Marital Property Liabilities
Dispelling the Myth of Community Debt

by Tom Featherston and Allison Dickson

The time has come to debunk a myth that has pervaded Texas court decisions and legislation for more than 40 years. We must all face the truth. Once and for all: There is no such thing as "community debt."

This article gives a brief overview of the basic tenets of Texas marital property law and discusses the legislative scheme for handling marital liability debts. Importantly, it addresses the source of the mythical concept that is community debt and identifies existing statutes that perpetuate the community debt misnomer. Finally, this article calls for Texas courts and the Legislature to incorporate current law into opinions and legislation so as to eliminate confusion among practitioners and the public alike.

Texas Marital Property: A Brief Overview

When faced with marital property issues, the initial crucial question involves the characterization of property as either separate or community property. The Texas Supreme Court in *Arnold v. Lawrence*[1] and *Kellet v. Trice*[2] made it clear to practitioners and the Legislature that the Texas Constitution ultimately defines what is separate or community property. Generally, the Texas Constitution states that all property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise, or descent, shall be the separate property of that spouse.[3] Not taking into account possible validly executed premarital or marital agreements, all other property acquired during a marriage is presumptively community property.[4] Unlike characterization, the Constitution allows laws to be passed that more clearly define the rights of spouses in relation to separate and community property.[5] The Legislature has rulemaking authority over areas such as the management of marital property and marital property liability.

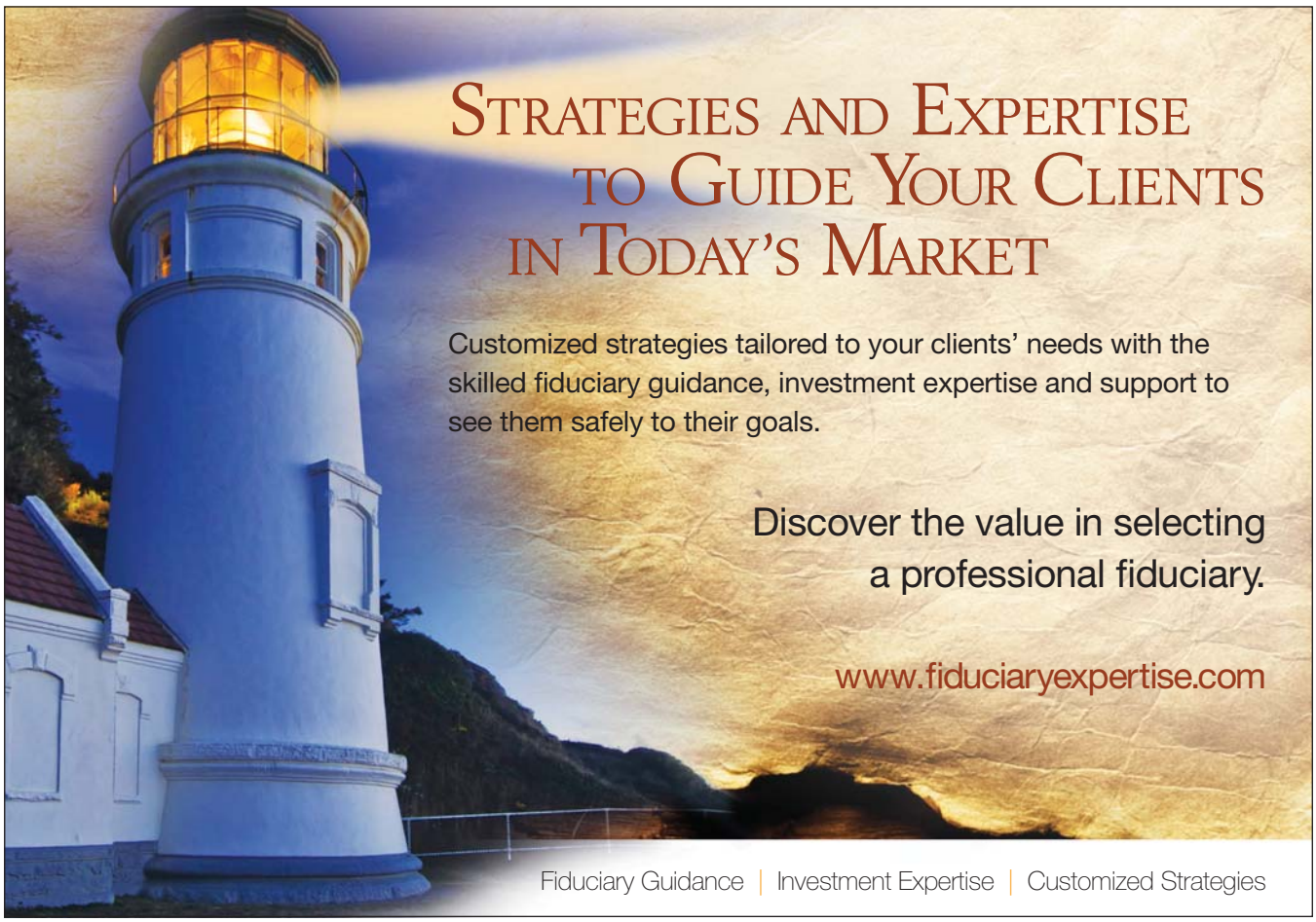
Historically in Texas, the husband managed both the community property of the marriage and the separate property of each spouse. As the women's rights movement began in the early 1900s and progressed over the next half century, the law changed and allowed women to manage their own separate property. The reform movement culminated with the Matrimonial Property Act of 1967, which granted women separate but equal rights in the management of their separate property as well as the right to manage their special community property and equally manage the couple's joint community property with their husbands.[6] In addition to new management rules, the reform movement also introduced a complementary system of divided liability of separate and community property.[7] Prior to 1967, Texas law related to liability rules was relatively simple. The husband was generally personally liable for all "community debts" and the wife was not.[8] In addition, all com-

munity property other than the wife's special community property was liable for the husband's debts.[9] When the Legislature passed the Matrimonial Property Act of 1967, the rules changed. The rules are currently codified in Sections 3.201, 3.202, and 3.203 of the Texas Family Code.[10]

Under current law, the Texas Legislature has adopted a logical liability system that depends on a multiple-step process to determine which assets are liable for which debts. To arrive at a proper conclusion, the practitioner must address four key questions. First, whose debt is it? It is either the debt of the husband, the debt of the wife, or the debt of both spouses. Second, when was the debt incurred? It was incurred either prior to or during the marriage. Third, what type of debt is it? It is either tortious or contractual. Fourth, are there any other substantive, non-marital rules of law that would make one spouse personally liable for the debts of the other spouse? After answering these four questions, Texas Family Code Sections 3.202 and 3.203 lead to further analysis.[11] Specifically, these sections provide that a spouse's separate property and special community property as well as the joint community property are liable for that spouse's debts. If the liability is a tort debt incurred during the marriage, the other spouse's special community property is also liable for the debt while the other spouse's separate property is exempt. If the debt incurred during the marriage is contractual, the other spouse's separate property and special community property are exempt from the debt unless the other spouse is personally liable under other rules of law. Other rules of law that may cause a spouse to be liable for a debt when he or she may not otherwise be liable include vicarious liability (but note that the marriage relationship alone is not sufficient to create such liability), a duty to support the other spouse and children for a specified period of time, and federal income tax liability. If the other spouse is liable because of the applicability of these other rules of law, that spouse's separate property and special community property are liable for the debt. Essentially, all non-exempt assets of the husband and wife would be available to satisfy the debt.[12]

The Source of the Myth that is Community Debt

Despite the plain meaning of the statutory plan enacted by the Legislature, some courts continue to create confusion for the practitioner by referring to the term "community debt" or "community obligation" as if the community were an entity separate and apart from the spouses which could own property and incur debt. Similarly, some courts still rely on opinions expressed in cases decided prior to the Matrimonial Property Act of 1967 and the subsequent enactment of the Texas Family Code.



For example, a recent court of appeals decision in *Mock v. Mock* stated: "Unless it is shown that [a] creditor agreed to look solely to the separate estate of the contracting spouse for satisfaction, §3.201 has no effect on the long-standing presumption that debts contracted during the marriage are presumed to be on the credit of the community and, thus, are joint community obligations."[13] Here, the court refers to a so-called presumption that doesn't really exist. There is no presumption that debts contracted during the marriage are on the credit of the community and thus are joint community obligations. The correct long-standing presumption is that property acquired on credit is community property unless the creditor agreed to look only to the acquiring spouse's separate property for satisfaction.[14] The Texas Supreme Court has held that marital liability rules are defined by the Legislature, and the *Mock* court's statement conflicts directly with Section 3.201 of the Texas Family Code.[15] Section 3.201 limits the personal liability of one spouse for the debts of the other spouse only to situations where the debtor spouse incurs the debt acting as the agent of the other spouse or the debtor spouse incurs a debt for necessaries. Again, it is important to recognize that the marital relationship in and of itself does not create a principal/agency relationship among the spouses.[16] Not only is the *Mock* court's reliance on an inaccurate long-standing presumption inconsistent with today's legislative marital liability directives, it is also misleading dicta. The real issue before the court in *Mock* was whether a divorce court could order a wife to pay her husband's credit card debts out of the joint community property and the husband's special community property. (The court had already properly awarded the joint community and husband's special community property to the wife.) The court of appeals held that the trial court did not err in ordering the wife to pay the husband's debts under the circumstances. Nevertheless, the court includes the misleading quote referring to the "long-standing presumption." It cites as authority for this inaccurate presumption *Cockerham v. Cockerham*, a Texas Supreme Court opinion.[17] Unfortunately, this court is not alone in ignoring the legislative mandate of the Texas Family Code. *Mock* cites other court of appeals decisions that also rely on *Cockerham* as authority.[18] Thus, *Cockerham* is the source of all of the confusing and misleading rhetoric.

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In *Cockerham v. Cockerham*, the wife opened a dress shop and incurred several business debts by purchasing inventory using "community credit."[19] When the dress shop failed, creditors sought to satisfy their claims against the wife from the entire community estate as well as the husband's separate property. The Texas Supreme Court stated: "… debts contracted during marriage are presumed to be on the credit of the community and thus are joint community obligations, unless it is shown the creditor agreed to look solely to the separate estate of the contracting party for satisfaction."[20] In essence, by ruling that the debts were joint liabilities of the husband and wife (i.e., a "community debt"), the Court held that the creditors could reach all assets to satisfy their debts, including the husband's separate property. However, the *Cockerham* court erroneously cites as its authority for the concept of "community debt" two cases, *Broussard v. Tian*[21] and *Gleich v. Bongio*.[22] A closer look at these two cases reveals that both were characterization cases rather than liability cases. The courts explained that property acquired during the marriage on credit is community property absent a showing that the creditor agreed to look only to the spouse's separate property for satisfaction of the debt. *Gleich* confirmed that property acquired on credit during the marriage is presumptively community property under the "rule of implied exclusion." Although the court does make references to "community obligations" and "credit of the community," the decision is a 1937 case issued long before the 1967 change in law. *Broussard* explained the exception to the general rule that property acquired on credit is community property unless there is proof of an agreement to make the note a "separate property obligation." The court makes references to a "community obligation" meaning that absent an agreement so described community property is liable for the debt, but again it should be noted that this is a pre-1967 case.

At the time *Gleich* and *Broussard* were decided, the husband managed all community property except the wife's "special community property."[23] Prior to 1967, the wife was not personally liable for the husband's debts and her special community property was also exempt from her husband's debts. References to "community debt" or "community obligations" were references to the debts of the husband that could be satisfied out of all of the community property other than the wife's special community property.[24] As one court of appeals noted, "Texas statutes do not define the term 'community debt.' "[25] Consequently, the terms "community debt" and "community obligation" must be interpreted within a particular statute or opinion within the parameters set by the time and circumstances of the issue presented.

References to "community debts" imply that the "community" is liable for the debts (i.e., all community property can be used to satisfy the debt). It also suggests that both spouses are

personally liable because they are the "community." This result is inconsistent with the legislative mandate based on the statutory plan of the Texas Family Code.[26] For example, a wife's special community property is not liable for a husband's contractual debts incurred during the marriage unless she is liable under some other substantive rule of law. Marriage itself does not create joint and several liability. Interestingly, *Cockerham* also seemed to extend the facts and circumstances under which one spouse could be held liable for the debts of the other spouse by announcing, in effect, a "totality of the circumstances" test. This test placed at risk all of the assets of either spouse whenever either spouse incurred a liability during the marriage. This result was obviously not contemplated by the Legislature in enacting the predecessor to Texas Family Code Section 3.202.[27] Furthermore, amendments to the Texas Family Code in 1987 should be interpreted as ending the confusion created by the *Cockerham* opinion. This 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. A few court of appeals opinions indicate that some courts do understand the legislative mandate.[28]

Interestingly, characterization and proper analysis of marital liability issues exist both during a marriage and after the death of a spouse. What happens to the debts of a married couple when the first spouse dies? The question sounds simple enough. Although the debts do not go away, the deceased spouse's death does not create personal liability on any party that did not exist prior to the death. Likewise, the deceased spouse may or may not have had any personal liability for the debts of the surviving spouse. The surviving spouse is still personally liable for his or her debts, and the deceased spouse's estate generally passes to the deceased spouse's heirs and/or devisees subject to the deceased spouse's debts. When addressing marital property liability after the death of a spouse, it remains crucial to recognize that the debts were either those of the husband, those of the wife, or those of both the husband and wife. There were no community debts because community debts do not exist. However, three sections of the Texas Probate Code make references to "community debts" or "community obligations" and add to the perpetuation of the community debt confusion. Sections 156, 160, and 168 were all enacted in 1955 to be effective Jan. 1, 1956. Although these provisions have been amended since then, none of their amendments adequately addressed the concept of divided marital property liabilities that was created in the late 1960s.[29] Further, virtually every decision listed in the annotations under these sections was decided prior to 1967. It is submitted that any reference to "community debts" or "community obligations" is a misnomer under current law. Any pre-1967 case is questionable authority when applied to post-1967 situations, and the above-mentioned sections should be interpreted in light of the 1967 changes to Texas marital property law.

A Call to End the "Community Debt" Confusion

More than 25 years ago, Professor Joseph W. McKnight discussed the inaccurate use of the phrase "community debt" in his annual survey of Texas Family Law.[30] He said:

> It is high time that the community debt argument be put to rest. The phrase 'community debt' has long been useful in characterizing borrowed money or property that a spouse buys on credit. If the lender or seller does not specifically look to the borrower's or buyer's separate property for payment, it is clear that a community debt has been incurred, and thus that the money borrowed or property bought is community property. But to take the phrase out of this context, as well as to say that the designation of such 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 [Tex. Fam. Code. Ann.] (i.e., the predecessor to section 3.201). Under Texas law as amended and recodified in 1969, a community debt means nothing more than that some community property is liable for satisfaction. … Confining the term 'community debt' to its traditional characterization context would remove a great source of confusion and discourage the tendency of some courts to find separate debts where a

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section 5.61 community debt was clearly intended by the parties concerned.

Although Professor McKnight was instrumental in the drafting and enactment of the marital property laws that ushered in the Texas Family Code, his call for all Texas courts to adhere to the legislative mandate was as true then as it is today. Reliance on *Cockerham*, *Broussard*, and *Gleich* as authority for the so-called "long-standing presumption that debts contracted during the marriage are joint community obligations" is reliance on a single statement in *Cockerham* taken out of context from *Broussard* and *Gleich*.[31] Those two cases were decided by the Texas Supreme Court when Texas law, in a bygone era, held that a husband was personally liable for all community debts, that a wife was not personally liable for community debts, and even that a surviving wife was not liable for community debts.[32] Because of pivotal changes that occurred in Texas marital property law over the last 40 years, reliance on any pre-1967 case is not necessarily good authority to resolve an issue today involving marital property management and liability.

Conclusion

Inarticulateness, over-expression, and a failure to appreciate how the law changed in 1967 due to legislative action continue to create confusion about marital liability issues. Courts continue to ignore clear legislative mandates with general statements of law that might have been more accurate before the changes in the 1960s that introduced the concept of divided management and liability of marital property. The term "community debt" suggests that both spouses are personally liable on a debt and/or that all community property can be reached to satisfy the debt. However, neither statement may be accurate under the circumstances. The focus under current law should be on whether a debt is the debt of the husband, a debt of the wife, or a debt of both the husband and the wife.

Last year marked the 40th anniversary of the enactment of the original version of the Texas Family Code, which codified the revolutionary new concepts found in the Matrimonial Property Act of 1967 and which ushered into Texas law a new era of marital property liability. It is past time for all Texas courts to factor into their decision-making, as well as to incorporate into their opinions, the "new" law. Continued reliance on the "old" law (i.e., citing a pre-1967 case as authority when the current law would change the result) creates confusion among practitioners and the public alike. In addition, the Legislature must eliminate the use of "community debts" and "community obligations" in statutes to help eliminate the confusion related to these terms. In sum, the Legislature has laid the foundation for a logical, workable structure for determining marital property liability. Courts must now build upon that foundation rather than ignoring legislative mandate. The myth has been dispelled: Under the modern framework of Texas marital property law, community debt does not exist.

Notes

1. *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925).
2. *Kellet v. Trice*, 95 Tex. 160, 66 S.W. 51 (1902).
3. Tex. Const. art. XVI, §15 (Vernon, Westlaw through 81st Leg., 2009).
4. Although a complete discussion of property characterization is beyond the scope of this article, for reference see Tex. Fam. Code Ann. §§3.001–3.009, 4.102, 4.103 (Vernon, Westlaw through 81st Leg., 2009).
5. Tex. Const. art. XVI, §15 (Vernon, Westlaw through 81st Leg., 2009).
6. *See McKnight*, "Recodification and Reform of the Law of Husband and Wife," 33 Tex. Bar J. 34 (Jan. 1970).
7. *Id.*
8. *See Leatherwood v. Arnold*, 66 Tex. 414, 1 S.W. 173 (1886).
9. *See Arnold* at 544–547.
10. Tex. Fam. Code Ann. §§3.201–3.203 (Vernon, Westlaw through 81st Leg., 2009).
11. *Id.*
12. *Id.*
13. *Mock v. Mock*, 216 S.W.3d 370, 374 (Tex. App. — Eastland 2006, pet. denied).
14. *Broussard v. Tian*, 156 Tex. 371, 295 S.W.2d 405 (1956).
15. *See Arnold, supra.*
16. Tex. Fam. Code Ann. §3.201 (Vernon, Westlaw through 81st Leg., 2009).
17. *Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975).
18. *Kimsey v. Kimsey*, 965 S.W.2d 690, 702 (Tex. App. — El Paso 1998, pet. denied).
19. *See Cockerham, supra.*
20. *Id.*
21. *See Broussard, supra.*
22. *Gleich v. Bongio*, 128 Tex. 606, 99 S.W.2d 881 (1937).
23. *Moss v. Gibbs*, 370 S.W.2d 452 (Tex. 1963).
24. *See Arnold, supra.*
25. *Brooks v. Brooks*, 515 S.W.2d 730, 733 (Tex. App. — Eastland 1974, writ ref'd n.r.e.).
26. Tex. Fam. Code Ann. §§3.201–3.203 (Vernon, Westlaw through 81st Leg., 2009).
27. *See Cockerham, supra* (Reavely, T., dissenting).
28. *See Patel v. Kuciemba*, 82 S.W.3d 589 (Tex. App. — Corpus Christi 2002, pet. denied); *Montemayor v. Ortiz*, 208 S.W.3d 627 (Tex. App. — Corpus Christi 2006, pet. denied); *Carr v. Houston Business Forms, Inc.*, 794 S.W.2d 849 (Tex. App. — Houston [14th Dist.] 1990, no writ).
29. Tex. Prob. Code Ann. §§156, 160. 168 (Vernon, Westlaw through 81st Leg., 2009).
30. Joseph W. McKnight, *Family Law: Husband and Wife*, 37 Sw. L.J. 65, 77 (1983).
31. *See Cockerham, supra; See Broussard, supra; See Gleich, supra.*
32. *See Leatherwood, supra.*

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