creditors secured and abstracted judgments against Edward alone.¹³³ Catherine then sued for a declaration that the creditors’ judgment liens were not valid against the land, or at least not against her interest in the land.¹³⁴ The creditors answered and asked that their liens be foreclosed against both Catherine and her former husband’s interest in the land.¹³⁵ In addition, and of some importance to this analysis, at least one creditor sued Catherine personally on the underlying debt.¹³⁶

The trial court ruled that Catherine “was not bound by the judgments against her former husband” and that her interest in the land was not subject to the liens.¹³⁷ The court then severed Catherine’s cause of action from the creditors’ still-pending affirmative claims; Stewart Title and the other creditors appealed the trial court’s determination of Catherine’s claim.¹³⁸

The creditors argued that, because their liens were abstracted some two years before Catherine filed the settlement agreement and divorce decree, and because they did not otherwise have notice, the agreement and

¹³⁰ *Id.*

¹³¹ *Stewart Title Co. v. Huddleston*, 608 S.W.2d 611, 612 (Tex. 1980) (per curiam).

¹³² *See Stewart Title*, 598 S.W.2d at 322.

¹³³ *Id.*

¹³⁴ *See id.* at 323. The court of civil appeals decision is not as clear as it might be on the exact nature of Catherine’s claims. The opinion says she sued for a declaration that the judgment liens were not valid “as to the land in question,” but then states that the trial court rendered summary judgment in Catherine’s favor as to “her interest in the land in question.” *Id.*

¹³⁵ The court of civil appeals opinion actually states that the creditors requested foreclosure of liens against “both plaintiff and her former husband.” *Id.* This should not be taken literally, however, as judgment liens are effective only against property, not people. *Cf.* 2 HUGH M. RAY & ROBIN RUSSELL, *TEXAS PRACTICE GUIDE: CREDITORS RIGHTS* § 9:2 (2010) (describing a judgment lien as “a general lien, attaching to practically all of the judgment debtor’s real property interests in the county where an abstract of the judgment is recorded”). The court of civil appeals was aware of this fact. *See Stewart Title*, 598 S.W.2d at 323 (“An abstracted judgment created a lien only on the property of the judgment debtor.”).

¹³⁶ *See Stewart Title*, 598 S.W.2d at 323 (stating that “the Davis estate sought judgment against plaintiff [Catherine] on the original debt owed to the Davis estate”).

¹³⁷ *Id.*

¹³⁸ *Id.*

judgment were void as to them.¹³⁹ The San Antonio Court of Civil Appeals rejected this argument.¹⁴⁰ The land in question had been community property before it was divided at divorce, so Catherine's interest in the property arose independent of the divorce and settlement.¹⁴¹ "Its existence resulted from our laws concerning the nature of property acquired during marriage, and [Catherine's] interest in the land could be subjected to the payment of debts only on the basis of a judgment against her in a suit to which she was a party."¹⁴² That statement probably is good law, so far as it goes.¹⁴³ The court therefore affirmed Catherine's summary judgment.¹⁴⁴

The court of civil appeals opinion in *Stewart Title* is of interest chiefly for some side remarks. The San Antonio court stated that "nonexempt property remains subject to the claims of community creditors, even after divorce,"¹⁴⁵ and that "[a] spouse who receives property which would, absent a divorce, be subject to the claims of creditors remains personally liable, and the property so received remains subject to being taken to satisfy the claims of the community creditors."¹⁴⁶ However, the court concluded that these rules, "while well established, are not applicable here."¹⁴⁷ The court explained that Catherine and Edward had divorced before the creditors filed suit against Edward, and also noted that the Texas Family Code had abolished the doctrine of virtual representation, under which the husband formerly was assumed to represent both spouses in litigation.¹⁴⁸

Before trying to decipher the Supreme Court of Texas's *per curiam* comments on *Stewart Title*, some further observations on the court of civil appeals opinion are helpful. The San Antonio court did refer to some then-new Family Code provisions.¹⁴⁹ The opinion also displays some awareness

¹³⁹ *Id.*

¹⁴⁰ *See id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 323–24.

¹⁴³ *See* RAY & RUSSELL, *supra* note 135, at § 9:15 (citing *Stewart Title*, 598 S.W.2d at 323, for the proposition that "[i]f only one spouse is the named debtor, the lien attaches to the interest of that spouse in community real property over which that spouse has or appears to have management authority").

¹⁴⁴ *Stewart Title*, 598 S.W.2d at 324.

¹⁴⁵ *Id.* at 323.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *See id.* (referring to then-Sections 5.03 and 5.42).

that the adoption of the Family Code had changed at least one underlying assumption of family-related litigation—the doctrine of virtual representation.¹⁵⁰ But so far as pre- and post-divorce personal liability and property liability goes, the San Antonio Court of Civil Appeals opinion displays a distressing degree of ignorance, verging on incoherence.

First, the opinion never makes clear whether the underlying debts were incurred during marriage by Edward alone, by Catherine alone, or by both spouses acting together—and in the last event whether by cosigning a note, by virtue of some sort of agency relationship, or through the “necessaries” doctrine.¹⁵¹ The opinion simply refers to the underlying obligations as “debts . . . incurred during the time that [Catherine] and Edward were married,” and that therefore “must be regarded as community debts.”¹⁵²

The court’s use of the phrase “community debt” in this context is a telltale sign of sloppy thinking. “Community debt” commonly means debt incurred for some family purpose.¹⁵³ The phrase also can be a useful reminder that when property is acquired through a credit transaction in which any community property is placed at risk, the property acquired also is considered community property.¹⁵⁴ But when the phrase “community debt” is used in a legal discussion of management or liability, the words have no clear meaning.¹⁵⁵ As one commentator recently put it: “Under the

¹⁵⁰ *See id.* The doctrine of virtual representation had been repudiated already by the Supreme Court of Texas. *See Cooper v. Tex. Gulf Indus., Inc.*, 513 S.W.2d 200, 202 (Tex. 1974) (stating that “the doctrine of virtual representation was abolished by the new Family Code”).

¹⁵¹ *See Stewart Title*, 598 S.W.2d at 322.

¹⁵² *Id.*

¹⁵³ *Cf. Twin Falls Bank & Trust Co. v. Holley*, 723 P.2d 893, 896 (Idaho 1986) (“The phrase ‘community debt’ is correct terminology insofar as it is used to signify a debt incurred for the benefit of the marital community. However, to the extent the phrase is used to imply the existence of a ‘community debtor,’ the phrase is imprecise and misleading. The marital community is not a legal entity such as a business partnership or corporation.”).

¹⁵⁴ This writer has recently explored the general subject at length. *See generally* Paulsen, *Acquiring Separate Property on Credit*, *supra* note 8.

¹⁵⁵ Conceivably, the conclusion that a “community debt” exists, in the sense that this debt was incurred for family purposes, might be the starting point for establishing the non-involved spouse’s personal liability under the “necessaries” doctrine, assuming that doctrine still is viable in Texas. *See supra* notes 15–19 and accompanying text; *cf., e.g., Sunkidd Venture, Inc. v. Snyder-Entel*, 941 P.2d 16, 19 (Wash. Ct. App. 1997) (approving personal liability for an ex-wife on a lease signed only by the husband on the theory that the lease was for “a family expense”).

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modern framework of Texas marital property law, community debt does not exist.”¹⁵⁶

Because the phrase “community debt” has crept into common use, some further explanation of the problem is in order. In Texas, debts are incurred by the husband, by the wife, or by both spouses. Debts are not incurred by some invisible entity called “the community.”¹⁵⁷

Moreover, under the Texas Family Code, when both spouses incur personal liability for a debt, all separate and all community property is placed at risk, making the phrase “community debt” under-inclusive.¹⁵⁸ If only one spouse incurs liability, then all of that spouse’s separate property and some—but not all—of the other spouse’s community property is at risk, thus making the phrase “community debt” both under- and over-inclusive.¹⁵⁹ As the dean of Texas marital property scholars, Professor Joseph McKnight, explains it, “to take the phrase out of this [characterization] context, as well as to say that the designation of such a debt as ‘community’ makes both spouses liable for it (when only one of them has contracted it), is clearly contrary to the express terms” of the Family Code.¹⁶⁰

A second and related deficiency in the court of civil appeals reasoning in *Stewart Title* stems from comments that hint at important unstated facts, or perhaps just reflect a thoroughgoing misunderstanding of post-Family Code liability law. For example, the court states as a truism the highly debatable statement that “nonexempt property *remains* subject to the claims of community creditors, even after divorce,” but fails to explain how that property ever *became* liable to the claims of creditors in the first instance.¹⁶¹

Similarly, the *Stewart Title* opinion states that “[a] spouse who receives property which would, absent a divorce, be subject to the claims of

¹⁵⁶ Featherston & Dickson, *supra* note 23, at 20.

¹⁵⁷ Accord Featherston, *When the Debtor is Married*, *supra* note 76, at E-3 (1996) (“[T]he courts and commentators, and in other contexts, even the legislature have created confusion for the practitioner by referring to the term, ‘community debt,’ as if the community were an entity separate and apart from the spouses, which ‘entity’ could own property and incur debts. The community is not an entity; community property is simply a form of co-ownership of property.”).

¹⁵⁸ See TEX. FAM. CODE ANN. § 3.202 (West 2006).

¹⁵⁹ See *id.*

¹⁶⁰ Joseph W. McKnight, *Family Law: Husband and Wife*, 37 SW. L.J. 65, 77 (1983) [hereinafter *1983 Survey*].

¹⁶¹ *Stewart Title Co. v. Huddleston*, 598 S.W.2d 321, 323 (Tex. Civ. App.—San Antonio), *writ ref’d n.r.e.*, 608 S.W.2d 611 (Tex. 1980) (per curiam) (emphasis added).

creditors *remains* personally liable,” yet fails to explain how the spouse *became* personally liable for anything.¹⁶² Apropos the latter point, one might wonder why an unsecured creditor would bother with thorny questions of post-divorce community property liability, if the more attractive alternative of a personal judgment against the non-debtor former spouse (a judgment that could subject all non-exempt property in that person’s hands to execution), also is available.

These and other loose statements make it difficult to intuit from *Stewart Title* whether Edward, Catherine or both of them contracted the debts on which the creditors sued.¹⁶³ The fact that the creditors initially sued only Edward is suggestive, but the fact that at least one creditor later sued Catherine individually clouds the issue.¹⁶⁴

A further factual deficiency in *Stewart Title* is that, while the court of civil appeals specified that the land the creditors sought to reach was community property, the court never makes clear exactly what kind of community property the land was for purposes of assessing liability—Edward’s sole management, Catherine’s sole management, or joint management.¹⁶⁵ Nor does the opinion provide any background facts that would enable the reader to make a reasonable guess.¹⁶⁶ One cannot determine from the opinion the source of funds used to purchase the land, or even whether both spouses worked outside the home.¹⁶⁷

Finally, a dubious legal statement deserves mention. The San Antonio Court of Civil Appeals opinion said Catherine’s community-property interest in the land—either before or after the divorce—“could be subjected to the payment of debts only on the basis of a judgment against her in a suit to which she was a party.”¹⁶⁸ That statement is plainly wrong. During marriage, all Edward’s sole-management and joint-management community property would be subject to execution to satisfy a judgment against

¹⁶² *Id.* (emphasis added).

¹⁶³ *See id.* at 322 (stating that the “debts . . . were incurred during the time that [Catherine] and Edward were married”).

¹⁶⁴ *See id.*

¹⁶⁵ *See id.*

¹⁶⁶ *See id.*

¹⁶⁷ While legal title is not determinative in such cases, the name in which property is held can give some hints—and sometimes can serve as a safe harbor for innocent third parties. Here, though, title was apparently held by a trustee in an “irrevocable” trust. *See id.* at 324.

¹⁶⁸ *Id.* at 323–24.

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Edward alone, even though Catherine owned a community interest.¹⁶⁹ It would not be necessary to join Catherine in the litigation to secure a valid judgment.¹⁷⁰

The Supreme Court of Texas did nothing to clear up all this confusion. The high court's half-page *per curiam* opinion in *Stewart Title* simply provides a detailed explanation of the procedural posture of the appeal, then concludes:

We interpret the judgments of the courts below as not foreclosing a judgment in the severed cause that any community property acquired by Catherine Evans Huddleston as a part of the partition of the community property would be subject to judgment liens properly secured against her as a result of preexisting community debts. *See* Texas Family Code, § 5.42(c), Texas Revised Civil Statutes Annotated.¹⁷¹

Taken in proper context (and ignoring the high court's odd phrasing),¹⁷² this statement is innocuous—so innocuous, in fact, that one wonders why the Supreme Court of Texas felt it necessary to say anything at all. The Supreme Court did not endorse or even comment on the court of civil appeals' reasoning. Rather, the *per curiam* opinion speaks only of “the severed cause” not before the appellate courts, in which at least one creditor was seeking a personal judgment against Catherine in the apparent belief that she was personally liable on the underlying debt.¹⁷³ To sum up this necessarily lengthy discussion in one sentence, the court of civil appeals decision in *Stewart Title* is difficult to follow, and the Supreme Court of Texas's *per curiam* comment adds little to the discussion of post-divorce property liability.

¹⁶⁹ *See* TEX. FAM. CODE ANN. § 3.202 (West Supp. 2010).

¹⁷⁰ *See id.* § 1.105 (West 2006) (providing that one spouse may sue or be sued without the other); *Few v. Charter Oak Fire Ins. Co.*, 463 S.W.2d 424, 427 (Tex. 1971) (holding that the husband is not a necessary party to a wife's suit involving sole-management community property personal injuries).

¹⁷¹ *Stewart Title Co. v. Huddleston*, 608 S.W.2d 611, 612 (Tex. 1980) (*per curiam*).

¹⁷² As already mentioned, one does not “secure a lien” against a person, strictly speaking. *See supra* note 135. The judgment would be obtained against Catherine, and the lien secured against Catherine's property.

¹⁷³ *See supra* note 136.

In fact, so far as *Stewart Title* fairly can be read as saying anything about post-divorce property liability, it actually suggests property awarded to the non-liable former spouse is not subject to the claims of unsecured creditors. The trial court granted and the court of civil appeals affirmed summary judgment that former community property in Catherine's hands was not subject to post-divorce judgment liens filed by Edward's pre-divorce creditors.¹⁷⁴ The Supreme Court of Texas let that decision stand.¹⁷⁵ It is hard to extract much meaning from a Supreme Court decision to deny writ under the best of circumstances.¹⁷⁶ However, because the high court studied the petition closely enough to issue a *per curiam* ruling on a tangential issue, one suspects the Supreme Court of Texas would have issued some further statement if it had been troubled by the lower courts' core holding.

C. Other Community Property Jurisdictions

Texas is one of ten modern community property jurisdictions.¹⁷⁷ Under ordinary circumstances, it might be helpful to seek guidance from those jurisdictions, as others have done.¹⁷⁸ For what it is worth, an apparent

¹⁷⁴ See *Stewart Title Co. v. Huddleston*, 598 S.W.2d 321, 324 (Tex. Civ. App.—San Antonio), writ *ref'd n.r.e.*, 608 S.W.2d 611 (Tex. 1980) (*per curiam*).

¹⁷⁵ See *Stewart Title*, 608 S.W.2d at 612.

¹⁷⁶ See, e.g., Ted Z. Robertson & James W. Paulsen, *The Meaning (If Any) of an "N.R.E."*, TEX. B.J., Dec. 1985, at 1306, 1308.

¹⁷⁷ The eight traditional community property jurisdictions are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. Wisconsin has more recently adopted the system legislatively, and Alaska permits spouses to "opt in." See, e.g., Monica Hof Wallace, *The Pitfalls of a Putative Marriage and the Call for a Putative Divorce*, 64 LA. L. REV. 71, 95–96 n.130 (2003); see also Howard S. Erlanger & June M. Weisberger, *From Common Law Property to Community Property: Wisconsin's Marital Property Act Four Years Later*, 1990 WIS. L. REV. 769, 770 (1990) (citing Wisconsin as the first state with a history of common law property jurisdiction to convert to a community property system for married persons).

¹⁷⁸ The author particularly recommends Andrea B. Carroll, *The Superior Position of the Creditor in the Community Property Regime: Has the Community Become a Mere Creditor Collection Device?*, 47 SANTA CLARA L. REV. 1 (2007), on which the discussion that follows draws extensively. See also Lamont C. Loo, Comment, *Contractual Creditor Rights upon Dissolution of Marriage: Revisiting Twin Falls Bank & Trust v. Holley, Proposal: A Tripartite Analysis*, 30 IDAHO L. REV. 777 (1994); Sonja A. Soehnel, Annotation, *Spouse's Liability, After Divorce, for Community Debt Contracted by Other Spouse During Marriage*, 20 A.L.R.4th 211 (1983).

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majority of community property jurisdictions that have addressed the issue in recent years¹⁷⁹ seem to favor some form of post-divorce creditor rights.¹⁸⁰

Unfortunately, the value of out-of-state decisions is limited in this context, because Texas differs in significant ways from its sister community property jurisdictions. For one thing, as already mentioned, the statutory divided management scheme is unique to Texas.¹⁸¹ Moreover, at least four

¹⁷⁹Some states do not seem to have addressed the general subject in recent years, either by court decision or by statute. Alaska, for example, does not yet appear to have generated any relevant litigation under its “opt-in” community property system. Cf. Soehnel, *supra* note 178 (listing no relevant state court decisions from Alaska, or from New Mexico, Nevada or Wisconsin).

A generally well-written student comment noted in 1994 that “[t]he courts in Nevada have yet to express an opinion directly on point,” Loo, *supra* note 178, at 790, but finds “guidance” for the conclusion that Nevada courts would recognize post-divorce creditor rights in *Marine Midland Bank v. Monroe*, 756 P.2d 1193 (Nev. 1988). Loo, *supra* note 178, at 790. This writer is less certain. *Marine Midland Bank v. Monroe* is a *per curiam* opinion that runs about one-and-one-half pages in the reporter. The case involved joint credit card debt, as to which the ex-wife presumably had personal liability. *Marine Midland Bank*, 756 P.2d at 1194. The holding simply was that the divorce decree could not affect the bank’s rights because the bank was not a party or privy to that decree. *Id.* Accordingly, *Marine Midland Bank v. Monroe* is neither factually nor legally analogous in any significant respect to the questions under discussion here.

As to New Mexico, a 1973 federal decision noted that there “appear[ed] to be no New Mexico cases directly in point.” *Moucka v. Windham*, 483 F.2d 914, 916 (10th Cir. 1973). The court therefore analogized to Washington law (on the theory that both states recognized the concept of “community debt”) and concluded that “under New Mexico law, a community debt incurred prior to the dissolution of the marital community, and for the benefit thereof, would properly be payable out of ‘community’ funds notwithstanding the fact that such ‘community’ property had been transmuted into ‘separate’ property by virtue of a decree of divorce.” *Id.* at 916–17.

¹⁸⁰See WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 17–23 (1997) (“As a general rule in most states a divorce decree dividing community property, or a property settlement agreement making such division, cannot reduce the rights of pre-divorce creditors of one spouse to reach property awarded the other if that property would have been liable absent the divorce.”); see also Loo, *supra* note 178, at 779–80 (“[I]n all community property jurisdictions, except Idaho and California, the community creditor after divorce is able to execute upon former community property, which is held as separate property of an innocent, nondebtor spouse”); Soehnel, *supra* note 178, at § 2 (“[T]he courts have generally held that the mass of community property, including that set aside to the noncontracting spouse, is subject to a judgment for the community debt . . . or have held that specific community property set aside to the noncontracting spouse is subject to a judgment for the debt”).

¹⁸¹See *supra* note 27; see also Carroll, *Superior Position of the Creditor*, *supra* note 178, at 15 (noting that all community property states save Texas follow an “equal management” approach to community property).

community property jurisdictions—Arizona, New Mexico, Washington and Wisconsin—take a “community debt” approach to obligations incurred during marriage that has little similarity to what has been termed the Texas “managerial” approach.¹⁸²

Additionally, and in further contrast with Texas, several other community property states have statutory provisions that address creditor rights at divorce. In Arizona, for example, an elaborate statutory scheme provides for court-ordered assignment of debts¹⁸³ and, on one party’s request or the court’s initiative, debt distribution plans.¹⁸⁴ The law authorizes liens for the payment of particular debts¹⁸⁵ and encourages the spouses to contact all creditors and work out payment schemes before divorce.¹⁸⁶ The statute even provides suggested forms for creditor agreements and liability releases.¹⁸⁷ State statutes directly provide expansive post-divorce creditor rights in Louisiana¹⁸⁸ and Wisconsin.¹⁸⁹ In contrast, California lawmakers have limited those rights.¹⁹⁰

For purposes of this particular discussion, Idaho law is perhaps most analogous to Texas. Like Texas, Idaho takes a “managerial” approach to marital property liability and does not address the post-divorce rights of unsecured creditors by statute.¹⁹¹ Unlike Texas, Idaho’s high court has

¹⁸² See, e.g., Carroll, *Superior Position of the Creditor*, *supra* note 178, at 16–17 (comparing the “managerial” systems of California, Idaho, Louisiana, Nevada and Texas to the “community debt” approach of Arizona, New Mexico, Washington and Wisconsin); *but see supra* notes 15–19 and accompanying text (discussing the Texas “necessaries” doctrine).

¹⁸³ ARIZ. REV. STAT. ANN. § 25-318(L) (2010).

¹⁸⁴ *Id.* § 25-318(J), (L).

¹⁸⁵ *Id.* § 25-318(E)(2).

¹⁸⁶ *Id.* § 25-318(H).

¹⁸⁷ *Id.* § 25-318(K).

¹⁸⁸ See LA. CIV. CODE ANN. art. 2357 (2009) (providing in part that “[a]n obligation incurred by a spouse before or during the community property regime may be satisfied after termination of the regime from the property of the former community and from the separate property of the spouse who incurred the obligation”).

¹⁸⁹ See WIS. STAT. ANN. § 766.55(2)(c)(2)(2m) (West 2009) (providing in part that “[m]arital property assigned to each spouse . . . is available for satisfaction of such an obligation to the extent of the value of the marital property at the date of the decree”).

¹⁹⁰ See CAL. FAM. CODE ANN. § 916(a)(2) (West 2004) (providing in part that “the property received . . . in the division is not liable for a debt incurred by the person’s spouse before or during marriage . . . unless the debt was assigned for payment by the person in the division of the property”).

¹⁹¹ See, e.g., Loo, *supra* note 178, at 779.

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spoken directly to the issue of an unsecured creditor's post-divorce rights in a comparatively modern decision. In *Twin Falls Bank & Trust Co. v. Holley*, the bank sued the former Mrs. Holley to collect on a pre-divorce promissory note signed by her ex-husband.¹⁹² The bank's theory was that the debt was "a community obligation . . . collectable from the community assets which Mrs. Holley received in the divorce settlement."¹⁹³

In the absence of guidance from the state legislature, the Supreme Court of Idaho announced that the case could be resolved "based on fundamental principles governing the debtor-creditor relationship."¹⁹⁴ The court proceeded to spell out the most important of those principles:

Generally speaking, a creditor must obtain a judgment to collect on a debt whether it is based on contract, tort or other obligations. The exception would be if the obligation was secured by a mortgage or some other form of security interest. Once a creditor obtains a judgment he is able to collect on his debt by execution on the debtor's assets. "These judicial procedures do not change whether dealing with a single or married debtor. The difference is the type of property that is subject to execution or attachment for the debt involved."¹⁹⁵

To this point in the analysis, the Supreme Court of Idaho simply makes explicit in *Twin Falls Bank & Trust* what the Supreme Court of Texas left unsaid in its *per curiam* opinion in *Stewart Title Co. v. Huddleston*:¹⁹⁶ absent a lien, post-divorce seizure of property requires a personal judgment against the new sole owner.¹⁹⁷

The remainder of the *Twin Falls Bank & Trust* analysis improves on *Stewart Title*. As already explained, the *Stewart Title per curiam* opinion perpetuated confusion by referring without explanation to so-called "community debts."¹⁹⁸ However, the Supreme Court of Idaho

¹⁹² 723 P.2d 893, 894 (Idaho 1986).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 896.

¹⁹⁵ *Id.* (quoting J. Henderson, *Creditors Rights Under a Community Property System* in IDAHO LAW FOUNDATION, IDAHO COMMUNITY PROPERTY LAW § 9.4 (1983)).

¹⁹⁶ See, e.g., *supra* text accompanying notes 171–173.

¹⁹⁷ See *Twin Falls Bank & Trust*, 723 P.2d at 897–98.

¹⁹⁸ *Stewart Title Co v. Huddleston*, 608 S.W.2d 611, 612 (Tex. 1980) (*per curiam*); see also *supra* notes 152–160 and accompanying text (discussing conceptual problems with casual use of

commendably refused to use those words:

The phrase “community debt” is correct terminology insofar as it is used to signify a debt incurred for the benefit of the marital community. However, to the extent the phrase is used to imply the existence of a “community debtor,” the phrase is imprecise and misleading. The marital community is not a legal entity such as a business partnership or corporation. While one may properly speak of a “corporate debtor,” there is no such entity as a “community debtor.” To the extent a lending institution enters into a creditor-debtor relationship with either member of the marital community or with both members, it does so on a purely individual basis. Thus, the lending institution may have a creditor-debtor relationship with either spouse separately or with both jointly.¹⁹⁹

Once the Idaho Supreme Court rejected the “community debt” notion and correctly stated the “one spouse or two spouses” premise, analysis became easy.²⁰⁰ Because only John Holley signed the promissory note, only John Holley was personally liable to the bank.²⁰¹ If the bank had obtained a judgment against Mr. Holley before divorce, it could have collected on all the couple’s community property.²⁰² If the bank had perfected a lien on community real estate before divorce, that lien also would have survived the divorce decree.²⁰³ But because the bank took

the phrase “community debt”).

¹⁹⁹*Twin Falls Bank & Trust*, 723 P.2d at 896 (internal citations omitted).

²⁰⁰*See id.* at 896–97.

²⁰¹*Id.* at 897 (“Mrs. Holley had not signed the . . . note and thus was not personally liable for that obligation . . .”).

²⁰²The Idaho Supreme Court noted that the bank had renewed an earlier note on June 26, 1981. *Id.* The couple did not divorce until August 28, 1981. *Id.* at 894. Accordingly, had the bank not chosen to renew the note in June 1981, “the bank had a claim against Mr. Holley which it could satisfy by judgment and execution against either Mr. Holley and any separate property which he may have had, or against the community property of Mr. and Mrs. Holley.” *Id.* at 897.

²⁰³The court was quite critical of the bank on this point. *See id.* The opinion stated that “the bank failed to perfect its security interest in real property held by Mr. Holley, losing it to the bankruptcy trustee,” *id.*, when John Holley filed for bankruptcy shortly after divorce. *Id.* at 895. The court concluded: “In short, the bank’s inability to obtain satisfaction for its unpaid obligation was in large part attributable to the bank’s failure to perfect its security interest in real property held by John Holley.” *Id.* at 897.

neither of these steps in a timely manner, it was limited to its remedies against Mr. Holley and his post-divorce property.²⁰⁴ In the section that follows, this article will suggest that, for the reasons stated by the Supreme Court of Idaho and more, a Texas court presented with the same question should give the same answer.²⁰⁵

IV. THE CORRECT RULE: NON-LIABILITY, ABSENT EXTRAORDINARY CIRCUMSTANCES

This section suggests that any theoretical basis for old creditor-favoring doctrines has disappeared. Moreover, post-divorce liability of former community property in the hands of the non-debtor spouse is inconsistent with the modern Texas Constitution, incompatible with the Family Code, and grossly inequitable. At the end of the discussion, the value of a limited fraud exception is considered.

A. Theoretical Bases for Post-Divorce Liability

Modern Texas decisions that suggest community property awarded the non-debtor spouse at divorce remains liable for the debtor-spouse's obligations typically offer no reasoned analysis—just a sentence or two setting out the supposed rule, followed by citations to earlier cases.²⁰⁶ Those citation strings typically track back to the last decades of the nineteenth century.²⁰⁷ The text of these early cases, in turn, offers little direct help understanding the origin of the doctrine.²⁰⁸

²⁰⁴ *Id.*

²⁰⁵ See *infra* Part IV. For a decidedly less enthusiastic review of *Twin Falls Bank & Trust*, see Andrea B. Carroll, *Incentivizing Divorce*, 30 CARDOZO L. REV. 1925, 1934–40 (2009).

²⁰⁶ See, e.g., *supra* note 74 and the cases cited therein.

²⁰⁷ The apparent principal culprit, *Richey v. Hare*, 41 Tex. 336 (1874), has been discussed at some length, and will be revisited momentarily. See *supra* notes 79–100 and accompanying text; see also *infra* notes 213–227 and accompanying text. Another early case, *Boyd v. Ghent*, 57 S.W. 25 (Tex. 1900), is discussed in note 103, *supra*.

²⁰⁸ In *Richey*, for example, the Supreme Court of Texas said things like “it cannot be supposed” that husband and wife could thwart a creditor’s expectations by private agreement, or that the divorce “could not have the effect” of passing property free of a creditor’s claims. 41 Tex. at 340. No further explanation or citation to authority is provided. *Boyd* is only slightly better. The Supreme Court of Texas cited an earlier court of civil appeals decision as authority for its dictum that property still remained liable for “community debt” even if the divorce had been finalized before the creditors perfected their lien. See 57 S.W. at 26. That earlier decision, however, offers no explanation or authority for the conclusion that a divorced wife “became

The lack of any clearly articulated rationale for a doctrine favoring an unsecured creditor over the non-debtor former spouse makes analysis more difficult than it should be. However, that same judicial incoherence also poses serious problems for the modern-day creditor who tries to seize property owned by one person to satisfy a debt owed by another. A creditor who, through a proceeding in rem or otherwise, seeks to appropriate another person's property must first establish a legal rationale for recovery—what lawyers would call a “cause of action.”²⁰⁹ A lawsuit against a former spouse who owns former community property is no exception.²¹⁰ The Supreme Court of Texas probably was saying exactly that, and nothing more, when it concluded in *Stewart Title* that creditors are free to proceed directly against the former wife, and that former community property “would be subject to judgment liens *properly secured against her* as a result of preexisting community debts.”²¹¹

Assume, for example, that *Stewart Title* had pursued its claims directly against the former Mrs. Huddleston after divorce, instead of just trying to seize her property. *Stewart Title* would have been required to articulate some theory of personal liability, property liability, or both.²¹² The first approach would entail a showing that the ex-wife had some direct legal responsibility for her ex-husband's debt; the second would require that *Stewart Title* establish some sort of lien on the property, or set aside the divorce transfer as fraudulent.

jointly liable with her divorced husband for . . . satisfaction [of the debt], to the extent of the community property received by her.” *Grandjean v. Runke*, 39 S.W. 945, 946 (Tex. Civ. App.—San Antonio 1897, no writ).

²⁰⁹See *supra* notes 136–138 and accompanying text (referencing the *Stewart Title* case wherein the trial court severed the creditors' claims against the former spouse for failure to state a cause of action against the spouse).

²¹⁰*Stewart Title Co. v. Huddleston*, 598 S.W.2d 321, 322 (Tex. Civ. App.—San Antonio), *writ ref'd n.r.e.*, 608 S.W.2d 611 (Tex. 1980) (per curiam) (finding that a former wife's half-interest in former community property was not subject to creditors' liens recovered against the former husband).

²¹¹*Stewart Title Co. v. Huddleston*, 608 S.W.2d 611, 612 (Tex. 1980) (per curiam) (emphasis added).

²¹²The *Cockerham* decision is a good example of an effort by a creditors' representative to pursue both approaches in a single lawsuit. See *Cockerham v. Cockerham*, 527 S.W.2d 162, 166 (Tex. 1975); see generally *supra* notes 20–25 and accompanying text; see *Providian Nat'l Bank v. Ebarb*, 180 S.W.3d 898, 902 (Tex. App.—Beaumont 2005, no pet.) (distinguishing between the “two distinct concepts” of personal and property liability under the Texas Family Code).

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As just stated, the older cases to which modern decisions refer when mentioning an unsecured creditor's supposed post-divorce rights do not clearly spell out the rationale underlying recovery. Nonetheless, a brief re-examination of the leading *Richey v. Hare* decision is instructive.²¹³

Richey actually mentions two discernable theories of creditor recovery.²¹⁴ One is clearly articulated and unexceptional: The creditor secured a judgment before the couple divorced.²¹⁵ This judgment constituted "a lien on the real estate of the [husband] in the county where it was rendered."²¹⁶ However, this lien-based theory of recovery offers no help to the unsecured creditor that has not intervened in the divorce action or otherwise secured a pre-divorce judgment lien.

Richey's second rationale is more problematical. The Supreme Court of Texas stated that "[t]he division of property between the husband and wife . . . must be done in subordination to the rights of creditors having claims on the community property, and which may be liable for debts."²¹⁷ Standing alone, this language also smacks of lien-based or property liability. But there is more. The *Richey* creditor offered to prove that the claim involved "a community debt against Crutcher *and wife*."²¹⁸ The court also commented that a divorce decree generally could not vest property in the former spouses "to the prejudice of a creditor holding a debt against the community."²¹⁹ These comments suggest that the wife, or some entity called "the community," was seen as personally liable.

There is at least one way to read *Richey* that makes some sense, at least in historical context. *Richey* was decided in a very different legal world. In the mid-1870s, married women generally were disabled from making contracts.²²⁰ Men managed all community property during marriage²²¹ and

²¹³ 41 Tex. 336 (1874); see generally *supra* notes 79–100 and accompanying text.

²¹⁴ See *Richey*, 41 Tex. at 340–41.

²¹⁵ See *id.* at 340.

²¹⁶ *Id.*

²¹⁷ *Id.* at 340–41.

²¹⁸ *Id.* at 340 (emphasis added).

²¹⁹ *Id.*

²²⁰ See, e.g., 23 Tex. Jur. *Husband and Wife* § 122 (1932).

²²¹ See *id.* ("The statutes declare that during coverture the community property of the husband and wife may be disposed of by the husband only Technically, this power is not as agent for the wife, but it is the lawful control imposed upon the community by force of the statute. What the husband does in the control and disposition of the community he does for himself in his own right and for his wife in virtue of his statutory right of control.").

were considered to virtually represent the wife in business transactions.²²² Taking the theory of virtual representation to its logical conclusion, a creditor dealing with a married man—particularly as regards a “community debt,” assuming that phrase meant a debt incurred for “family” purposes—was to some extent dealing with that man’s spouse as well.²²³ The average creditor probably did not give much thought to the possibility that the couple might divorce, because divorce was comparatively rare.²²⁴ If divorce did occur, it might have been thought fair to subject the former wife (or at least the community property received by her in the divorce) to the “family” or “community” liabilities incurred at least in part on her behalf by her husband. After all, under the theory of virtual representation, those debts could be considered hers as well.²²⁵

The fact that the *Richey* court repeated the phrase “community debt” or “debt against the community” several times in a comparatively short opinion²²⁶ lends strength to the hypothesis that the court considered the wife personally liable (at least to the extent of the community property she received) because her husband incurred those debts for family purposes.²²⁷

²²² *Id.*

²²³ The Supreme Court of Texas may have been making this point when it stated that “[t]he basis for virtual representation is the husband’s power of sole management of the entire community.” *Cooper v. Tex. Gulf Indus., Inc.*, 513 S.W.2d 200, 202 (Tex. 1974); *see also Dulak v. Dulak*, 513 S.W.2d 205, 207 (Tex. 1974) (describing virtual representation as a doctrine “whereby the husband could act for and represent the wife in an action concerning their joint community property”).

²²⁴ Available statistics indicate that Texas experienced a six-fold increase in the incidence of divorce from 1870 to 1900, when the rate was measured at 131 per 100,000. James W. Paulsen, *Remember the Alamo[ny]! The Unique Texas Ban on Permanent Alimony and the Development of Community Property Law*, 56 LAW & CONTEMP. PROBS. 7, 32, 32 n.168 (1993). A rough guess therefore would put the Texas divorce rate when *Richey v. Hare* was decided at about one-tenth modern rates. *See infra* note 318.

²²⁵ This is not to suggest Mr. Crutcher’s management power over all community property made him his wife’s general agent in business transactions, or that “community debts” equate to the purchase of “necessaries.” *Cf. supra* note 221. Were that true, then or now, post-divorce community property liability would be the least of Mrs. Crutcher’s worries; she would be personally liable to the creditor, and even her separate property would be placed at risk. This writer simply suggests that, by the lights of the time, post-divorce liability of former community property might have seemed very reasonable. As a practical matter, Mr. Crutcher was the family’s sole legal representative when debt was incurred and family property placed at risk.

²²⁶ *See Richey v. Hare*, 41 Tex. 336, 339–41 (1874).

²²⁷ The writer is not alone in suspecting that this sort of thinking often lies behind a court’s use of the phrase “community debt.” *See, e.g., Featherston & Still, supra* note 55, at 15 (stating

At least one modern court seems to have made just such a semantic leap when trying to justify an unsecured creditor's post-divorce rights.²²⁸

However, assuming this reading of *Richey* is correct, a modern-day unsecured creditor who lays claim to former community property in the hands of an innocent former spouse stands on very shaky legal ground. The doctrine of virtual representation is dead,²²⁹ and the related notion that a spouse incurs personal liability just by being married has been repudiated by statute.²³⁰ The idea that there is some entity called "the community," or that the "community" can incur "community debt," also makes no sense today (if indeed it ever did).²³¹

If the divorce transfer is tainted by fraud, as may have been the case in *Richey*,²³² a creditor could challenge the underlying decree or agreement as

that "[t]he courts' continued references to 'community debts' imply that . . . both spouses are personally liable because they are the 'community estate'" and adding: "This result is inconsistent with legislative mandate and with the statutory plan of . . . the Family Code").

²²⁸In *Wileman v. Wade*, 665 S.W.2d 519 (Tex. App.—Dallas 1983, no writ), the court stated: "[I]n addressing the question of joint and several liability, we note that the trial judge found the attorney's fees to be a debt of the community. This finding established the liability of both William and Wanda to Wileman." *Id.* at 520. To the Dallas court's credit, one judge dissented, questioning the "joint and several liability" reasoning. *See id.* at 521–23 (Sparling, J., dissenting).

²²⁹A colorful obituary of sorts was delivered by Fort Worth Court of Appeals Justice W.A. Hughes:

The Doctrine of Virtual Representation is dead. TEX. FAM. CODE ANN. § 5.22 (1975) was the weapon used to accomplish its demise in 1971. Justice Johnson delivered a few words over the corpse on the 110th anniversary of the Emancipation Proclamation (in Texas known as "June Teenth") in the case of *Cooper v. Texas Gulf Industries, Inc.*, 513 S.W.2d 200 (Tex. 1974). On the same day Justice Pope also participated in the Doctrine's last rites in the case of *Dulak v. Dulak*, 513 S.W.2d 205 (Tex. 1974).

Carlton v. Estate of Estes, 654 S.W.2d 36, 37 (Tex. App.—Fort Worth), *rev'd on other grounds*, 664 S.W.2d 322 (Tex. 1983) (per curiam).

²³⁰*See* TEX. FAM. CODE ANN. § 3.201(c) (West 2006) (stating that "[a] spouse does not act as an agent for the other spouse solely because of the marriage relationship"); McKnight, *supra* note 160, at 77 (stating that "to say that the designation of . . . a debt as 'community' makes both spouses liable for it (when only one of them has contracted it), is clearly contrary to the express terms of section 5.61"); *see also supra* notes 12–24 and accompanying text.

²³¹*See, e.g.,* Featherston & Still, *supra* note 55, at 14 (stating that "[d]espite the plain import of the statutory plan enacted by the legislature, courts continue to create confusion for the practitioner by referring to the term 'community debt' as if the community estate were an entity which could own property and incur debts separate and apart from the spouses" and characterizing this concept as "wholly false"); *see also supra* notes 152–160 and accompanying text.

²³²*See supra* notes 96–97 and accompanying text.

a fraudulent transfer.²³³ The possibility of recovery on appropriate theories of property liability also remains. A creditor with a properly secured contractual lien has nothing to fear from divorce.²³⁴ Nor would a tort or contract creditor who obtains a judgment lien before divorce, as the creditor in *Richey v. Hare* did.²³⁵ A catalog of other possibilities might include the occasional common law, statutory, or equitable lien.²³⁶ However, none offer much hope to the typical unsecured creditor.²³⁷ To the contrary, the

²³³That issue is addressed separately. See *infra* notes 371–408 and accompanying text.

²³⁴See *supra* note 69.

²³⁵See *supra* note 216.

²³⁶See, e.g., TEX. BUS. & COM. CODE ANN. § 24.002(8) (West 2002) (defining “lien” as “a charge against or an interest in property to secure payment of a debt or performance of an obligation,” and adding that the definition “includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien”); *Ward v. McKenzie*, 33 Tex. 297, 316–17 (1870) (listing the “different kinds of lien recognized in the jurisprudence of most, if not all of the American states” as including common, equitable, and statutory liens).

²³⁷A common-law lien requires possession. See, e.g., *Ward*, 33 Tex. at 317 (“[T]he common law lien . . . is the right to retain the possession of the property of another until some claim, or charge upon it, is satisfied . . .”); *Ingleside v. Johnson*, 537 S.W.2d 145, 152 (Tex. Civ. App.—Corpus Christi 1976, orig. proceeding) (“[A] common law lien is a right to retain that which is in his possession which belongs to another until certain demands of the person in possession are satisfied . . .”).

A statutory lien requires a statute. The Texas Family Code does address creditor rights. See TEX. FAM. CODE ANN. § 3.102 (West 2006). The fallacy of assuming this statute creates any sort of post-divorce creditor rights, to say nothing of a formal lien, will be addressed in detail later in this article. See *infra* notes 270–281, 315 and accompanying text.

An equitable lien requires proof of: (1) a debt, (2) an identified item of property to which the obligation attaches, (3) the intent that this property serve as security, (4) the absence of a legal remedy, and (5) reasons why in equity and good conscience a lien is appropriate. See *generally*, e.g., 51 AM. JUR. 2D *Liens* § 34 (2007). It is slightly more interesting because at least a couple of older cases espousing the unsecured creditor’s rights mention the phrase “equitable lien,” though without any effort to link the phrase to the formal elements of the doctrine. See *First Nat’l Bank v. Hickman*, 89 S.W.2d 838, 844 (Tex. Civ. App.—Austin 1935, writ ref’d) (stating that the creditor was “seeking to establish an equitable lien”); see also *Am. Emp’r’s Ins. Co. v. Dall. Joint Stock Land Bank*, 170 S.W.2d 546, 550–51 (Tex. Civ. App.—Dallas 1943, writ ref’d w.o.m.) (apparently relying on *Hickman* for the conclusion that the creditor was entitled to an equitable lien).

A modern unsecured creditor who tries to seize former community property in explicit reliance on equitable-lien analysis arguably would fail at every step of the way. Under the circumstances considered in this article, the debt is owed to a different person. See 51 AM. JUR. 2D *Liens* § 34 (2007) (explaining this element as “a debt, duty, or obligation owing by one person to another”). There is no particular identified item of property “to which that obligation fastens,”

state constitution, statutes and considerations of equity and fairness all suggest that unsecured creditors deserve no favored status.

B. Legal Considerations

1. The Texas Constitution

The starting point, and arguably the ending point, for analysis is the Texas Constitution. For more than a century, constitutional provisions setting out the state's marital property regime did not address management and liability issues directly. Accordingly, the state legislature and courts enjoyed considerable freedom of action.²³⁸ That situation changed somewhat in 1948, with adoption of the first substantive amendment to the Texas Constitution's marital property provisions since statehood.²³⁹ The amendment's goal was to overrule several Texas Supreme Court decisions and permit spouses to create separate property from community property by voluntary partition agreement.²⁴⁰ However, the new language that was tacked on to the end of Article XVI, § 15 began with the words: "provided that husband and wife, *without prejudice to pre-existing creditors*, may from time to time . . . partition" or exchange their community property.²⁴¹

nor is there any intent that "the property serve as security." *See id.* Rather, the creditor simply seeks to establish a right to recover from a category of property that may include much more than is necessary to satisfy the debt. Taken in connection with the marshalling statute discussed later that permits a court to order what property a creditor can seize, *see infra* notes 354–364 and accompanying text, equitable-lien doctrine seems a particularly poor fit. *See, e.g., Avco Delta Corp. Can. Ltd. v. United States*, 484 F.2d 692, 703 (7th Cir. 1973) (stating that an equitable lien requires "a res to which that obligation fastens, which can be identified or described with reasonable certainty"). Additionally, legal remedies—notably, intervention and judgment in a pending divorce, not to mention the availability of a formal security interest—are available. In short, the balance of modern-day equities weighs heavily against a creditor. *See infra* notes 317–353 and accompanying text.

²³⁸From earliest days, the state constitution provided that "laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property." TEX. CONST. art. XVI, § 15. As already mentioned, the Supreme Court of Texas ruled in *Arnold v. Leonard*, 273 S.W. 799, 804 (Tex. 1925), that this language gave state lawmakers the right to alter creditor rights. *See supra* note 14.

²³⁹Tex. H.R.J. Res. 13, § 1, 50th Leg., R.S. (1947).

²⁴⁰*See, e.g., McKnight, supra* note 2, at 85 (explaining that after a 1947 decision holding that a married couple could not physically divide their community property into two separate shares, "[t]he only avenue for reform was to change the constitution itself").

²⁴¹Tex. H.R.J. Res. 13, § 1, 50th Leg., R.S. (1947) (emphasis added).

Partition agreements commonly are encountered in divorce proceedings.²⁴² One therefore could argue that the 1948 constitutional amendment indirectly condoned earlier case law that extended the rights of unsecured creditors past divorce.²⁴³ Whether this was the amendment's specific intent or not,²⁴⁴ the situation changed again in 1980. Voters approved a further constitutional amendment that, among other changes, modified the language just quoted. The Texas Constitution now says that "persons about to marry and spouses, *without the intention to defraud pre-existing creditors*, may . . . partition" their community property.²⁴⁵

The intent of the "intent" language in the 1980 amendment is clear. By changing the constitutional language from "without prejudice" to "without the intention to defraud," state legislators and voters in large part repudiated the conceptual foundation on which earlier cases favoring unsecured creditors at divorce rested.²⁴⁶ Because the Texas Constitution represents core public policy, this amendment deserves further examination.²⁴⁷

Professor Joseph McKnight of the SMU Law School was the principal drafter of the 1980 constitutional amendment.²⁴⁸ He published an abridged version of comments originally delivered to the state legislature just before the amendment went to the voters,²⁴⁹ and followed up with a more detailed

²⁴² See, e.g., TEX. FAM. CODE ANN. § 7.006 (West 2006) (providing for agreements incident to divorce).

²⁴³ Accord Joseph W. McKnight, *Management, Control and Liability of Texas Marital Property*, 2 COMMUNITY PROP. J. 76, 83–84 (1975) ("[T]he proviso in favor of existing creditors added in 1948 with respect to partitions seems to place a limit on legislation in this regard. While its meaning has not been clearly adjudicated, the generally assumed meaning of the proviso is that spouses cannot divide their community property in such a way as to deprive existing creditors of reaching it in the future to satisfy liabilities regardless of the good faith of the spouses with respect to their creditors. This broad view of creditors' rights long antedates the constitutional amendment of 1948 . . .").

²⁴⁴ This writer is not aware of any evidence one way or the other.

²⁴⁵ TEX. CONST. art. XVI, § 15 (emphasis added); see also generally Richard G. Moore, Comment, *The 1980 Texas Marital Property Amendment: An Analysis of Its Meaning and Effect*, 33 BAYLOR L. REV. 307 (1981).

²⁴⁶ TEX. CONST. art. XVI, § 15.

²⁴⁷ See, e.g., Dist. Grand Lodge No. 25 Grand United Order of Odd Fellows v. Jones, 160 S.W.2d 915, 920 (Tex. 1942) ("Fundamental public policy is declared in the Constitution . . .").

²⁴⁸ Interview with Professor Joseph W. McKnight (Mar. 13, 2007).

²⁴⁹ See Joseph W. McKnight & Robert Edwin Davis, *For Amendment No. 9*, TEX. B.J., Oct. 1980, at 921, 925; see also Joseph W. McKnight, *Family Law: Husband and Wife*, 48 SMU L. REV. 1225, 1232 n.50 (1995) [hereinafter *1995 Survey*] (describing the origin of the *Texas Bar Journal* article in commentary presented to the Committee on Constitutional Amendments of the

analysis shortly after passage.²⁵⁰ The Supreme Court of Texas has relied on these comments when deciding a thorny issue raised by the 1980 amendments.²⁵¹

The 1980 drafters' comments explicitly refer to two post-Family Code court decisions in which the husband's pre-divorce creditors successfully seized the wife's post-divorce property,²⁵² as well as the Texas Supreme Court *per curiam* opinion in *Stewart Title v. Huddleston*²⁵³ discussed earlier in this article.²⁵⁴ The drafters explained:

The 1948 amendment to the Texas Constitution provided that spouses might partition their community property "without prejudice to pre-existing creditors." This provision gives pre-existing creditors an unwarranted

Texas House of Representatives).

²⁵⁰ See generally Joseph W. McKnight, *The Constitutional Redefinition of Texas Matrimonial Property as It Affects Antenuptial and Interspousal Transactions*, 13 ST. MARY'S L.J. 449 (1982).

²⁵¹ See *Beck v. Beck*, 814 S.W.2d 745, 748 (Tex. 1991) (relying on Professor McKnight's writings to "ascertain whether the legislature intended to apply the amendment retroactively"); cf. McKnight, *1995 Survey*, *supra* note 249, at 1232 n.49 (politely questioning the court's conclusion).

²⁵² See McKnight & Davis, *supra* note 249, at 925 (citing *Dean v. First Nat'l Bank*, 494 S.W.2d 222 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.) and *Md. Cas. Co. v. Schroeder*, 446 S.W.2d 117 (Tex. Civ. App.—El Paso 1969, writ ref'd n.r.e.)).

Neither *Dean* nor *Maryland Casualty* have previously been discussed in this article as authority for the supposed rule that an unsecured creditor's rights to collect from community property survive divorce. Arguably, they are not. *Maryland Casualty* poses an unusual case, in that the "creditor" was trying to recover funds embezzled by the husband and traced into property awarded the wife at divorce. 446 S.W.2d at 119. The court imposed a constructive trust on the particular assets obtained with the proceeds of fraud. *Id.* at 121.

Dean is a more traditional debtor-creditor case. The First National Bank of Athens recovered land awarded the wife at divorce in order to satisfy the ex-husband's obligations under promissory notes only he had signed. *Dean*, 494 S.W.2d at 223–25. However, the bank alleged and the trial court apparently concluded that the bank had filed suit and attached the land in question before the parties divorced. *Id.* at 223, 224. The trial court further found that "the divorce judgment was obviously obtained by collusion to defraud the bank and defeat its efforts to collect its notes and subject the property attached to the payment of the notes." *Id.* at 224. Either one of these circumstances arguably distinguishes *Dean* from the situation addressed in this article.

That said, neither the factual distinctions in *Dean* nor in *Maryland Casualty* would work to a typical unsecured creditor's benefit. If lawmakers and voters were concerned by overreaching in those cases, they would be even more concerned by efforts to collect in cases not involving embezzlement or existing attachments or judgment liens.

²⁵³ See McKnight, *Constitutional Redefinition*, *supra* note 250, at 452 n.15.

²⁵⁴ See *supra* text accompanying notes 171–173.

special advantage over the nondebtor spouse that is not given to pre-existing creditors in cases of interspousal gifts. Judicial partitions of community property on divorce also fall afoul of this provision. . . . Under present law, for example, a husband's pre-existing creditors may levy execution on community property (previously subject to sole or joint management of the husband) even though the partition did not cause the husband to become insolvent, and even though the husband was ordered to pay the creditor. . . . Under the proposed amendment the creditor's position would be the same whether the spouses make a partition or enter into some other type of transaction.²⁵⁵

The drafters of the 1980 constitutional amendment intended and expected that the new language would define the outer limits of an unsecured creditor's post-divorce rights.²⁵⁶ Unfortunately, that aspect of the amendment is seldom discussed,²⁵⁷ perhaps because the creditor-limiting language may have been obscured by more prominent features, such as provisions that authorized effective pre-marital agreements and resolved probate issues.²⁵⁸

Another reason why the 1980 language has not been widely linked to the issue of post-divorce creditor rights is more substantial. The new constitutional language does not in so many words address property division at divorce.²⁵⁹ Rather, the subject of the 1980 amendments is pre- and post-marital property agreements in general.²⁶⁰ One might argue

²⁵⁵ McKnight & Davis, *supra* note 249, at 925.

²⁵⁶ Professor McKnight, in fact, declared the problem of expansive creditor rights on divorce "effectively cured by the 1980 amendment." McKnight, *Constitutional Redefinition*, *supra* note 250, at 452.

²⁵⁷ A LexisNexis search reveals only two Texas decisions that quote the "without the intention to defraud pre-existing creditors" language. Neither involves a divorce or typical debtor-creditor relationship. See *Skelley v. Hayden*, No. 05-99-00802-CV, 2001 Tex. App. LEXIS 2498, at *12 (Tex. App.—Dallas Apr. 17, 2001, pet. dismissed by agr.) (unpublished opinion addressing probate fraudulent conveyance question); see also *Allard v. Frech*, 735 S.W.2d 311, 315 (Tex. App.—Fort Worth 1987), *aff'd*, 754 S.W.2d 111 (Tex. 1988) (probate partition question).

²⁵⁸ Cf. Stanley M. Johanson, *Against Amendment No. 9*, TEX. B.J., Oct. 1980, at 925, 927 (opining that "this [proposed] amendment does too much" and suggesting that drafters "go back to the drawing board").

²⁵⁹ TEX. CONST. art. XVI, § 15.

²⁶⁰ *Id.*

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(wrongly, in this writer's opinion) that a property agreement incident to divorce is fundamentally different from an ordinary spousal agreement and thus is outside the amendment's intended scope.²⁶¹ One might also argue (correctly, in this writer's opinion) that the 1980 language speaks only to agreed—not court-ordered—division at divorce.²⁶²

Nonetheless, this minor distinction should not be permitted to obscure a more fundamental truth: Ever since the 1980 amendment, special treatment for unsecured creditors at divorce cannot be squared with the fundamental public policy expressed by the modern Texas Constitution. To see why this is so, it helps to go beyond the drafters' comments and to consider the effect on creditors of other interspousal transactions during marriage.

Long before the 1980 amendment, the notion that unsecured creditors had some sort of inchoate equity that survived a divorce decree created anomalies. For example, as the amendment's drafters pointed out, a Texas debtor always has been able to reduce the amount of community property available to satisfy a creditor's demands by making a gift to her spouse, or to a third party.²⁶³ Though the gift may reduce the amount of property that is available to satisfy the demands of an unsecured creditor, the transfer still is valid unless the creditor can prove fraud or resulting insolvency.²⁶⁴

²⁶¹ See *Byrnes v. Byrnes*, 19 S.W.3d 556, 559 (Tex. App.—Fort Worth 2000, no pet.) (distinguishing between agreements incident to divorce and marital partition agreements). *But see* McKnight, *Constitutional Redefinition*, *supra* note 250, at 473 (“Although the divorce partition rests on a different line of authority from that of the ordinary spousal partition, both types of partition are now probably merged under the constitutional definition.”) (footnotes omitted) (citing *Amarillo Nat'l Bank v. Liston*, 464 S.W.2d 395, 398–401 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.); McKnight, *1983 Survey*, *supra* note 160, at 78 (arguing that “a partition made by spouses in anticipation of divorce is clearly within the constitutional provision”).

²⁶² As a general matter, a Texas divorce court has the power to divide community property “in a manner that the court deems just and right.” TEX. FAM. CODE ANN. § 7.001 (West 2006). The judge can reject the parties' property agreement incident to divorce on a finding that the agreement is not “just and right.” *Id.* § 7.006(c).

²⁶³ See *supra* text accompanying note 255 (stating that prior constitutional language gave “pre-existing creditors an unwarranted special advantage that is not given to pre-existing creditors in cases of interspousal gifts”).

²⁶⁴ See, e.g., *Pope Photo Records, Inc. v. Malone*, 539 S.W.2d 224, 226 (Tex. Civ. App.—Amarillo 1976, no writ) (applying insolvency analysis to a creditor's challenge of an interspousal gift of life insurance).

The principal drafter of the 1980 amendment noted this anomaly as one reason for the amendment. See McKnight, *Constitutional Redefinition*, *supra* note 250, at 451–52 (stating that “[t]his limitation on partitions was particularly inappropriate in divorce situations,” and that under prior law “[p]roperty transferred by interspousal gift could not be reached by prior creditors unless

After the 1980 amendment, persons about to marry or spouses have even more freedom to reduce or eliminate the amount of community property that otherwise would be available to satisfy creditors.²⁶⁵ To reiterate, the Texas Constitution authorizes pre- and post-marital agreements unless made “with the intention to defraud pre-existing creditors.”²⁶⁶ Implementing legislation mirrors this language, specifying that a spousal agreement is “void with respect to the rights of a preexisting creditor whose rights are intended to be defrauded by it.”²⁶⁷ The Family Code provisions regulating premarital agreements²⁶⁸ and agreements incident to divorce do not specifically mention creditor rights,²⁶⁹ though no implications are warranted from those omissions.²⁷⁰

In sum, an unsecured creditor can avoid the effect of a married person’s gifts and property-management agreements only by proving the equivalent

the transfer could be shown *fraudulent as to creditors*, whereas partitioned property could be reached merely if the creditor chose to seize it” (emphasis in original).

²⁶⁵ TEX. CONST. art. XVI, § 15.

²⁶⁶ *Id.*

²⁶⁷ TEX. FAM. CODE ANN. § 4.106(a) (West 2006).

²⁶⁸ *See id.* §§ 4.001–.010.

²⁶⁹ *See id.* § 7.006. Professor McKnight is of the opinion that, so far as agreements in anticipation of divorce are concerned, “unless a division of a joint tenancy in personalty was achieved with an intent of a debtor-spouse to defraud a creditor, or the division was made when the debtor-ex-spouse was insolvent, the creditors of the debtor-ex-spouse should not be able to reach the property awarded to the non-debtor ex-spouse.” McKnight, *Constitutional Redefinition*, *supra* note 250, at 473.

²⁷⁰ State lawmakers have done only a spotty job of adapting legislation to constitutional changes in this area. For example, the statutes governing premarital agreements do not mention creditor rights, *see generally* TEX. FAM. CODE ANN. §§ 4.001–.010, despite the clear limitation imposed by the Texas Constitution. *See* TEX. CONST. art. XVI, § 15. This may be due to the fact that the legislature simply adopted a uniform act rather than drafting statutes tailored to the Texas Constitution. *See* TEX. FAM. CODE ANN. § 4.010 (providing for citation as “the Uniform Premarital Agreement Act”). Nor does the statute that permits spouses to change the management status of property by agreement address creditor rights, *see id.* § 3.102(c), though such rights surely can be prejudiced by management agreements (including unwritten oral agreements). *See, e.g.,* Evans v. Muller, 510 S.W.2d 651, 654–55 (Tex. Civ. App.—Austin), *rev’d on other grounds*, 516 S.W.2d 923 (Tex. 1974); *see also* LeBlanc v. Waller, 603 S.W.2d 265, 267 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (validating oral management agreement). Oddly enough, the topic is mentioned in legislation implementing a 1999 amendment that permits the creation of community property by agreement, through language reminiscent of the pre-1980 version of the Texas Constitution. *See* TEX. FAM. CODE § 4.206 (“A conversion of separate property to community property does not affect the rights of a preexisting creditor of the spouse whose separate property is being converted . . .”).

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of actual fraud,²⁷¹ or by showing the spouse did not receive equivalent value and was rendered insolvent by the transfer.²⁷² A creditor's rights are even more restricted in relation to ordinary premarital and marital agreements—only proof of actual fraud will do.²⁷³ Parties also can divide their property by agreement at divorce, subject only to the trial court's oversight and potential veto.²⁷⁴ It simply is not reasonable to assume an unsecured Texas creditor in the post-1980 world has rights superior to a judge's broad-ranging "just and right" division powers; were that so, one would expect the legislature to spell out such an exception, just as the legislature has done in the Texas Probate Code.²⁷⁵

Put a little differently, if the public policy concern is potential fraud on creditors, as the 1980 constitutional amendment makes clear,²⁷⁶ it is hard to imagine a situation with less potential for fraud than a divorce agreement subject to judicial oversight, or a court order entered after a contested hearing. Either way, a judge has approved the agreement as "just and right,"²⁷⁷ presumably taking legitimate concerns of creditors into account.²⁷⁸

The fundamental illogic of trying to square expansive post-divorce unsecured creditor rights with the public policy set out in the Texas Constitution can be illustrated by hypothetical examples. Assume Husband runs up \$50,000 in debt on his sole-signer credit cards without his wife's

²⁷¹ See TEX. BUS. & COM. CODE ANN. § 24.005 (West Supp. 2010).

²⁷² *Id.* § 24.006.

²⁷³ The question of whether a divorce decree, or an agreement incident to divorce incorporated in such a decree, also can be set aside for constructive fraud or insolvency is taken up later in this article. See *infra* notes 371–408 and accompanying text.

²⁷⁴ See *supra* note 262.

²⁷⁵ As discussed earlier in this article, see *supra* notes 41–59 and accompanying text, the Texas Probate Code provides that the deceased spouse's community property "continues to be subject to the liabilities of that spouse upon death" and "passes . . . charged with the debts that were enforceable against such deceased spouse prior to his or her death." TEX. PROB. CODE ANN. § 156 (West 2003). As to divorce, the Family Code simply provides that the court must "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." TEX. FAM. CODE ANN. § 7.001. The legislature did not say "without prejudice to pre-existing creditors" as the Texas Constitution once said, "continues to be subject to the liabilities" of the spouses as the Probate Code says, or even "having due regard for the rights of each party, their creditors, and any children."

²⁷⁶ See TEX. CONST. art. XVI, § 15 (stating that agreements are permitted, providing there is no "intention to defraud pre-existing creditors").

²⁷⁷ See *supra* note 262.

²⁷⁸ See *supra* note 66 and accompanying text.

knowledge or consent. He is barely managing to make the minimum monthly payments from his current salary. The couple's only asset is a \$50,000 balance joint-management savings account. Wife learns of the credit card debt and threatens to leave Husband. In an effort to reconcile, they agree in writing to split the \$50,000 into two separate-property \$25,000 accounts. One month later, Husband is fired and in consequence stops making payments on the credit card. The creditor can obtain a personal judgment against Husband but cannot reach the \$25,000 in Wife's hands because the couple did not intend to defraud their creditors.²⁷⁹

Now consider a variation. Wife's discovery of the credit card debt is the last straw. She files for divorce. At trial, despite Husband's vigorous objection, the court splits the savings account 50-50 as a "just and right" division of the community estate. The court assigns responsibility for repayment of the entire credit card debt to Husband. Husband's job performance suffers, and he is fired. Under the apparent majority rule discussed in this article, the creditor could reach the wife's \$25,000 to satisfy its judgment. This supposedly would be the case, even though the possibility of fraud is diminished by the adversarial nature of the proceeding and by judicial oversight of fairness.

Finally, consider a further variation. With divorce pending, Husband does some soul-searching. He decides he should pay off his own debt, and that Wife should not suffer for his foolishness. As an expression of his remorse, and because he has greater future earning power, Husband and Wife agree that she should be awarded \$40,000 of the \$50,000 in the joint account, leaving only \$10,000 as Husband's post-divorce share. Husband also agrees to assume the entire \$50,000 debt—for which he is legally responsible in any event, as sole signer on the credit cards.

The court may doubt the wisdom of Husband's agreement. Nonetheless, the judge must honor its terms unless the court affirmatively finds the agreement is not "just and right."²⁸⁰ When Husband later is fired

²⁷⁹ See TEX. FAM. CODE ANN. § 4.106(a) (providing that marital partitions are void "with respect to the rights of a preexisting creditor whose rights are intended to be defrauded by it"); see *id.* § 3.202(a) (providing that one spouse's separate property is not subject to the other spouse's liabilities "unless both spouses are liable by other rules of law").

²⁸⁰ *Id.* § 7.006(c). Moreover, if the parties had submitted the agreement pursuant to mediation or collaborative law procedures, the court would be bound. See *id.* § 6.602(c) (stating that a party is "entitled to judgment on the mediated settlement agreement" notwithstanding any other rule of law); *id.* § 6.603(e) (same as to a collaborative law settlement); see also SAMPSON & TINDALL, *supra* note 17, § 7.006 *comment* ("Settlement agreements reached through those procedures are

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and defaults, the creditor cannot set aside the divorce agreement or reach the wife's \$40,000 in property because the couple did not intend to commit fraud.

Such an outcome, in which the spouses acting together would have the power to remove community property from their unsecured creditors' grasp but a disinterested judge would not, simply makes no sense. Denial of special treatment to unsecured creditors at divorce would maintain symmetry and logic in the law, and effectuate the clear intent—if not the precise words—of the current Texas Constitution.

2. State Statutes

Not only is the notion that the unsecured creditor of one spouse can reach property in the hands of an innocent spouse after divorce inconsistent with the Texas Constitution, but also it is inconsistent with state statutes and general rules of law. In fact, some modern decisions that conclude an unsecured creditor's right to seize community property survives divorce may simply be based on a misreading of the Texas Family Code.

Consider a 2006 opinion from the Eastland Court of Appeals.²⁸¹ *Mock v. Mock* does not directly involve creditor rights.²⁸² Rather, the wife appealed from the divorce court's order that she pay off her husband's credit card debts.²⁸³ However, in affirming the trial court, the Eastland court referred to a creditor's rights case already discussed²⁸⁴ and stated:

Section 3.202(c) of the Family Code provides that “community property subject to a spouse's sole or joint management, control, and disposition is subject to the liabilities incurred by the spouse before or during marriage.” Thus, community property that was under [the ex-husband's] sole or joint management during the marriage may be reached to satisfy debts incurred solely by

binding on the court . . .”).

²⁸¹*Mock v. Mock*, 216 S.W.3d 370 (Tex. App.—Eastland 2006, pet. denied).

²⁸²The Eastland Court of Appeals actually chided the ex-wife in a footnote, noting that she “cite[d] a number of cases in which creditors attempted to collect debts.” *Id.* at 374 n.1. That was a mistake, the court said, because “[t]hese cases did not involve the division of community liabilities upon divorce, and, therefore, the cases do not apply.” *Id.*

²⁸³*Id.* at 373.

²⁸⁴The case, *Anderson v. Royce*, 624 S.W.2d 621, 623 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.), is discussed *supra* in notes 121 and 125.

[the ex-husband]. . . . The record does not demonstrate that the community property awarded to [the ex-wife] did not include property subject to [the ex-husband's] sole management or joint management during the marriage. Therefore, we find that the trial court did not err²⁸⁵

The reasoning is clear and, at first blush, plausible. The Family Code does say that a spouse's sole- or joint-management community property is subject to that spouse's liabilities.²⁸⁶ The statute does not say that liability ceases at the time of divorce.²⁸⁷ Thus, reasons the court, community property liable to execution during marriage remains liable to execution after divorce.²⁸⁸

The error in the Eastland court's thinking is even clearer. Community property liable to execution under Family Code Section 3.02(c) during marriage is not liable to execution under that statute after divorce because—by definition—it no longer is “community” property subject to the statute.²⁸⁹

This technical but important point deserves emphasis. Legally speaking, there simply is no such thing as post-divorce “community” property. Upon divorce, community property not partitioned by agreement or divided by proper court order²⁹⁰ is held by the former spouses as tenants in common or joint owners,²⁹¹ “just as if they had never been married.”²⁹² When courts describe post-divorce joint holdings as a tenancy in common or joint tenancy, such language affirmatively negates community property

²⁸⁵ *Mock*, 216 S.W.3d at 374.

²⁸⁶ TEX. FAM. CODE ANN. § 3.202 (West 2006).

²⁸⁷ *Id.*

²⁸⁸ *Mock*, 216 S.W.3d at 374.

²⁸⁹ *Cf.* Featherston, *When the Debtor is Married*, *supra* note 76, at E-4 (“[I]t is necessary to remember that the basic rules of marital characterization, management and liability continue only during the marriage. Community property cannot exist without a marriage. Accordingly, when the marriage terminates by either death or divorce, community property ceases to exist, and generally either the probate court or the divorce court will resolve the characterization and liability issues that arose during the marriage.”).

²⁹⁰ The statute specifies that the court “shall” divide the community property at divorce. *See* TEX. FAM. CODE ANN. § 7.001.

²⁹¹ *Harrell v. Harrell*, 692 S.W.2d 876, 876 (Tex. 1985) (per curiam) (citing *Busby v. Busby*, 457 S.W.2d 551, 554 (Tex. 1970); *Taylor v. Catalon*, 166 S.W.2d 102, 104 (Tex. 1942)) (stating that this “has long been the rule in Texas”).

²⁹² *McDaniel v. Thompson*, 195 S.W.2d 202, 203 (Tex. Civ. App.—San Antonio 1946, writ ref'd).

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status.²⁹³ Some courts do speak of post-divorce “community” property.²⁹⁴ However, that is just sloppy language. Such post-divorce assets are more accurately described as the former spouse’s “property” or as “former community property.”²⁹⁵ An old Washington state case makes the point

²⁹³ Community property is a civil-law concept, and therefore by definition not a common-law tenancy. To the extent there is any common-law analogue to civil-law community property, the proper comparison would be to tenancy by the entirety. *See, e.g.*, *Lansberry v. Lansberry*, No. 01-95-00811-CV, 1997 WL 198144, at *2 n.1 (Tex. App.—Houston [1st Dist.] Apr. 24, 1997, no pet.) (not designated for publication) (“When parties bring to Texas property held [as tenants in the entirety] from the jurisdictions that allow it, that property would be treated as being held as either community property or as jointly held separate property, depending on the intent expressed in the instrument creating the tenancy by the entirety . . .”) (citing BARBARA ANNE KAZEN, *FAMILY LAW: TEXAS PRACTICE & PROCEDURE* § 11.02[5][a] (1996)); Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 124 n. 231 (2004) (“To some extent, tenancy by the entirety can provide a substitute for community property . . .”); Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1541–43 (2003) (describing and critiquing the general characteristics of tenancy by the entirety in comparison to marital property); *see also* John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 BYU L. REV. 35, 35–49 (providing a general description and history of the tenancy).

²⁹⁴ *See, e.g.*, *Michael v. Godwin*, No. 14-03-00741-CV, 2004 WL 2851499, at *1 (Tex. App.—Houston [14th Dist.] Dec. 14, 2004, pet. denied) (mem. op.) (stating that the former wife alleged her former husband “possessed community property that was not divided in their divorce”); *Brewer v. Brewer*, No. 04-99-00526-CV, 2000 WL 709091, at *4 (Tex. App.—San Antonio 2000, no pet.) (stating that the Texas Family Code permits “a former spouse to file suit to divide overlooked community property”); *Stephens v. Marlowe*, 20 S.W.3d 250, 252 (Tex. App.—Texarkana 2000, no pet.) (stating that “community property” not divided at divorce “is held by the former spouses as tenants in common”).

²⁹⁵ *See, e.g.*, *McCubbin v. Tate*, 844 S.W.2d 913, 917 (Tex. App.—Tyler 1992, no writ) (reforming a decree to provide that the ex-wife is awarded certain property “as her share of the former community property estate”); *Kartchner v. Kartchner*, 721 S.W.2d 482, 484 (Tex. App.—Corpus Christi 1986, no writ) (“[I]t is the rule in Texas that a partition of such former community property is the proper means of dividing property between tenants in common . . .”); *Eddy v. Eddy*, 710 S.W.2d 783, 785 (Tex. App.—Austin 1986, writ ref’d n.r.e.) (“Partition is available as a means of dividing property formerly held by spouses as community property *not divided* upon divorce On the other hand, community property . . . specifically allocated by the express terms of a divorce decree is *not later* subject to partition” (emphasis in original)); *Inwood Nat’l Bank v. Hoppe*, 596 S.W.2d 183, 185 (Tex. Civ. App.—Texarkana 1980, writ ref’d n.r.e.) (speaking of the ability of “community creditors to have reached the former community property awarded to [the ex-wife] by the divorce judgment”); *cf.* LA. CIV. CODE ANN. art. 2369.3 (2001) (example of a state statute explicitly referring to the post-dissolution treatment of “former community property”); *In re Provenza*, 316 B.R. 177, 211 (Bankr. E.D. La. 2003) (“Under Louisiana law, when the community of acquets and gains is terminated, the property that had comprised the community of acquets and gains technically is no longer considered ‘community property.’ Rather, it is considered ‘former community property,’ even though it has yet to be

well:

Where no disposition of the property rights of the parties is made by the divorce court, the separate property of the husband prior to the divorce becomes his individual property after divorce, the separate property of the wife becomes her individual property, and, from the necessities of the case, their joint or community property must become common property. After the divorce there is no community, and in the nature of things there can be no community property.²⁹⁶

A Texas case, *Workings v. Workings*, offers a vivid illustration of how divorce automatically changes the classification of property.²⁹⁷ This appeal from the same couple's second marriage and second divorce centered on Mr. Workings' Navy retirement benefits.²⁹⁸ These benefits were not specifically mentioned in the couple's first divorce decree,²⁹⁹ quite possibly because the property status of such benefits was not yet clearly established in Texas law.³⁰⁰ When the Workings divorced for the second time, the trial court classed the retirement benefits as community property, apparently thinking that the community property status of the benefits carried over from one marriage to the next.³⁰¹ The Dallas Court of Appeals reversed, stating:

[U]pon the termination of a marriage, any property held by the former husband and wife as community property

partitioned. The Bankruptcy Code does not recognize this distinction. The term 'community property,' as used in the Bankruptcy Code, encompasses both community property of an existing community, and the unpartitioned property of a terminated community property regime." (footnote omitted)).

²⁹⁶ *Ambrose v. Moore*, 90 P. 588, 589 (Wash. 1907); see also 15 AM. JUR. 2D *Community Property* § 106 (2006) (citing *Ambrose*, 90 P. 588) ("When spouses are divorced but their property rights have not been adjudicated, what was a spouse's separate property becomes that spouse's individual property, and the former community property becomes the common property of the former spouses, in the sense of property being held as tenants in common" (footnotes omitted)).

²⁹⁷ 700 S.W.2d 251, 253 (Tex. App.—Dallas, no writ).

²⁹⁸ *Id.* at 252.

²⁹⁹ *Id.* at 252–53.

³⁰⁰ See, e.g., *Cearley v. Cearley*, 544 S.W.2d 661, 662 (Tex. 1976) (setting out some of the events in the development of the law classifying retirement benefits).

³⁰¹ See *Workings*, 700 S.W.2d at 253.

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becomes their separate property. At the time of the first divorce, the community property held by the parties either became their separate property according to the terms of the purported property agreement, or, if there was no agreement, they became tenants-in-common of undivided separate property.³⁰²

“Remarriage,” the court added, “did not affect this classification.”³⁰³

To reiterate, the principal property-liability statute on which unsecured creditors must base their right to recover from community assets during marriage (or from former community assets after divorce) uses words like “spouses” and “community property.”³⁰⁴ After divorce, there is no longer any “community property” subject to liability.³⁰⁵ Nor, for that matter, are the former husband and wife still “spouses.”³⁰⁶

A final linguistic point is worth making. To the extent the Texas liability statute offers even analogical guidance, property in the hands of either spouse after divorce would more properly be considered “separate” than “community”—at least if one were forced to pick the “least worst” of two inappropriate labels.

Strictly speaking, at least in a community property jurisdiction, “separate property” is a term reserved for property held by married persons.³⁰⁷ Nonetheless, courts and commentators sometimes refer to former community property as “separate property.”³⁰⁸ Thus, in *Eggemeyer*,

³⁰² *Id.*

³⁰³ *Id.* at 254.

³⁰⁴ See TEX. FAM. CODE ANN. § 3.202 (West 2006) (using the word “spouse” nine times, and the phrase “community property” three times).

³⁰⁵ Accord Loo, *supra* note 178, at 779 n.18 (stating that “courts should not cite to managerial or community debt systems when a creditor is trying to collect subsequent to the divorce settlement” because “[a]t the point when the divorce division has been made, debt collection systems followed during marriage are no longer relevant”).

³⁰⁶ See, e.g., MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1138 (10th ed. 1998) (defining “spouse” as a “betrothed man, groom” or “betrothed woman, bride” or “married person”). The Texas Family Code does not explicitly define “spouse.” Nonetheless, by distinguishing between “prospective spouses,” “spouses” and “former spouses” at various points, the Code makes clear that no deviation from normal English usage is intended. See, e.g., TEX. FAM. CODE ANN. § 4.001 (defining a premarital agreement as one between “prospective spouses”); *id.* § 3.002 (defining community property as “property, other than separate property, acquired by either spouse during marriage”); *id.* § 71.003 (defining a family to include “former spouses”).

³⁰⁷ Cf. TEX. FAM. CODE ANN. § 3.001 (referring to a “spouse’s separate property”).

³⁰⁸ See, e.g., *Workings*, 700 S.W.2d at 253; JOSEPH W. MCKNIGHT & WILLIAM REPPY,

the Supreme Court of Texas characterized the trial court's decision to award one spouse's separate real estate to the other at divorce as a "decree that the husband's separate property shall become the separate property of the divorced wife."³⁰⁹ It is entirely correct to refer to community property partitioned by spouses during marriage as being "separate property" after the partition; in fact, both the Texas Constitution³¹⁰ and enabling legislation use that phrase.³¹¹ So for most purposes, it does no real harm to refer to property partitioned by spouses in an agreement incident to divorce, or by the court after a contested hearing, as "separate property."³¹²

So far as the subject matter of this article is concerned, though, a conclusion that community property awarded one spouse at divorce actually becomes "separate property"—or the non-marital equivalent of separate property—puts an unsecured creditor in a far worse position than if the property were simply considered "his (or her) property" or "former community property." The Texas Family Code's liability provision does not address "former community property" one way or another.³¹³ However, the statute affirmatively provides that "[a] spouse's separate property is not subject to liabilities of the other spouse unless both spouses are liable by other rules of law."³¹⁴ Moreover, as mentioned earlier, an attempt to divest one spouse of separate property for any purpose (and particularly, one might think, to pay the debts of the other former spouse) raises constitutional concerns.³¹⁵ In sum, so far as the Texas Family Code analysis is concerned, the only fairly debatable issue is whether an unsecured creditor's post-divorce attempt to seize property awarded the innocent spouse is explicitly, or just implicitly, prohibited by statute.

TEXAS MATRIMONIAL PROPERTY LAW 11:35 (1999 ed.) ("Community property undivided on divorce becomes a tenancy in common of separate property of the two former spouses . . ."); J. THOMAS OLDHAM, TEXAS MARITAL PROPERTY RIGHTS 314 (4th ed. 2003) ("Divorce ostensibly changes community property into the separate property of each spouse . . .").

³⁰⁹ *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977).

³¹⁰ See TEX. CONST. art. XVI, § 15 (providing, *inter alia*, that "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 . . . 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").

³¹¹ See TEX. FAM. CODE ANN. § 4.102 ("Property . . . transferred to a spouse by a partition or exchange agreement becomes that spouse's separate property . . .").

³¹² See TEX. CONST. art. XVI, § 15.

³¹³ See TEX. FAM. CODE ANN. § 3.202.

³¹⁴ *Id.* § 3.202(a).

³¹⁵ See *supra* text accompanying note 65.

C. Fairness and Public Policy

1. Balancing Modern Equities

The world has changed since the Texas doctrine granting favored treatment to unsecured creditors at divorce first was announced. It is difficult to imagine what equities might still justify a rule that deviates from modern rules of commerce to specially favor unsecured creditors in their dealings with married persons in the absence of a common-law lien or statutory right.³¹⁶ To the contrary, any creditor should know that a potential debtor might be married³¹⁷ and that divorce is common.³¹⁸ A savvy creditor also should know that the property that seems available to satisfy a judgment when a loan is made might be affected by any number of later events—such as a voluntary sale, another creditor’s lien or judgment, or even a spousal agreement³¹⁹ that can be set aside only by proving fraud.³²⁰

³¹⁶Professor Andrea Carroll recently has suggested that a rule favoring unsecured creditors at divorce might be justified on the ground that it discourages divorce by removing a potential economic incentive. See Carroll, *Incentivizing Divorce*, *supra* note 205, at 1973–75. This writer also has speculated that such considerations may have been in play in one early Texas case, *Richey v. Hare*, 41 Tex. 336 (1874). See *supra* text accompanying note 97. However, ever since a 1948 constitutional amendment, the same result can be accomplished in Texas with much less fuss through a marital property agreement. See *supra* note 240.

³¹⁷As of 2000, about 59% of all Texans over 15 years of age were married. *Table 4: Marital Status of the Population 15 Years of Age and Older for the State of Texas and Counties in Texas with Numerical and Percent Change, 1990 and 2000*, TEXAS STATE DATA CENTER AND OFFICE OF THE STATE DEMOGRAPHER, http://txsdc.utsa.edu/Resources/Decennial/2000/DP2_4/US/tab-004.txt (last visited Nov. 25, 2011).

³¹⁸Across the United States, 40–50% of marriages end in divorce. See, e.g., Raymon Zapata, Comment, *Child Custody in Texas and the Best Interest Standard: In the Best Interest of Whom?*, 6 SCHOLAR 197, 198 (2003). Texas does not appear to differ appreciably from the national average. See, e.g., *Marriage & Divorce*, TEXAS DEPARTMENT OF STATE HEALTH SERVICES, <http://www.dshs.state.tx.us/CHS/VSTAT/latest/nnuptil.shtm> (last visited Nov. 25, 2011) (reporting a 2004 crude marriage rate of 7.9 per 1,000 residents and a crude divorce rate of 3.6 per 1,000 residents for the same period); accord Carroll, *Superior Position of the Creditor*, *supra* note 178, at 49 (“Given the proliferation of divorce nowadays, creditor reliance on marital status as a continuing one may be unreasonable . . .”).

³¹⁹Accord Carroll, *Superior Position of the Creditor*, *supra* note 178, at 48–49 (“It could certainly be argued that, given the proliferation of marital agreements and the likelihood that the spouses could opt out of the community at any moment, a creditor should never form an expectation of seizing any of the non-debtor spouse’s community property . . .”).

In some circumstances, the recording of an agreement could make a difference. A recorded partition agreement affecting real property would constitute constructive notice to a third party purchaser or creditor (presumably a secured creditor) only if that agreement is acknowledged and

While rules of coverture once prohibited a married woman from freely contracting debts, the unsecured contract creditor of one spouse now occupies that position only by choice.³²¹ If a loan benefits both spouses, or if the creditor has some other legitimate reason to require that both spouses assume personal liability,³²² the creditor can insist that both spouses sign.³²³ If the creditor intends to rely on the availability of any particular item of property for payment, the creditor can take and properly perfect a security interest.³²⁴ In sum, “[f]uture creditors of the spouses, at least their voluntary or contractual creditors, have an extraordinary ability to self-protect that weighs against giving them additional special protection.”³²⁵

The Supreme Court of Idaho found this line of thinking persuasive when it denied an unsecured creditor recovery in *Twin Falls Bank & Trust Co. v. Holley*,³²⁶ discussed earlier.³²⁷ Because only John Holley signed the

recorded in the county in which the real property is located. TEX. FAM. CODE § 4.106(b).

³²⁰ See *supra* text accompanying notes 239–245.

³²¹ A tort creditor, of course, does not enter the relationship voluntarily. Nonetheless, such a creditor can protect any legitimate interests by filing suit promptly, and by taking advantage of pretrial remedies. See, e.g., TEX. CIV. PRAC. & REM. CODE §§ 61.001, 63.001 (West 2008) (attachment & garnishment, respectively).

³²² In deciding whether to require one spouse’s signature before making a loan to the other spouse, a potential creditor should keep federal non-discrimination laws and regulations in mind. See generally Todd M. Johnson, *Limitations on Creditors’ Rights to Require Spouses’ Signatures Under the ECOA and Washington Community Property Law*, 4 U. PUGET SOUND L. REV. 333 (1981); Winnie F. Taylor, *The Equal Credit Opportunity Act’s Spousal Cosignature Rules and Community Property States: Regulatory Haywire*, 37 SW. L.J. 1039 (1984).

³²³ *Schlaefter v. Fin. Mgmt. Serv., Inc.*, 996 P.2d 745, 749 (Ariz. Ct. App. 2000) (“[T]hird party creditors can easily avoid the risk of unknown interspousal transfers (and the embarrassment or burden of inquiring about them) by obtaining both spouses’ signatures on notes Obtaining both spouses’ signatures is a reasonable burden to place on creditors who later attempt to recover against former community assets.” (quoting *Leasefirst v. Borrelli*, 17 Cal. Rptr. 2d 114, 116–17 (Cal. App. Dep’t Super. Ct. 1993), in turn quoting *Kennedy v. Taylor*, 201 Cal. Rptr 779, 781 (Cal. Ct. App. 1984))); see also SAMPSON & TINDALL, *supra* note 17, at B-5 (“[C]reditor[s] generally have the good sense to protect themselves by insisting that the spouses act jointly when they incur liability . . .”).

³²⁴ Accord Carroll, *Superior Position of the Creditor*, *supra* note 178, at 51 (stating that “a creditor desiring additional protection may require security for the debt, thus binding a particular piece of property to guarantee repayment, or even better, demand the signature of both spouses, making the property of either seizable”).

³²⁵ Carroll, *Superior Position of the Creditor*, *supra* note 178, at 51. Professor Carroll adds: “Most simply, the creditor can develop appropriate expectations as to what property may be available to satisfy the debt of his prospective married debtor by asking!” *Id.*

³²⁶ 723 P.2d 893, 897–98 (Idaho 1986).

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promissory note, only John Holley was personally liable.³²⁸ If the bank had obtained a judgment against Mr. Holley before divorce, it could have collected on all the couple's community property.³²⁹ If the bank had perfected a lien in community real estate before divorce, that lien would have survived the divorce decree.³³⁰ Having done neither, the bank had to be satisfied with its ordinary remedies against Mr. Holley and his post-divorce property.³³¹

Even if an unsecured creditor fails to take any of these other elementary steps at self-protection, the creditor still can intervene in the divorce,³³² at

³²⁷ See *supra* text accompanying notes 191–205.

³²⁸ *Twin Falls Bank & Trust*, 723 P.2d at 897 (stating that “Mrs. Holley had not signed the . . . note and thus was not personally liable for that obligation”).

³²⁹ The Idaho Supreme Court noted that the bank had renewed an earlier note on June 26, 1981. *Id.* The couple did not divorce until August 28, 1981. *Id.* at 894. Accordingly, had the bank not chosen to renew the note in June 1981, “the bank had a claim against Mr. Holley which it could satisfy by judgment and execution against either Mr. Holley and any separate property which he may have had, or against the community property of Mr. and Mrs. Holley.” *Id.* at 897.

³³⁰ The court was quite critical of the bank on this point. *Id.* at 897. The opinion stated that “the bank failed to perfect its security interest in real property held by Mr. Holley, losing it to the bankruptcy trustee,” when John Holley filed for bankruptcy shortly after divorce. *Id.* at 895, 897. The court concluded: “In short, the bank’s inability to obtain satisfaction for its unpaid obligation was in large part attributable to the bank’s failure to perfect its security interest in real property held by John Holley.” *Id.* at 897.

³³¹ See *id.* at 897–98.

³³² See, e.g., *Fletcher v. Nat’l Bank of Commerce*, 825 S.W.2d 176, 179 (Tex. App.—Amarillo 1992, no writ) (citing case authority for the conclusion that “[a] creditor may intervene in a divorce action subject to being stricken out by the court for sufficient cause on the motion of any party”); 15A TEX. JUR. *Divorce and Separation* § 163 (1955) (“The creditor may properly intervene in the suit for divorce in order to obtain a satisfaction of his claim . . .”).

Creditor intervention features in several cases were already discussed in this article. See, e.g., *Cockerham v. Cockerham*, 527 S.W.2d 162, 164 (Tex. 1975) (“This is a divorce case in which the wife’s trustee in bankruptcy has intervened . . .”); *LeBlanc v. Waller*, 603 S.W.2d 265, 266 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (stating that “appellee, as an alleged creditor of the community, intervened”); *Broadway Drug Store of Galveston, Inc. v. Trowbridge*, 435 S.W.2d 268, 269 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ) (“Judgment was granted to the intervenor, Broadway Drug, in the divorce decree . . .”).

A recent case from the Austin Court of Appeals, *Doe v. Carroll*, No. 03-08-00556-CV, 2009 WL 1811002 (Tex. App.—Austin June 23, 2009, no pet.) (mem. op.), expresses a more hostile attitude toward divorce intervention by an unsecured creditor. In *Doe v. Carroll*, the Carrolls were divorcing with criminal child sex abuse charges pending against the husband. *Id.* at *1. The parents of one child Mr. Carroll was accused of molesting tried to intervene to protect their tort claims. *Id.* The trial court refused to grant the intervention, and the Austin Court of Appeals affirmed on abuse of discretion analysis. *Id.* at *9. The court of appeals based its decision in part

least in Texas.³³³ Divorce filings are public record,³³⁴ creditors lose little by intervening,³³⁵ and Texas courts sometimes fashion creative remedies for alert creditors with legitimate concerns.³³⁶ The availability of intervention

on the peculiar allegations in the case—in particular, the Does' claim that they needed to intervene to conduct discovery on the state of Mr. Carroll's assets. *Id.* at *5. Such discovery could have been handled just as easily in the Does' tort action. *Id.* In part, however, the decision also was grounded in broader principles—specifically, the court's finding that an unliquidated tort claim did not rise to the level of a "justiciable interest" in the divorce suit sufficient to justify intervention. *See, e.g., id.* at *8.

³³³The Texas approach evidently is contrary to the majority rule in other jurisdictions. *See, e.g.,* Brett R. Turner, *Division of Third-Party Property in Divorce Cases*, 18 J. AM. ACAD. MATRIMONIAL LAW. 375, 426 (2003) ("It should be noted that the majority rule does not allow any and all third parties to intervene in a divorce action. For example, unsecured creditors with no actual claim to any specific marital asset never have standing to intervene. Even a secured creditor should probably lack standing to intervene, based only upon the presence of a lien, unless the underlying debt is so substantially in default as to give the creditor a claim for immediate ownership. The key limitation under the majority rule is that third parties can intervene (and their joinder is required) only to the extent that they possess a prima facie claim to ownership rights in a specific marital asset.").

³³⁴Texas has one modest exception to this rule, providing a thirty-day confidentiality period for divorce suits filed in counties with a population of 3.4 million or more—that is, Houston and surrounding communities. *See, e.g.,* TEX. FAM. CODE ANN. § 6.411 (West 2006); City of Katy, Texas, <http://www.caneisland.com/city-of-katy.htm> (last visited Nov. 25, 2011) ("Harris County is the third largest county in the United States with a population of over 3.4 million people . . ."). The obvious purpose of the statute is to discourage Houston-area divorce lawyers from soliciting business too quickly.

³³⁵It has even been suggested that a divorce court lacks power to affect a creditor's rights. SAMPSON & TINDALL, *supra* note 17, at B-10 ("Because a divorce court cannot force [a novation] or absolve a spouse from a valid liability, a creditor takes no risk in intervening . . ."); *Blake v. Amoco Fed. Credit Union*, 900 S.W.2d 108, 111 (Tex. App.—Houston [14th Dist.] 1995, no writ) ("Just because [the creditor] was named a party, answered, and appeared at the hearing on the clarification and enforcement motion does not necessarily mean that the court could modify its rights under the facts presented here . . ."); *Swinford v. Allied Fin. Co.*, 424 S.W.2d 298, 301 (Tex. Civ. App.—Dallas 1968, writ *dism'd*) ("The court in a divorce action has no power to disturb the rights which creditors lawfully have against the parties . . ."). That certainly would be so in a proceeding to which the creditor is not a party. *See supra* notes 69–71 and accompanying text. This writer is not certain the same would be true if the creditor formally intervenes or is properly joined as a party. *Cf. Bradley v. Ramsey*, 65 S.W. 1112, 1113 (Tex. Civ. App.—Dallas 1901, no writ) (ruling that a divorce court had the authority to consider a creditor's plea in intervention, despite the fact that the money value of the claim was below the minimum jurisdictional limit of the court).

³³⁶For example, in *Williams v. Norwest Bank Mont., N.A.*, No. 09-99-096-CV, 1999 WL 651072, at *1 (Tex. App.—Beaumont Aug. 26, 1999, no pet.) (not designated for publication), an apparent unsecured creditor of the husband intervened in the pending divorce action. The wife

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also is of interest because eminent commentators believe the development of Texas doctrine favoring broad post-divorce creditor rights “was the likely consequence of old Texas procedural law and practice under which a creditor (or any other interested third party claimant) could not intervene in a divorce proceeding to protect himself.”³³⁷ Assuming this to be true,³³⁸ the

obtained summary judgment that she had no personal liability. *Id.* However, before doing so, the trial court granted a temporary injunction preventing the wife from disposing of property sought by the creditor until the creditor’s claim against the husband was concluded. *Id.* The trial court then severed the creditor’s claim from the divorce action and granted the divorce. *Id.* The creditor then obtained summary judgment against the husband and refiled against the ex-wife. *Id.* The ex-wife appealed the injunction, but the Beaumont Court of Appeals sustained the trial court’s ruling. *Id.* at *3; *see also* *Brink v. Ayre*, 855 S.W.2d 44, 45 (Tex. App.—Houston [14th Dist.] 1993, no writ) (involving receivership and turnover relief, denied under the circumstances).

³³⁷JOSEPH W. MCKNIGHT & WILLIAM REPPY, *TEXAS MATRIMONIAL PROPERTY LAW* 11:34 (1999 ed.).

³³⁸This writer has not been able to verify the underpinnings of Professors McKnight and Reppy’s hypothesis. That hypothesis, set out more fully, is as follows:

Prior to *Stewart Title* it had sometimes been concluded that property that could have been seized by a creditor of an obligor spouse during marriage remained subject to seizure after divorce even though, due to the division of property by the divorce court, that interest had become the separate property of the non-obligor ex-spouse This point of view was the likely consequence of old Texas procedural law and practice under which a creditor (or any other interested third party claimant) could not intervene in a divorce proceeding to protect himself, and the consequences of the old response to this procedural situation continued to be applied in divorces long after third party intervention occurred in other types of cases. Intervention (or joinder) of third parties in divorce cases, however, was not thought feasible until after the 1940s and did not occur with any frequency until after 1970.

Id.

The leading Texas family law treatise of the 1920s, Judge Ocie Speer’s *Treatise on the Law of Marital Rights*, does not say that third parties generally were prohibited from intervening in divorce cases at that time; to the contrary, Speer states:

Ordinarily, of course, the only formal parties to a divorce case are the husband and wife. But there may be others. To the general rule that all persons interested in the subject-matter of the controversy may, and should, be made parties to the litigation, a divorce case is no exception. When another is interested in property in controversy in a divorce proceeding, he is a proper party, and he may intervene for the purpose of protecting his rights in the controversy.

SPEER, *A TREATISE ON THE LAW OF MARITAL RIGHTS IN TEXAS* § 596 (1929); *cf.* *Woeltz v. Woeltz*, 57 S.W. 905, 907 (Tex. Civ. App.—San Antonio), *rev’d on other grounds*, 58 S.W. 943, 945 (Tex. 1900) (sustaining, as against a claim of misjoinder, the wife’s decision to join a secured creditor in her divorce action).

free availability of intervention is another reason unsecured creditors should enjoy no special status today.³³⁹

When considering creditor equities, one also should remember that the community property system already greatly favors unsecured creditors.³⁴⁰ This basic point has been made persuasively in an excellent article by Professor Andrea Carroll of the Louisiana State University School of Law.³⁴¹ Professor Carroll concludes “the community regime has simply gone too far in placing the rights of creditors above those of the spouses” and that typical management and liability rules “could hardly favor creditors more.”³⁴² Simplifying greatly, because liability rules and common presumptions add community property to the separate property available to a creditor in common-law jurisdictions, “[m]odern creditors in community property regimes have access to a mass of spousal property almost inconceivable in non-community property states.”³⁴³

Because of its unique divided management scheme, Texas does not suffer from this vice to quite the same extent as other community property

Judge Speer specifically approved creditor interventions, stating: “Creditors are necessarily charged with notice of the pendency of the suit for a divorce, since the proceeding is *in rem*, and they may, therefore, if they like, intervene for the protection of their property interests.” SPEER, *supra* § 630 (footnote omitted). He added that “[i]n such a case the intervention would be incidental to the divorce, and the court would have jurisdiction of the pleas regardless of the amounts involved.” *Id.* As direct authority, Speer cited a 1901 decision, *Bradley*, 65 S.W. at 1113. *See also* *Jacobson v. Jacobson*, 88 S.W.2d 515, 515 (Tex. Civ. App.—Beaumont, 1935, no writ) (pre-1940 example of secured and unsecured creditor intervention in divorce).

The availability of formal intervention in divorce litigation also might not have been seen as an especially important issue at the time creditor-favoring Texas doctrine developed. In a largely rural environment, with a small bench and bar and limited terms of court, litigants and courts undoubtedly were well aware of the pendency of related litigation. Thus, in the leading case of *Richey v. Hare*, 41 Tex. 336 (1874), discussed earlier in this article, the creditor was quite able to protect his rights without intervention, simply by prosecuting independent parallel litigation. *See generally supra* text accompanying notes 79–100.

³³⁹*Accord McKnight, 1983 Survey, supra* note 160, at 78 (“A creditor who has failed to assert his claim to property during marriage or to intervene in the divorce should be later foreclosed from pursuing it in the hands of the debtor’s former spouse, unless the circumstances of the property division show an intent to defraud the creditor . . .”).

³⁴⁰Carroll, *Superior Position of the Creditor, supra* note 178, at 3 (discussing “the significant protection afforded creditors in the community regime”).

³⁴¹*Id.*

³⁴²*Id.* at 3, 16.

³⁴³*Id.* at 3.

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jurisdictions.³⁴⁴ At least in theory, rigid segregation of marital income and careful record keeping could combine to limit one spouse's contract debtor to the same property that person would have owned if single.³⁴⁵ However, at least in this writer's experience, such situations are rare.

Additionally, one should keep in mind that an unsecured creditor loses no legal right if formerly available community property is awarded to the non-debtor spouse at divorce. An unsecured creditor always assumes some risk. The debtor spouse might give or gamble property away, lose it in bad investments, or pay it out in medical bills. Divorce does not affect an unsecured creditor's substantive rights.³⁴⁶ It is just another contingency. "The creditor still has the same rights that the creditor had during the marriage, only the quantity of property available for the creditor has changed."³⁴⁷

In fact, a Texas unsecured creditor does not always lose ground even in the quantum of property available to satisfy a debt after divorce. To the contrary, even without special rules, an unsecured creditor may wind up in a more favorable position after divorce than before. This anomaly stems from the fact that the Texas divided-management system operates independently from the trial court's power to divide the entire mass of community property at divorce.³⁴⁸

Assume, for example, that the debtor spouse does not work outside the home, and that the non-debtor keeps all earnings in segregated accounts totaling \$1,000,000. One day before divorce, the debtor spouse's unsecured contract creditor could not reach one penny of that \$1,000,000, it being the non-debtor's sole-management community property.³⁴⁹ But once the trial court makes an equal division of the community in the exercise of its "just

³⁴⁴ See generally *supra* notes 26–33 and accompanying text.

³⁴⁵ See TEX. FAM. CODE ANN. §§ 3.102(a) (West 2006) (defining sole-management community property generally as "the community property that the spouse would have owned if single") & 3.102(b) (providing that if one spouse's sole-management community property is "mixed or combined" with the other spouse's sole-management community property, the resulting mass is joint-management community property).

³⁴⁶ See Loo, *supra* note 178, at 780–81 n. 22.

³⁴⁷ *Id.*

³⁴⁸ See TEX. FAM. CODE ANN. § 7.001 (stating that "the court shall order a division of the estate of the parties" without referring to management categories).

³⁴⁹ See *id.* § 3.102.

and right” powers,³⁵⁰ the debtor ex-spouse suddenly has \$500,000 available to satisfy the creditor’s demands.

There is, in this writer’s view, nothing inherently wrong with this result. Divorce does not affect the creditor’s right to take a personal judgment against the debtor ex-spouse.³⁵¹ Because there is no community property after divorce, the statute governing creditor rights no longer shields the non-debtor spouse’s former sole-management community property.³⁵² The divorce court’s power is not circumvented; indeed, in an appropriate case, the judge might even have ordered a disproportionate division of the community assets to assure the debtor spouse would have enough money to pay personal creditors and get on with life.³⁵³

A final matter, bearing both on the equities of post-divorce creditor recovery and on the proper reading of the liability statute, deserves a close look. That is the Texas marshalling statute. This statute, Family Code Section 3.203, immediately follows the Code’s general marital-property liability provision.³⁵⁴ It gives a judge the power to “determine, as deemed just and equitable, the order in which particular separate or community property is subject to execution and sale to satisfy a judgment.”³⁵⁵

This statute apparently has never been construed by a Texas court.³⁵⁶ However, a federal tax case illustrates its operation. *Estate of Fulmer*³⁵⁷ arose in the aftermath of a shootout between an apartment owner and husband-and-wife managers that left the owner dead and both managers wounded.³⁵⁸

The managers recovered a tort judgment against apartment owner Fulmer’s estate.³⁵⁹ By law, all Fulmer’s separate property and all

³⁵⁰ See *id.* § 7.001.

³⁵¹ See *supra* note 69.

³⁵² See TEX. FAM. CODE ANN. § 3.202.

³⁵³ See, e.g., *Vannerson v. Vannerson*, 857 S.W.2d 659, 673 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (“The parties’ liabilities are factors to be considered in making a just and right division . . .”).

³⁵⁴ See TEX. FAM. CODE ANN. § 3.202; see also *supra* notes 34–39 and accompanying text.

³⁵⁵ TEX. FAM. CODE ANN. § 3.203(a).

³⁵⁶ See SAMPSON & TINDALL, *supra* note 17, § 3.203 comment (“There are no reported cases citing this section since its enactment in 1970 . . .”).

³⁵⁷ *Estate of Fulmer v. Comm’r*, 83 T.C. 302 (1984).

³⁵⁸ See *Fulmer v. Rider*, 635 S.W.2d 875, 876 (Tex. App.—Tyler 1982, writ ref’d n.r.e.) (setting out details).

³⁵⁹ *Estate of Fulmer*, 83 T.C. at 302.

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community property was available to satisfy the judgment; only Mrs. Fulmer's separate property was exempt.³⁶⁰ Mr. Fulmer apparently had no separate property.³⁶¹ So the state probate court invoked Section 3.203's predecessor and determined it would be "just and equitable" that the victims collect their tort judgment from Mr. Fulmer's estate's half-interest in the community—Mr. Fulmer being the tortfeasor and Mrs. Fulmer an innocent spouse.³⁶² The executor then deducted the full judgment amount in computing federal tax liability.³⁶³

The Internal Revenue Service protested, arguing that because the Texas Family Code says all community property can be reached to satisfy the tortious liability of one spouse, "the liabilities therefore attached to [all] the community property of the decedent and his wife."³⁶⁴ Accordingly, in the Commissioner's view, only one-half the tort judgment could be deducted.³⁶⁵ The United States Tax Court sided with the estate, however, holding that the probate court's action was a proper use of the marshalling statute.³⁶⁶

Because the *Fulmer* marriage ended in death, it was easy to raise the marshalling statute in the course of winding up estate affairs. State law specifically addresses the treatment of debts.³⁶⁷ Things would be more complicated in a divorce. Creditors are not required to intervene,³⁶⁸ and the innocent spouse may not even know the debt exists.³⁶⁹

A rule of law that would let the tort or contract creditor of one spouse wait until a divorce becomes final, then pursue a judgment and collect from the non-debtor's property, would undermine the intended effect of the marshalling statute.³⁷⁰ Assume, for example, that the husband borrows money from his family during marriage. The court assigns liability for repayment to the husband, and also awards the wife some hotly contested items of community property. After divorce, relations with the former family sour. The husband's family secures a judgment, then collects that

³⁶⁰ See TEX. FAM. CODE ANN. § 3.202(a), (d).

³⁶¹ See *Estate of Fulmer*, 83 T.C. at 304.

³⁶² *Id.* at 304.

³⁶³ *Id.*

³⁶⁴ *Id.* at 306.

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 309.

³⁶⁷ See generally *supra* notes 41–59 and accompanying text.

³⁶⁸ See *supra* note 332 for the proposition that a creditor "may" intervene.

³⁶⁹ TEX. FAM. CODE ANN. § 3.202 (West 2006).

³⁷⁰ *Id.*

judgment by executing on former joint-management community property awarded the former wife. If this were permitted, property the court deliberately awarded to the ex-wife could be reclaimed by the husband's family. The former wife's only recourse would be to bring suit against her former husband and hope for the best.

2. Dealing with Debtor Fraud

One final issue worth addressing is the problem of debtor fraud. Undoubtedly, some married creditors will be tempted to institute or take advantage of a divorce proceeding to avoid their just debts.³⁷¹ That seems to have been the motive behind the property agreement in *Richey v. Hare*.³⁷² Moreover, the "without the intent to defraud existing creditors" language added to the Texas Constitution in 1980 suggests concern that marital agreements, at least, should not be used to cheat creditors.³⁷³

That said, the bare possibility of fraud in some cases cannot justify a general rule granting unsecured creditors special privileges at divorce in all cases. As just discussed, a concerned creditor can take reasonable self-protective steps. Moreover, creditors already enjoy substantial protection under existing state and federal law. The Texas version of the Uniform Fraudulent Transfer Act³⁷⁴ and federal bankruptcy law³⁷⁵ let unsecured creditors set aside conveyances if the circumstances constitute actual or constructive fraud. More specifically, a property transfer can be set aside if made "with actual intent to hinder, delay, or defraud" a creditor,³⁷⁶ or if the debtor is (or is made) insolvent at the time and does not receive "reasonably equivalent value."³⁷⁷ Spousal agreements are not immune to fraudulent

³⁷¹ See, e.g., *Citibank, N.A. v. Williams*, 159 B.R. 648, 665 (Bankr. D.R.I. 1993) (court approved agreement involving transfer of substantially all personal property to non-debtor spouse while not informing divorce court of \$4 million liability held fraudulent); *Germain v. Kaczorowski*, 87 B.R. 1, 3 (Bankr. D. Conn. 1988) (transfer of interest in family residence to non-debtor spouse for considerably less than fair value, supposedly as alimony, but as to which divorce proceedings were dropped, held fraudulent); *Steed v. Bost*, 602 S.W.2d 385, 389 (Tex. Civ. App.—Austin 1980, no writ) (affirming a finding that a property settlement agreement incident to divorce should be set aside as fraudulent).

³⁷² See generally *supra* text accompanying notes 79–100.

³⁷³ See generally *supra* text accompanying notes 240–280.

³⁷⁴ See TEX. BUS. & COM. CODE ANN. §§ 24.001–.013 (West 2002).

³⁷⁵ See 11 U.S.C. § 548 (2006).

³⁷⁶ 11 U.S.C. § 548(a)(1)(A); TEX. BUS. & COM. CODE ANN. § 24.005(a)(1) (West 2009).

³⁷⁷ See 11 U.S.C. § 548(a)(1)(B)(i); TEX. BUS. & COM. CODE ANN. § 24.005(a)(2).

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transfer analysis;³⁷⁸ indeed, it has been suggested such transfers should be examined with particular care.³⁷⁹

In the interest of completeness, however, it must be admitted that some significant aspects of the interaction between Texas divorce decrees and state and federal fraudulent transfer law are not altogether clear. For example, while the Texas Constitution's "intent to defraud existing creditors" language obviously encompasses ordinary marital agreements,³⁸⁰ an argument could be made that agreements incident to divorce are qualitatively different.³⁸¹ Nor does the constitutional language by its terms extend to contested divorce decrees.³⁸² As already discussed, the drafters of the constitutional amendment believed it should have broad effect,³⁸³ and it would make little sense to construe it otherwise.³⁸⁴ Nonetheless, these questions await judicial clarification.

Another potentially significant state law issue is whether a creditor seeking to avoid the effect of a Texas spousal agreement or divorce decree must prove actual fraud, and if so, by what standard. The constitutional language just quoted, as well as implementing legislation for ordinary spousal agreements,³⁸⁵ appear to require proof of actual fraud. However,

³⁷⁸ See generally, e.g., Featherston & Still, *supra* note 55 at 24–28 (considering such transactions in the context of fraudulent transfer law).

³⁷⁹ See, e.g., Joann H. Henderson, *Marital Agreements and the Rights of Creditors*, 19 IDAHO L. REV. 177, 186 (1983) (stating that fraudulent transfer statutes, as "the main source of protection for unsecured creditors whose debtors improperly transfer property . . . [.] are particularly appropriate for transfers between spouses, where the transfer is viewed with some suspicion").

³⁸⁰ See TEX. CONST. art. XVI, § 15 (specifically referring to spousal agreements).

³⁸¹ See *supra* note 261.

³⁸² Accord McKnight, *Constitutional Redefinition*, *supra* note 250, at 473 ("[N]othing is said in the constitution about judicial partitions on divorce").

³⁸³ See, e.g., McKnight & Davis, *supra* note 249, at 925 (stating that "[u]nder the amendment pre-existing creditors would no longer be able to reach partitioned property unless there was an intent to defraud them" and specifically mentioning problems with "[j]udicial partitions of community property on divorce" as one of the issues spurring the amendment).

³⁸⁴ As Professor Joseph W. McKnight, the amendment's principal drafter, stated: "It may be cogently argued that if spouses can make such a [pre-divorce] partition, the divorce court should be able to do so for them, with the same effect, when they cannot agree. A court might thus prevent application of those authorities the amendment was designed to limit." McKnight, *1983 Survey*, *supra* note 160, at 77.

³⁸⁵ Accord Featherston & Still, *supra* note 55, at 26 ("[T]o the extent that a creditor seeks to avoid a partition as a fraudulent transfer under the Texas UFTA, it appears that the rights of pre-existing creditors in partitioned assets must be determined by reference to whether the spouses had an actual intent to defraud . . .").

even if this is the case, neither the Texas Constitution nor the Family Code answers the question whether actual fraud can be proved by the standard set out in the Texas Uniform Fraudulent Transfer Act (UFTA).³⁸⁶ This could be important in some cases because the Texas UFTA list of “badges” or indicia of fraud includes consideration of whether the consideration received was “reasonably equivalent to the value of the asset transferred” or if “the debtor was insolvent or became insolvent shortly after the transfer was made”³⁸⁷—that is, the same factors constituting constructive fraud.³⁸⁸ The drafters’ comments actually make matters more confusing, by suggesting that the intent—which unfortunately does not appear in the amendment’s wording—was to encompass claims of both actual and constructive fraud.³⁸⁹

Texas courts apparently have not yet addressed these issues. However, the United States Court of Appeals for the Fifth Circuit has issued some interesting rulings in analogous Bankruptcy Code fraudulent transfer cases, such as *Ingalls v. Erlewine*.³⁹⁰ In *Ingalls*, a Texas divorce court awarded the non-debtor spouse a disproportionate share of the community assets.³⁹¹

³⁸⁶ *Accord* Featherston & Still, *supra* note 55, at 26 (stating that “[l]eft unanswered is whether [the Family Code] integrates the actual fraud rules of the Texas UFTA”). The United States Fifth Circuit, citing Featherston & Still, has elected to incorporate the Texas UFTA’s standard for proof of fraudulent intent into the Family Code’s “actual fraud” standard for setting aside marital agreements. *See* Hinsley v. Boudloche, 201 F.3d 638, 643 n.8 (5th Cir. 2000).

³⁸⁷ TEX. BUS. & COM. CODE ANN. § 24.005(b)(8), (9) (West 2009).

³⁸⁸ *See* 11 U.S.C. § 548(a)(1)(B)(i) (2006); TEX. BUS. & COM. CODE ANN. § 24.005(a)(2).

³⁸⁹ Comments published before the vote led off with the statement that “[u]nder the amendment pre-existing creditors would no longer be able to reach partitioned property unless there was an intent to defraud them.” McKnight & Davis, *supra* note 249, at 925. However, the drafters added a comment explaining that under ordinary fraudulent transfer law, “if the debtor was insolvent at the time of making the transfer, the gratuitous transfer is void as to pre-existing creditors regardless of the debtor’s intent,” and stating that “[u]nder the proposed amendment the creditor’s position would be the same whether the spouses make a partition or enter into some other type of transaction.” *Id.* Professor McKnight’s more detailed exposition, published shortly after the amendment went into effect, suggests the new language was not intended to eliminate a constructive fraud challenge. *See* McKnight, *Constitutional Redefinition*, *supra* note 250, at 473–74 (“If the debtor-spouse does not intend to defraud creditors, or that spouse is not made insolvent by the partition of community property that would have been available for the enforcement of that spouse’s debts, the property so partitioned to the non-debtor-spouse is not to be subjected to payment of the debts of the debtor-spouse as would have resulted previously . . .”).

³⁹⁰ 349 F.3d 205 (5th Cir. 2003); *see also generally* Tye C. Hancock, *Fifth Circuit Bankruptcy Survey*, 37 TEX. TECH L. REV. 575, 587–89 (2005).

³⁹¹ *Ingalls*, 349 F.3d at 207.

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The debtor ex-spouse's bankruptcy trustee argued the property division should be set aside for constructive fraud, because the debtor had received "less than a reasonably equivalent value" in the exchange.³⁹² The bankruptcy court ruled the debtor ex-spouse had received reasonably equivalent value as a matter of law, apparently giving conclusive weight to the divorce decree.³⁹³ The Fifth Circuit affirmed.³⁹⁴

The rule announced by the Fifth Circuit is not as clear as one might hope. The non-debtor spouse argued for a "bright line" rule that the divorce decree conclusively established "reasonably equivalent value," analogizing to a United States Supreme Court decision giving conclusive effect to a non-collusive foreclosure sale³⁹⁵ and a Fifth Circuit ruling affording similar treatment to a tort or contract judgment.³⁹⁶ The trustee argued for a contrary "bright line" rule that unequal division disfavoring the debtor can never constitute "reasonably equivalent value."³⁹⁷ In support of this position, the trustee pointed to a Fifth Circuit decision setting aside an unequal division of assets in a marital property agreement on the ground that "[i]ntangible, non-economic benefits, such as preservation of marriage, do not constitute reasonably equivalent value."³⁹⁸

The Fifth Circuit rejected the trustee's argument.³⁹⁹ The court gave lip service to the argument that "intangible, non-economic benefits" do not

³⁹² *Id.* at 208 (citing 11 U.S.C. § 548(a)(1)(B)(i) (2000)).

³⁹³ *Id.*

³⁹⁴ *Id.* at 213.

³⁹⁵ *See* BFP v. Resolution Trust Corp., 511 U.S. 531, 545 (1994) (holding that "reasonably equivalent value," in the context of foreclosed property, "is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with").

³⁹⁶ *See* Besing v. Hawthorne, 981 F.2d 1488, 1496 (5th Cir. 1993) (holding that "the Texas court's disposition of the Debtors' claims constituted a transfer for reasonably equivalent value as a matter of law").

³⁹⁷ An equal division or partition presumably would never raise "reasonably equivalent value" questions. *Cf.* Featherston & Still, *supra* note 55, at 26 ("From the perspective of a creditor who has lost recourse against this portion of the partitioned property, there is no exchange of reasonably equivalent value between the spouses. However, reasonably equivalent value is actually exchanged since there has been an equal division of 'community property interests,' each spouse receiving reasonably equivalent value for the surrender of that spouse's community property interest.").

³⁹⁸ *Hinsley v. Boudloche*, 201 F.3d 638, 643 (5th Cir. 2000).

³⁹⁹ *Ingalls*, 349 F.3d at 212.

equal reasonably equivalent value, terming it “a sound principle.”⁴⁰⁰ But, it added, the principle “is meant to guard against a type of mischief not present in this case”⁴⁰¹—apparently, actual fraud.⁴⁰² In contrast, the property division in the Erlewines’ divorce was “above all an economic transaction, albeit an involuntary one.”⁴⁰³ Moreover, and perhaps more important, accepting the trustee’s argument “would apparently subject every divorce decree to scrutiny in the bankruptcy court, so long as the divorce court divided the community property unequally.”⁴⁰⁴ This would, at a minimum, raise federalism concerns.⁴⁰⁵

The Fifth Circuit, however, also doubted the non-debtor spouse’s contention that a divorce court judgment should always constitute reasonably equivalent value as a matter of law.⁴⁰⁶ Accordingly, the court concluded: “Whatever concerns might arise in other cases, the divorce before us—which was fully litigated, without any suggestion of collusion, sandbagging, or indeed any irregularity—should not be unwound by the federal courts merely because of its unequal division of marital property.”⁴⁰⁷

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Hinsley*, the case from which the “sound principle” in question was quoted, was an actual fraud case. *See* 201 F.3d at 643.

⁴⁰³ *Ingalls*, 349 F.3d at 212. The court’s distinction is a little difficult to understand. In Texas, a divorce court may order assets divided unequally for a number of reasons, including fault. *See, e.g.*, *Murff v. Murff*, 615 S.W.2d 696, 698–99 (Tex. 1981) (setting out a list of acceptable factors). It therefore seems odd that the Fifth Circuit would reject consideration of non-economic factors such as the husband’s professed “effort at reconciliation” in *Hinsley*, 201 F.3d at 641, but effectively permit consideration of non-economic factors such as fault in the marital breakup by accepting the results of a non-collusive judicial determination in *Ingalls*, 349 F.3d at 212.

⁴⁰⁴ *Ingalls*, 349 F.3d at 212.

⁴⁰⁵ Drawing on a United States Supreme Court decision, the Fifth Circuit commented that a federal statute that implicates an important state interest “cannot . . . be construed without regard to the implications of our dual system of government.” *Id.* (quoting *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994), quoting in turn Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539–40 (1947)). The Fifth Circuit concluded: “[W]e should hesitate before we impute to Congress an intent to upset the finality of judgments in an area as central to state law as divorce decrees.” *Id.*

⁴⁰⁶ However, the *Ingalls* court stopped short of rejecting the contention outright, stating simply that “[w]e are not sure that *Besing* sweeps so broadly as always to prevent a Trustee from challenging a divorce decree under § 548(a)(1)(B).” *Id.*

⁴⁰⁷ *Id.* at 212–13.

It is difficult to make sense out of the current status of state and federal fraudulent transfer law, and resolution of the issue is tangential to the thrust of this article. However, it is worth observing that federal and state case law and statutes might be evolving in the direction of a single standard for judging whether property division in a divorce decree, agreed or otherwise, should be subject to avoidance as a fraudulent transfer. Specifically, the decree should be held binding absent proof of actual fraud on creditors, judged with reference to all the “badges of fraud” set out in the Texas UFTA.⁴⁰⁸

Ingalls involves a fully contested divorce and federal law. Nevertheless, the Fifth Circuit’s desire to avoid fraud and collusion, but also to respect federalism and discourage routine relitigation of divorce judgments, makes equal sense in a proceeding in which a Texas divorce court reviews and approves a property agreement as being “just and right.”⁴⁰⁹ At the state level, an “actual fraud, as defined by the Texas UFTA” rule would be a reasonable way to accommodate the state constitution’s language, the framers’ intent, and the fraudulent transfer act’s language.⁴¹⁰ It also should satisfy any unsecured creditor’s legitimate concerns.

V. CONCLUSION

The notion that an unsecured creditor of a married Texan has some special claim on property awarded to an innocent spouse at divorce is a relic of a bygone age. The doctrine lacks any modern legal justification, and subverts the intent of the Texas Constitution and Family Code. The doctrine has no practical benefits that cannot be obtained in most cases by recognition of an actual fraud exception within the meaning of the Texas Fraudulent Transfer Act. The Texas Supreme Court should finally and definitively lay the doctrine to rest by declaring unambiguously that an unsecured creditor of a married person has no special rights against a former spouse or that spouse’s property, once the marriage is at an end.

⁴⁰⁸ Cf. Amanda Barkey, Note, *The Application of Constructive Fraud to Divorce Property Settlements: What’s Fraud Got To Do With It?*, 52 WAYNE L. REV. 221 (2006) (arguing against use of constructive fraud analysis in divorce judgments).

⁴⁰⁹ See *Ingalls*, 349 F.3d at 212–13.

⁴¹⁰ TEX. BUS. & COM. CODE ANN. § 24.005 (West 2009).