How To Address Liabilities In Divorce

– Communicating With Your Client –
– Who’s Responsible For Unpaid Bills –
– Bankruptcy Issues In Divorce Cases –
– Management Of Property In Small Estates –
– The Overall Liability Exposure To Your Client –
– How To Draft Documents To Avoid Disaster –

By Randall B. Wilhite
Looper, Reed, Mark & McGraw Incorporated
1300 Post Oak Blvd., Suite 2000
Houston, Texas 77056
713.986.7000

22nd Annual Marriage Dissolution Institute
May 13-14, 1999
San Antonio, Texas
Randall B. Wilhite
Looper, Reed, Mark & McGraw Incorporated
1300 Post Oak Boulevard, Suite 2000
Houston, Texas 77056
Firm Number: (713) 986-7000
Direct Dial Number: (713) 986-7112
Telefax Number: (713) 986-7100
rwilhite@lrmm.com

Education:
University of Texas at Austin, BBA, Accounting, 1976
University of Houston College of Law, Doctor of Jurisprudence, 1979

Professional Licenses:
Member, State Bar of Texas, 1979
Certified Public Accountant, Texas, 1980

Employment:
Shareholder & Director: Looper, Reed, Mark & McGraw Incorporated (1989 to present)
(President & Managing Director, 1996-1999)
Associate: Hilgers & Watkins (1979 to 1980)

Specialty Certifications:
Board Certified in Family Law by the Texas Board of Legal Specialization, 1984 (re-certified in 1989 and 1994)
Board Certified in Family Law Trial Advocacy by the National Board of Trial Advocacy, 1995
(NTBA Family Law Test Examiner: 1996-1999 - Ethics & Evidence)
Fellow, American Academy of Matrimonial Lawyers, 1989
Certified Mediator (Attorney - Mediator Institute, 1993)

Mediation Experience:
Mediated Over 150 Family Law Disputes Since 1993 (85% + settlement rate)

Articles / Speeches:
# How To Address Liabilities In Divorce

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By Randall B. Wilhite
Looper, Reed, Mark & McGraw Incorporated
Houston, Texas

I. Introduction.
When most attorneys and their clients focus on the trial or settlement of a divorce case, the majority of the attention is paid to who will get what assets. Significant issues and problems, however, can arise in many situations regarding the allocation of liabilities in the Decree. Several different kinds of liabilities can create several different types of post-divorce obligations in several different ways. Some liabilities attach to a person; others to property; and still others to both. Also, the federal government has a multitude of methods by which it can enforce its tax and other obligations. A creative attorney can also craft obligations in the Final Decree of Divorce that will create post-divorce obligations from one spouse to another. These decree provisions include allocating liabilities for past and current years for federal income taxes. Formulating and allocating these obligations in the decree can involve many different scenarios. And, in most every case, the specter of bankruptcy can be regarded as a possibility.

II. Spousal Liability During Marriage.
Spousal liability during marriage takes on many different forms for the many different types of liabilities. In general, a spouse can be personally liable for a liability; or just a spouse’s property can be the subject of liability; or, both.

III. Personal Spousal Liability.
A person is personally liable for the acts of the person’s spouse only if (1) the spouse acts as an agent for the person; or (2) the spouse incurs a debt for necessaries. Tex. Fam. Code § 3.201 (Vernon Supp. 1998). Furthermore, a spouse does not act as an agent for the other spouse solely because of the marriage relationship. Id. See also Missouri K. T. R. Co. v. Hamilton, 314 S.W.2d 114 (Tex. App.–Dallas 1958, writ ref’d n.r.e.). Legal theories, such as respondeat superior and joint enterprise are available to creditors trying to attach liability to the non-acting spouse. See Wilkinson v. Stevison, 514 S.W.2d 895, 898 (Tex. 1974); Graham v. McCord, 384 S.W.2d 897, 899-900 (Civ. App.–San Antonio 1964, no writ).

Personal liability is distinguished from property liability. Personal liability makes a spouse personally responsible for a debt; whereas property liability creates a burden against a property right, regardless of personal responsibility. The marriage relationship alone does not create a basis for personal liability. This statute is specifically intended to clarify the misleading and confusing discussion in Cockerham v. Cockerham, 527 S.W.2d 162 (Tex. 1975) (which held that both spouses were personally liable for the debts created by a business primarily, but not exclusively, managed by one of them). See, e.g., Nelson v. Citizens Bank & Trust Co., 881 S.W.2d 128 (Tex. App.–Houston [14th Dist.] 1994, no writ) (wife not personally liable for husband’s separate property debt despite signing deed of trust as security); Carr v. Houston Business Forms, Inc., 794 S.W.2d 849 (Tex. App.–Houston [14th Dist.] 1990, no writ) (marital relationship alone is insufficient evidence that a spouse acted as the other spouse’s agent); Latimer v. City Nat’l
One interesting recent example of joint enterprise liability is *Rhea v. Williams*, 802 S.W.2d 118 (Tex. App.–Fort Worth 1991, writ granted, denied). Mr. and Mrs. Rhea were in an auto accident while on their way to deliver income tax papers. Mrs. Rhea, the driver, was determined to 77 percent at fault. Williams, the driver of the other car, was able to avoid liability to Mr. Rhea, the passenger, on the theory of joint enterprise. The elements—agreement, common purpose, mutual pecuniary interest and equal control—were met by the particular circumstances; the court emphasized that “[o]ur finding of joint enterprise in the instant case does not stem from the Rhea’s marital relationship, but upon specific facts of this case....” Id. At 121.

IV. Post-Judgment Execution.

One spouse’s separate property bank account cannot be garnished by a judgment creditor of the other spouse for a debt owed individually by the latter spouse. Texas Commerce Bank Nat. Assn. v. Tripp, 516 S.W.2d 256 (Tex. App.–Fort Worth 1974, writ granted). However, the provision does not insulate a spouse’s separate property from joint liabilities, since they are not liabilities of the “other spouse.” *Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975).

V. Borrowing For One’s Separate Estate.


VI. Contract Liability.

As a general rule, “[n]o person is liable on an instrument unless his signature appears thereon.” TEX. BUS. & COM. CODE § 3.401. Nonetheless, given the nature of many of the contract obligations that arise during marriage, many creditors dealing with married couples will succeed in getting the signatures of both parties on lending documents. This creates direct and personal liability.

Under the Federal Equal Credit Opportunity Act, creditors in many consumer loans are prohibited from demanding the signature of one’s spouse, as opposed to any other creditworthy cosigner. See Reg B, 12 C.F.R. Pt. 1202.

VII. Tort Liability.

In the case of tort liability, neither spouse is individually liable for the torts of the other spouse, unless liability is imposed under a doctrine such as agency, respondeat superior, or...
joint enterprise. Missouri K. T. R. Co. v. Hamilton, 314 S.W.2d 114 (Tex. App.–Dallas 1955, writ ref’d n.r.e.) (doctrine of imputed negligence has no application to negligence of husband or wife, and they are liable personally only for their own individual torts). Thus, a spouse is not liable for torts of the other spouse unless the other spouse is acting in the capacity of the spouse’s agent and acting in the scope of his or her employment as agent. Taylor v. Martin, 386 S.W.2d 211 (Tex. App.–Waco 1964, writ dism’d w.o.j.). For example, a husband was found to be not liable for injuries to a third person resulting from his wife’s operation of an automobile, where the automobile was under the wife’s sole control, absent proof that the husband could be held liable under principles of respondeat superior. Graham v. McCord, 384 S.W.2d 897 (Tex. App.–San Antonio 1964). See also Cohen v. Hill, 286 S.W. 661 (Tex. Civ. App. 1926, writ dism’d w.o.j.) (under doctrine of respondeat superior, husband is personally liable for wife’s torts committed as his agent).

A husband and wife may be held liable as joint tortfeasors. Martin v. Martin, 130 S.W.2d 863 (Tex. App.–Dallas 1939, writ dism’d jm’t cor). In such a case, however, no right of contribution is available to either spouse. Stamper v. Scholtz, 17 S.W.2d 184 (Tex. App.–El Paso 1929), appeal after remand 29 S.W.2d 883 (Tex. App.–San Antonio 1930, writ ref’d); Stevens v. Lilley, 7 S.W.2d 883 (Tex. App.–Galveston 1928); Scott v. Brazil, 292 S.W. 185 (Tex. Com. App.1927). As the San Antonio court put it in Lawrence v. Hardy, 583 S.W.2d 795, 799 (Tex. Civ. App.–San Antonio 1979, writ ref’d n.r.e.), “[n]either spouse is ‘individually’ or ‘personally’ liable for the torts of the other spouse except to the extent of his or her interest in the community property, unless there is a greater liability imposed under such doctrines as agency, respondeat superior or joint enterprise.”

The grounds on which both spouses might be found directly liable in tort vary as widely as the possible torts that could be permitted. One case, Bransom v. Standard Hardware, 874 S.W.2d 919 (Tex. App–Fort Worth 1994, writ filed), deserves mention as an example of the reasoning sometimes employed. Mrs. Bransom embezzled nearly half a million dollars from her employer, Standard Hardware. Mr. Bransom claimed to have no knowledge of her actions, despite the fact that his wife ran up $159,000 in Visa charges on a combined yearly income of about $140,000 for the two years in question. In a civil suit against both husband and wife, the Standard Hardware advanced two theories: fraud and unjust enrichment.

As the Fort Worth Court of Appeals pointed out in its opinion, one need not be the person committing the misrepresentations to be liable for fraud:

“A party in interest may become liable by mere silent acquiescence and partaking of the benefits of the fraud. Corpus Christi Teachers C.U. v. Hernandez, 814 S.W.2d 195, 198 (Tex App–San Antonio 1991, no writ). Where one is seeking to prove knowledge of a party in interest, the fraud is almost always proven by circumstantial evidence from which inferences may be drawn from the facts proved. Id. However, the facts must be sufficient to sustain the inference.

Bransom, 874 S.W.2d at 924.

While the law supported a direct cause of action by Standard Hardware against Mr. Bransom, however, the Fort Worth Court of Appeals took a dim view of the facts. Evidence that the husband opened a separate account to avoid a TRO was no evidence of fraudulent intent; the Visa statements were no proof of actual or constructive knowledge, absent proof of what Mrs. Bransom bought. The Fort Worth court thus reversed and rendered on the fraud count.

Standard Hardware was luckier on its unjust enrichment claim, however. Unjust enrichment is a somewhat murky doctrine based on the equitable principle that one who receives unjust benefits out to make restitution. See Bransom, 874 S.W.2d at 927; Corpus Christi v. S.S. Smith & Sons Masonry, Inc., 736 S.W.2d 247, 250 (Tex App–Corpus Christi 1987, writ denied). This is not really a theory of tort liability, but something more along the lines of quasi-contract. See Allen V. Berry, 645 S.W.2d 550, 553 (Tex. App–San Antonio 1982, writ ref’d n.r.e.). Since Mr. Bransom did not preserve his error on appeal, Standard Hardware was entitled to restitution.

In what is possible the most interesting aspect of the decision, the Fort Worth Court of Appeals explicitly disagreed with the Dallas Court of Appeals on the question of whether the stolen funds could be recovered from homestead
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property. The Bransom court imposed a constructive trust on homestead proceeds, holding that "[s]tolen funds used for the purchase of a homestead of improvement of an existing homestead can never acquire homestead rights as they are held in trust for the rightful owners of the funds." Bransom, 874 S.W.2d at 928. In Curtis Sharp Custom Homes, Inc. v. Glover, 701 S.W.2d 24, 29 (Tex.App.–Dallas 1985, writ ref'd n.r.e.), however, the Dallas Court of Appeals held that the Texas Constitution protects even embezzled funds from foreclosure of a judicial lien, provided that those funds are invested in the homestead.

VIII. Joinder In Civil Suits.

A spouse may sue and be sued without the joinder of the other spouse. When claims or liabilities are joint and several, the spouses may be joined under the rules relating to joinder of parties generally. Tex. Fam. Code § 1.105 (Vernon Supp. 1998). See Cooper v. Texas Gulf Industries, Inc., 513 S.W.2d 200 (Tex. 1974) (a suit naming only the husband is not binding on the wife; doctrine of virtual representation repudiated); and Few v. Charter Oak Fire Insurance Co., 463 S.W.2d 424 (Tex. 1971) (joinder of spouse not required in lawsuit).

Before enactment of this section, a married woman could not sue or be sued without joinder of her husband. This section overturns that antiquated practice and makes clear that a wife may be sued in her individual capacity.

When liability for a spouse's debts is sought, the issue of whether both spouses must be parties to a suit has arisen in two contexts. First, the issue has arisen with respect to determining whether both spouses are bound by the judgment. Suits seeking to adjudicate a third party's claim to ownership of community property commonly raise the question of whether both spouses must be joined as parties to a suit before community property may be used to satisfy a judgment. The Texas Supreme Court has stressed that there was nothing in the language of Texas Family Code Section 3.202, that required both spouses to be joined in the suit in order for such community property to be used to satisfy a judgment rendered against one spouse. Carlton v. Estate of Estes, 664 S.W.2d 322, 323 (Tex. 1983). Hence, a creditor's failure to bind both spouses in a suit for collection on a community debt did not deprive a trial court of jurisdiction for failure to join an indispensable party, and it was held to be reversible error for the trial court to grant a motion to dismiss on that ground. Dr. Donald R. Klein & Assoc. v. Klein, 637 S.W.2d 507, 508 (Tex. App.–Eastland 1982, no writ)(when estate of patient's deceased husband is not joined as party, Prob. C. § 5A(b), providing that "any cause of action incident to an estate" be brought in statutory probate court rather than in district court, does not deprive county court at law of jurisdiction to hear doctor's suit against patient for community debt, because there is no requirement that husband's estate be joined, and, therefore, suit solely against wife is not claim against estate).

IX. Marital Property Liability.

Liability can attach to property, even though not to one or even both spouses. State Farm Lloyds, Inc. v. Williams, 791 S.W.2d 542 (Tex. App.–Dallas 1990, writ denied) (liability of property is "in rem" judgment, not "personal" judgment against spouse holding property).

X. Management Of Marital Property.

The liability for marital property follows how it is managed.

XI. Presumption As To Debt Incurred During Marriage.

A marital debt incurred prior to the termination of the marriage by divorce is presumed to be a community debt. Cockerham v. Cockerham, 514 S.W.2d 150 (Tex. App.–Waco 1974, writ granted), aff'd in part and rev'd in part on other grounds 527 S.W.2d 162 (Tex. 1975); Taylor v. Taylor, 680 S.W.2d 645 (Tex. App.–Beaumont 1984, writ ref'd n.r.e.); Brazosport Bank of Texas v. Robertson, 616 S.W.2d 363 (Tex. App.–Houston [14th Dist.] 1981); Le Blanc v. Waller, 603 S.W.2d 265 (Tex. App.–Houston [14th Dist] 1980). Thus a spouse seeking to prove that such a debt is the other spouse's separate debt bears the burden of
XII. **Borrowed Money.**

Whether or not borrowed money is separate or community property depends on the intention of the parties on obtaining the loan. *Coggin v. Coggin*, 204 S.W.2d 47 (Tex. App.–Amarillo 1947); *Connor v. Boyd*, 176 S.W.2d 212 (Tex. App.–Waco 1943, writ ref’d w.o.m.); *Armstrong v. Turbeville*, 216 S.W. 1101 (Tex. Civ. App. 1919, writ dism’d) (holding that if wife borrows money for benefit of separate property, intending to repay it out of her separate estate, and both she and her husband intend that borrowed fund shall belong separately to wife, such will be its status, though husband solos signed note and pledged his separate property to secure loan); see also *Emerson-Brantingham Implement Co. v Brothers*, 194 S.W. 608 (Tex. Civ. App. 1917); and *Edsall v Edsall*, 240 S.W.2d 424 (Tex. App.–Eastland 1951) (status of money borrowed during marriage relationship is determined by intention to repay out of separate fund of husband or wife, or from their community fund). Ordinarily, in the absence of a contrary intention, money borrowed after marriage will be presumed to have been borrowed for the benefit of the community. *Cockerham v Cockerham*, 527 S.W.2d 162 (Tex. 1975); *Brazosport Bank of Texas v Robertson*, 616 S.W.2d 363 (Tex. App.–Houston [14th Dist.] 1981, no writ). There is an unresolved issue as to whether parol evidence is admissible in such a case. *See Broussard v. Tian*, 295 S.W.2d 405, 406 (Tex. 1956). Joint liability of both spouses can also be secured, usually through obtaining two signatures.

XIII. **What Constitutes Community Debt.**

In the absence of statutory provision to the contrary, community debts may be created during marriage by either the husband or the wife. *Dickey v Jackson*, 1 S.W.2d 577 (Tex. Com. App. 1928); *Cullum v Lowe*, 9 S.W.2d 70 (Tex. Civ. App. 1928); *Stamper v Scholtz*, 17 S.W.2d 184 (Tex. App–El Paso 1929), appeal after remand 29 S.W.2d 883 (Tex. Civ. App. 1930), writ ref’d); *Biggs v Hinds*, 177 S.W.2d 288 (Tex. App.–Amarillo 1943, writ ref’d w.o.m.); *Chanowsky v Friedman*, 205 S.W.2d 641 (Tex. App–Fort Worth 1947, writ ref’d n.r.e.); *Jones v Jones*, 211 S.W.2d 269 (Tex. App–El Paso 1944). Debts contracted during marriage are presumed to be on the credit of the community and are joint community obligations, unless it is shown that the creditor agreed to look solely to the separate estate of the contracting spouse for satisfaction. *Cockerham v Cockerham*, 527 S.W.2d 162 (Tex. 1975); *Wall v Wall*, 630 S.W.2d 493 (Tex. App.–Fort Worth 1982, writ ref’d n.r.e.); *Dan Lawson & Associates v Miller*, 742 S.W.2d 528 (Tex. App.–Fort Worth 1987); *Rush v Montgomery Ward*, 757 S.W.2d 521 (Tex. App.–Houston [14th Dist.] 1988, writ den’d); *Sunbelt Service Corp. v Vandenburg*, 774 S.W.2d 815 (Tex. App.–El Paso 1989, writ den’d); *Pemelton v Pemelton*, 809 S.W.2d 145 (Tex. App.–Corpus Christi 1991, writ granted), rev’d on other grounds, 836 S.W.2d 145 (Tex. 1992, mod. cause remanded). Although debts arising during marriage are presumed to be community debts,
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this presumption can be overcome. *Smart v Crawford Bldg. Material Co.*, 638 S.W.2d 228 (Tex. App–Tyler 1982). To determine whether a debt is only that of the contracting spouse or if it is instead that of both husband and wife, it is necessary to examine the totality of the circumstances in which the debt arose. *Cockerham v Cockerham*, 527 S.W.2d 162 (Tex. 1975); *Pope Photo Records, Inc. v Malone*, 539 S.W.2d 224 (Tex. App.–Amarillo 1976); *Miller v City Nat. Bank*, 594 S.W.2d 823 (Tex. App.–Waco 1980); *Le Blanc v Waller*, 603 S.W.2d 265 (Tex. App–Houston [14th Dist.] 1980); *Dan Lawson & Associates v Miller*, 742 S.W.2d 528 (Tex. App.–Fort Worth 1987).

XIV. Rules Of Property Management.

It is important to have a clear understanding of the rules relating to the management of marital property before addressing the rules of any potential liability, as the two issues are obviously correlative.

The Texas Family Code specifies the management powers each spouse has over the marital assets. As would be expected, each spouse has sole management, control and disposition over his/her separate property. Tex. Fam. Code § 3.101 (Vernon Supp. 1998). Furthermore, each spouse has sole management, control and disposition over the community property he/she would own if not married, including wages, income from separate property, monetary recoveries for personal injuries and income from that spouse’s community property subject to his/her sole management and control. Tex. Fam. Code § 3.102(a) (Vernon Supp. 1998). If the spouses commingle their respective sole management community property, then the mixed or combined community property becomes subject to the joint management of the spouses. Tex. Fam. Code § 3.102(b) (Vernon Supp. 1998). Additionally, except for the property designated as sole managed community property in the Texas Family Code section 3.102(a), all other community property is subject to both spouses' joint management, control and disposition. Tex. Fam. Code § 3.102(c) (Vernon Supp. 1998).

XV. Attachment Of Liability To Property.

XVI. Separate Property Liability.

A spouse’s separate property is not subject to liabilities of the other spouse unless both spouses are liable by other rules of law. Tex. Fam. Code § 3.202(a) (Vernon Supp. 1998).

XVII. Sole Management Community Property Liability.

Unless both spouses are personally liable, the community property subject to a spouse’s sole management, control, and disposition is not subject to: (1) any liabilities that the other spouse incurred before marriage; or (2) any nontortious liabilities that the other spouse incurs during marriage. Tex. Fam. Code § 3.202(b) (Vernon Supp. 1998). Almost all “nontortious liabilities” are contractual liabilities.

XVIII. Joint Management Community Property Liability.

The 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. Tex. Fam. Code § 3.202(c) (Vernon Supp. 1998). *See Carlton v. Estate of Estes*, 664 S.W.2d 322 (Tex. 1983) (jointly managed community property subject to other spouse’s individually incurred debt); *Stewart Title Co. v. Huddleston*, 608 S.W.2d 611 (Tex. 1980) (wife not joined in creditors’ action against ex-husband, property awarded to her in divorce may be subject to debts incurred during marriage).

XIX. Interpretation And Application Of Texas Family Code Rules.

While the Texas Family Code Section 3.201 establishes the limitations of personal liabilities of spouses, Section 3.202 provides rules for the satisfaction of a liability against marital property once the obligation is established against one or both spouses. Although a spouse may not be personally liable for an obligation, the "innocent" spouse may suffer the loss of community property due to the other spouse's liability.

Liabilities are classified according to whether they are tortious or non-tortious, whether they were incurred before the marriage or after the marriage and whether both spouses are personally liable for the obligation. As a general rule, liability follows management, so that all of the property which that spouse has a right to manage is subject to all of his/her liabilities. The Family Code makes an exception to this general rule concerning tort liability. The entire community estate, including the non-tortfeasor spouse's sole management community property, is subject to all of his/her spouse's tort liabilities which were incurred during the
marriage. There is no clear reason why this tort exception exists, except to suggest that, at one time, the plaintiff’s attorney lobby successfully made their pitch to the legislators, and by so doing, allowed greater collectibility of the tort judgments.

First, the practitioner must determine whether the debt was incurred solely by the husband, solely by the wife or jointly by both husband and wife. Secondly, determine whether the debt was incurred prior to the marriage or was it incurred during the marriage. Thirdly, classify the debt as either tortious or non-tortious in nature. Finally, determine whether there are any other substantive rules of law which would make one spouse personally liable for the debts of the other spouse, such as agency or necessaries. Featherston and Still, “Marital Liability in Texas ... Till Death, Divorce, or Bankruptcy Do They Part,” 44 BAYLOR L. REV. 1, 14 (1992). Once these issues have been addressed, the practitioner should then be able to review Section 3.202 of the Texas Family Code to determine which of the marital assets are subject to a particular debt.

Applying these rules under the legislative scheme of the Texas Family Code, there are five types of marital property (based on management). A summary of liabilities that can attach to each types of marital property is as follows:

I) **Liability of Husband's Separate Property.**
A husband’s separate property is only liable for his non-tortious liabilities during marriage, his premarital liabilities, his tortious liabilities during marriage, his federal tax liabilities, the joint liabilities of him and his wife, the liabilities incurred for his wife and children's necessaries, and liabilities incurred by his wife as his agent.

II) **Liability of Wife's Separate Property.**
A wife's separate property is only liable for her non-tortious liabilities during marriage, her premarital liabilities, her tortious liabilities during marriage, her federal tax liabilities, the joint liabilities of her and her husband, the liabilities incurred for her husband and children's necessaries, and liabilities incurred by her husband as her agent.

III) **Liability of Husband’s Sole Management Community Property.**
A husband’s sole management community property is liable for his premarital liabilities, his tortious and non-tortious liabilities during marriage, his wife’s tortious liabilities during marriage, the joint liabilities of him and his wife, the liabilities incurred for his wife and children's necessaries, the liabilities incurred by his wife as agent for him, and federal taxes of him and his wife.

IV) **Liability of Wife’s Sole Management Comm. Property.**
A wife’s sole management community property is liable for her premarital liabilities, her tortious and non-tortious liabilities during marriage, her husband’s tortious liabilities during marriage, the joint liabilities of her and her husband, the liabilities incurred for her husband and children’s necessaries, the liabilities incurred by her husband as agent for her, and federal taxes of her and her husband.

V) **Liability of Wife’s Joint Management Comm. Property.**
Joint management community property is liable for the wife’s premarital liabilities, the husband’s premarital liabilities, the wife’s tortious and non-tortious liabilities during marriage, the husband’s tortious and non-tortious liabilities during marriage, joint liabilities of husband and wife, and federal taxes of husband and wife.

XX. **Tort Liability.**
All community property is subject to tortious liability of either spouse incurred during marriage. Tex. Fam. Code § 3.202(d) (Vernon Supp. 1998). But liability of all community property for tort damages does not make the other spouse "individually" or "personally" liable. Lawrence v. Hardy, 583 S.W.2d 795 (Tex. App. – San Antonio 1978, writ ref’d n.r.e.). Also, there is no requirement for joinder of both spouses for there to be liability of all community property. De Anda v. Blake, 562 S.W.2d 497 (Tex. App. – San Antonio 1978, no writ).

A spouse is not liable for the other spouse’s torts, except as to such spouse’s interest in community property. Jackson v Dickey, 281 S.W. 1043 (Tex. Com. App. 1926) rev’d on other grounds, 1 S.W.2d 577 (Tex. Com. App. 1928); Stamper v Scholtz, 17 S.W.2d 184 (Tex. App.–El Paso 1929), appeal after remand, 17 S.W.2d 184 (Tex. App.–San Antonio 1930, writ ref’d).
XXII.  **Liabilities Imposed By Operation Of Law.**

There are numerous liabilities that are imposed or that attach to property that arise by operation of law. In many cases, these types of liabilities have characteristics that differ from liabilities that arise by the direct actions of a spouse to incur the liability.

XXIII.  **Federal Income Taxes.**

The tax consequences stemming from a division of property as well as any unpaid tax liabilities incurred during the marriage are proper factors to be considered in making a fair and just division of the community property.  

*Able v. Able*, 725 S.W.2d 778, 780 (Tex. App. – Houston [14th Dist.] 1987, ref. n.r.e.);  
*McCarty v. McCartney*, 548 S.W.2d 435, 439 (Civ. App. – Houston [1st Dist.] 1976, no writ);  

Although the court is not required to afford any greater weight to the issue of tax liability than to other factors, it has been held reversible error for a court to fail to consider tax liability, particularly when it is substantial and one of the spouses is without means to pay the obligation.  

*Benedix v. Benedict*, 542 S.W.2d 692, 698 (Civ. App. – Fort Worth 1976, dism’d.);  
*Cole v. Cole*, 532 S.W.2d 102, 105 (Civ. App. – Dallas 1975, no writ).  Although the tax consequences stemming from a property division may be taken into account if those consequences flow from the capital gains already realized at the time of divorce, it is not proper to allow one party a credit or offset for the tax that he or she would incur if the party sold certain property he or she is being awarded in the property division. In that situation, the question of whether the property will ever be subject to capital gains tax can be answered only by engaging in speculation or surmise.  


A divorce judgment, requiring one spouse to assume all the community indebtedness, cannot relieve the other spouse of individual responsibility for payment of federal income tax on one-half of the community income received during the year in which the divorce is granted, since a tax is not a debt in the ordinary sense of that word.  

*Brooks v Brooks*, 515 S.W.2d 730 (Tex. App.– Eastland 1974, writ ref’d n.r.e.) (holding that requirement in divorce judgment that husband pay community debt did not include potential income tax obligations of wife).  But even though a tax is technically not a debt, and the divorce court has no power to relieve either party of personal liability to the taxing authority, the court, in dividing the property on divorce, may take the tax liability into consideration and may even require one...
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Agreement, incorporated verbatim in a divorce decree, that provides for the assumption by the husband of all debts, obligations, charges, and liens, he is liable for deficiency income tax assessments subsequently imposed by the federal government on the wife for the year of the agreement and prior years. Bryant v McMurrey, 246 S.W.2d 249 (Tex. App. - Texarkana 1951, writ ref’d n.r.e.).

Where a divorce decree is entered before the date on which federal income taxes for the previous year have become due and payable, it is error for the trial court to consider such income taxes in making the property division. Mata v Mata, 710 S.W.2d 756 (Tex. App.-- Corpus Christi 1986).

Where the former wife alleged that the trial court erred in allowing her former husband an offset for hypothetical future tax consequences in the event of a sale of the property which he was awarded in the divorce, the trial court erred in allowing the tax credit when the question of whether the property would ever be subject to capital gains tax or not could only be answered by engaging in speculation or surmise. Harris v Holland, 867 S.W.2d 86 (Tex. App.-- Texarkana 1993).

XXIV. Necessaries.

A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to the spouse to whom support is owed. Tex. Fam. Code §2.501(b) (Vernon Supp. 1998). The spouse for whom necessaries were provided, may not, however, maintain an action against the non-providing spouse for a breach of his or her duty to supply his or her spouse with necessaries. On the contrary, such an action must be brought by the third party who supplied the spouse with the necessaries in question. Gonzales v Gonzales, 300 S.W. 20 (Tex. 1927); Cunningham v Cunningham, 40 S.W.2d 46 (Tex. 1931). The person contracting for necessaries is also liable on the contract. Magee v White, 23 Tex. 180 (1859); Booth v Cotton, 13 Tex. 359 (1855); Milburn v Walker, 11 Tex. 329 (1854); Hollis v Francois, 5 Tex. 195 (1849).

VI Items Constituting Necessaries.

The term "necessaries" is not susceptible of exact definition. Whether a liability incurred by a spouse is for necessaries is a question of fact to be determined from the facts and circumstances of each case. Crooks v Aero Mayflower Transit Co., Inc., 363 S.W.2d 191, 192 (Tex.Civ.App.-San Antonio 1962, writ ref’d n.r.e.). A determination of what is "necessary" depends

Illustrations

It was proper for the trial court in a divorce proceeding to assess all of the couple's income tax liability against the husband where: that liability arose from a tax shelter investment made by the husband without wife's knowledge; he concealed the liability from the wife during the settlement negotiations; he had at all times the capability to pay the liability but had instead allowed penalties and interest to accumulate; and he still had the capability to pay the liability whereas the wife did not. Baccus v Baccus, 808 S.W.2d 694 (Tex. App.-- Beaumont 1991). Where the parties to a divorce were jointly liable to Internal Revenue Service for federal taxes, and where the husband was involved in the details of the sale of wife's separate property and was aware of potential for understatement of tax liability, the trial court acted within its authority in holding the husband responsible for the federal income tax liability during the marriage. Mullins v Mullins, 785 S.W.2d 5 (Tex. App.-- Fort Worth 1990).

Under a property settlement agreement that gives the wife certain described property, free of all community debt, but that requires that she assume all indebtedness theretofore or thereafter incurred by her, the husband is not obligated to pay the tax on her share of the community income. Moody v Moody, 265 S.W.2d 610 (Tex. App.-- Galveston 1954, writ granted), aff’d 274 S.W.2d 535 (Tex. 1955).

But under a community property settlement agreement, incorporated verbatim in a divorce
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upon what is reasonable and proper for persons in
the spouse's "station of life." Daggett v. Neiman Marcus Co., 348 S.W.2d 796, 799 (Tex. Civ. App. -Houston, [1st Dist.] 1961, no writ.) Minimal necessaries include food, clothing, and shelter. See Wadkins v. Dillingham, 59 S.W.2d 1099, 1100 (Tex. Civ. App.-Austin 1933, no writ). However, items also held to be
necessaries include cosmetics, Gabel v. Blackburn Operating Corp., 442 S.W.2d 818, 820 (Tex.Civ.App.-Amarillo 1969, no writ); airline tickets, Jarvis v. Jenkins, 417 S.W.2d 383, 384 (Tex.Civ.App.-Waco 1967, no writ); a piano, Lee v. Hall Music Co., 35 S.W.2d 685 (Tex. 1931). The term is used to designate such things as are suitable to the station in life of the spouse and children, insofar as the ability of the parties will permit. Walling v Hannig, 73 Tex. 580 (1889); Milburn v Walker, 11 Tex. 329 (1854). Conditions and station in life of parties are
to be considered in determining whether articles purchased by wife are necessary, and ordinarily she is judge thereof, subject to satisfying court and jury that articles are reasonable and proper. Daggett v Neiman-Marcus Co., 348 S.W.2d 796 (Tex. Civ. App. – Houston [1st Dist.,] 1961). See also Wadkins v Dillingham 59 S.W.2d 1099 (Tex. App.-- Austin 1933). Whether contract executed by wife is for
necessaries is generally question of fact to be determined from facts and circumstances of particular case. Crooks v Aero Mayflower Transit Co., 363 S.W.2d 191 (Tex. App.-- San Anotonio 1962, writ ref'd n.r.e.). Term "necessaries" encompasses such services as necessary, and ordinarily she is judge thereof, subject to satisfying court and jury that articles are reasonable and proper. Daggett v Neiman-Marcus Co., 348 S.W.2d 796 (Tex. Civ. App. – Houston [1st Dist.,] 1961). See also Wadkins v Dillingham 59 S.W.2d 1099 (Tex. App.-- Austin 1933). Whether contract executed by wife is for
necessaries is generally question of fact to be determined from facts and circumstances of particular case. Crooks v Aero Mayflower Transit Co., 363 S.W.2d 191 (Tex. App.-- San Anotonio 1962, writ ref'd n.r.e.). Term "necessaries" encompasses such services as

husband is financially able to, and should, provide for wife's benefit and that are suitable to
maintenance of condition and station in life family occupies. Approved Personnel Service v Dallas, 358 S.W.2d 150 (Tex. App.-- Texarkana 1962). What constitutes necessaries for the wife or children depends entirely on the facts and circumstances of the particular case. Examples are:

The purchase, Bexar Bldg. & Loan Ass'n v Heady, 50 S.W.2d 1079 (Tex. Civ. App.-- 1899), rental, Harris v Williams, 44 Tex. 124 (1875); Wadkins v Dillingham, 59 S.W.2d 1099 (Tex. App.-- Austin 1933), construction, Howell v McMurry Lumber Co., 132 S.W. 848 (Tex. Civ. App. 1910, writ diss'md), and furnishing of a house for the use of the family, Desmond v Dockery, 116 S.W. 114 (Tex. Civ. App. 1909) (rooming house). Purchase of piano by wife who traded in old one established that piano was necessary household article. Oliver H. Ross Piano Co. v Walker, 111 S.W.2d 1165 (Tex. App.-- Fort Worth 1937);

The purchase of suitable food and clothing for the wife and children, Gabel v. Blackburn Operating Corp., 442 S.W.2d 818 (Tex. App.-- Amarillo 1969) (holding that evidence was sufficient to support jury finding that clothing and cosmetics purchased from department store were necessaries); Corbett v Wade, 124 S.W.2d 889 (Tex. App.-- Austin 1939); Colonna v Kruger, 246 S.W. 707 (Tex. Civ. App.-- 1922); Ellis v Emil Blum Co., 242 S.W. 1099 (Tex. Civ. App. 1922);


Expenditures incurred on behalf of a child, for its tuition, Bradley v Gilliam, 260 S.W. 289 (Tex. Civ. App.-- 1924); but see Haas v American Nat. Bank, 94 S.W. 439 (Tex. Civ. App. 1906) (tuition for child brought into family without husband's consent does not come under heading of "necessaries.")

Expenses incurred for medical and dental services for the family, Black v Bryan, (1857) 18 Tex. 453 see also Corbett v Wade, 124 S.W.2d 889 (Tex. App.-- Austin 1939) (husband's liability extends to nursing care furnished wife); Meinen v Muesse, 72 S.W.2d 931 (Tex. App.-- Austin 1934) (nurse's and housekeeper's services are necessaries); and White v Lubbock Sanitarium Co., 54 S.W.2d 1058 (Tex. App.-- Amarillo 1932, writ diss'md w.o.j.) (medical services rendered wife by sanitarium are necessaries).

Reasonable fees for the services of an attorney to represent the wife in a divorce suit are also usually denominated necessaries.

Transportation expenses may be necessaries; Jarvis v Jenkins, 417 S.W.2d 383 (Tex. App.-- Waco 1967) (holding that where evidence was that defendant's wife was separated from him, that she was ill, and that she went to Virginia to visit her mother and go to the hospital and get medical attention, trial judge had right to conclude that airline ticket purchased for wife by plaintiff, wife's attorney, was necessity). Also, where wife, following decision to permanently separate from husband, had contracted with carrier for interstate transportation of furniture and household effects, whether such contract was one for necessaries
was question of fact, and in post reconciliation suit by husband for return of furniture, rendition of summary judgment for carrier was error. *Crooks v Aero Mayflower Transit Co.*, 363 S.W.2d 191 (Tex. App.-- San Antonio 1962, writ ref’d n.r.e.).

Examples of expenditures that are not necessaries are:

Purchases to aid the wife in carrying on a business of her own, *Wadkins v Dillingham*, 59 S.W.2d 1099 (Tex. App.-- Austin 1933); *Graves v Parker*, 22 S.W.2d 747 (Tex. App.-- San Antonio 1929, writ dism’d w.o.j.); *Palmer v Coghlan*, 55 S.W. 1122 (Tex. Civ. App. 1900);

Expenses for improving or developing her separate property, *Taylor v Hustead & Tucker*, 257 S.W. 232 (Tex. Com. App. 1924) (drilling of oil well); and

Commissions to a broker for effecting an exchange of her separate property 16 do not come under the heading of necessaries, *Winkie v Conatser*, 171 S.W. 1017 (Tex. Civ. App. 19194, writ ref’d).

VII) **Necessaries Furnished To A Child**

A parent who fails to discharge the duty of support of his or her child is liable to any person who provides necessaries to the child to whom support is owed. Tex. Fam. Code § 4.02 (Vernon Supp. 1998). If a parent refuses or neglects to provide necessaries and they are supplied by a third person, the law implies a promise on the part of the parent to pay for them, *Hartman v Chumley*, 266 S.W. 444 Tex. Civ. App. 1924); *Sanger Bros. v Trammell*, 198 S.W. 1175 (Tex. Civ. App. 1917); *Snell v Ham*, 151 S.W. 1077 (Tex. Civ. App. 1912, writ dism’d). The person furnishing the necessaries may sue and recover their value from the parent. *Gully v Gully*, 231 S.W. 97 (Tex. 1921); *Lawrence v Cox*, 464 S.W.2d 674 (Tex. App-- Waco 1971, writ dism’d w.o.j.); *Bauman v Heard*, 442 S.W.2d 416 (Tex. App--Fort Worth 1969, writ granted), aff’d 443 S.W.2d 715 (Tex. 1969); *Smith v Waller*, 422 S.W.2d 189 (Tex. App-- Fort Worth 1967, writ ref’d n.r.e.); *Dilger v Dilger*, 271 S.W.2d 169 (Tex. App.-- Amarillo 1951); *Maxwell v Maxwell*, 204 S.W.2d 32 (Tex. App-- Amarillo 1947, writ ref’d n.r.e.); *Hooten v Hooten*, 15 S.W.2d 141 (Tex. App-- Texarkana 1929, writ granted).

XXV. **Statutory Liability Of Parent For Child**

A parent or other person who is responsible for the control and reasonable discipline of a child is liable for any property damage proximately caused by the negligent conduct of the child, if the conduct is reasonably attributable to the negligent failure of the parent or other person to exercise that duty, Tex. Fam. Code §33.01(1) (Vernon Supp. 1998), or the willful and malicious conduct of a child who is at least 12 years of age, but is under 18 years of age. Tex. Fam. Code §33.01(2) (Vernon Supp. 1998). The liability of a parent for a child's tortious conduct that injures property is more theoretical than real; while a parent can be held liable for up to $25,000 in damages for negligent or malicious acts of the child, very few instances of a court actually holding a parent liable have been reported.

XXVI. **Parent’s Liability To A Child**

An unemancipated minor child may maintain an action for damages against the parent for a willful or malicious personal tort. *Felderhoff v Felderhoff*, 473 S.W.2d 928 (Tex. 1971). By the commission of willful, malicious, and intentional wrongs against a child, the parent has abdicated or abandoned parental responsibilities and thereby subjects itself to liability. *Id*. There is no parental immunity from suit, if the child is of legal age. *Wallace v Wallace*, 466 S.W.2d 416 (Tex. App-- Eastland 1971, writ granted).

A child, however, does not have an action against the parent for ordinary negligence, where the parental act involves the reasonable exercise of parental authority or ordinary parental discretion with respect to provision for care and necessities of the child. *Felderhoff v Felderhoff, supra*. Parental duties, in this respect, include the provision of shelter, food, schooling, family chores, medical care and recreation. *Id*. Acts that go beyond this authority and discretion will provide sufficient basis for an action for damages. *Id*.

XXVII. **Marshalling Statute**

A judge may 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, if the property subject to liability for a judgment includes any combination of:

(1) a spouse’s separate property;
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(2) community property subject to a spouse’s sole management, control, and disposition;
(3) community property subject to the other spouse’s sole management, control, and disposition; and
(4) community property subject to the spouses’ joint management, control, and disposition.

In determining the order in which particular property is subject to execution and sale, the judge shall consider the facts surrounding the transaction or occurrence on which the suit is based. Tex. Fam. Code § 3.203(a) (Vernon Supp. 1998). There are no reported cases citing this section since its enactment in 1970.

XXVIII. Constitutional Restrictions On Financing & Re-Financing Homesteads.
Texas has traditionally taken a very conservative approach to the protection of the homestead, prohibiting forced sale for most debts. Until 1995, only three exceptions to the prohibition on forced sale were recognized. These exceptions allowed for the placement of liens for debts for the purchase money of the homestead, taxes due on the homestead, and for improvements to the homestead. Two additional exceptions, relating to owelties of partition and refinancings of previously permitted debts, were approved by the voters in 1995.

The amended constitutional provision allows for two additional types of extensions of credit that may be secured by a homestead: home equity loans and reverse mortgages. An equity loan or secondary mortgage loan is an extension of credit under which money is borrowed and repaid in accordance with the terms of a written loan agreement. The Texas provision, while permitting these loans, still includes detailed restrictions on their use. The reverse mortgage is an arrangement by which a borrower is able to receive payments on the basis of home equity without paying for the loan until the homestead is transferred or the borrower moves. Reverse mortgages are available only if the borrower (or the borrower’s spouse) is at least 55 years old.

The amendments also now permit enforcement of a lien granted as part of an owelty of partition, including “a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding.” Tex. Const. Art. 16 § 50(a)(3). This provision is codified in Tex. Prop. Code. § 41.001(a)(4).

Neither the limiting provisions of Family Code Section 3.202, nor any of the Texas exemption statutes [see, e.g., Prop. C. §§ 41.002 – homesteads, 42.002 – personal property; Ch. 132, Levy and Execution] prevent seizure of a spouse's sole management community property by the federal government in satisfaction of the federal liabilities of the other spouse. [Broday v. United States, 455 F.2d 1097, 1099-1101 (5th Cir. [Tex.] 1972); Short v. United States, 395 F. Supp. 1151, 1153-1154 (E.D. Tex. 1975); but see Rev. Rul. 85-70, 1985-1 C.B. 361 – I.R.S. may not use spouse's community one-half interest in joint income tax refund to offset separate premarital tax liability of other spouse, unless state law permits that interest to be reached to satisfy premarital debts.

The federal government’s claims for taxes is a lien in favor of the United States on all property and rights to property, whether real or personal, belonging to the person who is liable to pay the tax and who neglects or refuses to pay the tax after demand. 26 U.S.C. § 6321. The federal tax lien does not always have priority over all preexisting liens that have become properly fixed. 26 U.S.C. §§ 6323-6324A.

Under federal law, one half of all community income is taxable to each spouse, regardless of which spouse exercises control over the income at issue. For example, a spouse may be liable for one half of federal income tax liability accruing on the interest earned on the other spouse’s sole management community property. Tabassi v. NBC Bank – San Antonio, 737 S.W.2d 612, 614 (Tex. App. – Austin 1987, ref. n.r.e.)(because under Texas law, interest earned on husband's separate property foreign savings was community property – albeit sole management community property – wife was liable for one half of federal income tax liability accruing on such interest during marriage.

A homestead right, though securely established and existing, is subject to a lien for federal taxes. United States v. Rodgers, 461 U.S. 677, 690-702, 103 S. Ct. 2132, 76 L. Ed. 2d 236 (1983); United States v. Molina, 584 F. Supp. 1101, 1015 (S.D. Tex. 1984). However, when the rights of a third party, such as a non-delinquent taxpayer-spouse co-owner, are involved, the court does not have “unbridled discretion” to order a sale when the interests of
When satisfying a lien for federal taxes, the Internal Revenue Service may levy on a joint bank account of a taxpayer without first determining the property interest of the co-depositors. The co-depositors may secure the return of their interests in the accounts through administrative and judicial action after the levy. *United States v. National Bank of Commerce*, 472 U.S. 713, 724-731, 105 S. Ct. 2919, 86 L. Ed. 2d 565 (1985)(divided court).

XXX. Character (As Community Or Separate) Is Fixed By Character Of Obligation.

The character of the debt is fixed by the character of the contractual obligation undertaken by each spouse and the agreement of the parties at its inception as to what marital property will be liable to the creditor. For example, when either spouse incurs an indebtedness during marriage and the person extending credit does not specifically agree to look solely to the separate estate of one of the spouses for satisfaction, the borrowing spouse pledges community credit and whatever is acquired as a result is community property. *Broussard v. Tian*, 156 Tex. 371; 295 S.W.2d 405, 406 (1956); *Gleich v. Bongio*, 128 Tex. 606, 99 S.W.2d 881, 883 (1937). If, on the other hand, an agreement to look solely to the separate estate of one spouse is proved, the other spouse is not liable. *Dunlap v. Williamson*, 683 S.W.2d 544, 545 (Tex. App. – Austin 1984), aff’d in part, rev’d in part on other grounds, 693 S.W.2d 373 (Tex. 1985)(case involving two married couples, presumption of community debt was rebutted when jury found that note-holder agreed to look solely to husband for satisfaction of debt and neither wife impliedly assented to establishment of debt).

The payment of community debt with separate property funds does not alter character of the property with which the debt is secured. *Broussard v. Tian*, 156 Tex. 371; 295 S.W.2d 405 (1956). *See also Leighton v. Leighton*, 921 S.W.2d 365 (Tex. App. – Houston [1st Dist] 1996, no writ)(because husband acquired ranch before he married wife, it was his separate property, even though ranch was improved with borrowed funds on which both parties were liable; parties built home on ranch, which had been unimproved property, and parties jointly executed loan application, lien, note, and deed of trust securing financing for building home).

XXXI. Divorce And Its Effect On Liabilities.

The division of the property in a divorce must take into consideration all the equities, the nature of the property, the debts secured by liens on property awarded to each, the liabilities, and
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XXXII. Court Must Consider Liabilities In Division Of Property At Trial.

A trial court has authority over debts, as well as assets, in a divorce. See, e.g., Taylor v. Taylor, 680 S.W.2d 645 (Tex.App.—Beaumont 1984, writ ref’d n.r.e.). This includes the power, at least as between the spouses, to determine the liabilities of the parties to third party creditors. See, e.g., Coggin v. Coggin, 738 S.W.2d 375 (Tex. App.—Corpus Christi 1987, no writ).

Ordering one spouse to pay the vast majority of debts, while giving that spouse few assets, may be an abuse of discretion. See, e.g., Welch v. Welch, 694 S.W.2d 374 (Tex. App.—Houston[14th Dist.] 1985, no writ). There is, however, no requirement that an assignment of debt accompany each property award. For example, the husband can properly be required to pay the debt on property awarded to the wife. Coggin v. Coggin, 738 S.W.2d 375 (Tex. App.—Corpus Christi 1987, no writ).

XXXIII. Subordination To Rights Of Creditors.

A divorce does not diminish or limit creditor’s right to proceed against either spouse or both spouses for payment of community debts incurred prior to divorce decree. Blake v Amoco Fed. Credit Union, 900 S.W.2d 108 (Tex. App.—Houston [14th Dist.] 1995, no writ); Mussina v Morton, 657 S.W.2d 871 (Tex. App.—Houston, [1st Dist.] 1983, no writ). Thus, a division of community property must be in subordination to the rights of creditors. Walker v. Walker, 527 S.W.2d 200 (Tex. Civ. App.—Fort Worth 1975, no writ); Goren v. Goren, 531 S.W.2d 897 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ dism’d w.o.j.). Subject to these limitations, the trial court does have the authority, as between the parties to the divorce suit only, to determine their liability to third-party creditors. Coggin v. Coggin, 738 S.W.2d 375 (Tex. App.—Corpus Christi 1987, no writ); Whitt v. Whitt, 684 S.W.2d 731 (Tex. App.—Houston [14th Dist.] 1984, no writ); Walker v. Walker, 527 S.W.2d 200 (Tex. Civ. App.—Fort Worth 1975, no writ).

The former community property of the divorced spouses remains subject to the community debts, notwithstanding a decree of divorce dividing it between them, Rush v. Montgomery Ward, 757 S.W.2d 521 (Tex. App.—Houston [14th Dist.] 1988, writ denied) and the creditor may subject the interest of either spouse to his or her claim against the community, unless the property is a homestead or other property exempt from the payment of debts. Richey v. Hare, 41 Tex. 336 (1874); McIntyre v. McIntyre, 722 S.W.2d 533 (Tex. App.—San Antonio 1986, no writ); Holland v. Zilliox, 86 S.W. 36 (Tex. Civ. App. 1905, writ dism’d).

Community property that has been partitioned by the divorce court remains subject to the demands of creditors, and a former wife who has, under a partition, received and appropriated property that would otherwise be liable to the claims of creditors, becomes personally liable for the payment of debts to such creditors to the extent of the property she has received. Swinford v. Allied Finance Co. of Casa View, 424 S.W.2d 298 (Tex. Civ. App.—Dallas 1968, writ dism’d w.o.j.; cert. den. 393 U.S. 923, 89 S.Ct. 253, 21 L. Ed. 259).

The proceeds from the sale of a homestead cannot be used to extinguish the liabilities due unsecured creditors, although failure to raise the issue of existence of a homestead at trial precludes a party from raising the issue on appeal. McIntyre v. McIntyre, 722 S.W.2d 533 (Tex. App.—San Antonio, 1986).

XXXIV. Shedding Creditors In A Divorce?

Professor McKnight’s view is that unsecured creditors’ rights can be shed in a divorce. See Joseph W. McKnight, Dealing with Liabilities in a Divorce, STATE BAR OF TEXAS, 15th ADVANCED FAMILY LAW COURSE, at DDD-3 (1989); Joseph W. McKnight, Commentary to Family Code § 5.61, 21 TEX. TECH L. REV. 1108, 1110 (1990). At the outset, it surely seems as if there is some room for doubt on the subject. Stewart Title is the
closest thing we have to a Texas Supreme Court decision on the subject, and the case is singularly uninspiring. The Texas Supreme Court’s per curiam opinion says little, other than that a spouse’s property cannot be reached after divorce without a personal judgment against that spouse. The court of appeals decision does not make it clear whether the creditors were secured or unsecured, whether the spouse who received the property was personally liable on the debt, or whether there was enough other property remaining to satisfy the debt.

Spouses surely can partition and exchange their property during marriage, diminishing the total pool of community property available to satisfy preexisting creditors, providing that there is no intent to defraud existing creditors. A spouse even can give community property to another spouse and cut off the rights of creditors, providing that there is no intent to defraud and that the gift does not result in insolvency at the time it is made. See Henry S. Miller Co. v. Evans, 452 S.W.2d 426, 432 (Tex. 1970). It would be irrational not to permit the same result when the partition is accomplished by a judge in a divorce decree, or through approval of a property agreement incident to divorce. There surely would be less chance of fraud than in an ordinary partition agreement, and more reason for honoring the finality of the partition. Of course, even a property division incident to divorce would be subject to the Texas Uniform Fraudulent Transfer Act.

XXXV. Discretion Of Court In Ordering Payment Of Community Debts Generally.


The divorce court does not abuse its discretion where in its decree it makes one spouse responsible for the majority of the community debts. Coggin v. Coggin, 738 S.W.2d 375 (Tex. App.-- Corpus Christi 1987, no writ) (circumstances justified assessing greater proportion of debts against husband); McIntyre v. McIntyre, 722 S.W.2d 533 (Tex. App.--San Antonio 1986); Padon v. Padon 670 S.W.2d 354 (Tex. App.-- San Antonio 1984, no writ).

XXXVI. The Court’s Consideration Of Tax Liabilities & Consequences.

Texas courts hold that the trial court should not speculate on potential tax consequences that may or may not arise after the division of property unless there is proof of an immediate and specific tax liability. If there is no sale contemplated, actual or ordered, the Court should not take potential, speculative tax consequences into consideration. In Harris v. Holland, 867 S.W.2d 86 (Tex App - Texarkana 1993), the court described the credit the Husband received in the value of his cattle, hay and equipment as "phantom future tax consequences." The Appellate Court reversed the award of the credit, stating:

Almost all of any community estate divided by the courts, like other property, might be subject to tax consequences if sold for a gain. When, if ever, Holland sells his share of the awarded property, he might sell it at a loss and receive favorable tax consequences. Admittedly, it may be appropriate for a trial court to consider the tax liability for the sale of capital assets which has been realized by the parties at the time of divorce. However, where the question whether the property will ever be subject to capital gains tax or not can be answered only by engaging in speculation or surmise, a trial court errs in allowing a credit for that "tax."

The Harris court cited as support Freeman v. Freeman, 497 S.W. 97 (Tex. Civ. App - Houston 14th Dist. 1993), which held that the trial court erred in valuing a pension plan awarded to the Husband because the court deducted the "hypothetical present tax liability" that the Husband would incur if the plan were immediately liquidated. In Freeman there was no immediate liquidation, yet the trial court reduced the value as if the funds were then withdrawn in cash. The Freeman court did not, however, rule out some tax consideration in the value of the pension, stating:

While it would be proper in computing the present value to make a reasonable deduction for the present value of
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Taxes that may become payable in the future the amount of the deduction would probably be less than the income tax payable if it were withdrawn now.

See also Simpson v. Simpson, 679 S.W.2d 39 (Tex App. - Dallas 1984), which also reversed the application of the "hypothetical present tax liability" to a deferred compensation plan.

Income tax liability (i.e., what is owed to the I.R.S. for taxes already incurred) nevertheless should be considered by a court in the division of the community estate. Robbins v. Robbins, 601 S.W.2d 90 (Tex App. - Houston, 1st Dist, 1980).

Professor Ronald Hjorth, in his article "The Effect of Federal Tax Consequences on Amount of Property Allocation to Spouses in State Court Dissolution Proceedings," 24 Fam. L. Q. 247 (Fall, 1990), concludes that "The general rule that values of traditional property interests will not be discounted for the present value of future taxes unless those taxes are 'immediate and specific' is a sound rule." He adds, however, that "There are nonetheless numerous exceptions to those rules which courts will apply and which counsel should consider in negotiating marital dissolution property settlements." He suggests that the following rules would be the fairest application:

i. If an item of property is required to be sold to a third party by the terms of the dissolution instrument, the value of the asset should be reduced by the present value of the estimated tax on the sale.

ii. If one spouse sells appreciated property to another spouse pursuant to marriage dissolution, the price should be discounted by one-half the present value of the tax that would be payable if the property were sold to a third party on the same terms and conditions.

iii. If one spouse receives assets that will definitely be taxed to that spouse or an assignee of that spouse, the value of the assets should be reduced to reflect anticipated taxes that will eventually be paid. Assets of this type include amounts to be received under installment sales contracts and rights under non-qualified deferred compensation arrangements. Pensions under qualified plans present special problems because they often enjoy tax advantages that can enhance their value.

iv. Where it is not clear that the gain attributable to property will ever be recognized by the transferee spouse, the value of assets should not be reduced to reflect the amount of speculative or hypothetical taxes. The respective amounts of such taxes should, nevertheless, be considered as a factor in determining the amounts of property to be awarded to each spouse, at least in states that permit some flexibility in making property settlements. For example, if one spouse receives cash and the other spouse receives property with a very low basis, it would seem appropriate, other factors being equal, to award the spouse who gets the property somewhat more than half the property if an equal division would be made apart from tax considerations.

XXXVII. Texas Uniform Fraudulent Transfer Act.

Prior to advising the client about a property settlement agreement, the practitioner must keep in mind the provisions dealing with fraudulent transfers. A transfer of assets from one spouse to another pursuant to a divorce settlement may be set aside as being fraudulent as to both pre-divorce and post-divorce creditors. Therefore, the rules regarding fraudulent transfer and the assets to which a creditor has a right to attach must be taken into consideration before agreeing to a divorce settlement.

The action to avoid and recover fraudulent transfers may be brought by a creditor or the trustee in a bankruptcy action. A property settlement agreement between spouses incident to a divorce may be difficult to show it was done with the intent to hinder, delay or defraud creditors. However, it is the constructive fraud section of the fraudulent transfer act, located at section 24.006(a) of the Texas Business and Commerce Code, that can cause significant problems for the parties.

As to present creditors, the Texas Business and Commerce Code Section 24.006(a) provides:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose
claim arose before the transfer was made or the obligation incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent as that time or the debtor became insolvent as a result of the transfer or obligation.


A transfer is fraudulent if it is made in exchange for less than reasonable equivalent value and the debtor was insolvent at the time of the transfer or was rendered insolvent as a result of the transfer. Therefore, a spouse who accepts non-exempt assets in a divorce settlement should look carefully at the financial condition being created for the other spouse before agreeing to the divorce settlement.

XXXVIII. Agreements To Allocate Liabilities.

Parties in a divorce are expressly permitted to enter into agreements concerning their liabilities. Tex. Fam. Code. § 7.006(a) (Vernon Supp. 1998). As long as the terms are just and right, the agreement is binding on the Court. Tex. Fam. Code. § 7.006(c) (Vernon Supp. 1998).

XXXIX. Post-Decree Enforcement Of Liability Assumption.

Though there is no express statement in the statute, by implication, the liability allocation provisions in a Final Decree of Divorce can be enforced by the Court after the divorce is over. See Tex. Fam. Code § 9.001(a) & (c) (Vernon Supp. 1998) (the statute only expressly provides a remedy for parties affected by decrees regarding division of property, but the notice provisions also apply to parties whose liabilities may be affected).

XL. Miscellaneous Divorce Liability Issues.

XLI. Debt Pending Divorce.

A debt incurred by a spouse while a suit for divorce or annulment is pending that subjects the other spouse or the community property to liability is void with respect to the other spouse if the transfer was made or the debt incurred with the intent to injure the rights of the other spouse. Tex. Fam. Code § 6.707 (Vernon Supp. 1998). However, a transfer or debt is not void if the person dealing with the transferor or debtor spouse did not have notice of the intent to injure the rights of the other spouse. Under this statute’s provisions, a spouse may bring an action to set aside a fraudulent conveyance that occurs during the pendency of an action for divorce or annulment. Goodwin v. Goodwin, 451 S.W.2d 532, 534 (Tex. Civ. App.–Amarillo), rev’d on other grounds, 456 S.W.2d 885 (Tex. 1970).

XLII. Change Of Name.

If a party changes his or her name in a divorce, the name change does not release a person from liability incurred in that person’s previous name. Tex. Fam. Code § 45.104 (Vernon Supp. 1998).

XLIII. Homestead Debt.

The Texas Constitution exempts the homestead from “the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead” Tex. Const. Art. 16 § 50; see, e.g., Matter of Daves, 770 F.2d 1363, 1366-1369 (5th Cir. [Tex.] 1985)(neither constructive trust nor equitable lien could be judicially imposed against Texas homestead property in absence of strict compliance with requirements of statutes and Texas Constitution). On divorce, a homestead may be partitioned. When partition is not possible, a homestead is subject to sale and distribution of the proceeds to the parties. Nevertheless, the trial court may not order that the proceeds from the sale of the parties' homestead be used to extinguish debts owed to unsecured creditors. To do so would violate the constitutional and statutory provisions protecting the homestead, and the proceeds from its sale, from the reach of general creditors. In re the Marriage of Banks, 887 S.W.2d 160, 164 (Tex. App. – Texarkana 1994, no writ)(trial court could not order that proceeds from sale of parties' homestead be used to pay attorney's fees); see Tex. Const. Art. 16 § 50; Prop. C. § 41.001.

XLIV. Creditor Intervention Into Divorce Action.

Creditors or others with an interest in the matrimonial property may intervene in the suit.
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Parr v. First State Bank of San Diego, 507 S.W.2d 579, 583 (Civ. App. – San Antonio 1974, no writ); Broadway Drug Store of Galveston v. Trowbridge, 435 S.W.2d 268, 269-270 (Civ. App. – Houston [14th Dist.] 1968, no writ); see Humphrey v. Taylor, 673 S.W.2d 954, 956 (Tex. App. – Tyler 1984, no writ)(creditors intervened in divorce action asserting that note executed by husband without wife's participation or knowledge constituted "community debt" for which all community property was liable, but creditors failed to establish community character of debt, and take-nothing judgment in favor of wife was affirmed).

XLV. Property Division Techniques Involving Debt-Related Structures.

XLVI. Alimony.

Contractual alimony can be used by agreement; or maintenance can be ordered by the Court or agreed to by the parties to establish a post-divorce liability for one spouse to make payments to the other. The advantage of these payments is that they are generally non-dischargeable in bankruptcy. In re Nunnally, 506 F.2d 1024, 1026 (5th Cir. [Tex.] 1975)(nondischargeability of contractual alimony). Generally, although certainly possible, there is little reason, other than the nondischargeability aspect, for a decree to have non-taxable alimony. Most alimony, and all maintenance under Texas law, is therefore, taxable to the recipient and deductible by the payor.


XLVII. General Definition.

To be included in the income of the recipient spouse under I.R.C. § 71(a), an "alimony" payment must meet the following requirements:

VIII) Cash Payment.

Only cash payments can qualify as taxable alimony. I.R.C. § 71(b)(1).

IX) Divorce or Separation Instrument.

The payments must be "received under" a qualified divorce or separation instrument. I.R.C. § 71(b)(1)(A). See Mercurio v. Commissioner, T.C. Memo 1995-312 (husband's payments to wife that the parties later stipulated in writing to be spousal support did not satisfy the writing requirement as there was no written agreement designating the payments as support at the time payments were made).

X) Payment Must Not Be Designated as Nontaxable.

Cash payments may be in the instrument as not includable in the income of the recipient nor deductible by the payor (excludible/nondeductible). A payment so designated, of course, is not taxable alimony. I.R.C. § 71(b)(1)(B). Absent a designation that cash payments are not deductible by the payor and includable by the payee, they will be deductible by the payor and includable by the payee even if an examination of the basis on which the state court calculated the alimony award reveals an underlying assumption that the payor and payee would not be taxable on the payments. See Richardson v. Commissioner, 125 F.3d 551 (7th Cir. 1997), aff'g 70 T.C.M. (CCH) 1390 (1995).

XI) Divorced Spouses Must Live in Separate Households.

I.R.C. § 71(b)(1)(C)

XII) Payments Must Terminate on the Death of the Recipient.

The obligation to make payments must terminate upon the death of the recipient, and the settlement must not provide a substitute for the terminated payments. I.R.C. § 71(b)(1)(D).

XLVIII. Lump Sum Payments.

Under § 71(b)(1)(D) a payment is not alimony unless the payor's liability to continue making payments ceases with the payee's death. See Barrett v. United States, 878 F. Supp. 892 (S.D. Miss. 1995) ("lump sum alimony" awarded as additional property settlement in action in which obligation to pay arrearage or future alimony was terminated was not alimony for purposes of § 71(b) because obligation would survive obligor's death); Hoover v. Commissioner, 69 T.C.M. (CCH) 2466 (1995).
obligation to pay wife's attorney's fees as "additional alimony" by the parties, if, as is usually the case, the obligation to pay the debts is not extinguished by the death of the nonpayor spouse. Compare Heffron v. Commissioner, 69 T.C.M. (CCH) 2849 (1995), aff'd by order sub nom. Murley v. Commissioner, 104 F.3d 361 (6th Cir. 1996) (even though obligation to pay debts was labeled as "additional alimony" by the divorce settlement agreement, neither the divorce instrument nor state law unambiguously terminated husband's obligation to pay debts if ex-wife died), with Burkes v. Commissioner, 75 T.C.M. (CCH) 1772 (1998) (husband's payment of wife's attorney fees as "additional alimony" was taxable to her under § 71 because under state law "support alimony" obligation terminated on payee's death, but "property settlement" alimony did not so terminate, and examination of the language of the divorce instrument as a whole indicated that husband's obligation to pay wife's attorney's fees was "support alimony").

L. Termination In Decree or Agreement?

As originally enacted in 1984, I.R.C. § 71(b)(1)(D) required that the condition be specifically provided in the decree or agreement; but in 1986 this express requirement provision was repealed retroactively. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1843(b), 100 Stat. 2085, 2853. The 1986 amendments to § 71(b)(1)(D) invalidated Temp. Reg. § 1.71-1T(b), Q&A-11, Q&A-12. As a result, the condition terminating payments upon the payee's death may be provided either by the terms of the decree or written agreement or by local law. See Notice 87-9, 1987-1 C.B. 421; Cunningham v. Commissioner, 68 T.C.M. (CCH) 801 (1994) (although written instrument did not expressly so provide, payment obligation was found to survive payee's death under North Carolina law, thus payments were not alimony); Stokes v. Commissioner, 68 T.C.M. (CCH) 705 (1994) (monthly alimony for a specified number of months was not deductible because under state law, as interpreted by the Tax Court, the obligation survived the payee's death). See also Rosenthal v. Commissioner, 70 T.C.M. (CCH) 1614 (1995) (if agreement specifically provides that support payments continue for a stated term regardless of either spouse's death, language in agreement specifically providing that support payments are intended to be deductible by husband and includable by wife does not create ambiguity; payments were not statutory alimony); and Sugarman v. Commissioner, T.C. Memo 1996-410 (payment to wife payable in 24 equal installments for her interest in certain marital property held not to terminate on death of payee under applicable state law, rendering alimony not deductible).

XIII) Effect Of Local Law.

Local law generally will be consulted only if the divorce instrument is silent regarding whether or not the payment obligation terminates on the payee's death. An express provision in the divorce instrument will be determinative. Hoover v. Commissioner, 102 F.3d 842 (6th Cir. 1996) (payments designated "alimony" in divorce decree not treated as alimony for tax purposes where payments were secured and to be paid "in full"; liability to make the payments did not cease at payee’s death under applicable state law); Heller v. Commissioner, 103 F.3d 138 (9th Cir. 1996)(unpub. opin)(applied California law that provides that a party's spousal support obligation under a support order terminated upon the death of either party); Murley v. Commissioner, T.C. Memo 1995-253 (follows Hoover where neither divorce agreement nor then-applicable state family law unambiguously provided for termination of payments upon ex-wife’s death, payments for marital debts fail to qualify as alimony); and TAM 9542001 (husband’s court-ordered payment of wife’s
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attorney fees not alimony in absence of specific language in divorce decree or operation of provision of state law terminating husband’s obligation to pay the fees in the event of wife’s death).

XIV) Texas Family Code Maintenance.

LI. Payments May Not Be Child Support.
I.R.C. § 71(c)(1). Under § 71(c)(2), an amount is considered to be child support if the period over which it is payable is determined with reference to an event relating to a child, such as attaining a specified age, marrying, dying, or leaving school. For example, in Hammond v. Commissioner, 75 T.C.M. (CCH) 1745 (1998), the husband was obligated to make separate and distinct payments of "child support" in the amount of $1,140 per month until the couple's child attained the age of 18, died married, or joined the military and "alimony" of $2,012 per month until the earlier of the child's eighteenth birthday or the wife's remarriage. Notwithstanding the separate denomination and differences in terminating conditions, because the $2,012 per month payments terminated after the child's eighteenth birthday, they, as well as the specifically denominated child support payments, were child support, not alimony, for purposes of § 71.

XV) Restrictions on "Front-Loaded" Payments.
If the amount paid decreases during the first three calendar years in which alimony payments are made, there may be a "recapture" in the third year. This restriction is intended to prevent too blatant an exchange of "property" rights for taxable alimony. I.R.C. § 71(f).

LII. Equitable Liens.
Imposition of a judicial lien is one technique that a court uses in dividing community property. For instance, when one of the spouses is awarded a money judgment to compensate for an award to the other spouse of all or a substantial portion of the community property, the courts have been willing to impose a judicial lien on the community property so awarded to secure payment of the money judgment. Wren v. Wren, 702 S.W.2d 250, 252 (Tex. App. – Houston [1st Dist.] 1985, dis.); Magallanez v. Magallanez, 911 S.W.2d 91, 94-95 (Tex. App. – El Paso 1995, no writ); Cole v. Cole, 880 S.W.2d 477, 484-485 (Tex. App. – Fort Worth 1994, no writ)(when community homestead was awarded to husband, lien could properly be placed on homestead to secure payment of amount awarded to wife, but amount secured was limited to value of homestead interest awarded to wife). A judicial lien (sometimes called an equitable lien) may also be imposed when one party agrees in a marital property settlement to sell his or her interest in community property to the other party.

If a judgment secured by an equitable lien is not paid, the party awarded the judgment has the right to seek judicial foreclosure. Kimsey v. Kimsey, 965 S.W.2d 690, 698 (Tex. App. – El Paso 1998, pet. denied)]. An equitable lien attaches only to the selling spouse's interest in the community property and does not support foreclosure on the entire community property McGoodwin v. McGoodwin, 671 S.W.2d 880, 882-883 (Tex. 1984); Colquette v. Forbes, 680 S.W.2d 536, 538 (Tex. App. – Austin 1984, no writ)(implied lien arises from provisions of agreement incident to divorce by which wife executed note in favor of husband in exchange for husband's ownership interest in house). In other words, the lien arises only against the interest sold to the debtor and it is only that interest that may be foreclosed on to satisfy the claim Magallanez v. Magallanez, 911 S.W.2d 91, 94-95 (Tex. App. – El Paso 1995, no writ)(ex-husband was entitled to foreclose on homestead that had been awarded to ex-wife, but only to extent of amount she had been ordered to pay him for his equity interest).

Judicial foreclosure of an equitable lien is an adequate means of enforcement in an ordinary case. However, when the spouse against whom the equitable lien is established has a history of resisting court orders, it may be appropriate for the trial court to require that spouse to execute a promissory note evidencing the debt and a deed of trust giving the lienholder-spouse the right to nonjudicial foreclosure and sale of the property in the event of default. Execution of a deed of trust formalizes the equitable lien and allows for prompt enforcement in case of default. For example, in one case involving a husband who had repeatedly resisted the trial court's
temporary orders to the extent that the wife was forced to expend significant time and money in enforcing those orders, the trial court abused its discretion in failing to require the husband to execute a deed of trust to formalize the equitable lien imposed on his separate real property. Kimsey v. Kimsey, 965 S.W.2d 690, 697-698 (Tex. App. – El Paso 1998, pet. denied).

In some circumstances, the court may enforce an equitable lien on real property awarded to a spouse who has failed to discharge debt obligations that were assumed incident to the divorce as part of the consideration for the real property award, to a third party such as the Internal Revenue Service. Stapler v. Stapler, 720 S.W.2d 271, 272 (Tex. App. – Fort Worth 1986, no writ); although agreed divorce decree did not explicitly provide for lien in event wife failed to pay Internal Revenue Service, husband had right to foreclose on implied equitable lien against real property awarded to her by decree.

A court may not impose a lien on the separate property of a spouse as part of the property division simply to secure a just and right division of the community estate. Heggen v. Pemelton, 836 S.W.2d 145, 146 (Tex. 1992); but see Rider v. Rider, 887 S.W.2d 255, 260-261 (Tex. App. – Beaumont 1994, no writ); (equitable lien imposed on wife’s separate real property to secure money judgment awarded to husband). The imposition of a lien is available against separate property of a spouse only to secure reimbursement claims. See Heggen v. Pemelton, 836 S.W.2d 145, 146-148 (Tex. 1992); Parker v. Parker, 897 S.W.2d 918, 937 (Tex. App. – Fort Worth 1995, writ denied); (imposition of equitable lien on husband’s separate property to secure judgments awarded to wife was error in absence of reimbursement claim against that property; e.g., Winkle v. Winkle, 951 S.W.2d 80, 87-88 (Tex. App. – Corpus Christi 1997, writ denied.). Moreover, if the separate property on which a lien is sought is the homestead of a spouse, the claim for reimbursement must fall within one of the limited exceptions provided by the Texas Constitution. Faires v. Billman, 849 S.W.2d 455, 458 (Tex. App. – Austin 1993, no writ); see Tex. Const. Art. 16 § 50.

A lien imposed on community property as an owelty of partition is enforceable. This includes an owelty that secures “a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding.” Tex. Const. Art. 16 § 50(a)(3); see also Tex. Prop. Code § 41.001(a)(4). Even without these provisions, the Texas Supreme Court has held that the trial court’s power to order a just and right division of community property includes the power to order the sale of the community homestead and the partition of the proceeds. Laster v. First Huntsville Properties Co., 826 S.W.2d 125, 131 (Tex. 1991). Thus, if the parties agree to postpone partition of the homestead (for example, until the youngest child reaches a certain age), the property may be subject to partition at that subsequent time just as if it had been apportioned at the time of divorce. Id.

Another tool for securing an obligation to pay a debt is a possessory lien on personal property. In one case, for example, a husband was ordered to pay a mortgage on the community homestead awarded to the wife, and the obligation was secured by awarding the wife a possessory lien on personal property awarded to the husband. Siefkas v. Siefkas, 902 S.W.2d 72, 76-77 (Tex. App. – El Paso 1995, no writ); (lien gave husband reasonable incentive to pay off mortgage and reduced need for future court supervision).

I.III. Installment Payments.

Installment payments are one way in which a court may divide marital property. The court may order installment payments to a spouse so long as they are referable to property subject to division. Whenever a party is to make one or more payments after the date of divorce, the decree should specify the dates, time, and location of the payments. Kimsey v. Kimsey, 965 S.W.2d 690, 697 (Tex. App. – El Paso 1998, pet. denied).

Installment payments do not constitute impermissible alimony. A court’s discretionary power to divide the community property equitably includes the power to order payment of a cash sum even though there is no cash in the community estate. It is good practice for the court to specify the particular source of money from which payments are to be made. Absent proof of abuse of discretion in making the division, or absent error in not finding that the property was fairly susceptible of division in kind, the trial court’s division will not be disturbed on appeal as being in the nature of permanent alimony. Beavers v. Beavers, 675 S.W.2d 296, 299-300 (Tex. App. – Dallas 1984, no writ); (fact that husband could not meet his payment obligations out of current income did not constitute abuse of discretion by trial court). Garrett v. Garrett, 534 S.W.2d 381, 382-383 (Civ. App. – Houston [1st Dist.] 1976, no writ).
LIV. Monetary Judgment.

A trial court in dividing the marital property may render a money judgment against a spouse. Price v. Price, 591 S.W.2d 601, 603-604 (Civ. App. – Tyler 1979, no writ)(money judgment does not constitute impermissible alimony); see Barcelo v. Barcelo, 603 S.W.2d 276, 278 (Civ. App. – Houston [14th Dist.] 1980, dis.), if the estate cannot be divided equitably by partitioning the assets in kind. Hanson v. Hanson, 672 S.W.2d 274, 278 (Tex. App. – Houston [14th Dist.] 1984, dis.); see Finch v. Finch, 825 S.W.2d 218, 224 (Tex. App. – Houston [1st Dist.] 1992, no writ)(fact that husband did not have liquid assets to pay money judgment did not make judgment improper, since he could borrow money to pay it. When the nature of the community property is such that one spouse can put the property to its best use, it is proper to award that party the community property and compensate the other spouse with a money judgment. Hanson v. Hanson, 672 S.W.2d 274, 278 (Tex. App. – Houston [14th Dist.] 1984, dis.)(money judgment justified when bulk of property consisted of husband's medical corporation, husband's retirement plans, and heavily mortgaged real estate). Whenever a party is to make one or more payments after the date of divorce, the decree should specify the dates, time, and location of the payments. Kimsey v. Kimsey, 965 S.W.2d 690, 697 (Tex. App. – El Paso 1998, pet. denied).

A monetary award must divide property rather than merely create a personal obligation on the spouse required to make the payment. For example, when a trial court has divided money owed to the community on promissory notes, the court may not give one spouse recourse against the other to ensure that the notes are paid. A right of recourse that exists regardless of whether the notes are actually paid by the third-party debtor is a personal obligation and thus constitutes an impermissible form of court-imposed alimony. Reed v. Reed, 813 S.W.2d 716, 718-719 (Tex. App. – El Paso 1991, no writ). If a money judgment is awarded, the term for payment should be set for as short a period as possible without imposing a serious hardship on the party required to pay. Hanson v. Hanson, 672 S.W.2d 274, 279 (Tex. App. – Houston [14th Dist.] 1984, dis.). Furthermore, when a money judgment is granted to achieve an equitable division of a community estate, security for the judgment should be provided unless there is a compelling reason not to provide security. Hanson v. Hanson, 672 S.W.2d 274, 279 (Tex. App. – Houston [14th Dist.] 1984, dis.); see also In re Nunnally, 506 F.2d 1024, 1026 (5th Cir. [Tex.] 1975)(nondischargability of contractual alimony).

L.V. Execution Of Promissory Note.

Another technique of property division is the execution of promissory notes. The trial court may order a party to execute a promissory note under threat of contempt of court if the party fails to do so. Kidd v. Kidd, 584 S.W.2d 552, 555 (Civ. App. – Austin 1979, no writ)(promissory note does not constitute indirect form of permanent alimony “if the payments are referable to rights and equities of the parties in and to property at the time of dissolution of marriage”).

L.VI. Making A Deal With The Creditors.

Surprisingly as it may seem, a creditor sometimes is willing to agree to a modification of the terms of a debt when a divorce is in progress. A secured creditor surely will not wish to trade for a worse collateral position, and an unsecured creditor may wish to become secured. Nonetheless, from a creditor’s point of view, there are some administrative advantages in not having to deal with two ex-spouses squabbling over who was obligated to make the last payment. Moreover, if there is a prospect of further loan business in the future, an agreement of this nature may be looked upon as enhancing customer relations.

L.VII. Arrange For Discharge Of The Debt In The Decree.

If there is any uncertainty about the willingness or ability of a former spouse to pay a debt for which that spouse will be liable under the decree, and there is enough property to pay the debt, it might be a good idea to arrange to have that debt paid as part of the divorce. One
L.VIII. Collateralize The Spouse’s Obligation To Pay Debt.

Divorce courts surely can impose equitable liens in conjunction with a property award or money judgment. See e.g. McGoodwin v. McGoodwin, 671 S.W.2d 145 (Tex. 1992). Where an implied vendor’s lien has been found in a case in which one spouse received real estate and an obligation to pay unrelated debts, then did not pay those debts, Stapler v. Stapler, 720 S.W.2d 271 (Tex. App.–Fort Worth 1986, no writ), an express lien in the judgment is much easier.

L.IX. Dealing With Exempt Assets.

One way to avoid creditors from attaching the assets awarded to your client in a divorce, is to negotiate the settlement in such a way that your client is awarded the exempt assets, which may include the homestead, TEX. CONST. Art. XVI, §50 and TEX. PROP. CODE ANN. §41.001 (Vernon Supp. 1998); personal property, TEX. PROP. CODE ANN. § § 42.001, 42.002 (Vernon Supp. 1998); retirement benefits, TEX. PROP. CODE ANN. §42.0021 (Vernon Supp. 1998); and insurance proceeds, TEX. PROP. CODE ANN. §42.002(12) (Vernon Supp. 1998) and TEX. INS. CODE ANN. Art. 21.22 (Vernon Supp. 1998).

L.X. Provide Penalties For Non-Payment.

Because Texas prohibits imprisonment for debt, contempt usually is not a remedy for failure to discharge a debt obligation contained in a divorce decree. See generally Joseph W. McKnight, Family Law: Husband and Wife, 31 S.W. L.J. 105, 123-25 (1977). Nonetheless, a divorce decree can and should provide for liability if someone other than the spouse ordered to pay a debt is required to do so. See Walker v. Walker, 527 S.W.2d 200 (Tex. Civ. App.–Fort Worth 1975, no writ)(Massey, C.J., concurring). A decree may contain an indemnification provision for such a situation. See e.g. Rush v. Montgomery Ward, 757 S.W.2d 521 (Tex. App.–Houston [14th Dist.] 1988, writ denied).

L.XI. Contempt As A Remedy For Non-Payment Of Debt.

In general, a court may, on its own motion, hold a person in contempt or may grant a request for contempt in order to enforce the court’s orders and judgments. The court may punish the contemnor by imposing a fine or, in some instances, imprisoning the contemnor. Gov. C. §§ 21.001, 21.002; Ch. 133, Contempt. To be enforceable by contempt, the divorce decree must be an order to do something specific, rather than an award of property. In re Hill, 611 S.W.2d 457, 458 (Civ. App. – Dallas 1980, orig. proceeding). However, an order that requires delivery of specific property or an award of a right to future property may be enforced by the court's contempt power. Tex. Fam. Code § 9.012(a) (Vernon Supp. 1998). An award of a sum of money in a decree of divorce or annulment, payable in a lump sum or in future installment payments in the nature of a debt, is enforceable by contempt if the fund either (1) was in existence at the time of the decree or (2) constitutes an award of the right to receive installment payments or a lump sum payment due on the maturation of an existing vested or nonvested right to be paid in the future. Tex. Fam. Code § 9.012(b) (Vernon Supp. 1998); see Ex parte Preston, 162 Tex. 379, 347 S.W.2d 938, 940-941 (1961)]. For example, when a division made by the court includes an order to pay money received from a specific fund, such as a former spouse's pension benefits, the court’s order may be enforced by contempt proceedings. Ex parte Gorena, 595 S.W.2d 841, 846-847 (Tex. 1979) – payments directly to former wife; Patrick v. Patrick, 728 S.W.2d 864, 866 (Tex. App. – Fort Worth 1987, ref. n.r.e.)(contempt order based on husband's refusal to execute form authorizing U.S. Air Force to pay benefits to wife); Ex parte Sutherland, 515 S.W.2d 137, 140-142 (Civ. App. – Texarkana 1974, dis.)(payment into court registry). Imprisonment to compel the payment of this type of debt is not imprisonment for a debt within the meaning of Article One, Section 18 of the Texas Constitution. Ex parte Sutherland, 526 S.W.2d
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536, 539 (Tex. 1975); Ex parte Preston, 162 Tex. 379, 347 S.W.2d 938, 940 (1961).

An order to pay a money judgment in installments, when neither the funds nor the right to receive the funds were in existence at the time of the decree, has been held not to be enforceable by contempt proceedings, because enforcement of the type of order by contempt would constitute imprisonment for debt. Ex parte Neff, 542 S.W.2d 268, 269-270 (Civ. App. – Fort Worth 1976, orig. proceeding); see Tex. Const. Art. 1 § 18. Similarly, an order to pay interest on overdue payments is not enforceable by a contempt proceeding. Ex parte Sutherland, 515 S.W.2d 137, 141 (Civ. App. – Texarkana 1974, dis.).

LXII. Federal Income Tax Liability.

LXIII. General Rules Of Liability.

Generally, if a spouse files a tax return under the status of “married filing separate,” only the spouse filing such return has direct personal liability to the Internal Revenue Service. And, of course, the corollary is true, that if spouses file a tax return under the status of “married filing jointly,” both spouses become personally liable for the entire tax burden of that return. An exception to this general rule is the so-called “innocent spouse doctrine.”

LXIV. Innocent Spouse Rules Of Liability.

LXV. Prior Law.

Under the community property rules of Texas, both parties are ordinarily at least partly taxable upon income earned by the other. The same result (or worse) frequently occurs in non-community property jurisdictions as well, due to that common phenomenon, the jointly-filed return. Under the Internal Revenue Code, the signatories to a joint return are jointly and severally responsible for the taxes. See I.R.C. § 6013(d)(3).

In Texas, partners to a marriage have two possibilities: either file separately (and each reports and is responsible for taxes on one-half of the community income); or file a joint return, which normally subjects each spouse to joint and several liability for the entire amount.


LXVI. Section 6013(e).

I.R.C. § 6013(e), entitled "Spouse Relieved of Liability In Certain Cases," provided that one spouse may be relieved of liability for tax, provided that four conditions are met:

LXVII. A joint return has been made;

LXVIII. There is a "substantial understatement" of tax attributable to "grossly erroneous item" of the other spouse;

LXIX. The innocent spouse can establish that he or she "did not know or have reason to know" about the understatement; and

LXX. Taking into account all of the facts and circumstances, it would be "inequitable" to hold the innocent spouse responsible for the tax deficiency caused by the substantial understatement.

The innocent spouse defense was an affirmative defense. United States v. Shanbaum, 10 F.3d 305 (5th Cir. 1994). Failure to prove any one of the four elements set forth in § 6013(e)(1) prevents a taxpayer from qualifying for relief under the "innocent spouse rule." Buchine v. Commissioner, 20 F.3d 173, 181 (5th Cir. 1994); Purificato v. Commissioner, 9 F.3d 290, 293 (3d Cir. 1993), cert. denied --- U.S. ---, 114 S.Ct. 1398, 128 L.Ed.2d 71 (1994); Stevens v. Commissioner, 872 F.2d 1499, 1504 (11th Cir. 1989); Purcell v. Commissioner, 826 F.2d 470, 473 (6th Cir. 1987), cert. denied, 485 U.S. 987, 108 S.Ct. 1290, 99 L.Ed.2d 500 (1988).

LXXI. Terms Defined and Often Arbitrary.

For example, the understatement resulting from a "grossly erroneous item" can result from either a failure to report gross income, or from the erroneous claim of a deduction or credit for which there is no basis in fact or law. However, whether there is a "substantial understatement" depends on the source of the adjustment.

LXXII. Neither the Code nor the Regulations defined the phrase "no basis in fact or law," which determines whether an item of deduction, credit, or basis is grossly erroneous.

LXXIII. If the deficiency resulted from an erroneous deduction or
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credit, the deficiency must have exceeded
10 percent of adjusted gross income for the
previous year in the case of incomes of
$20,000 or less; or 25 percent of adjusted
gross income for the previous year in the
case of incomes exceeding $20,000.

LXXIV. By contrast, a
deficiency resulting from a failure to report
income is always "substantial", without
regard to income levels in current or past
years, if the deficiency in tax exceeded
$500.

LXXV. The erroneous items giving rise
to "innocence" must be "attributable" to the
other spouse, without regard to community
property laws.

LXXVI. If the mechanical tests
are met, that still left the "wild cards" of
whether the innocent spouse "had reason to
know" of the erroneous item(s); and
whether it would be "inequitable" to hold
the innocent spouse liable for the
deficiency.

LXXVII. The Restructuring And

Innocent Spouse relief now applies to all
understatements of tax attributable to erroneous
items of the other spouse. It is no longer
necessary for an understatement to be
"substantial," which eliminates the $500
minimum and the minimums based on the
innocent spouse's adjusted gross income. In
addition, it is no longer necessary for the items
of the other spouse to which an understatement
is attributable to be "grossly" erroneous. This
eliminates the hurdle of demonstrating that the
understatement has no factual or legal basis.
I.R.C. § 6015(b)(1)(B), as added by the IRS
Restructuring and Reform Act of 1998. The
easing of the restrictions on innocent spouse
relief makes the determination of eligibility for
such relief simpler and fairer. The minimum
thresholds for innocent spouse relief were
arbitrary and had a disproportionate impact on
low income taxpayers. The grossly erroneous
standard could be used by the IRS to deny relief
even for understatements whose justification
was very tenuous.

LXXVIII. Partial Relief Available.

Innocent spouse relief continues to be
available only if the spouse invoking such relief

establishes that, in signing the return, he or she
did not know, and had no reason to know, that
there was an understatement of tax. I.R.C. §
6015(b)(1)(C), as added by the 1998 Act. However, if the spouse establishes that, in
signing the return, he or she did not know, and
had no reason to know, the extent of the
understatement, innocent spouse relief is
available on an apportioned basis. In such a
case, the spouse is relieved of liability to the
extent it is attributable to the portion of the
understatement that the spouse did not know or
have reason to know. I.R.C. § 6015(b)(2), as
added by the 1998 Act.

LXXIX. Election.

Taxpayers must elect innocent spouse relief
using an IRS form. Taxpayers are entitled to
elect such relief up to two years after the date
the IRS begins collection activities with respect
to the electing taxpayer. I.R.C. § 6015(b)(1)(E),
as added by the 1998 Act. In reference to the
separate liability election discussed below, the
Senate Committee Report notes that the two-
year period begins with collection activities that
have the effect of notifying the electing spouse
of the IRS’s intention to collect from that
spouse. Such activities would include
garnishment of the electing spouse’s wages and
notice of levy against the electing spouse’s
property, but not notice of deficiency and
demand for payment addressed to both spouses.
Under the effective date provisions, this two-
year period will not expire before two years after
the date of the first collection activity that occurs
after the date of enactment. The IRS must
provide a form for such an election within 180
days after the date of enactment. § 3201(c) of
the 1998 Act.

LXXX. Equitable Relief.

The requirement that, under all the facts
and circumstances, it would be inequitable to
hold the innocent spouse liable for a tax
deficiency due to an understatement continues to
be a requirement for innocent spouse relief.
I.R.C. § 6015(b)(1)(D), as added by the 1998
Act. The IRS is authorized, however, to provide
equitable relief in cases in which innocent
spouse relief is otherwise not available. I.R.C. §
6015(f), as added by the 1998 Act. The
Conference Committee Report instructs the IRS
to use its authority to grant equitable relief in tax
underpayment situations. Thus, equitable relief
is to be available to a spouse who did not know,
and had no reason to know, that funds intended
for paying tax were instead taken by the other spouse for the other spouse’s benefit. The report emphasizes, however, that equitable relief should be available for both understatements and underpayments of tax.

LXXXI. Separate Liability Election.
Despite filing a joint return for a tax year, certain taxpayers may elect to limit their liability for any deficiency assessed with respect to the return. In general, liability is limited to the amount of deficiency arising from items that would have been allocated to the electing taxpayer if he or she had filed a separate return for the tax year. A taxpayer may elect separate liability under a joint return if:

LXXXII. at the time of the election, the taxpayer is no longer married to or is legally separated from the person with whom the taxpayer filed the joint return; or

LXXXIII. the taxpayer was not living in the same household as the person with whom the taxpayer filed the joint return at any time during the 12 months preceding the election. I.R.C. § 6015(c)(3)(A)(i), as added by the 1998 Act.

LXXXIV. Election.
Taxpayers are entitled to elect separate liability up to two years after the date the IRS begins collection activities with respect to the electing taxpayer. I.R.C. § 6015(c)(3)(B), as added by the 1998 Act. The Senate Committee Report notes that the two-year period begins with collection activities that have the effect of notifying the electing taxpayer of the IRS’s intention to collect from that taxpayer. Such activities would include garnishment of the electing taxpayer’s wages and notice of levy against the electing taxpayer’s property, but not notice of deficiency and demand for payment addressed to both spouses. Under the effective date provisions, this two-year period will not expire before two years after the date of the first collection activity that occurs after the date of enactment. The IRS must provide a form for such an election within 180 days after the date of enactment (§ 3201(c) of the 1998 Act).

LXXXV. Inappropriate Elections Prohibited
An election to limit liability may be partially or completely ineffective due to the electing taxpayer’s knowledge of an incorrect item on the joint return or transfers between the joint filers that are intended to avoid tax or are fraudulent.

LXXXVI. Electing Taxpayer’s Knowledge.
An election to limit the liability under a joint return is invalid with respect to a deficiency (or portion of a deficiency) if the IRS demonstrates that, at the time he or she signed the return, the taxpayer making the election had actual knowledge of any item giving rise to the deficiency (or portion thereof). An item of which the electing spouse had actual knowledge is allocable to both spouses. This provision does not apply if the electing taxpayer establishes that he or she signed the return under duress. I.R.C. § 6015(c)(3)(C), as added by the 1998 Act.

Example. Tony and Tina Orlando, who are separated, file a joint return for 1998 reporting $90,000 of wage income earned by Tony, $60,000 of wage income earned by Tina, and $30,000 of investment income on the couple’s jointly owned assets. The IRS assesses a $4,800 tax deficiency for $12,000 of unreported investment income from assets held in Tony’s name. Tina knew about a bank account in Tony’s name that generated $1,000 of interest income but had no knowledge of Tony’s other separate investments. Under the rules discussed below, the $12,000 of unreported income is fully allocable to Tony, and he is liable for the entire $4,800 deficiency. If Tina elects separate liability, she will not be liable for $4,400 of the deficiency. This is the amount of the deficiency attributable to the $11,000 of unreported income of which Tina had no actual knowledge ($4,800 x. $11,000 / $12,000). Tina will, however, be liable for $400, which is the amount of the deficiency attributable to the $1,000 of unreported interest income from the bank account ($4,800 x. $1,000 / $12,000).

The Senate and Conference Committee Reports state that “actual knowledge must be established by the evidence and shall not be
LXXXVII. **Actual Knowledge Standard Much Narrower.**

The standard of “actual” knowledge is much narrower than the standard of “known or should have known” that makes a taxpayer ineligible for innocent spouse relief. As the committee reports point out, knowledge of an erroneous item will not be imputed to a joint filer in determining that taxpayer’s separate liability.

LXXXVIII. **Transfers To Avoid Tax.**

The liability of a joint filer electing separate liability is increased by the value of any “disqualified asset.” A “disqualified asset” is any property or property right that is transferred by the other joint filer to the electing taxpayer for the principal purpose of avoiding tax or payment of tax. Any transfer by the other joint filer to the electing taxpayer within one year preceding the date on which the first letter of proposed deficiency is sent is presumed to have avoidance of tax or payment of tax as its principal purpose. This presumption can be rebutted by showing that the principal purpose of a transfer was not to avoid tax or payment of tax. In addition, the presumption does not apply to transfers made pursuant to a decree of divorce or separate maintenance. I.R.C. § 6015(c)(4), as added by the 1998 Act.

LXXXIX. **Fraudulent Transfers.**

An election is invalid, and joint and several liability continues to apply to the entire return, if the IRS demonstrates that the taxpayers filing the joint return transferred assets between themselves as part of a fraudulent scheme. I.R.C. § 6015(c)(3)(A)(ii), as added by the 1998 Act.

XC. **Electing Taxpayer’s Portion of Deficiency.**

An electing taxpayer’s liability generally is limited to the portion of the deficiency that is attributable to items allocable to the taxpayer. An item giving rise to a deficiency generally is allocated in the manner it would had been allocated if the taxpayers had filed separate returns. I.R.C. § 6015(d)(1) and I.R.C. § 6015(d)(3)(A), as added by the 1998 Act.

Example (1). In 1998, Letta Thompson earns $30,000 from freelance work. She regards this income as her “play” money and does not tell her husband, Jerry, about it. The income is not reported on the Thompsons’ joint return. Letta and Jerry get a divorce in 1999. If the IRS assesses a deficiency for the unreported income, Jerry may elect separate liability and owe none of the deficiency, regardless of the IRS’s ability to collect the deficiency from Letta. Letta will be liable for the entire deficiency.

Example (2). Assume the same facts as in Example (1), except that on the couple’s 1998 return Jerry claimed a $10,000 bad debt deduction for a loan he made to his cousin. The IRS assesses a deficiency attributable to $30,000 of unreported income and the $10,000 deduction, which it disallowed. If Jerry elects separate liability, his liability would be limited to 25% of the deficiency ($10,000 â—¡ $30,000 + $10,000); if Letta elects separate liability, her liability would be limited to 75% of the deficiency. If either Jerry or Letta does not elect separate liability, the nonelecting spouse is liable for the entire deficiency unless it is reduced by innocent spouse relief or the IRS provides equitable relief.

The Senate Committee Report notes that, in general, items of income should be allocated to the spouse who earned the wages or owned the business or investment that produced the income. Income from a jointly-owned business or investment should be allocated equally between each spouse unless there is clear and convincing evidence that supports a different allocation.

XCI. **Equitable Relief.**

The IRS is authorized to provide equitable relief in cases in which relief under a separate liability election is otherwise not available. I.R.C. § 6015(f), as added by the 1998 Act. The Conference Committee Report instructs the IRS to use its authority to grant equitable relief in tax underpayment situations. Thus, equitable relief is to be available to a spouse who did not know, and had no reason to know, that funds intended for paying tax were instead taken by the other spouse for the other spouse’s benefit. The report
How To Address Liabilities In Divorce emphasizes, however, that equitable relief should be available for both understatements and underpayments of tax.

XCII. Bankruptcy.

XCIII. Introduction.

The number of personal bankruptcies filed each year now exceeds 1 million per year. Group Offers Ways to Stem Tide of Personal Bankruptcies, Houston Chronicle, March 5, 1997 (hereinafter, the "Chronicle Article"), at 5C (figures provided by CDB Infotek, a public records research firm, showed 1,242,700 filings, up 35 percent from 918,964 in 1995, while Visa credit card company's studies showed consumer bankruptcies up 26.6 percent, from 883,000 in 1995 to 1,117,000 last year). That rate, more than 1 per 100 households, is eight times higher than during the Great Depression and three times higher than in 1980. Approximately 12% of individuals who filed for bankruptcy cited divorce as the reason for filing. USA Today, October 4, 1996 (citing a Visa credit card company survey). Based upon these statistics, over 120,000 divorce cases filed each year throughout the United States may also involve bankruptcy issues.

As many family lawyers know, even the best negotiated settlement or victory at trial can be upset by the effects of bankruptcy. Consequently, every family law attorney should have a working knowledge of the convergence of the United States Bankruptcy Code [11 U.S.C. § 101 et seq. (hereinafter, the "Code") with state family laws. The family law attorney that is familiar with the Code is often able to minimize or eliminate the adverse results of bankruptcy upon the rights of his clients in family law matters.

XCIV. Bankruptcy Essentials.

XCV. Relief Available to Individuals.

Under the Code, an individual debtor may file a petition for relief from debts under any of chapters 7, 11, 12, or 13 [see 11 U.S.C. § 109(b), (d), (e), and (f)], and relief under each of these four chapters generally provide the individual debtor with a discharge of debts. See 11 U.S.C §§ 727, 1141, 1228, and 1328 (the order of discharge voids any judgment for the personal liability of the debtor and operates as a permanent injunction against future attempts to collect the discharged debt). Although significant differences exist between the specific chapters with respect to how and when an individual obtains a discharge, many Code provisions that are important to family law cases apply to each of the four chapters.

XCVI. Chapter 7.

Chapter 7 of the Code is the most often utilized form of relief in the bankruptcy process and is designed for individuals that wish to make a fresh start but cannot pay their debts from their income. The filing of a chapter 7 case creates an estate, consisting of all non-exempt legal or equitable interests of the debtor in any property, which is administered by a court-appointed trustee. 11 U.S.C. § 541. The individual debtor is permitted to exempt certain property from administration and sale by the trustee, but the trustee will sell non-exempt property and distribute the proceeds to creditors. 11 U.S.C. § 522(b)(1) and (d) (an individual debtor may exempt from property of the estate either property listed in the Bankruptcy Code or property exempt under the law of the jurisdiction where the case is filed); see also Texas Property Code §§ 41.001, 41.002, 42.001, 42.002, and 42.0021 (under Texas law, a debtor may exempt the following property: (1) a debtor's homestead, subject to purchase money or improvement liens, consisting of a lot or lots not exceeding one acre if located in town or 200 acres if in a rural community; (2) personal property having an aggregate fair market value not to exceed $30,000.00 for a single person or $60,000.00 for a family, exclusive of the amount of any liens, security interests or other charges encumbering the property comprised of the following items: (a) household furnishings, including family heirlooms; (b) provisions for consumption; (c) tools, equipment, books, and apparatus, including boats and motor vehicles used in a trade or profession; (d) wearing apparel; (e) jewelry not to exceed 25% of the aggregate limits set forth above; (f) two firearms and other athletic and sporting equipment; (g) certain passenger cars and light trucks that are not used for the production of income; and (h) current wages for personal services; and (3) pension, profit sharing, IRA's & Keogh retirement plans that qualify under applicable provisions of the Internal Revenue Code of 1986). While chapter 7 has no insolvency or debt requirements, the bankruptcy court may dismiss a chapter 7 case filed by an individual debtor whose debts are primarily consumer debts if the court finds that granting of relief would be a substantial abuse of the Code. 11
Chapter 11.

Chapter 11 of the Code is designed for business debtors to reorganize their debts through a process requiring the confirmation of a chapter 11 plan of reorganization. Like chapter 7, an individual chapter 11 debtor may exempt certain property from the plan of reorganization and distribution to creditors. 11 U.S.C. § 522(b). Unlike chapter 7, however, the debtor remains in possession of all property, which the debtor holds as a fiduciary for the benefit of the creditors. 11 U.S.C. § 1107. While chapter 11 has no insolvency or debt requirement, the court may convert a chapter 11 case to a chapter 7 case for cause, including the debtor's inability to effectuate a confirmable plan of reorganization. 11 U.S.C. § 1129. In general, a chapter 11 debtor must pay his creditors in full to confirm a chapter 11 plan of reorganization that provides for the debtor's retention of any non-exempt property. 11 U.S.C. § 1129. A confirmed plan of reorganization creates a new contract between the debtor and its creditors for payment of debts owing at the time of the filing of the bankruptcy petition as well as certain debts accrued through the effective date of the plan. 11 U.S.C. § 1141.

Chapter 12.

Chapter 12 of the Code is available to only a family farmer with regular income [11 U.S.C. § 109(f); see also 11 U.S.C. §§ 101(18)(defining "family farmer" as, inter alia, a debtor with aggregate debts not exceeding $1,500,000)] to reorganize debts through a process requiring the confirmation of a chapter 12 plan of reorganization. An individual chapter 12 debtor may exempt certain property from the plan of reorganization and distribution to creditors but, unlike chapter 7 or 11, must include in the plan all property acquired by the debtor after commencement of the chapter 12 case, including the debtor's earnings from services. 11 U.S.C. § 1207. Like chapter 11, the chapter 12 debtor remains in possession of all property, which the debtor holds in trust for the benefit of the creditors. 11 U.S.C. § 1203. Chapter 12 also contains certain provisions, unique to chapter 12, that are designed to facilitate the rehabilitation of the farmer. 11 U.S.C. § 1205 (providing for limited adequate protection of an entity's interest in property of the family farmer). In order to confirm a chapter 12 plan of reorganization, the debtor must agree to pay his creditors: (1) at least as much as they would receive under chapter 7 [See 11 U.S.C. 1225(a)(4) and (2) all his disposable income for at least three years. See 11 U.S.C. § 1225(b)(1); see also 11 U.S.C. § 1225(b)(2)("disposable income" means income received by the debtor which is not reasonably necessary to be expended for the maintenance and support of the debtor or a dependent of the debtor or for the payment of expenditures necessary for the continuation, preservation, and operation of the debtor's business). Because the chapter 12 debtor must, in effect, agree to work for his creditors to receive a discharge, chapter 12 may be initiated only voluntarily. See In re Molina Y Vedia, 150 B.R. 393, 399 (Bankr. S.D. Tex. 1992)(Congress manifested a clear intent that chapter 12 and chapter 13 would be strictly voluntary, and no creditor can initiate an involuntary proceeding against a debtor eligible under those chapters).

Chapter 13.

Chapter 13 of the Code is available to individual debtors with regular income, unsecured debts of less than $250,000, and total debts of less than $750,000. See 11 U.S.C. § 109(e). Chapter 13 permits both consumer and business debtors to restructure most secured and unsecured obligations by taking advantage of the lower interest rates that are generally available under chapter 13. See Local Rule 3020(d) for the U.S. District Court, Southern District of Texas (absent an agreement with the creditor to the contrary, the interest rate on secured debt payable under a chapter 13 case will be set by the court at two percent (2%) above the prime rate set in the money rates section of the Wall Street Journal on the date the case is commenced); but see 11 U.S.C. § 1322(b)(2)(a chapter 13 plan may not modify the rights of a holder of a claim secured by a security interest in real property that is the debtor's principal residence). Like chapters 7, 11, and 12, a chapter 13 debtor may exempt certain property from the plan of reorganization, but as in chapter 12, a chapter 13 may be initiated only voluntarily, and a debtor must include in the plan all property acquired by the debtor after
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commencement of the chapter 13 case, including earnings from services. 11 U.S.C. § 1306. As in chapters 11 and 12, a chapter 13 debtor remains in possession of all property, [11 U.S.C. §§ 1303 and 1304] and like chapter 12, a chapter 13 plan will be confirmed if the debtor agrees to pay his creditors at least the amount they would receive under chapter 7 [See 11 U.S.C. 1325(a)(4)] and, at a minimum, all his disposable income for at least three years. 11 U.S.C. § 1325(b)(1); 11 U.S.C. § 1325(b)(2)("disposable income" means income received by the debtor which is not reasonably necessary to be expended for the maintenance and support of the debtor or a dependent of the debtor and, if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business).

One important distinction of chapter 13 for the family law attorney is that the provisions of chapter 13, unlike chapters 7, 11, and 12, enable a debtor to discharge property settlement debts incurred in the course of a divorce or separation. 11 U.S.C. § 1328(a)(2)(after completion by the debtor of all payments required under the chapter 13 plan, the court shall grant the debtor of all debts provided for by the plan, except any debt of a kind described under section 523(a)(5), (8), or (9)). The result of section 1328(a)(2) is that a chapter 13 debtor may discharge debts described under section 523(a)(15). This super-discharge provision is afforded in exchange for the chapter 13 debtor's voluntary agreement to commit future earnings to payment of antecedent debts, an obligation not required under either chapters 7 or 11. Compare In re Molina Y Vedia, 150 B.R. at 399-400 (because there is no comparable provision in chapter 11 requiring a debtor to pay future wages to a creditor, Congress' concern about imposing involuntary servitude on a chapter 13 debtor is not relevant to a chapter 11 reorganization).

C. Federal Bankruptcy Law Governs.

When a debtor with a matrimonial financial obligation seeks relief under the Code, a conflict is created between the rights of the receiving spouse, former spouse, or child to collect the sums agreed to or awarded for support or as a property settlement, including both arrears of support and current support, and the rights of the debtor spouse to receive a "fresh start" and freedom from the obligation. While the state courts fix the rules governing the determination of matrimonial obligations for a debtor, federal law regulates the enforceability of those claims in bankruptcy. Brown v. Felsen, 442 U.S. 127 (1979)(the issue of dischargeability of indebtedness under the federal bankruptcy code must be decided under federal bankruptcy law).


By passing the Bankruptcy Reform Act of 1994, [Pub. L. No. 103-394, 1994 (the "Act") (the provisions of the Act are generally effective with respect to cases filed after October 22, 1994)], Congress acknowledged that then existing Code did not adequately protect the children and former spouse of bankruptcy debtors and sought to alleviate the often disastrous effects of bankruptcy. 140 Cong. Rec. H10770 (October 4, 1994). Toward that end, Congress authorized the commencement or continuation of certain family law actions without regard to the automatic stay, [11 U.S.C. § 362(b)(2)] excepted certain property settlement debts from discharge, [11 U.S.C. § 523(a)(15)] elevated certain unsecured support claims from general unsecured claims to priority claims, [11 U.S.C. § 507(a)(7)] placed important limitations on a debtor's ability to set aside judicial liens, [11 U.S.C. § 522(f)(1)(A)] and immunized certain support claimants from the trustee's preference attacks. 11 U.S.C. § 547(c)(7). Congress also amended the Code to allow child support creditors or their representatives to appear and intervene in bankruptcy proceedings without any cost or meeting local rules, provided the creditor or representative files a form in the bankruptcy court detailing the child support debt. Act § 304(g). While the Act amendments have improved the position of the family law creditor in bankruptcy, these improvements present new and complex legal issues to the family law attorney.

CII. The Convergence Of The Code With Family Law.

CIII. The Automatic Stay.

CIV. Family Law Proceedings Exempt From The Stay.

A petition for relief under the Code triggers the automatic stay, which acts as an injunction on the commencement or continuation of actions or proceedings by a creditor against the debtor or property of the estate. 11 U.S.C. § 362(a). This injunction remains in effect until the case is closed, dismissed, or the debtor receives a
I-36  22nd Annual Marriage Dissolution Institute discharge.  11 U.S.C. § 362(c)(2).  Creditors may, under certain circumstances, obtain permission from the bankruptcy court to, inter alia, commence or continue litigation, foreclose or repossess collateral for loans, and recover leased property.  11 U.S.C. § 362(d).  Commencement of a bankruptcy case does not, however, enjoin the commencement or continuation of the following family law actions or proceedings:  the establishment of paternity; the establishment or modification of an order for alimony, maintenance, or support; or the collection of alimony, maintenance, or support from property that is not property of the estate.  11 U.S.C. § 362(b)(2).  Prior to the Act, the Code exempted from application of the automatic stay actions to collect alimony, maintenance, and support from property that was not property of the estate (such as exempt property or wages in a chapter 7 or 11 case) but enjoined, absent court approval, actions to establish paternity or to modify or establish a support obligation.  See Stringer v. Huet, 847 F.2d 549, 552-53 (9th Cir. 1988)(holding that an action for child support modification was not "collection" and therefore not permitted).  The Act amendments reversed the result in Stringer.

CV.  Family Law Proceedings Subject To The Stay.

XVI)  Granting A Divorce and Dividing Property.


XVII)  When To Request Relief From the Automatic Stay.

Orders, judgments, or any other actions in violation of the stay are void as opposed to voidable.  Kalb v. Feuerstein, 308 U.S. 433, 438-44 (1940)(state court action contrary to and without authority of the bankruptcy court was void);  In re Ward, 837 F.2d 124, 126 (3rd Cir. 1988)(sheriff's foreclosure sale violated the automatic stay and was void).  As a result, in an extreme case, a couple might remain legally married if a divorce decree was entered in violation of the automatic stay.  Additionally, real estate and other transfers completed pursuant to a divorce decree entered in violation of the stay may also be void.  In re Briglevich, 147 B.R. 1015, 1019 (Bankr. N.D. Ga. 1992) (stating that transfers of property directed by a divorce decree violate the automatic stay and are void).  Moreover, actual damages, including reasonable attorneys' fees, and punitive damages may be awarded for willful violations of the automatic stay.  11 U.S.C. § 362(h)(an individual injured by any willful violation of a stay shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages);  see also 11 U.S.C. § 106(a)(1)(as a result of the Act amendments, governmental units are no longer immune from the payment of damages for stay violations).

Due to the lack of clear guidance from the Code and the courts, and the possibility that orders entered without bankruptcy court approval may be void, the family law practitioner should, out of an abundance of caution, request relief from the automatic stay before commencing or continuing a divorce proceeding.  An example of a motion requesting an order from a bankruptcy court for relief from the automatic stay to commence or continue a
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divorce proceeding and entry of a property
settlement agreement is attached as Appendix 1.

CVI. Exceptions To Discharge For Family
Law Obligations.

CVII. NondischARGEABLE Support
Obligations.

CVIII. Statutory Language.

Pursuant to section 523(a)(5) of the Code
[11 U.S.C. § 523(a)(5)] a discharge under
section 727, 1141, 1228(a), 1228(b), or 1328 of
the Code does not discharge an individual debtor
from any debt--

to a spouse, former spouse, or child of the
debtor, for alimony to, maintenance for, or
support of such spouse or child, in
connection with a separation agreement,
divorce decree or other order of a court of
record, determination made in accordance
with state or territorial law by a
governmental unit, or property settlement
agreement, but not to the extent that--

(A) such debt is assigned to
another entity, voluntarily, by operation
of law, or otherwise (other than debts
assigned pursuant to section 402(a)(26)
of the Social Security Act, or any such
debt which has been assigned to the
Federal Government or to a State or any
political subdivision of such State);

(B) such debt includes a
liability designated as alimony, maintenance,
or support, unless such
liability is actually in the nature of
alimony, maintenance, or support.

CIX. Judicial Interpretations.

The courts generally resolve the issue of
whether an obligation arising out of a divorce
decree is in the nature of support, and therefore
nondischARGEABLE, or whether the obligation
represents a property settlement, by analyzing
the intent of the parties. Gianakas v. Gianakas,
917 F.2d 759, 762 (3rd Cir. 1990)(whether an
obligation is in the nature of alimony, maintenance or support, as distinguished from a property settlement, depends on a finding as to
the intent of the parties); Sylvester v. Sylvester,
865 F.2d 1164, 1166 (10th Cir. 1989)(per curiam)(the first inquiry in determining the
nature of an obligation is the parties' intent);

Long v. West, 794 F.2d 928, 931 (4th Cir.
1986)(the test for whether obligations are
alimony lies in the proof of parties' intentions; if
the parties or the state court intended to create a
support obligation, the obligation is nondischARGEABLE). While the bankruptcy court
must consider the way in which the state court
and the parties represented the payments, the
court is not bound by those expressions. Melichar v. Ost, 661 F.2d 300 (4th Cir. 1981),
cert. denied, 456 U.S. 972, 102 S.Ct. 1974
(1982). An intention to create a support
obligation may also be discerned directly from
the testimony of the parties at the
dischARGEability hearing or from an examination
of written contracts, agreements, or decrees.
Sylvester v. Sylvester, 865 F.2d 1164, 1166 (10th
Cir. 1989) (per curiam)(evaluating intent on the
basis of the parties' settlement agreement).
However, headings and labels used in these
documents are not controlling, and parol
evidence may be used to ascertain the parties' or
the court's intention. In re Combs, 101 B.R. 609,
615-16 (9th Cir. BAP 1989)(disregarding titles
and labels but admitting parol evidence when
determining intent). And while intent is
typically determined as of the time the
obligation arose, the events occurring thereafter
may also affect the trier of fact in making a
determination of the intention of the parties and
the purpose of the payment. Sylvester v.
Sylvester, 865 F.2d 1164, 1166 (10th Cir.
1989)(per curiam)(noting that neither the
language or the legislative history of § 523(a)(5)
warriGHTS a determination of the former spouse's
present need for support); Forsdick v. Turgeon,
812 F.2d 801, 803 (2nd Cir. 1987)(rejecting
argument concerning "changed circumstances");
Gianakas v. Gianakas, 917 F.2d 759, 763 (3rd
Cir. 1990)(recognizing that most courts have
rejected arguments concerning "changed circumstances"); but see Long v. Calhoun, 715
F.2d 1103, 1110 (6th Cir. 1983) (considering
parties' earning power, financial status, work
experience, and other support); and Singer v.
Singer, 787 F.2d 1033, 1033-35 (6th Cir.
1986)(accessing the terms of the parties'
agreement and present circumstances); see also
In re Kelly, 151 B.R. 790 (Bankr. S.D. Tex.
1992)(the bankruptcy court considered both the
terms of an agreement incident to divorce, which
provided for one spouse to make periodic
support payments to the other and deduct those
payments from taxes, as well as the fact that the
obligor spouse had actually taken the tax
deductions in four years subsequent to the
In determining the parties' intent to create a support obligation, courts may consider the following factors: the effect and function of the obligation imposed; whether the obligation provides a necessity of life; the method by which the debt may be enforced, for example, contempt proceedings compared to levy and execution; whether the obligation is to be paid in a lump sum or periodically; the absolute or contingent nature of the award; whether the award terminates on death, remarriage, or upon children reaching the age of majority; the relative earning power of the parties; the economic disparity between the parties; the age, health, and work skills of the parties; the label given the award by the parties or the state court; the express terms of the obligation and the inferences that can be drawn therefrom; whether minor children are in the care of the creditor-spouse; the presence or absence of provisions for alimony, maintenance, or support in the divorce decree or marital property agreement; the length of the marriage; and whether the obligations are payable directly to the former spouse. Shaver v. Shaver, 736 F.2d 1314, 1316-17 (9th Cir. 1984); see also Hixson v. Hixson, 23 B.R. 492 (Bankr. S.D. Ohio 1982)(examining the following twelve factors to determine the intent of the parties to create a support obligation: (1) the express terms of the separation agreement; (2) the relative incomes of the parties; (3) the length of the marriage; (4) the number and age of children; (5) the amount of child support; (6) whether the obligation terminates on death or remarriage of the recipient or donor spouse; (7) whether the obligation is payable in installments over a substantial period of time; (8) the level of education of the parties; (9) the physical health of the parties; (10) the probable need for future support; (11) the property brought to the marriage by either party; and (12) whether the payments are intended as economic security); and In re Coffman, 52 B.R. 667 (Bankr. D. Md. 1985)(considering the following factors from the developed case law to determine the nature of the obligation and whether it was for support: whether there was an alimony award entered by the state court; whether there was a need for support at the time of the decree; whether the support award would have been inadequate to provide support; whether debtor's obligation terminates upon death or remarriage of the spouse or a certain age of the children or any other contingency such as a change in circumstances; the age, health, work skills and educational levels of the parties; whether the payments are made periodically over an extended period or in a lump sum; the existence of a legal or moral "obligation" to pay alimony or support; the express terms of the debt characterization under state law; whether the obligation is enforceable by contempt; the duration of the marriage; the financial resources of each spouse, including income from employment or elsewhere; whether the payment was fashioned in order to balance disparate income of the parties; whether the creditor spouse relinquished rights of support in payment of the obligation in question; whether there were minor children in the care of the creditor spouse; the standard of living of the parties during the marriage; the circumstances contributing to the estrangement of the parties; and whether the debt is for past or future obligation, any property division, or any allocation of debt between the parties).

As illustrated by the decision of the Fifth Circuit in Matter of Joseph, 16 F.3d 86 (5th Cir. 1994), issues concerning support obligations can also affect an award of attorneys fees to the lawyer. In Matter of Joseph, the court held that an attorney fee award granted pursuant to a divorce decree does not elude discharge because it tangentially relates to an award of support and maintenance; rather, the attorneys fee award is deemed nondischargeable if the award itself reflects a balancing of the parties' financial needs. Based upon the facts of the case, the court held that the obligation to pay a former wife's attorney's fee was in the nature of alimony, maintenance, and support, and therefore nondischargeable under section 523(a)(5). Jordan v. Southeast Nat. Bank, 927 F.2d 221, 226-28 (5th Cir. 1991)(where a party has contracted to pay attorney's fees for the collection of a nondischargeable debt, the fees will also be nondischargeable in bankruptcy).

CX. Nondischargeable Property Settlement Obligations.

CXI. Statutory Language.

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discharge under section 727, 1141, 1228(a), 1228(b), and 1328 of the Code does not discharge an individual debtor from any debt--

not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless--

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependant of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

CXII. "Fresh Start" v. Interests Of Spouse And Children.

While section 523(a)(5) makes support obligations nondischargeable without regard to the effect of that continuing obligation upon the debtor, section 523(a)(15) attempts to balance the fundamental right of a debtor to a "fresh start" against the interests of children and former spouses of a debtor by making property settlement obligations nondischargeable unless either (1) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to support the debtor, his dependents, or his business; or (2) discharging the debt would benefit the debtor more than it would harm the debtor's spouse, former spouse, or child.

The legislative history of the Act clearly indicates that, in assessing the debtor's ability to pay the property settlement debt, the support requirements of the debtor's dependents are paramount and must take precedence over property settlement debts. H.R. Rep. No. 835, 103rd Cong., 2d Sess. 54 (1994). The legislative history warns against an insufficient weighing of discharge in the benefit/detriment calculus by cautioning that the benefits of the debtor's discharge should be sacrificed only if there would be substantial detriment to the nondebtor spouse that outweighs the debtor's need for a fresh start. Id. The legislative history also provides that only a party to the divorce or separation may make an assertion of nondischargeability under section 523(a)(15). If the debtor agrees to pay marital debts that were owed to third parties, those third parties do not have standing to assert the this exception. It is only the obligation owed to the spouse or former spouse--an obligation to hold the spouse or former spouse harmless--which is within the scope of this section. See H.R. Rep. No. 103-835, 103rd Cong., 2nd Sess. (1994); U.S. Code & Admin. News 1994, p. 3340; 104 Cong. Rec. H10752 (October 4, 1994); see also In re Dressler, 194 B.R. 290, 304 (Bankr. D.R.I. 1996)(third party creditor with the original claim has no standing to assert an exception to discharge under section 523(a)(15)).

CXIII. Judicial Interpretations.

Unlike the intent analysis made with respect to support obligations, the nondischargeability of property settlement obligations clearly depends upon the parties' present and prospective circumstances, not just their circumstances at the time of the divorce. Becker v. Becker, 185 B.R. 567, 570 (Bankr. W.D. Mo. 1995)(considering the parties' present and future financial situation and stating that section 523(a)(15) is concerned with the relative positions of the parties at the time of the bankruptcy, not at the time of the divorce).

While characterizing the benefit/detriment analysis as an especially "illusive statutory standard," the bankruptcy court in Hill v. Hill, 184 B.R. 750, 756 (Bankr. N.D. Ill. 1995), balanced the following factors to evaluate the equities between the debtor and the creditor-spouse: the income and expenses of both parties; whether the nondebtor spouse is jointly liable on the debts; the number of dependents; the nature of the debts; the reaffirmation of any debts; and the nondebtor spouse's ability to pay. In Hill, neither the debtor nor the creditor-spouse lived luxuriously, and both had expenses that exceeded their modest incomes. Since neither party could afford to pay the property settlement debts, which arose out of the debtor's obligation to assume the couple's indebtedness to third-party creditors, the court found that the benefits of discharge to the debtor outweighed the negative consequences to the creditor-spouse. Id.
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at 755 (the court reviewed the debtor's income and reasonably necessary expenses and determined that the debtor's financial condition renders it virtually impossible for him to pay the property settlement debt).

In Becker v. Becker, 185 B.R. 567, 569-70 (Bankr. W.D. Mo. 1995), the bankruptcy court held that the benefits of discharge outweighed the negative consequences to the creditor-spouse by carefully examining the income and expenses of both parties and concluding that the debtor's financial situation had deteriorated since the divorce decree but that the creditor-spouse's situation had improved.

In an attempt to reach a more equitable result, the bankruptcy court in In re Comisky, 183 B.R. 883 (Bankr. N.D. Cal. 1995), determined that the debtor's assets and income were not sufficient to repay the entire property settlement debt and accordingly ordered the discharge of only a portion of the debt on the theory that the debtor had the ability to repay part, but not all, of the debt. Accord In re Smither, 194 B.R. 102 (Bankr. W.D. Ky. 1996). The Comisky court compared the new property settlement exception to the exception to discharge applicable to student loans and adopted the rulings of courts in case law where a partial discharge of a student loan was granted on grounds of undue hardship. Id. at 884 (citations omitted).

CXIV. Important Distinctions Between Sections 523(a)(5) and 523(a)(15).

Whether the obligation is in the nature of support or in the nature of a property settlement remains important in bankruptcy for several reasons.

CXV. Judicial Liens.

As part of property settlements, divorce courts often award property to one spouse as his or her sole and separate property and order the receiving spouse to pay a sum of money to the other spouse, secured by a lien on the property awarded. If the spouse to whom the property has been awarded files bankruptcy, the debtor-spouse may seek to set aside the lien granted to the other spouse. Farrey v. Sanderfoot, 500 U.S. 291, 292 (1991) (involving a debtor-spouse's attempts to avoid the lien granted to the debtor's former spouse). Under the Code, however, the debtor-spouse's ability to avoid a judicial lien depends upon whether the lien secures a support debt or a property settlement obligation. 11 U.S.C. § 522(f)(1)(A)(i). Section 522 provides in pertinent part:

(f)(1) Notwithstanding any waiver of exemptions, but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is--

(A) a judicial lien, other than judicial lien that secures a debt--

(i) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement; and

(ii) to the extent that such debt--

(I) is assigned to another entity, voluntarily, by operation of law, or otherwise; and

(II) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support. If the lien secures a support debt, the lien cannot be set aside. Id. But, if the lien secures a property settlement debt, the lien is avoidable even though the underlying obligation may be nondischargeable. 11 U.S.C. § 523(a)(15).

CXVI. Priority Status For Support Debts.

Under the Act, Congress elevated unsecured, past due, matured nondischargeable support debts from general unsecured claim status to seventh priority status. 11 U.S.C. § 507(a)(7). Section 507 provides in pertinent part:
(a) The following expenses and claims have priority in the following order:

(7) Seventh, allowed claims for debts to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt--

(A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or

(B) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support. 11 U.S.C. § 502(b)(5)(unmatured, nondischargeable support debts are not afforded priority status). Prior to the Act, support claims that were not discharged remained general unsecured claims without priority status. Now, support claims are paid after administrative expenses and certain business debts but before both unsecured tax obligations and general unsecured claims. 11 U.S.C. § 507(a).

Interestingly, not all holders of matured, unsecured support claims enjoy seventh priority status. If an unsecured support debt has been assigned to another entity, including a state, a political subdivision, or the federal government, the debt is a general unsecured claim rather than a priority claim, even though the debt is nondischargeable. Thus, priority status is given to only the direct recipient of the debt rather than to an entity collecting the debt as a result of a voluntary assignment or assignment by operation of law. 11 U.S.C. § 507(a)(7)(A). While priority status will certainly benefit creditors in chapter 7 liquidation cases by elevating their right to payment from the typically limited resources of a liquidating bankruptcy estate, the priority granted to support debts will significantly impact cases under chapters 11, 12, and 13 since reorganizing debtors must pay priority claims in full through their plans. 11 U.S.C. §§ 1129(a)(9)(B), 1222(a)(2), 1322(a)(2).

XVIII) **Preferences.**

As result of the Act, a bankruptcy trustee may not avoid, as a preference, transfers of property or payments made to a spouse, or former spouse or child for spousal or child support even though such payments were made within one year of the filing of the bankruptcy petition. 11 U.S.C. § 547(c)(7). In describing the support claims entitled to this protection, Congress used language nearly identical to that employed in the judicial lien avoidance and priority claim provisions. 11 U.S.C. § 547(c)(7). Section 547 provides in pertinent part:

(c) The trustee may not avoid under this section a transfer--

(7) to the extent such transfer was a bona fide payment of a debt to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt--

(A) is assigned to another entity, voluntarily, by operation of law, or otherwise; and

(B) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.

*Compare supra*, notes 72 and 75. As a result, assignees of prepetition payments on support claims are subject to preference actions. 11 U.S.C. § 547(c)(7)(A).

XIX) **60-day Requirement To File Complaint.**

A complaint to determine the dischargeability of a property settlement obligation must be filed within sixty days of the first meeting of creditors held in a debtor's
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bankruptcy case. 11 U.S.C. § 523(c)(1); see also Fed. R. Bankr. P. 4007(c). A complaint to
determine the dischargeability of a support
obligation may be filed at any time. Fed. R.
Bankr. P. 4007(b).

XX) Jurisdiction Of State and Federal
Courts.
While determinations under section 523 are
matters of federal bankruptcy law and not state
law, [Dennis v. Dennis, 25 F.3d 274 (5th Cir.
1994)] state courts and federal courts have
concurrent jurisdiction to determine the
dischargeability of support debts under section
523(a)(5). Goss v. Goss, 722 F.2d 599, 602
(10th Cir. 1983)(stating that bankruptcy courts
and state courts have concurrent jurisdiction to
determine dischargeability of alimony and
support payments). In contrast, the bankruptcy
court has exclusive jurisdiction to determine
dischargeability of property settlement debts
under section 523(a)(15). 11 U.S.C. § 523(c);
see also In re Smither, 194 B.R. 102, 106.

XXI) Chapter 13.
As previously explained, the super-
discharge provisions of chapter 13 enable an
individual debtor to discharge property
settlement debts after completion by the debtor
of all payments under the plan, while support
debts remain nondischargeable. 11 U.S.C. §
1328(a)(2)(after completion by the debtor of all
payments required under the chapter 13 plan, the
court shall grant the debtor of all debts provided
for by the plan, except any debt of a kind
described under section 523(a)(5), (8), or (9)).

CXVII. The Burden of Proof.
The burden of proof is ordinarily on a
creditor to establish an exception to discharge by
a preponderance of evidence. Grogan v. Garner,
498 U.S. 279, 289-90 (1991)(burden on the
creditor to prove exception to discharge by a
preponderance of the evidence); Werner v.
Hofmann, 5 F.3d 1170, 1172 (8th Cir. 1993)(per
curiam)(creditor has the burden of proving that a
debt falls within an exception to discharge);
Goldberg Securities, Inc. v. Scarlata, 979 F.2d
521, 524 (7th Cir. 1992)(creditor has the burden
to prove exception to discharge); see also In re
Ellis, 103 B.R. 977 (Bankr. N.D. Ill. 1989)(once
the objecting party makes a prima facie case of
nondischargeability or that the claim sought is
for alimony, maintenance or support, the burden
shifts to the debtor to go forward to rebut the
evidence respecting nondischargeability or
status and nature of the debt, although the
ultimate burden of proof remains with the party
objecting to discharge, and the burden of proof
of nondischargeability is clear and convincing
evidence). While this is clearly the rule with
respect to the dischargeability of support debts.
Long v. West, 794 F.2d 928, 930 (4th Cir.
1986)(creditor bears the burden of proving an
alimony award is nondischargeable). some
recent court decisions have held that the debtor
has the burden of proof with respect to the
property settlement exception to discharge under
both section 523(a)(15)(A) and 523(a)(15)(B).
In re Morris, 193 B.R. 949, 952 (Bankr. S.D.
Cal. 1996)(burden of proof shifts to the debtor
after the debt is established); accord In re
Smither, 194 B.R. 102 (Bankr. W.D. Ky. 1996);
see also In re Speaks, 193 B.R. 436, 441 (Bankr.
E.D. Va. 1995)(the exceptions under section
523(a)(15) to dischargeability are affirmative
defenses); but see In re Dressler, 194 B.R. 290
(Bankr. D.R.I. 1996)(creditor has the burden of
proof in establishing nondischargeability under
section 523(a)(15)(A) and 523(a)(15)(B); accord

CXVIII. Practical Tips, Suggestions,
And Strategies.

CXIX. Is It Support? Or, Is It A Division Of
Property?
The first decision to be made concerning a
claim in a matrimonial context is whether the
claim is for support or a property settlement
under principles of federal law. If the duty to
support is clear, and the relationship between the
duty and the debt whose discharge is sought is
clear, the dischargeability decision should be
simple. Frequently, though, the relationship
between the duty to support and the nature of the
debt is not readily apparent.

In order make its decision, the bankruptcy
court must inquire into the entire economic
relationship between former spouses to
determine the nature of their debtor-creditor
relationship and differentiate between debts that,
at least in terms of their function, are often
indistinguishable. Jana B. Singer, Divorce
Obligations and Bankruptcy Discharge:
Rethinking the Support/PropertyDistinction,
30 Harv. J. on Legis. 43, 73-75, 81 (1993). For
example, in Texas, since community property
settlements must satisfy the rule of just and right
division of property, each spouse is entitled to a
share of the community property based upon the
financial needs of each spouse after the divorce.
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Accordingly, a family law court might determine that one spouse's economic needs after divorce, because of education, job skills, or responsibility for dependent children, exceed those of the other and order, for example, that one spouse retain a community property residence but pay the other spouse an amount equal the value of the entire community interest in the property as the just and right division of community assets. Even though the debt may be described as a property settlement debt, it is arguably in the nature of support.

CXX. Questions To Ask Your Client.

Anne Turner Beletic, in her scholarly article presented at the August 1994 Advanced Family Law Course sponsored by the State Bar of Texas, suggests ten questions you should always ask in an initial client interview, whether the representation involves a divorce case, a paternity case, a post divorce modification or even a contempt action:

1. Has a bankruptcy been filed by either party within the last ten (10) years?

2. If a bankruptcy has been filed, has the bankruptcy estate been closed? (Frequently, the client will not know the answer to this question, but at this point, you need to inquire into obtaining documents concerning the bankruptcy, which may include having your client or legal assistant obtain records from the bankruptcy court).

3. If a bankruptcy has been filed by either party, has the automatic stay been lifted?

4. Does the filing party (debtor) owe any obligations to the non-debtor?

5. If the answers to question 4 is yes, has a proof of claim been filled?

6. Does the debtor owe any obligations to any third party on behalf of the non-debtor by agreement, contract, or any other theory of law?

7. If the answers to question 6 is yes, has a proof of claim been filed by the non-debtor on behalf of any third party creditors for which the non-debtor may be liable?

8. If no bankruptcy has been filed by either party, has there been any mention of a bankruptcy filing or the possibility of a bankruptcy filing?

9. Even if the debtor does not voluntarily file for bankruptcy, do the debts of the parties present the possibility of an involuntary filing?

10. Does a pre or post marital agreement exist that would affect the characterization of assets or debts as separate or community?

CXXI. Get The Schedules And File A Notice Of Appearance.

Once you learn of a bankruptcy involving your client's ex-spouse, obtain a complete copy of the bankruptcy schedules. The schedules will enable you to determine if the debtor has listed your client as a creditor. Next, file a notice of appearance on behalf of your client to ensure that you are kept informed about the bankruptcy case. An draft of a notice of appearance is attached as Appendix 2 and should be filed with the court and served on all persons named in the debtor's service list.

CXXII. Notice Of Intervention Of Child Support Creditor.

If applicable, file a notice of intervention of child support creditor with the bankruptcy court clerk. Filing this notice will ensure that your client will have a right to be heard in any phase of the case and to assert a position.

CXXIII. File A Proof Of Claim.

File a Proof of Claim. A proof of claim should be filed with the bankruptcy court clerk on Official Bankruptcy Form 10, a copy of which is attached as Appendix 3. A copy of the proof of claim should be served on the debtor, debtor's counsel, and the trustee, in applicable.

CXXIV. Timely File An Adversary Proceeding.

If your client holds a claim that may be non-dischargeable under section 523(a)(15), you must file a complaint objecting to dischargeability by the earlier of: (a) 60 days of the first date set for the debtor's creditor meeting under section 341; or (b) any other date set by the court for filing such a complaint. A form of complaint objecting to dischargeability of a debt under section 523(a) is attached as Exhibit 4.

CXXV. Perfect Contractual Liens To Secure Payment Of Ongoing Obligations.

In every divorce proceeding, be certain that your client receives contractual liens on real property as security for debts owing to your
client and take all appropriate steps to validly perfect the lien under state law. If possible, obtain an order of the court imposing judicial liens on the property and file the divorce decree in the deed records of the county where the property is located.

CXXVI. **In Reorganizations, File An Objection To The Plan.**

If the debtor is involved in a chapter 11, 12, or 13 case and proposes to pay less than all of your client’s claim, consider filing an objection to the debtor's plan of reorganization. As previously explained, a debtor must generally pay creditors in full to confirm a chapter 11 plan that provides for the retention by the debtor of any non-exempt property. In chapter 12 and 13 cases, a debtor must commit all disposable income to the plan for at least three years. If these requirements are not met, object.

CXXVII. **Allocate And Characterize Debts So As To Make Them Non-Dischargeable.**

Be extremely careful how you allocate and characterize debts in a divorce. For example, avoid awarding property to one spouse while requiring the other spouse to make payments to a third-party creditor. If the obligor spouse files for bankruptcy, your client may lose the property to the third-party creditor? The better way to write the decree is to award the property, and the obligation for payments, to your client and require your client to indemnify the other spouse from the debt. The decree should provide that in exchange for the indemnity, the other spouse will reimburse your client for the full amount of the debt assumed as a payment in the nature of support for your client. If the other spouse files for bankruptcy, your client has a properly worded decree that gives you grounds to file a complaint objecting to discharge of the debt.

Every family lawyer should be familiar with the effects of bankruptcy on family law matters. Under the Code, certain family law actions may be commenced or continued without regard to the automatic stay, although other matters should be pursed only after securing the consent of the bankruptcy court. While the Code has long protected the support debt from discharge, as a result of the Act, certain property settlement debts are now nondischargeable. The Act also gave priority to payment of support claims, placed important limitations on a debtor’s ability to set aside judicial liens, and immunized certain support claimants from the trustee’s preference attacks.

Through the Code, Congress has demonstrated its commitment to policies protecting marital and child support obligations. However, family law practitioners share responsibility with the courts for implementing these policies and achieving the goals sought by Congress. You can participate in this process—and do quite a bit to protect your client's interests—by employing the strategies discussed above. Whatever shortcomings exist in the Code, the Act has provided lawyers with an opportunity to give their family law client a greater measure of protection.

CXXVIII. **Conclusion.**

Liabilities, which are often overlooked, can provide a good deal of post-divorce problems when things do not go as planned in the settlement or as ordered by the Judge in a trial. Anticipating these problems, however, can go a very long way towards ensuring that the client gets that to which he or she has bargained or won at trial.
Appendix A – Forms for Indemnification & Allocation of Liabilities in a Divorce

Appendix A, Form Set 1
Final Decree Of Divorce.

1. Obligations and Liabilities Assumed by Wife. IT IS ORDERED AND DECREED that the wife shall pay, as a part of the division of the estate of the parties, and shall indemnify and hold the husband and her property harmless from any failure to so discharge the obligations and liabilities listed in Schedule 1 of this Agreement.

2. Obligations and Liabilities Assumed by Husband. IT IS ORDERED AND DECREED that the husband shall pay, as a part of the division of the estate of the parties, and shall indemnify and hold the wife and her property harmless from any failure to so discharge the obligations and liabilities listed in Schedule 2 of this Agreement.

3. Assumption of Encumbrances. IT IS ORDERED AND DECREED that each party hereby assumes the debts, encumbrances, taxes and liens on all the property each will hold, subsequent to the date of this divorce unless express provision to the contrary is made in this Decree, and IT IS ORDERED AND DECREED that each party shall indemnify and hold harmless the other party and his or her property from any claim or liability that the other party suffers or may be required to pay because of such debts, encumbrances, taxes or liens.

4. Liability Not Listed. IT IS ORDERED AND DECREED that a liability not described in this Section shall be the sole responsibility of the party who has incurred or may hereafter incur it, and each party is ORDERED to pay it as the same shall become due and to indemnify and hold the other party and his or her property harmless from any and all such debts, obligations or liabilities.

5. Indemnification of Wife and Granting of Equitable Vendor's Lien. IT IS ORDERED AND DECREED that, if any claim, action or proceeding is hereafter initiated seeking to hold Wife liable for the obligations and/or liabilities assumed by Husband under this Section, Husband shall, at his sole expense, defend Wife against any such claim, action or proceeding, whether or not well-founded, and indemnify her and her property against any loss resulting therefrom, including, but not limited to, costs of court and attorney's fees incurred by Wife in connection therewith. IT IS ORDERED AND DECREED that Husband shall pay the obligations and liabilities assumed by him, listed in Schedule 2, the Court finds that this representation forms part of the consideration by and between the parties to this entire agreement, and more specifically represents part of the consideration in the award to Husband of the property, listed in Schedule 3. IT IS ORDERED AND DECREED that an equitable vendor's lien is hereby GRANTED on all property awarded Husband, listed in Schedule 3, in an amount equal to the obligations and liabilities listed on Schedule 2. IT IS ORDERED AND DECREED that said equitable vendor's lien shall be reduced by an amount equal to each payment made by Husband towards the reduction of the obligations and liabilities listed in Schedule 2, as each such payment is made. IT IS ORDERED AND DECREED that the equitable vendor's lien awarded to Wife herein shall be extinguished upon full and complete payment by Husband of all obligations and liabilities, and any related costs, listed on Schedule 2. The Court finds that Husband’s assumption to pay the obligations and liabilities listed on Schedule 2, and the various indemnity/hold harmless agreements provided in Section 5 are given as part of a continuing duty of support for Wife, and the minor children of the parties, and not as part of the property settlement in this cause, and shall not be dischargeable in bankruptcy.

6. Indemnification of Husband and Granting of Equitable Vendor's Lien. IT IS ORDERED AND DECREED that, if any claim, action or proceeding is hereafter initiated seeking to hold Husband liable for the obligations and/or liabilities assumed by Wife under this Section, Wife shall, at his sole expense, defend Husband against any such claim, action or proceeding, whether or not well-founded, and indemnify her and her property against any loss resulting therefrom, including, but not limited to, costs of court and attorney's fees incurred by Husband in connection therewith. IT IS ORDERED AND DECREED that Wife shall pay the obligations and liabilities assumed by him, listed in Schedule 2, the
Court finds that this representation forms part of the consideration by and between the parties to this entire agreement, and more specifically represents part of the consideration in the award to Wife of the property, listed in Schedule 3. IT IS ORDERED AND DECREEd that an equitable vendor's lien is hereby GRANTED on all property awarded Wife, listed in Schedule 3, in an amount equal to the obligations and liabilities listed on Schedule 2. IT IS ORDERED AND DECREEd that said equitable vendor's lien shall be reduced by an amount equal to each payment made by Wife towards the reduction of the obligations and liabilities listed in Schedule 2, as each such payment is made. IT IS ORDERED AND DECREEd that the equitable vendor's lien awarded to Husband herein shall be extinguished upon full and complete payment by Wife of all obligations and liabilities, and any related costs, listed on Schedule 2. The Court finds that Wife’s assumption to pay the obligations and liabilities listed on Schedule 2, and the various indemnity/hold harmless agreements provided in Section 5 are given as part of a continuing duty of support for Husband, and the minor children of the parties, and not as part of the property settlement in this cause, and shall not be dischargeable in bankruptcy.

7. **Notice of Claims.** IT IS ORDERED AND DECREEd that Husband and Wife shall give the other prompt written notice of any litigation threatened or instituted against either party which might constitute the basis of a claim for indemnity by either the Husband or Wife against the other pursuant to the terms of this Decree.

8. **Damages.** IT IS ORDERED AND DECREEd that "damages," as used herein, will include any judgment, loss, cost, expense, penalty, damage to credit-worthiness and other damage, including, without limitation, counsel fees and other costs and expenses reasonably incurred in investigating or in attempting to avoid same or oppose the imposition thereof or in enforcing this indemnity. IT IS ORDERED AND DECREEd that the indemnifying party shall reimburse the indemnified party on demand for any payment made by the indemnified party at any time after the entry of the divorce decree to satisfy any judgment of any court or competent jurisdiction or pursuant to a bona fide compromise or settlement of claims, demands, or actions for any damages to which the foregoing indemnity relates.

**Appendix A, Form Set 2**

"Catch-All" Provision In Decree

IT IS FURTHER ORDERED AND DECREEd, as a part of the division of the estate of the parties, that any community liability not expressly assumed by a party under this decree is to be paid by the party incurring the liability, and the party incurring the liability shall indemnify and hold the other party and his or her property harmless from any failure to so discharge the liability.

**Appendix A, Form Set 3**

Agreement Incident To Divorce.

1. **Obligations and Liabilities Assumed by Wife.** Wife assumes and promises to pay as they shall become due and hereby agrees to indemnify and hold Husband and his property harmless from the obligations and liabilities listed in Schedule 1 of this Agreement.

2. **Obligations and Liabilities Assumed by Husband.** Husband assumes and promises to pay as they shall become due and hereby agrees to indemnify and hold Wife and her property harmless from the obligations and liabilities listed in Schedule 2 of this Agreement.

3. **Assumption of Encumbrances.** Each party hereby assumes the debts, encumbrances, taxes and liens on all the property each will hold, subsequent to the date of this Agreement unless express provision to the contrary is made in this Agreement, and each party agrees to indemnify and hold harmless the other party and his or her property from any claim or liability that the other party suffers or may be required to pay because of such debts, encumbrances, taxes or liens. Each party in possession of property to be awarded to the other party warrants that all dues, fees, assessments, mortgages, taxes, insurance payments and the like attendant to such property are current, or if not current, notice of any arrearage or deficiency has been given to the receiving party prior to the execution of this Agreement.
4. **Liability Not Listed.** Each party represents and warrants to the other that he or she has not incurred any debt, obligation or other liability, other than those described in this Agreement, as to which the other party is or may be liable. A liability not described in this Section will be the sole responsibility of the party who has incurred or may hereafter incur it, and each party agrees to pay it as the same shall become due and to indemnify and hold the other party and his or her property harmless from any and all such debts, obligations or liabilities.

5. **Indemnification of Wife and Granting of Equitable Vendor's Lien.** If any claim, action or proceeding is hereafter initiated seeking to hold Wife liable for the obligations and/or liabilities assumed by Husband under this Section, Husband will, at his sole expense, defend Wife against any such claim, action or proceeding, whether or not well-founded, and indemnify her and her property against any loss resulting therefrom, including, but not limited to, costs of court and attorney's fees incurred by Wife in connection therewith. Husband expressly agrees that his agreement to pay the obligations and liabilities assumed by him, listed in Schedule 2, forms part of the consideration by and between the parties to this entire agreement, and more specifically represents part of the consideration in the award to Husband of the property, listed in Schedule 3. Husband further expressly agrees that Wife shall have an equitable vendor's lien on all property awarded Husband, listed in Schedule 3, in an amount equal to the obligations and liabilities listed on Schedule 2. Said equitable vendor's lien shall be reduced by an amount equal to each payment made by Husband towards the reduction of the obligations and liabilities listed in Schedule 2, as each such payment is made. The equitable vendor's lien awarded to Husband herein shall be extinguished upon full and complete payment by Husband of all obligations and liabilities, and any related costs, listed on Schedule 2. Husband expressly agrees that his assumption to pay the obligations and liabilities listed on Schedule 2, and the various indemnity/hold harmless agreements provided in Section 5 are given as part of a continuing duty of support for Wife, and the minor children of the parties, and not as part of the property settlement in this cause, and shall not be dischargeable in bankruptcy.

6. **Indemnification of Husband and Granting of Equitable Vendor's Lien.** If any claim, action or proceeding is hereafter initiated seeking to hold Husband liable for the obligations and/or liabilities assumed by Wife under this Section, Wife will, at her sole expense, defend Husband against any such claim, action or proceeding, whether or not well-founded, and indemnify him and his property against any loss resulting therefrom, including, but not limited to, costs of court and attorney's fees incurred by Husband in connection therewith. Wife expressly agrees that her agreement to pay the obligations and liabilities assumed by her, listed in Schedule 1, forms part of the consideration by and between the parties to this entire agreement, and more specifically represents part of the consideration in the award to Husband of the property, listed in Schedule 4. Wife further expressly agrees that Husband shall have an equitable vendor's lien on all property awarded Wife, listed in Schedule 4, in an amount equal to the obligations and liabilities listed on Schedule 1. Said equitable vendor's lien shall be reduced by an amount equal to each payment made by Wife towards the reduction of the obligations and liabilities listed in Schedule 1, as each such payment is made. The equitable vendor's lien awarded to Husband herein shall be extinguished upon full and complete payment by Wife of all obligations and liabilities, and any related costs, listed on Schedule 1. Wife expressly agrees that her assumption to pay the obligation and liabilities listed on Schedule 1, and the various indemnity/hold harmless agreements provided in Section 5 are given as part of a continuing duty of support for Husband, and the minor children of the parties, and not as part of the property settlement in this cause, and shall not be dischargeable in bankruptcy.

7. **Notice of Claims.** Husband and Wife agree to give the other prompt written notice of any litigation threatened or instituted against either party which might constitute the basis of a claim for indemnity by either the Husband or Wife against the other pursuant to the terms of this Agreement.

8. **Damages.** "Damages," as used herein, will include any judgment, loss, cost, expense, penalty, damage to credit-worthiness and other damage, including, without limitation, counsel fees and other costs and expenses reasonably incurred in investigating or in attempting to avoid same or oppose the imposition thereof or in enforcing this indemnity. The indemnifying party will reimburse the indemnified party on demand for any payment made by the indemnified party at any time after the entry of the divorce decree to satisfy any judgment of any court or competent jurisdiction or pursuant to a bona fide compromise or settlement of claims, demands, or actions for any damages to which the foregoing indemnity relates.
Appendix A, Form Set 4
Specific Assumption Of Lease And/Or Rental Agreement

In addition to Husband assuming full responsibility for the liabilities set forth on Schedule X, Husband shall also assume Wife's interest as lessee under such of the leases and/or rental agreements described in Schedule Y, and in consideration therefor the Husband hereby assumes and agrees to timely pay and discharge from and after the date of divorce all of Wife's obligations (monetary and non-monetary) under such lease and/or rental agreements, [including or excluding] any such obligations that are required to be performed under such lease and/or rental agreement on or prior to the date of divorce or that are attributable to any default or breach occurring under or in connection with such lease and/or rental agreement on or prior to the date of divorce. The above described leases and rental agreements, together with all amendments, modifications and schedules thereto, are incorporated herein by reference for all purposes.

Appendix A, Form Set 5
Allocation Of Accrued But Unpaid Real Estate Taxes

Pro-Rated. Real estate taxes on the real property herein awarded to Wife shall be prorated as of 11:59 p.m. on the date of divorce. If the divorce shall occur before actual real estate taxes for the calendar year 1999 are known, the apportionment of such taxes shall be made upon the basis of such taxes for calendar year 1998, provided that if such taxes for calendar year 1999 are thereafter determined to be more or less than such taxes for calendar year 1998, Husband and Wife shall promptly adjust the proration of such taxes and Husband or Wife, as the case may be, shall pay to the other any amount required as a result of such adjustment and the obligations hereunder shall survive the divorce.

[OR]

Not Pro-Rated. Real estate taxes on the real property herein awarded to Wife attributable to any period on or prior to the date of divorce shall be paid by Husband, and all such taxes attributable to the period after the date of divorce shall be paid by Wife. Payment by Husband of any such items, the benefit of which payment related in whole or in part to the period after the date of divorce, shall be adjusted between Wife and Husband such that Husband shall receive credit or be reimbursed by Wife for that portion of any such obligation paid by Husband which relates to the period after the date of divorce. Prepayments received by Husband on any liability relating to the real property herein awarded to Wife received on or prior to the date of divorce but which relate in whole or in part to periods after the date of divorce shall be paid over and delivered by Husband to Wife to the extent the same relate to periods after the date of divorce; and upon such payment, Wife shall thereafter assume all obligations and liabilities with respect to such items.

Appendix A, Form Set 6
Assumption & Indemnification Of Liabilities In Connection With A Business

Except for the obligations on which Wife is expressly obligated to assume pursuant to this Agreement, Wife expressly disclaims responsibility for and shall not assume nor be obligated to pay, perform or discharge, and Husband shall pay, perform, discharge, indemnify, defend and hold Wife harmless from and against, any and all liability, claim, action, suit, loss, cost, damage and/or expense arising out of or in connection with Husband's ownership of the Husband's Business or the operation thereof on or prior to the date of divorce. In addition, from and after the date of divorce Husband shall comply with all the terms of this Agreement and shall discharge all duties imposed upon Husband under this Agreement, and Husband shall jointly and severally indemnify and hold Wife harmless from and against any loss, cost, claims, liabilities or expenses (including, but not limited to, reasonable attorneys' and other professional fees and reasonable costs of legal proceedings) suffered or incurred by Wife as a result of or in connection with Husband's failure to comply with and discharge their respective obligations under this Agreement and/or any breach of any of Husband's warranties and representations under this Agreement. Without limiting the preceding provisions, Husband shall indemnify, defend and hold
harmless Wife from and against any and all claims, demands, causes of action, liability, damages and costs and expenses (including, but not limited to, reasonable attorneys and other professional fees and reasonable costs of legal proceedings) asserted by any creditor of Husband’s Business against any of the Wife or any of the assets relating to Husband’s Business.

The indemnified party hereunder shall seasonably notify the indemnifying party of the existence of any claim, demand or other matter to which the indemnifying party's indemnification obligations under this Agreement shall apply, and the indemnified party shall give the indemnifying party a reasonable opportunity to defend the same at the indemnifying party's own expense and with counsel of its own selection; provided, the indemnified party shall at all times also have the right to participate fully in the defense at its own expense. If the indemnifying party shall, within a reasonable time after such notice, fail to defend, then the indemnified party shall have the right, but not the obligation, to undertake the defense of, and to compromise or settle, the claim or other matter on behalf, for the account, and at the risk, of the indemnifying party. If the claim is one that cannot by its nature be defended solely by the indemnifying party (including, without limitation, any federal or state tax proceeding), then the indemnified party shall make available all information and assistance that the indemnifying party may reasonably request (at the cost of the indemnifying party). The omission of any indemnified party to notify an indemnifying party of any such claim, demand or other matter shall not relieve the indemnifying party from any liability in respect of such claim, demand or other matter which it may have otherwise had to such indemnified party except and only to the extent that the indemnifying party is prejudiced thereby, and in no event shall the indemnifying party be relieved of any other liability which it may have to such indemnified party pursuant to this Agreement.

Anything in this agreement to the contrary notwithstanding, the indemnifying party or parties shall not settle any claim without the consent of the party indemnified unless such settlement involves only the payment of money and the claimant provides to the party to be indemnified a release from all liability in respect to such claim. If the settlement of the claim involves more than the payment of money, the indemnifying party or parties shall not settle the claim without the prior consent of the party to be indemnified, which consent shall not be unreasonably withheld. The party to be indemnified and the indemnifying party or parties will each cooperate with all reasonable requests of the other. The remedies provided in this Agreement shall not be exclusive of any other rights or remedies available by one party against the other, either at law or in equity.

**Appendix A, Form Set 7**

**Assumption & Indemnification Of Contingent Personal Liabilities**

If and to the fullest extent that any action or inaction by Husband, occurring during the term of the parties marriage, gives rise to a claim by any third party against the community property assets herein awarded to Wife, then Husband shall, at his sole expense, defend Wife against any such claim, action or proceeding, whether or not well-founded, and indemnify her and her property against any loss resulting therefrom, including, but not limited to, costs of court and attorney's fees incurred by Wife in connection therewith.
DEED OF TRUST TO SECURE ASSUMPTION

DATE:________________________________

GRANTOR: Gayle Grantee

GRANTOR'S MAILING ADDRESS (INCLUDING COUNTY):
   9257 Memorial Drive, Houston, Harris County, Texas 77024

TRUSTEE: Alfred Attorney

TRUSTEE'S MAILING ADDRESS (INCLUDING COUNTY):
   2300 Attorney Blvd., Suite 2001, Houston, Texas 77002

BENEFICIARY: Gordon Grantor

BENEFICIARY'S MAILING ADDRESS (INCLUDING COUNTY):
   P.O. Box 11111, Houston, Harris County, Texas 77002

NOTE AND DEED OF TRUST ASSUMED

That of record.

PROPERTY (INCLUDING ANY IMPROVEMENTS):
   A Portion of Lot Twenty (20), Building Site Seven (6) of Replat Of Divorce Acres, an addition
   in Harris County, Texas, according to the map or plat thereof recorded in Volume 91, Page 441,
   of the Map Records of Harris County, Texas

OTHER EXCEPTIONS TO CONVEYANCE AND WARRANTY:

Those of record, if any.

By deed dated the same as this instrument, Beneficiary conveyed the property to Grantor, who as
part of the consideration promised to pay the note assumed and to be bound by the deed of trust assumed.
Beneficiary has retained a vendor's lien.

For value received and to secure Grantor's assumption, Grantor conveys the property to Trustee in
trust. Grantor warrants and agrees to defend the title to the property. If Grantor performs all the covenants
of the note and deed of trust assumed and if Beneficiary has not filed a notice of advancement, a release
of the deed of trust assumed shall release this deed of trust to secure assumption and Beneficiary's vendor's lien.

GRANTOR’S OBLIGATIONS & ADDITIONAL DEFAULT PROVISIONS

If the underlying mortgage holder does not waive the due on sale clause, Grantor’s obligations hereunder shall be deemed to be in default.

If any of the following provisions are not carried out, Grantor’s obligations hereunder shall be deemed to be in default:

– Gayle Grantee must use her best efforts to effect a refinancing of the underlying liens on said property;

– If Gayle Grantee does not refinance said real estate on or before June 30, 1999, she shall make a pre-payment of principal in the amount of $25,000.00 on the first lien note underlying the property by that date;

– If Gayle Grantee does not refinance said real estate on or before June 30, 2000, she shall make a pre-payment of principal in the amount of $10,000.00 on the first lien note underlying the property by that date;

– Gayle Grantee shall pay off the entire loan(s) on such real estate on or before June 30, 2001.

– Gayle Grantee shall make all such mortgage payments on the existing notes presently secured by such real estate on or before the first of each month, and shall provide to Gordon Grantor, in writing, documentation that she has made such payment.

BENEFICIARY’S RIGHTS

1. Beneficiary may appoint in writing a substitute or successor trustee, succeeding to all rights and responsibilities of Trustee.

2. If Grantor fails to perform any of Grantor's obligations under the note or deed of trust assumed, Beneficiary may perform those obligations, advance funds required, and then be reimbursed by Grantor on demand for any sums so advanced, including attorney's fees, plus interest on those sums from the dates of payment at the highest legal rate. The sum to be reimbursed shall be secured by this deed of trust to secure assumption.

3. Beneficiary may file a sworn notice of such advancement in the office of the county clerk where the property is located. The notice shall detail the dates, amounts, and purposes of the sums advanced and the legal description of the property.

4. If Grantor fails on demand to reimburse Beneficiary for the sums advanced, and such failure continues after Beneficiary gives Grantor notice of the failure and the time within which it must be cured, as may be required by law or by written agreement, then Beneficiary may:

   a. request Trustee to foreclose this lien, in which case Beneficiary or Beneficiary's agent shall give notice of the foreclosure sale as provided by the Texas Property Code as then amended; and

   b. purchase the property at any foreclosure sale by offering the highest bid and then have the bid credited to the reimbursement of Beneficiary.

TRUSTEE’S DUTIES
If requested by Beneficiary to foreclose this lien, Trustee shall:

1. either personally or by agent give notice of the foreclosure sale as required by the Texas Property Code as then amended;

2. sell and convey all or part of the property to the highest bidder for cash with a general warranty binding Grantor, subject to prior liens and to other exceptions to conveyance and warranty; and

3. from the proceeds of the sale, pay, in this order:
   a. expenses of foreclosure, including a commission to Trustee of 5% of the bid;
   b. to Beneficiary, the full amount advanced, attorney's fees, and other charges due and unpaid;
   c. any amounts required by law to be paid before payment to Grantor; and
   d. to Grantor, any balance.

GENERAL PROVISIONS

1. If any of the property is sold under this deed of trust, Grantor shall immediately surrender possession to the purchaser. If Grantor fails to do so, Grantor shall become a tenant at sufferance of the purchaser, subject to an action for forcible detainer.

2. Recitals in any Trustee's deed conveying the property will be presumed to be true.

3. Proceeding under this deed of trust to secure assumption, filing suit for foreclosure, or pursuing any other remedy will not constitute an election of remedies.

4. This lien shall be superior to liens later created even if Beneficiary has made no advancements when later liens are created.

5. If any portion of the advancements cannot be lawfully secured by this deed of trust to secure assumption, payments shall be applied first to discharge that portion.

6. No sale under this deed of trust to secure assumption shall extinguish the lien created by this instrument.

7. Grantor assigns to Beneficiary absolutely, not only as collateral, all present and future rent and other income and receipts from the property. Leases are not assigned. Grantor warrants the validity and enforceability of the assignment. Grantor may as Beneficiary's licensee collect rent and other income and receipts as long as Grantor is not in default under the note or the deed of trust assumed. Grantor will apply all rent and other income and receipts to payment of the note and performance of the deed of trust assumed, but if the rent and other income and receipts exceed the amount due under the note and deed of trust assumed, Grantor may retain the excess. If Grantor defaults in payment of the note or performance of the deed of trust assumed, Beneficiary may terminate Grantor's license to collect and then as Grantor's agent may rent the property if it is vacant and collect all rent and other income and receipts. Beneficiary neither has nor assumes any obligations as lessor or landlord with respect to any occupant of the property. Beneficiary may exercise Beneficiary's rights and remedies under this paragraph without taking possession of the property. Beneficiary shall apply all rent and other income and receipts collected under this paragraph first to expenses incurred in exercising Beneficiary's rights and remedies and then to Grantor's obligations under the note and deed of trust assumed in the order determined by Beneficiary. Beneficiary is not required to act under this paragraph, and acting under this paragraph does not waive any of Beneficiary's other rights or remedies. If Grantor becomes a voluntary or involuntary bankrupt, Beneficiary's filing a proof of claim in bankruptcy will be tantamount to the appointment of a receiver under Texas law.

8. Interest on the debt secured by this deed of trust to secure assumption shall not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or
received under law; any interest in excess of that maximum amount shall be credited on the principal of
the debt or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any
such excess shall be canceled automatically as of the acceleration or prepayment or, if already paid,
credited on the principal of the debt or, if the principal of the debt has been paid, refunded. This provision
overrides other provisions in this and all other instruments concerning the debt.

9. When the context requires, singular nouns and pronouns include the plural.

10. This deed of trust to secure assumption shall bind, inure to the benefit of, and be exercised by
successors in interest of all parties.

Gayle Grantee

This instrument was prepared based on information furnished by the parties, and no independent title search
has been made.

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This instrument was acknowledged before me on ________________ by Gayle Grantee.

Notary Public, State of Texas

After Recording Return To:

Gordon Grantor
P.O. Box 11111
Houston, Texas 77002
Liability for Federal Income Taxes for Prior Years.

[Liability assumed all by Husband].

IT IS ORDERED AND DECREED that Husband shall be solely responsible for all federal income tax liabilities of the parties from the date of marriage through December 31, 1997, and shall timely pay any deficiencies, assessments, penalties, or interest due thereon and shall indemnify and hold Wife and her property harmless therefrom unless such additional tax, penalty, and/or interest resulted from Wife's omission of taxable income or claim of erroneous deductions. In such case, the portion of the tax, penalty, and/or interest relating to the omitted income or claims of erroneous deductions shall be paid by Wife.

[Joint Liability]

IT IS ORDERED AND DECREED that Husband and Wife shall be equally responsible for all federal income tax liabilities of the parties from the date of marriage through December 31, 1997, and each party shall timely pay 50 percent of any deficiencies, assessments, penalties, or interest due thereon and shall indemnify and hold the other party and his or her property harmless from 50 percent of such liabilities unless such additional tax, penalty, and/or interest resulted from a party's omission of taxable income or claim of erroneous deductions. In such case, the portion of the tax, penalty, and/or interest relating to the omitted income or claims of erroneous deductions shall be paid by the party who earned the omitted income or proffered the claim for an erroneous deduction. The parties agree that nothing contained herein shall be construed as or is intended as a waiver of any rights that a party has under the "Innocent Spouse" provisions of the Internal Revenue Code.

Treatment/Allocation of Community Income for Year of Divorce.

IT IS ORDERED AND DECREED that, for the calendar year 1998, each party shall file an individual income tax return in accordance with the Internal Revenue Code and report as the party's income 50 percent of all predivorce community income or loss attributable to the parties, all postdivorce income attributable to the reporting party, and all the reporting party's separate income during any part of the year. Each party shall take credit for 50 percent of all prior year overpayments, estimated tax payments, and withholdings occurring before the date of divorce and for 100 percent of the reporting party's estimated tax payments and withholdings occurring after the date of divorce.

Allocation of Tax Liability for Year of Divorce.

[Method No. 1]

IT IS ORDERED AND DECREED that, for calendar year 1998, Husband shall timely pay and hold Wife and her property harmless from any liability of either party for federal income taxes for all income attributable to the parties, or either of them, during calendar year 1998, except for the following amount of tax, which Wife is ordered to pay: that amount of tax arrived at by independent calculation by multiplying Wife's taxable income (including only Wife's separate income before divorce, all income after divorce, deductions, exemptions, or adjustments attributable to her income after date of divorce) by the effective federal income tax rate as determined by dividing taxable income as reported on her 1998 U.S. Individual Income Tax Return into the tax as computed in the return. In making this computation, Wife shall be entitled to only those deductions, exemptions, or adjustments attributable to her after the date of divorce. The independent calculation shall credit against Wife's liability all income tax withheld from her earnings after the divorce is granted and all estimated tax payments made by her after that date, and any resulting overpayment shall belong to Wife. All other income tax withheld from earnings of Wife in the year of divorce and all other estimated tax payments made by the parties, or either of them, with respect to the year of divorce shall be credited to Husband for the purposes of this calculation.
IT IS ORDERED AND DECREED that for calendar year 1998, each party shall indemnify and hold the other party and his or her property harmless from any tax liability associated with the reporting party's individual tax return for that year unless the parties have agreed to allocate their tax liability in a manner different from that reflected on their returns.

[Method No. 2]

IT IS ORDERED AND DECREED that Husband shall timely pay and hold Wife and her property harmless from any tax liability attributable to Husband's income from the date of divorce until December 31 of that year. IT IS ORDERED AND DECREED that Wife shall timely pay and hold Husband and his property harmless from any tax liability attributable to Wife's income from the date of divorce until December 31 of that year. IT IS ORDERED AND DECREED that each party shall be solely entitled to use as a credit against his or her own tax liability for calendar year 1998 all prepayments and withholdings made by him or her after the date of divorce and all deductions, exemptions, and adjustments attributable to his or her income and expenses after the date of divorce. In this regard, IT IS ORDERED AND DECREED that Wife's tax liability shall be that amount arrived at by independent calculation that she would owe if she were filing a separate return for the entire year and reporting only the income earned or received by her from the date of divorce to December 31 of that year, and with only those deductions attributable to expenditures made by her from the date of divorce to December 31 of that year, with 100 percent of any statutory deduction available to her in lieu of itemizing her deductions and 100 percent of one full dependency exemption.

IT IS ORDERED AND DECREED that any portion of the income tax on Wife's return paid by Husband during this year shall be deemed part of Wife's share of the marital estate of the parties.

IT IS ORDERED AND DECREED that for calendar year 1998, each party shall indemnify and hold the other party and his or her property harmless from any tax liability associated with the reporting party's individual tax return for that year unless the parties have agreed to allocate their tax liability in a manner different from that reflected on their returns.

[Method No. 3]

IT IS ORDERED AND DECREED that, for the calendar year 1998, each party shall timely pay and indemnify and hold the other party and his or her property harmless from any federal income tax liability attributable to the personal earnings of the reporting party and any net income resulting from property subject to the sole management and control of the reporting party from January 1 of that year through the date of divorce and for all such postdivorce earnings and income.

IT IS ORDERED AND DECREED that each party shall be entitled to use as a credit against his or her tax liability all estimated tax payments, credit for tax payments made in prior years, and withholdings made solely in the name of the reporting party and 50 percent of such estimated tax payments, credit for tax payments, and withholdings made in the names of both parties before the date of divorce together with any net loss resulting from property subject to the sole management and control of the reporting party and 50 percent of any net loss attributable to property subject to the joint management of the parties.

IT IS ORDERED AND DECREED that for calendar year 1998, each party shall indemnify and hold the other party and his or her property harmless from any tax liability associated with the reporting party's individual tax return for that year unless the parties have agreed to allocate their tax liability in a manner different from that reflected on their returns.

**Furnishing Information**

IT IS ORDERED AND DECREED that each party shall furnish such information to the other party as is requested to prepare federal income tax returns for 1998 within thirty days of receipt of a written request for the information, and in no event shall the available information be exchanged later than March.
Preparation of Returns

IT IS ORDERED AND DECREED that each party shall pay for the preparation of his or her return for 1998.

Refunds

IT IS ORDERED AND DECREED that if a refund is made for overpayment of taxes for any year during the parties' marriage through December 31 of 1997, each party shall be entitled to one-half of the refund, and the party receiving the refund check is designated a constructive trustee for the benefit of the other party, to the extent of one-half of the total amount of the refund, and shall pay to the other party one-half of the total amount of the refund check within five days of receipt of the refund check. Either party is ORDERED to endorse a refund check on presentation by the other party.

Preservation of Information

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

Tax Provisions Part of Property Division

IT IS ORDERED AND DECREED that all payments made to the other party in accordance with the allocation provisions for payment of federal income taxes contained in this Decree of Divorce are not deemed income to the party receiving those payments but are part of the property division and necessary for a just and right division of the parties' estate.

Sections 66(a) & 879(a) Allocations (Living Apart With No Exchange Of Income)

The Court finds that the parties have lived apart at all times during the calendar year of 1998, that Husband and have earned income that is community income during that calendar year, and that there have been no transfers of earned income between them from January 1, 1998, through the date of divorce. IT IS ORDERED AND DECREED that each party file an individual income tax return in accordance with Internal Revenue Code sections 66(a) and 879(a) for the entire year ending December 31, 1998.

IT IS ORDERED AND DECREED that the parties' income shall be reported and allocated in accordance with the Internal Revenue Code. IT IS ORDERED AND DECREED that each party shall be solely liable for the tax liability shown on his or her return and shall timely pay and hold the other party and his or her property harmless from any liability of the reporting party for federal income taxes for calendar year 1998.

IT IS ORDERED AND DECREED that each party shall use as a credit against his or her tax liability for 1998 all estimated tax payments and wage/salary withholding made by him or her, 50 percent of the parties' prior year overpayments and credits, and 50 percent of the estimated payments made in the names of both parties.

IT IS ORDERED AND DECREED that, if the Internal Revenue Service disallows filing in accordance with sections 66(a) and 879(a), each party shall file an individual income tax return in accordance with the Internal Revenue Code and report as the party's income 50 percent of all predivorce community income or loss attributable to the parties, all postdivorce income attributable to the reporting party, and all the reporting party's separate income during any part of the year. Each party shall take
credit for 50 percent of all prior year overpayments, estimated tax payments, and withholdings occurring before the date of divorce and for 100 percent of the reporting party's estimated tax payments and withholdings occurring after the date of divorce. Allocation of tax liability will still be made in the same proportions as though the tax were calculated under section 66(a).

IT IS ORDERED AND DECREED that for calendar year 1998, each party shall indemnify and hold the other party and his or her property harmless from any tax liability associated with the reporting party's individual tax return for that year unless the parties have agreed to allocate their tax liability in a manner different from that reflected on their returns.
Appendix C – Innocent Spouse IRS Form

[NOT AVAILABLE ON DISKETTE]
UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT
OF TEXAS

IN RE:§

____________________________,§ Case No. __________________________
Debtor§

____________________________§

Plaintiff,§

v.§ Adversary Proceeding No. ____________

____________________________,§

Defendant.§

COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

TO THE HONORABLE BANKRUPTCY JUDGE:

_________________________________________ ("Plaintiff") respectfully represents:

1. This Complaint is filed in connection with Defendant's bankruptcy case under chapter ____ of title 11, Case No. _____________________________, now pending in this court. This court has jurisdiction over this complaint pursuant to 28 U.S.C. §§ 157(b)(2)(I) and 1334 and 11 U.S.C. § 523.

2. On ______________________, the District Court of Harris County, Texas, ________ Judicial District, signed a Final Decree of Divorce In the Matter of the Marriage of __________________________________ (the "Decree"), a copy of which is attached hereto as Exhibit "A," pursuant to which the court ordered Defendant to pay $______________________ to Plaintiff for _____________________________ (the "Debt").

3. The award of the Debt under the Decree is actually in the nature of support of Plaintiff and reflects a balancing of the financial needs of Plaintiff and Defendant due to the disparity in their earning power, relative business opportunities, probable future need for support, and educational background. Accordingly, the Debt is non-dischargeable pursuant to 11 U.S.C. § 523(a)(5).

4. Defendant's failure to pay the Debt to Plaintiff after written request by Plaintiff necessitated Plaintiff's hiring of the undersigned attorney and agreement to pay the undersigned attorney a reasonable fee. The reasonable fee for the services rendered and to be rendered in connection with this complaint is the sum of $______________.

WHEREFORE, Plaintiff prays that this court determine that the debt owed by the Defendant to Plaintiff is nondischargeable; that this court determine the remaining issues and render judgment for Plaintiff for the amount of its debt, plus interest and attorney's fees; and that Plaintiff have such other and further relief as is just.

Dated this _________ day of __________________, 199____.

Respectfully submitted,

Law Firm Name
By _________________________________
Attorney’s Name
TBA No. 00000000
Attorney’s Address
Houston, TX 77002
713/999-9999
713/999-9998 (Fax #)

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Complaint to Determine Dischargeability of Debt was forwarded by first-class United States mail, postage prepaid to the attorney for the debtor, _________________________________ at _________________________________, Houston, Texas, 770___ on the _______ day of ________________, 199__.

______________________________
Attorney
The complaint of _____________________ ("Plaintiff"), seeking determination of the dischargeability of the debt owed by ____________________________ ("Defendant") to Plaintiff, having been tried on ________, 19___; it is

ORDERED, ADJUDGED, AND DECREED that the debt of Defendant to Plaintiff in the amount of $_________________, plus interest and attorney's fees in the amount of $_________________ is hereby determined to be nondischargeable. It is further

ORDERED, ADJUDGED AND DECREED that Plaintiff do have judgment for $____________________ against Defendant together with interest from the date of this judgment.

Dated this _____ day of __________________, 199__.
TO THE HONORABLE BANKRUPTCY JUDGE:

NOW COMES, ________________________________ ("Movant"), and file this Motion For Relief From Stay To Permit Prosecution of Pending Divorce Action against ________________________________ ("Respondent"), and would show the court the following:

1. This motion is filed pursuant to § 362(d) of the Bankruptcy Code to modify the automatic stay in effect pursuant to the Respondent's bankruptcy petition filed under Chapter ____ of the Bankruptcy Code on ___________________ (the "Petition Date"), which case has been assigned case no. ______________________, so that Movant may prosecute a divorce action.

2. This court has jurisdiction over this motion pursuant to 28 U.S.C.A. §§ 157(b)(2)(G) and 1334(b).

3. On ___________________, Movant initiated a divorce action against Respondent in the District Court of Harris County, Texas, Judicial District _________ under case number ____________________ (the "Lawsuit").

4. The Lawsuit was pending on the Petition Date and is now pending.

5. Movant request relief from the automatic stay for cause pursuant to 11 U.S.C. §362(d)(1) so that Movants may continue to prosecute the Lawsuit and obtain an order of the state court terminating the marriage between Movant and Respondent and determining a just and right division of property between the parties. The Movant acknowledges that the just and right division of property between the parties will be subject to further orders of this court.

6. Prosecution of the Lawsuit will not hinder, burden, delay, or be inconsistent with this case.

WHEREFORE, PREMISES CONSIDERED, the Movants pray for an order modifying the automatic stay to permit the Movant to obtain an order of the state court terminating the marriage between Movant and Respondent and determining a just and right division of property between the parties and granting such other and further relief as is just and proper.

Respectfully submitted,
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion for Relief from Stay was forwarded by first-class United States mail, postage prepaid to the United States Trustee, and to all parties-in-interest at the addresses reflected on the attached service list, on the _____ day of ________________, 199___.

__________________________
Attorney
UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT
OF TEXAS

IN RE:§

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CASE NO. ____________________

Movant,§

§

V. §

§

§

§

Respondent§

ORDER MODIFYING STAY TO PERMIT
PROSECUTION OF PENDING SUIT

The motion of _______________________ ("Movant") to modify the stay afforded by 11 U.S.C. §362 to permit the prosecution of a divorce action against Respondent in the District Court of Harris County, Texas, Judicial District __________ under case number ________________ (the "Lawsuit"), and after hearing the evidence and arguments of counsel, the court finds that cause exists for relief from the stay in this case and that Movant should be permitted to prosecute the Lawsuit, it is accordingly,

ORDERED that Movant be, and hereby is, authorized to prosecute the Lawsuit and obtain an order of the state court terminating the marriage between Movant and Respondent and determining a just and right division of property between the parties; provided, however, the just and right division of property between the parties will be subject to further orders of this court; It is further,

ORDERED that the stay afforded by 11 U.S.C. §362 be, and it hereby is, modified to that extent.

DATED:

BANKRUPTCY JUDGE