

**ECONOMIC TORTS:  
PROVING WASTE & FRAUD FOR  
A DISPROPORTIONATE DIVISION**

**Bruce D. Bain**

Bain, Files, Jarrett,  
Bain & Harrison, P.C.

109 West Ferguson  
Tyler, Texas 75702

903-595-3573

Fax 903-597-7322

[bbain@bain-files.com](mailto:bbain@bain-files.com)

[www.bain-files.com](http://www.bain-files.com)

**STATE BAR OF TEXAS  
MARRIAGE DISSOLUTION**

**April 17-18, 2008**

**Galveston, Texas**

**Chapter 17**

## **Bruce D. Bain**

---

Bain, Files, Jarrett, Bain & Harrison, P.C.  
109 W. Ferguson  
Tyler, Texas 75702  
(903) 595-3573  
(903) 597-7322 fax  
[bbain@bain-files.com](mailto:bbain@bain-files.com)

### **PERSONAL – *The important stuff first***

Married to Martha for 16 wonderful years and full time father of three boys as homework helper, diorama assistant, reader listener, video game time arbitrator with binding, unappealable authority, multi-sport assistant coach resulting in great memories.

### **AREAS OF PRACTICE**

Complex divorces and child custody cases. Protection of separate property and pursuit of reimbursement and/or economic contribution claims through tracing. Grandparent and third party conservatorship claims. Interstate custody conflicts and international compacts.

### **LECTURER & AUTHOR**

Ethics: Paralegal and You – SBOT Marriage Dissolution Boot Camp – 2007  
Economic Contribution and Valuation – Texas College for Judicial Studies - 2007  
Post Judgment Issues – SBOT Ultimate Trial Notebook: Family Law – 2006  
Motions in Limine – SBOT Family Law Basic Training – 2005  
New Grievance Procedures – Smith County Bar Assoc. - 2004  
When Disaster Strikes – SBOT Advanced Family Law 2003  
Recent Cases and Legislation - Smith County Bar Assoc., Family Law Section – 2002, 2003  
Current Issues in Family Law – Tyler Area Association of Legal Professionals - 2003  
Texas Private Schools: Family Law Issues and School Responsibility - 2002  
Economic Contribution – Smith County Bar Assoc. - 2002  
Economic Contribution – Texas Panhandle Family Law Assoc. - 2002  
Modification of Custody – SBOT – Pro Bono Project - 2001  
The New Discovery Rules – Smith County Bar Assoc. - 1998

### **PROFESSIONAL ASSOCIATIONS**

Board Certified – Family Law – Texas Board of Legal Specialization - 2001- present  
Texas Academy Family Law Specialists – Member (Prior Board of Director)  
Texas Pattern Jury Charge – Family 2001- current  
SBOT – Family Law Practice Manual Committee – 2006 - current  
SBOT Grievance Committee – District 2A - 2003 – current (past Chairman)  
Unauthorized Practice of Law Committee – Texas Supreme Court – 2001 - current  
Smith County Bar Association – President 2005-2006; Vice President 2004-2005; Secretary 2002-2003; Director 2001-2002  
Smith County Bar Foundation – President 2007-2008; Director, 2005-2007

### **EDUCATION & ACCOLADES**

South Texas College of Law – J.D.; University of Mississippi – B.B.A.  
Smith County Bar Association – Young Lawyer of the Year – 2004  
BScene Magazine – Best Family Law Lawyer in East Texas - Fall, 2006

# Table of Contents

I.	INTRODUCTION .....	1
II.	BIG PICTURE MULLINGS.....	1
	A. Variety of Resources.....	1
	B. Fee Contract(s).....	1
III.	FIDUCIARY AND ECONOMIC TORTS IN FAMILY LAW.....	2
IV.	BREACH OF FIDUCIARY DUTY - CLAIMS, CAUSES AND REMEDIES .....	2
	A. Fiduciary Duties Between Spouses.....	2
	1. Fiduciary duty between spouses .....	2
	2. Good faith and fair dealing .....	2
	3. Confidential relationship.....	2
	4. Fraud on the community .....	3
	B. Inception and duration of fiduciary duty .....	3
	1. Fiduciary duty before marriage.....	3
	2. Pre and post marital agreements .....	3
	3. Fiduciary duty ends during contested proceeding.....	4
	4. Fiduciary duty terminates on divorce .....	4
	5. Fiduciary duty did not expire on divorce .....	4
	C. Management of Property .....	4
	1. Management and control of joint and community property .....	4
	2. Transfer of Joint community property .....	5
	3. Separate property and special community property.....	5
	4. Transfer of special community property .....	5
	5. Management rights and the Trust Fund Doctrine .....	5
	D. Statute of Limitations for Breach of Fiduciary Duty .....	6
	1. Statute of limitations .....	6
	2. Commencement of statute of limitations .....	7
	E. Claims and Remedies for Breach of Fiduciary Duty Against Third Parties .....	7
	1. Claims against third parties.....	7
	2. A third party who knowingly participates in the breach of a fiduciary duty may be liable .....	7
	3. Conveyance of community as legal fraud.....	8
	4. Proof required .....	8
	5. Intent to defraud known.....	8
	6. Constructive trust.....	8
	7. Money judgments against third parties.....	8
V.	COMMON LAW FRAUD.....	8
	A. Fraud Generally.....	8
	B. Actual Fraud.....	9
	1. Definition .....	9
	2. Intent to harm.....	9
	3. Fraud on the property.....	9
	4. Fraud on the person.....	9
	5. Elements for proof of actual fraud .....	9
	6. Misrepresentation.....	10
	7. Burden of proof.....	10
	8. Suits between spouses regarding separate property .....	10

9. Third parties jointly and severally liable .....	10
C. Constructive Fraud .....	10
1. Constructive fraud.....	10
2. Based on fiduciary duty .....	10
3. Intent to deceive not required .....	10
4. Disposal of other spouse's interest in community property .....	11
5. Presumption of constructive fraud .....	11
6. Burden of proof.....	11
7. Moderate gifts to third parties.....	11
8. Capricious or excessive gifts .....	11
9. Factors considered by the Court .....	11
10. Cases involving constructive fraud.....	11
D. Remedies Available for Fraudulent Conduct.....	14
1. Disproportionate division of community estates .....	14
2. Recovery by injured spouse .....	14
3. Money judgment is viable remedy.....	14
4. Amount of money judgment .....	14
5. Owelty can equalize awards.....	14
6. Evidence should be presented.....	14
7. Constructive trust remedy available.....	14
8. Resulting trusts .....	15
9. Texas Uniform Fraudulent Transfer Act.....	16
10. Election of remedies .....	17
11. Punitive damages.....	17
VI. <i>SCHLUETER V. SCHLUETER</i> - NO INDEPENDENT CAUSE OF ACTION BETWEEN SPOUSES FOR DAMAGES TO THE COMMUNITY ESTATE.....	17
A. No separate cause of action for fraud on the community estate .....	17
B. "Just and right" property division .....	18
C. Division of marital estate in "just and right" manner.....	18
D. "Fraud on the community" damages.....	18
E. Fraud on the community not abolished.....	18
F. Actual fraud regarding separate estates .....	18
G. Personal injury tort claims .....	18
H. Money judgment is available.....	18
I. Money judgment for fraud on the community estate.....	18
J. Amount of money judgment. ....	18
K. Waste of community assets considered .....	19
L. No punitive damages allowed.....	19
M. The Effect of <i>Schlueter</i> .....	19
N. Then along came <i>Vickery v. Vickery</i> .....	19
1. Jury award upheld.....	19
2. Dissent's view .....	20
VII. DAUBERT AND "EXPERTS" ON FIDUCIARIES .....	20
A. Threshold Question .....	20
B. Questions of law .....	20
VIII. CONCLUSION .....	20

# ECONOMIC TORTS: PROVING WASTE & FRAUD FOR A DISPROPORTIONATE DIVISION

## I. INTRODUCTION

This paper will discuss the various claims and defenses spouses may assert against each other in the divorce context. It will briefly review how we arrived at our current status as well as provide a fair summary of prior cases on specific claims that will jump start your critical thinking for your client's best interest.

The paper is not intended to cover the separate claims or causes of action future or former spouses may have against each other outside the marriage context, although there are several cases of interest included.

I endeavored to provide you with a practical review of the claims that may be asserted, how to evaluate each claim or defense as well as its presentment in the courtroom. As such, the paper does not have a separate section for courtroom presentation issues, but presentment is discussed within each section for each specific claim or defense.

My sincere appreciation to John Nichols, Sr., for his gracious kind heartedness in allowing me to utilize his prior hard work as the basis for this paper.

## II. BIG PICTURE MULLINGS

When considering the wrongful conduct of the opposing spouse within a divorce context, the essential character of the wrong needs to be reviewed. A spouse's disposal of the property (either by the wasting of it - in any number of manners - or providing the property to a third party) is a deprivation of the community asset, and therefore a depletion of the community estate, to which the general remedy is a disproportionate division of the community estate.

On the other hand, conduct against the spouse as a person or against the spouses' separate property sounds in a tort action and the general remedy is damages caused by the conduct. Where the tort lies – against who or what – is the deciding factor.

## A. Variety of Resources

Always remember that a divorce is a civil suit between two parties – albeit spouses. And as a civil suit, the rules of procedure, the rules of evidence and the conduct of the litigation mirror almost exactly any other civil suit. The tort claims between spouses are not like child custody matters which are, by their nature, unique to the family law arena and have no other substantially similar claims in other legal arenas. The tort claims between spouses are more like the marital estate's characterization issues in that the probate courts provide a fair amount of law and legal analysis in interpreting the spouses' legal positions and remedies.

Therefore, when there is a tort between spouses, that particular claim just happens to fall within the divorce context and you should view the divorce court as being a jurisdictional determination only. The court is fixed, the claims are open.

So do not limit your review of appropriate legal analysis to the divorce context only but view other cases between any other 'regular' non-related litigants to properly evaluate the tort claim. Review personal injury cases, look at trust issue cases, consider fiduciary cases, and reread your old law school Tort text book to determine what you may assert, how to plead, the evidence needed, the defenses available and the remedies obtainable.

In a nutshell, don't become myopic in the family law court setting in researching and proving or defending your client's claims.

This variety should include the multiple volumes of the Texas Pattern Jury Charge. Recall, there are other versions beside family law. There are *General Negligence & Intentional Personal Torts*; *Malpractice, Premises & Products*; and *Business, Consumer, Insurance & Employment*. And an added benefit that the good people at the State Bar of Texas through its Texas Bar Books Department has included within the *Texas Pattern Jury Charge – Family* are the indices (as an appendix) of all the other Pattern Jury Charge volumes to assist you in determining what may be helpful in your preparation of your client's case.

## B. Fee Contract(s)

Recall that in Texas, family law matters cannot be handled on a contingency basis. TEX. DISCIPLINARY R. PROF. CONDUCT 1.04, and comment 9. But also in Texas, written

contingency contracts are allowed for other matters, such as tort claims. *Id.* If during the representation of your client an appropriate tort claim arises, and it is asserted within the divorce context, have a clear written demarcation on how the fees are to be determined and / or paid.

A separate fee contract for the tort claim is appropriate, but you must ensure that differentiation is made on the billing statements for the work performed for the divorce and for the tort. This segregation of fees is no different than one encounters on an enforcement action or a custody matter where attorney fees are specifically mandated, if distinguished from other work performed.

### III. FIDUCIARY AND ECONOMIC TORTS IN FAMILY LAW.

The breach of a fiduciary duty is a tort. *Douglas v. Aztec Pet. Corp.*, 695 S.W.2d 312, 318 (Tex. App.-Tyler 1985, no writ); see *Crutcher-Rolft-Cummings, Inc. v. Ballard*, 540 SW2d 380, 388 (Tex. App.-Corpus Christi 1976, writ refd n.r.e.); O'Connor's, *Texas Causes of Action*, Chapter 10 -*Fiduciary Duty*, §1 General, p. 215 (2005).

With the abolition of inter-spousal immunity by the Texas Supreme Court as to willful and intentional torts in *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1977) and as to any cause of action in *Price v. Price*, 732 S.W.2d 316 (Tex. 1987), doors were opened to the family courts to try tort causes of action with a divorce. When a tort is tried with the divorce, the court must avoid awarding a double recovery. *Twyman v. Twyman*, 855 SW2d 619 (Tex. 1993). A spouse may not be allowed to recover tort damages and a disproportionate division of the community estate based on the same conduct. *Id.*; *Toles v. Toles*, 45 SW3d 252 (Tex. App.-Dallas 2001); West's, *Texas Practice Guide Family Law: Torts*, Chapter 16 (2003).

It has been opined that "creative and inventive theories of recovery" abound for what are termed "economic torts" committed against a community estate. See, *Sprick v. Sprick*, 25 S.W.3d 7, 14-15 (Tex. App.-El Paso 1999, pet. denied) (McClure, Jr., concurring). Such economic torts range from waste, depletion of assets, the community opportunity doctrine and its inverse partner, the community jeopardy doctrine, to the generic tort of fraud, which encompasses a number of varieties such as breach of fiduciary duty, fraudulent conveyance,

excessive gifts to children, and community funds expended on paramours, among other. See, *Id.*, at 15.

## IV. BREACH OF FIDUCIARY DUTY - CLAIMS, CAUSES AND REMEDIES

### A. Fiduciary Duties Between Spouses

#### 1. Fiduciary duty between spouses

The relationship that exists between a husband and a wife has been held to create a fiduciary duty, requiring the duty of utmost good faith. *Matter of Marriage of Moore*, 890 S.W.2d 821, 827 (Tex. App.- Amarillo 1994, no writ); *Matter of Marriage of De Vine*, 869 S.W.2d 415, 428 (Tex. App.-Amarillo 1993, writ denied); *In re Marriage of Moore*, 890 S.W.2d 821, 827 (Tex. App. Amarillo 1994, no writ); see also, *Sprick*, 25 S.W.3d, at 15 (McClure, J., concurring) (because of the confidential relationship between a husband wife, the marital partnership is fiduciary in nature). As expressed by *Texas Pattern Jury Charge Family*, PJC 206.1 (2008).

A relationship of confidence and trust exists between a husband and wife with regard to that portion of the community property that each controls. This relationship requires that the spouses use the utmost good faith and frankness in their dealings with each other.

Because of the nature of the spousal relationship, conduct of a spouse affecting the property rights of the other spouse may be fraudulent even though identical conduct would not be fraudulent between non-spouses. See also, *Restatement (Second) of Torts* §551 (in most states, a marriage creates a relationship of trust and confidence between the spouses, requiring the utmost good faith in their dealing with each other.)

#### 2. Good faith and fair dealing

The term "fiduciary" contemplates good faith and fair dealing. The term includes informal relations which exist whenever one party trusts and relies on another. The origin of the confidence may be moral, social, domestic, or personal. *Texas Bank and Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980).

#### 3. Confidential relationship

Texas recognizes that a confidential relationship exists between spouses. Spouses have a particular relationship of trust and confidence requiring good faith and fair dealing as to the community property managed or controlled by each. *Carnes v. Meador*, 533 S.W.2d 365 (Tex. Civ. App.-Dallas 1975, writ ref'd n.r.e.); *Spruill v. Spruill*, 624 S. W.2d 694 (Tex. App.-EI Paso 1981, writ dismissed). Because of the nature of the spousal relationship, conduct of a spouse affecting the property rights of the other spouse may be fraudulent even though identical conduct would not be fraudulent as between other persons. See, State Bar of Texas, *Texas Pattern Jury Charges-Family* PJC 206.1 (2008).

#### 4. Fraud on the community

The breach of a legal or equitable duty which violates the fiduciary relationship existing between spouses is termed "fraud on the community," a judicially created concept based on the theory of constructive fraud. *In re Estate of Herring*, 970 S.W.2d 583, 586 (Tex. App.-Corpus Christi 1998, no writ); *Zieba v. Martin*, 928 S.W.2d 782, 789 (Tex. App.-Houston [14th Dist.] 1996, no writ); *Jackson v. Smith*, 703 S.W.2d 791 (Tex. App.-Dallas 1985, no writ).

### **B. Inception and duration of fiduciary duty**

Texas law is conflicting regarding the duration of the fiduciary duty between spouses. Reported cases speak in terms of the formal fiduciary relationship (as a matter of law) but do not state that a fact based informal fiduciary relationship can not exist.

#### 1. Fiduciary duty before marriage

An informal fiduciary relationship and duty may arise before marriage. *Andrews v. Andrews*, 677 S.W.2d 171, 174 (Tex. App.-Austin 1984, no writ) (a fiduciary duty was held to have existed between a couple who had been living together for several years and had agreed to purchase a house together to use as their marital residence; even though the conduct occurred prior to marriage, it was held that the nature of the premarital circumstances created a fiduciary relationship). On a different but interesting note, see also, *Jenkins v. Jenkins*, 2001 W.L. 507221 (Tex. App.-Dallas 2001, pet. denied) [unpublished opinion] - in her petition, wife alleged husband breached his fiduciary duty

owed to wife by representing himself to be a heterosexual, marrying wife, insisting she have children, then declaring himself to be a homosexual and leaving her. In his motion for summary judgment, husband argued that his alleged conduct does not constitute a breach of fiduciary duty, as a matter of law. In the alternative, husband argued there was no evidence to support the essential elements of a claim for breach of fiduciary duty, that is, the existence of a duty, and a breach of the duty, and damages caused by the breach. Considering the wife's allegations in her summary judgment evidence, the court concluded that no fiduciary duty existed between the parties prior to marriage that required husband to reveal any internal conflict he might have experienced. No fiduciary duty, answerable in tort damages, exists between spouses to remain married. The fiduciary duty that partners owe to one another does not encompass a duty to remain partners or answer in tort damages. Because no duty existed, the trial court properly rendered summary judgment in husband's favor on wife's claims for breach of fiduciary duty.

#### 2. Pre and post marital agreements

It has been stated that the fiduciary duty does not exist as a matter of law between persons about to marry with respect to premarital agreements, although it does exist in the context of post-marital agreements. *Marsh v. Marsh*, 949 S.W.2d 734 (Tex. App.-Houston [14th Dist] 1997, no writ). *In the Matter of the Marriage of Smith*, 115 S.W.3d 126 (Tex. App.-Texarkana 2003, pet. denied) after 29 years of marriage husband and wife entered into a Separation and Partition Agreement. Twenty years later [after 49 years of marriage] the husband filed for a petition for divorce. At issue was a broadly-worded residual clause in the Partition Agreement which mandated award of all of the retirement benefits of husband to him. The court noted that because of the confidential relationship between a husband and wife, Texas courts have closely scrutinized property agreements made by spouses during marriage and have imposed the same duties of good faith and fair dealing on spouses as required of partners and other fiduciaries. The court also noted that courts will not protect a party who knowingly enters into a lawful but improvident contract. The fact that a bargain is a hard one does not entitle a party to be relieved there from if he or she assumed it fairly and

voluntarily. The record indicated that for approximately twenty years neither party took the position that the Agreement was unconscionable. Additionally, during those twenty years both parties accepted the benefits of the agreement without complaint of unconscionability.

### 3. Fiduciary duty ends during contested proceeding

The Fort Worth Court of Appeals has held that the fiduciary duty between a husband and wife does not continue when a divorce is filed and both sides are represented by independent counsel. *Parker v. Parker*, 897 S.W.2d 918, 924 (Tex. App.-Fort Worth 1995, writ denied); *Bass v. Bass*, 790 S.W.2d 113, 119 (Tex. App.Fort Worth 1990, no writ); but see *Faram v. Gervitz-Faram*, 895 S.W.2d 839, 844 (Tex. App. Fort Worth 1995, no writ) (waste occurred by acquiring property, incurring debt, and escalating attorneys fees after separation).

But see however, *Boyd v. Boyd*, 67 S.W. 3d 398 (Tex. App.-Fort Worth 2002) wherein the wife filed for divorce and the parties entered into a mediated settlement agreement that wife later rejected. The trial court held that the mediated settlement agreement was unenforceable and signed a divorce decree after a trial on the property issues. The failure of the husband to disclose his bonus in the mediated settlement agreement rendered it unenforceable. Where a person is under a duty to disclose material information and refrains in doing so and thereby leads another to contract in reliance on a mistaken understanding of the facts, the resulting contract is subject to rescission due to the potential nondisclosure. There is a duty to speak that arises from the fiduciary or confidential relationship or where a person is by force of circumstances under a duty to speak. The fiduciary duty arising from their marriage relationship is not continued when a husband and wife each hire independent professional counsel to represent them in a contested divorce proceeding. Nonetheless, a duty to speak exists where, as here, the parties to a mediated settlement agreement have represented to one another that they have each disclosed the marital property known to them. When one voluntarily discloses information, he has a duty to disclose the whole truth rather than making a partial disclosure that conveys a false impression.

### 4. Fiduciary duty terminates on divorce

The Texarkana Court of Appeals has held that the fiduciary duty between spouses terminates upon divorce. *Grossnickle v. Grossnickle*, 935 S.W.2d 830, 846 (Tex. App.-Texarkana 1996, writ denied). In *In the Matter of the Marriage of Natash*, 118 S.W.3d 868 (Tex. App.Texarkana 2003) ex-husband appealed decision from family district court dividing the parties' community property and a finding of breach of fiduciary duty against him in connection with a Motion to Modify a previously granted foreign [Iranian] divorce decree. The Court held that the ex-husband did not owe the ex-wife a fiduciary duty based on their marital relationship *after their divorce* and that the evidence was legally insufficient to support a breach of fiduciary duty, or fraud on the community during the marriage. The court further held that when the trial court failed to divide property at the time of the divorce, the ex-spouses became tenants-in-common as to the ownership of the property and no fiduciary or agency relationship exists between co-tenants, or tenants-in-common in the absence of an agreement or contract providing for such. The court concluded that the husband did not owe the wife a fiduciary duty based solely on their relationship as co-tenants.

### 5. Fiduciary duty did not expire on divorce

The Dallas Court of Appeals held that the fiduciary duty did not expire upon the filing of the divorce where the wife sued the husband several years after the divorce to rescind the shareholders agreement she signed during the separation of the parties. *Miller v. Miller*, 700 S.W.2d 941 (Tex. App.-Dallas 1985, writ refiled n.r.e.). Here the court applied a "special facts" relationship to impose a fiduciary duty. *Practice Note*: The subsequent actual receipt by the non-owning party of property awarded to the owner in a decree of divorce or annulment creates a fiduciary obligation in favor of the owner and imposes a constructive trust on the property for the benefit of the owner. *Tex. Fam. Code* §9.011 (2007).

## C. Management of Property

See additional cases under Section VI. C. 10. (e), below.

### 1. Management and control of joint and community property

Texas law requires both the husband and wife to join in the management, control, and disposition of joint community property unless the parties otherwise agree. *TEX. FAM. CODE ANN.* §3.102(c).

2. Transfer of Joint community property

A court will declare void a transfer if the alleging spouse proves only that an asset was joint community property and that he or she did not join in its transfer. The transferor spouse then bears the burden to show why the court should affirm the transaction. *Dalton v. Don Jackson, Inc.*, 691 S.W.2d 765 (Tex. App.-Austin 1985, no writ).

3. Separate property and special community property

During marriage, each spouse has the right to sole management and control of:

(1) his or her separate property; and

(2) his or her "special" community property that the spouse would have owned if single, including personal earnings, revenue from separate property, recoveries for personal injuries, and the increase and mutations of, and the revenue from all property subject to his or her sole management, control and disposition. *Tex. Fam. Code Ann.* § 3.102(a).

4. Transfer of special community property

In the absence of fraud, each spouse may transfer his or her special community property without the approval of the other spouse, though both spouses have an undivided one-half interest in that property. *Massey v. Massey*, 807 S.W.2d 391, 401 (Tex.App.-Houston [1st Dist.] 1991, writ denied), 867 S.W.2d 766 (Tex. 1993) (*per curiam*); *Mazique v. Mazique*, 742 S.W.2d 805,807 (Tex. App.-Houston [1st Dis1.] 1987, no writ).

5. Management rights and the Trust Fund Doctrine

Management rights are limited by the fiduciary obligation created by the existence of the marital relationship. A trust relationship exists between a husband and wife as to the community property controlled by each spouse, and the managing spouse becomes a fiduciary to the other spouse in the management and disposition of special community property. The managing spouse has a duty not to dispose, transfer or diminish the special community under

his or her control in fraud of the other spouse's ownership rights to that property. See *Carnes v. Meador*, 533 S.W.2d 365, 370 (Tex. Civ. App.-Dallas 1975, writ ref'd n.r.e.); *Matter of Marriage of Moore*, 890 S.W.2d 821 (Tex. App.-Amarillo 1994, no writ); *Fanning v. Fanning*, 828 S.W.2d 135 (Tex. App.-Waco 1992), aff'd in part, rev'd in part on other grounds, 847 S.W.2d 225 (Tex. 1993).

However, see *Cleaver v. Cleaver*, 935 S.W.2d491 (Tex. App.- Tyler 1996) where the wife filed a divorce action and husband countersued. The trial court entered a divorce decree and husband appealed. The court held that wife's interest as beneficiary in a trust was her separate property since her interest was established before her marriage and was conveyed by gift or devise. The court further held that the interest held by a partnership in which the trust was a member was not part of the community estate. The earnings of two corporations in which the trust was a stock holder was not community property and the interest earned on funds held in trust for the wife not timely distributed to the wife constituted community property. Additionally, the managing partner of the partnership did not have a fiduciary duty to wife and the husband to distribute partnership earnings to the trust. The husband lacks standing to bring a shareholder derivative action against the corporations on the basis that the corporation was required to disburse earnings and dividends.

Finally the court held that the trustee did not breach any fiduciary duty to the trustee to trust beneficiary or the beneficiary's husband by serving concurrently as controlling corporate board member that decided that corporate earnings were not to be distributed to the trust. As to the partner's decision that partnership earnings would be retained by the partnership, the husband contended that by the nature of the partnership relationship, income passes through the partners as it is earned and may not be retained by the partnership. The court disagreed.

Partnership management may withhold earnings. Here, the partner controlled all of the partnership interest individually and as trustee. He was the managing partner. He had the exclusive authority to determine the amount of the partnership earnings that should be distributed. No cause of action may be asserted against a managing partner absent of breach of trust or fiduciary duty to another partner as by converting partnership assets to his own use. A

fiduciary duty arose in favor of husband and wife because they were not members of the partnership.

The court also held that the husband lacks standing to bring a shareholder derivative action against the corporations on the basis that the corporation was required to disburse earnings as dividends. The court noted that a similar rationale applied to corporate management decisions. The claim that corporate dividends had been suppressed implies a breach of duty by the management to the corporation itself not to the shareholders. It is established that corporate management may invest company earnings and corporate assets rather than distributing those earnings to shareholders.

Texas Business Corporation Act does not empower even stockholders to participate in or to control, the management of the corporation; that is the province of the managing board. Under the "business judgment" rule, alleged unwise, inexpedient, negligent or other imprudent decisions or conduct will not sustain a suit against the management of a corporation by the shareholders. *Of particular note is that the court held that no fiduciary duty existed between the husband and wife as to the handling of the Wife's separate estate as distinguished from the spouses' community property.* But see the "Trust Fund Doctrine" which stands for the proposition that if the managing spouse is in fact handling both community property and the other spouse's separate property, then the managing spouse has the burden of producing records and tracing the community portion. If he fails to meet his burden, then under the trust principles announced in *Farrow v. Farrow*, 238 S.W.2d 255 (Tex. Civ. App. - Austin 1951, no writ), and *Sibley v. Sibley*, 286 S.W. 2d 659 (Tex. Civ. App. - Dallas 1955, writ dismissed), the interests of the managing spouse in the community are lost and the mixture becomes the other spouse's separate property.

Consider that the court in *Farrow v. Farrow*, 238 S.W.2d 255 (Tex. Civ. App. Austin 1951, no writ) applied the trust fund doctrine to the tracing or commingling of community and separate funds in a marriage, and determined that:

(1) if a man mixes trust funds with his own, the whole will be treated as trust property, except so far as he may be able to distinguish what is his own; and

(2) an owner who wrongfully permits the property of another to become so intermingled and confused with his own property as to render

impossible the identification of either, is under the burden of disclosing such facts as will ensure a fair division, and if he fails or refuses to do so, the combined property or its value will be awarded to the injured party .

Under *Sibley v. Sibley*, 286 S.W.2d 657, 659 (Tex. Civ. App. - Dallas 1955, writ dismissed), the application of the trust fund doctrine in a divorce case means that "the trustee (husband) is presumed to have checked out his money first."

The primary concern in tracing cases applying the trust fund doctrine is to see that a wrongdoer does not prosper by his actions.

In *Andrews v. Brown*, 10 S.W.2d 707, 709 (Tex.Com.App., 1928) cited with approval in *Mooers v. Richardson Petroleum Company*, 146 Tex. 174, 204 S.W. 2d 606.1947, the following appears:

"If a man mixes trust funds with his own,' it is said, 'the whole will be treated as trust property, except so far as he may be able to distinguish what is his own.' \*\*\* That principal seems to have recognition in most if not all, American jurisdictions. \*\*\*

"Analogous doctrines are part of the law of accession and specification\*\*\*, and of confusion of goods\*\*\*. The principal, we apprehend, is but a part of the equity's declination to extricate the wrongdoer from self-imposed hard conditions, or to tax the innocent, where one or two not in pari delicto must suffer.'

Looking to another 'non-family' law source, in 9 TexJur. "*Title Confusion of Goods*," Sec. 2, we find this principal stated: "An owner who wrongfully permits the property of another to become so intermingled and confused with his own property as to render impossible the identification of either is under the burden of disclosing such facts as will insure a fair division, and he fails or refuses to do so, the combined property or its value will be awarded to the injured party. The rule applies where there has been an intermingling of cattle, community property or its value or what-not. There must be a willful or wrongful invasion of right in the order to induce the condign consequences of the forfeiture. This doctrine of the law has often been discussed, and it may be considered as having been clearly and distinctly settled."

#### **D. Statute of Limitations for Breach of Fiduciary Duty**

##### 1. Statute of limitations

The Corpus Christi Court of Appeals held that since a claim of fraud or misrepresentation ordinarily is a claim for a debt and, as such, is governed by a four year statute of limitations, and as a breach of fiduciary duty subsumes a claim of constructive fraud, a breach of fiduciary claim is also governed by a four year statute of limitations. *In re Estate of Herring*, 970 S.W.2d 583 (Tex. App.-Corpus Christi 1998, no pet.); Tex. Civ. Prac. & Rem. CodeAnn. § 16.051.

## 2. Commencement of statute of limitations

The statute of limitations does not commence to run until the fraud is discovered by the exercise of reasonable diligence. Further, when there has been a breach of fiduciary duty, the statute of limitations does not begin to run until the claimant knew or should have known of facts that in the exercise of reasonable diligence would have led to the discovery of the wrongful act. *Little v. Smith*, 943 S.W.2d 414, 420 (Tex. 1997); *In re Estate of Herring*, 970 S.W.2d 583 (Tex. App.-Corpus Christi 1998, no pet.); *Steinhagen v. Ehl*, 126 S.W.3d 623 (Tex. App.-Beaumont 2004) - the discovery rule defers the accrual of a cause of action until the Petitioner discovers or, in the exercise of reasonable diligence, should discover the nature of his or her injury. A cause of action accrues when the wrongful act causes some legal injury, even if the fact of the injury is not discovered until later, and even if all resulting damages have not yet occurred. The discovery rule is applied to a category of cases where the nature of the injury is inherently undiscoverable, and not to particular cases. In conversion cases, the general rule is that the statute of limitations begins to run at the time of the lawful taking, when the legal injury occurs. The "fraudulent concealment doctrine" may be pleaded as an avoidance of the accrual of the cause of action for conversion. However, the discovery rule and the fraudulent concealment doctrine are distinct concepts that exist for different reasons. See *Wagner & Brown, Limited LTD v. Horwood*, 58 S.W. 3d 732, 736 (Tex. 2001).

## E. Claims and Remedies for Breach of Fiduciary Duty Against Third Parties

See Section VI, D. 9, below for additional remedies against a third party through the Texas Uniform Fraudulent Transfer Act.

### 1. Claims against third parties

Claims against third parties may be joined in a suit for divorce. *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998).

### 2. A third party who knowingly participates in the breach of a fiduciary duty may be liable

A third party who knowingly participates in the breach of a fiduciary duty may be liable for that fraud. *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998); *Mayer v. Stewart*, 11 S.W.3d 440 (Tex. App.-Houston (14th Dist.) 2000, reh'g of pet. for review overruled); *Connell v. Connell*, 889 S.W.2d 534 (Tex. App.-San Antonio 1994, writ denied); *Osuna v. Quintana*, 993 S.W.2d 201 (Tex. App.-Corpus Christi 1999, no pet.); see also *In re Estate of Herring*, 970 S.W.2d 583 (Tex. App.-Corpus Christi 1998, no pet.). In *Mayer v. Stewart*, 11 S.W.3d 440 (Tex. App.-Houston [14<sup>th</sup> DisL] 2000, pet. denied) former wife brought action against former husband and former husband's friend for fraud, conspiracy and breach of fiduciary duty with regard to proceeds of a lottery ticket. The court of appeals observed that in other cases that a wife who had no knowledge of her former husband's ownership in certain property at the time of their divorce in which he had secretly conveyed in trust, would be allowed to establish her ownership in the property as against her former husband's second wife; that a third party who knowingly participates in the breach of fiduciary duty may also be liable for the unfair disposal of community property; and that a fact issue exists as to whether a wife had been fraudulently deprived of her rights and proceeds of an insurance policy purchased by husband with community funds in a suit against the wife's former mother-in-law and recovery for one-half of the proceeds.

In *Stevenson v. Koutzarov*, the court found a third party liable to husband for fraud. *Stevenson v. Koutzarov*, 795 S.W.2d 313 (Tex. App.-Houston [1st Dist.] 1990, writ denied). The third party sought reimbursement from husband for medical bills, furniture and cash advances on credit cards allegedly made for wife. *Id.*, at 322. The court found the hospital bills were in fact for the third party and the furniture was delivered to the third party's home. *Id.*, at 322. Also, the cash advances were deposited into the third party's personal account. *Id.*, at 322. The court found this evidence sufficient to support a finding of fraud against the third party. *Id.*, at 322.

### 3. Conveyance of community as legal fraud

A conveyance or disposition of community property may be a legal fraud even though there is an absence of intent. *Hartman v. Crain*, 398 S.W.2d 387 (Tex. Civ. App.-Houston 1966, no writ); *Osuna v. Quintana*, 993 S.W.2d 201 (Tex. App.-Corpus Christi 1999, no pet.).

### 4. Proof required

If a third party paid valuable consideration for an asset fraudulently conveyed during marriage, the complaining spouse must prove that the third party either colluded in the fraud on the community or had actual or constructive notice of the managing spouse's lack of authority to exchange the special community property asset in order to receive the remedy of constructive trust. *Tex. Fam. Code Ann. § 3.104(b)*; see *Thomas v. Casale*, 924 S.W.2d 433 (Tex. App.-Fort Worth 1996, writ denied). If an asset is transferred while a divorce is pending, the Family Code protects the third party from divestiture of his or her interest in the asset, and the alleging spouse bears the burden of proving that the third party had notice of the managing spouse's intent to injure the rights of the other spouse. *Tex. Fam. Code Ann. § 6.707*.

### 5. Intent to defraud known

A third party must repay community funds improperly expended for the third party's benefit if the person has the knowledge that the funds are community funds and is aware of a spouse's intent to defraud the non-transferor spouse. *Tex. Fam. Code Ann. § 6.707*; see *Thomas v. Casale*, 924 S.W.2d 433 (Tex. App.-Fort Worth 1996, writ denied).

### 6. Constructive trust.

When there is a gift to a third party, courts are willing to impose a constructive trust for the transferred asset. *Carnes v. Meador*, 533 S.W.2d 365 (Tex. Civ. App.-Dallas 1975, writ ref'd n.r.e.). This is consistent with the court's view that transfers of special community property without consideration are constructively fraudulent, and the burden of proof shifts to the conveying spouse to show that the transfer was not fraudulent. *Murphy v. Metropolitan Life Ins. Co.*, 498 S.W.2d 278, 282 (Tex. Civ. App.-Houston [14th Dist.] 1973, writ ref'd n.r.e.); *In re Marriage of DeVine*, 869 S.W.2d 415, 422 (Tex. App.-Amarillo 1993, writ. denied). However, in

*Wilkerson v. Wilkerson*, 992 S.W.2d 719 (Tex. App.-Austin 1999) the husband filed action for divorce, and the trial court, in entering the divorce decree, imposed a constructive trust and lien as to real property in favor of the former wife on which real property husband had signed a contract for deed and began making payments before marriage to his wife. The court held that the wife sought to avoid the consequences of her failure to prove reimbursement by advancing the equitable theory of constructive trust. The court noted that a constructive trust arises where a conveyance is induced on the agreement on a fiduciary or confidant to hold in trust for a reconveyance or other purpose. It is a well settled general rule that if one person obtains the legal title to property, not only by fraud, or by violation of confidence of fiduciary relations but any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of double ownership, equitable and legal, by impressing a constructive trust on the property in favor of the one who is good conscience and is entitled to it, and who is considered in equity as a beneficial owner. Wife's facts did not support constructive trust.

But consider that the subsequent actual receipt by the non-owning party of property awarded to the owner in a decree of divorce or annulment creates a fiduciary obligation in favor of the owner and imposes a constructive trust on the property for the benefit of the owner. *Tex. Fam. Code §9.011 (2007)*.

### 7. Money judgments against third parties

Judgments against third parties for participating in the fraud on the community are allowed. *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998); *Osuna v. Quintana*, 993 S.W.2d 201 (Tex. App.-Corpus Christi 1999, no writ) (joint and several judgment against husband and mistress upheld, which represented total community funds diverted by husband to mistress).

## V. COMMON LAW FRAUD

### A. Fraud Generally

Spouses are burdened with reciprocal fiduciary duties in the management, control and disposition of community property. There is also a fiduciary duty owed by one spouse to the other in the reasonable management and control of a

spouse's special community property. *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982); *Kruegar v. Williams*, supra; *Horlock v. Horlock*, supra; *Carnes v. Meador*, 533 S.W.2d 365 (Tex. App.-Dallas 1975, writ ref'd n.r.e.). A breach of fiduciary duty occurs when one spouse exercises the power of his special community property or over the community estate in excess, capricious or arbitrary manner, *Horlock v. Horlock*, supra. The fraudulent disposition of existing community property or fraudulent conduct in the acquisition of property can give rise to a breach of fiduciary duty or fraud, either actual or constructive. *Spruill v. Spruill*, 624 S.W.2d 694 (Tex. App.-El Paso 1981, writ dismissed); *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. App.-Houston [14th Dist.] 1975, writ dismissed). The right of one spouse to dispose of community property requires an absence of fraud, either actual or constructive. *Givens v. Gerard Life Ins. Co. of America*, 480 S.W.2d 421 (Tex. App.-Dallas 1972, writ ref'd n.r.e.). The burden is on the managing spouse to prove the disposition was not unfair to the rights of the other spouse. Constructive fraud is an equitable doctrine which does not require an intent to deceive. *Rafidi v. Rafidi*, 718 S.W.2d 43 (Tex. App.-Dallas 1986, no writ); *Archerv. Griffith*, 390 S.W.2d 735 (Tex. 1964). Rather, constructive fraud is characterized by deception, a violation of confidence or injury to the public interest. *Carnes v. Meador*, supra; *Matthews v. Matthews*, 725 S.W.2d 275 (Tex. App.-Houston [1st Dist.] 1986, writ ref'd n.r.e.).

No independent tort for actual or constructive fraud exists in a divorce context. The Schlueter Court relied on *In re Marriage of Moore*, 890 S.W.2d 821, (Tex. App. Amarillo 1994, no writ) when it concluded that the only course available to a wronged spouse is breach of fiduciary duty to the community estate, that is, an action for fraud on the community. The Court in Schlueter found the Court of Appeals correctly determined that no independent cause of action existed in Texas to recover separate damages when the wrongful act defrauded the community estate. *Id* at 829.

## B. Actual Fraud.

### 1. Definition

Actual fraud involves dishonesty of purpose or intent to deceive. *Land v. Marshall*, 426 S.W.2d 841 (Tex. 1968); *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. Civ. App.-Houston [14th

Dist.] 1975, writ dismissed w.o.j.) (the fact that husband intentionally deprived wife of knowledge of gifts of money to children of a prior marriage did not constitute actual fraud); *See*, State Bar of Texas, *Texas Pattern Jury Charges-Family* PJC 206.2A (2008).

### 2. Intent to harm

Actual fraud requires intent to harm by transferring or expending community property to deprive the other spouse of the use and enjoyment of the assets involved in the transaction. *Matter of Marriage of DeVine*, 869 S.W.2d 415, 421 (Tex. App.-Amarillo 1993, writ denied).

### 3. Fraud on the property

The Business Pattern Jury Charges, not the family law, set out all of the necessary questions, definitions and instructions for the submission of actual fraud on the property. *See* State Bar of Texas, *Texas Pattern Jury Charges-Business, Consumer, Insurance and Employment*, PJC 105.1, *et seq.*

### 4. Fraud on the person.

The concept and submission of "fraud on the person" took on new meaning in the case of *Vickery v. Vickery*, 999 S.W.2d 342 (Tex. 1999). Under special circumstances, as set out in the *Vickery* case, and where the loss is not entirely economic, a spouse may recover mental anguish damages for fraud on the person. In *Vickery*, the wife alleged that the husband committed actual fraud against her individually, by fraudulently binding her into agreeing to a divorce and a contractual division of property. Wife's claims were that, but for his misrepresentations about the reason for the divorce, she would have never agreed to the divorce or signed a contract dividing the community property. Thus, the Court of Appeals, Houston First District, held that wife's claim was not one of constructive fraud on the community, but of actual fraud perpetrated against the wife individually. In a common law fraud action, which is an intentional tort, the plaintiff may recover damages for mental anguish. *Formosa Plastics Corp. v. Prisedio Eng'rs & Contractors*, 960 S.W.2d 41, 47 (Tex. 1998).

### 5. Elements for proof of actual fraud

The elements for proof of actual fraud are the following:

- (1) a material misrepresentation was made;
  - (2) it was false;
  - (3) when the speaker made it he or she knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion;
  - (4) the speaker made it with the intention that it should be acted upon by the party;
  - (5) the party acted in reliance upon it; and
  - (6) the party thereby suffered injury.
- Johnson and Johnson Medical, Inc. v. Sanchez*, 924 S.W.2d 925,929-30 (Tex. 1996).

#### 6. Misrepresentation

A "misrepresentation" may consist of the concealment of a material fact when there is a duty to speak. A duty to speak or to disclose arises when one party knows that the other party is ignorant of the material fact and does not have an equal opportunity to discover the truth. *New Process Steel Corp., Inc. v. Steel Corp. of Texas, Inc.*, 703 S.W.2d 209, 214 (Tex. App.Houston [1st Dist.] 1985, writ refiled n.r.e.).

#### 7. Burden of proof

The burden of proof for a claim of actual fraud is on the complaining party. *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. Civ. App.--Houston [14th Dist.] 1975, writ dismissed w.o.j.); but see *Buckner v. Buckner*, 815 S.W.2d 877 (Tex. App.--Tyler 1991, no writ) (husband had the burden of demonstrating the fairness of the transaction).

Recall that constructive fraud allegations place the burden on the responding party. Very few family law opinions address the elements of actual fraud because the burden of proof for constructive fraud requires no intent to deceive. The elements for actual fraud have evolved from business transactions as opposed to the breach of fiduciary duty in the marital context. Many actions between spouses do not rise to the level of actual fraud because there is no intent to deceive.

#### 8. Suits between spouses regarding separate property

Following *Schlueter v. Schlueter*, although there no longer exists a separate tort cause of action between spouses for fraud on the community estate independent of divorce proceedings, one spouse can still sue another for actual fraud concerning the defrauded spouse's

separate estate. *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998) (Hecht dissenting).

#### 9. Third parties jointly and severally liable

Third parties are held jointly and severally liable for actual fraud along with the fraudulent spouse if there is sufficient evidence to prove that they knew about the spouse's fraudulent intent to injure the other spouse's rights. *Thomas v. Casale*, 924 S.W.2d 433, 437 (Tex. App.-Fort Worth 1996, writ denied).

### C. Constructive Fraud

#### 1. Constructive fraud

The terms "constructive fraud" and "fraud on the community" are essentially the same tort. *Matter of Marriage of Moore*, 890 S.W.2d 821, 827 (Tex. App. Amarillo 1994, no writ). A spouse commits a fraud on the community or constructively defrauds the other spouse if he or she makes an improper transfer of community property in breach of the fiduciary duty that he or she owes the other spouse. *Massey v. Massey*, 807 S.W.2d 391, 402 (Tex. App.-Houston [1st Dist.] 1991), writ denied, 867 S.W.2d 766 (Tex. 1993) (*per curiam*).

#### 2. Based on fiduciary duty

Constructive fraud is based upon the existence of a fiduciary duty requiring utmost good faith. *Matter of Marriage of Moore*, 890 S.W.2d 821, 827 (Tex. App.Amarillo 1994, no writ); *Matter of Marriage of De Vine*, 869 S.W.2d 415, 428 (Tex. App. Amarillo 1993, writ denied). Constructive fraud is the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests. *Land v. Marshall*, 426 S.W.2d 841 (Tex. 1968); *Matthews v. Matthews*, 725 S.W.2d 275 (Tex. App.Houston [1st Dist.] 1986, writ refiled n.r.e.).

Recall that a fiduciary relationship exists as a matter of law during marriage. A fiduciary relationship can also arise pre-marriage. If it arises pre-marriage, there is a fact question as to whether or not the fiduciary relationship exists.

#### 3. Intent to deceive not required

Constructive fraud does not require an intent to deceive. It is the consequence of a breach of the relationship of trust and confidence between

spouses involving a transfer, gift or waste or dissipation of community property that is capricious, excessive or arbitrary resulting in unfairness to the other spouse. *Mazique v. Mazique*, 742 S.W.2d 805, 807 (Tex. App.-Houston [1st Dist.] 1987, no writ); *Carnes v. Meador*, 533 S.W.2d 365 (Tex. Civ. App.-Dallas 1975, writ ref'd n.r.e.); *Murphy v. Metropolitan Life Ins. Co.*, 498 S.W.2d 278 (Tex. Civ. App. - Houston [14th Dist.] 1973, writref'd n.r.e.). The jury instruction for constructive fraud was based on these cases and is found in State Bar of Texas, *Texas Pattern Jury Charges Family*, PJC 206.4A (2008).

#### 4. Disposal of other spouse's interest in community property

It is constructively fraudulent for one spouse to dispose of the other spouse's interest in community property without the other's knowledge or consent. *Matter of Marriage of DeVine*, 869 S.W.2d 415 (Tex. App.-Amarillo 1993, writ denied).

#### 5. Presumption of constructive fraud

A presumption of constructive fraud arises when one spouse unfairly disposes of the other spouse's onehalf interest in the community property without the other spouse's knowledge or consent. *Carnes v. Meador*, 533 S.W.2d 365 (Tex. Civ. App.-Dallas 1975, writ ref'd n.r.e.); *Zieba v. Martin*, 928 S.W.2d 782 (Tex. App.-Houston [14th Dist.] 1996, no writ).

A presumption of constructive fraud arises where one spouse disposes of the other spouse's one-half interest in community property without the other's knowledge or consent. *Zieba v. Martin*, 928 S.W.2d 782, 789 (Tex. App.-Houston [14th Dist.] 1996, no writ); *Camp v. Camp* 972 S.W.2d 906 (Tex. App.-Corpus Christi 1998, writ denied).

#### 6. Burden of proof

Once alleged by the complaining party, the responding party must carry the burden of rebutting the presumption of constructive fraud by proving the fairness of the transaction. See *Mazique v. Mazique*, 742 S.W.2d 805, 807 (Tex. App.-Houston [1st Dist.] 1987, no writ); *Massey v. Massey*, 807 S.W.2d 391, 402 (Tex. App.-Houston [1st Dist.] 1991), writ denied, 867 S.W.2d 766 (Tex. 1993) (*per curiam*).

The "disposing-of-property spouse" must prove the fairness of all three factors to rebut the

presumption of constructive fraud, to-wit: the size of the gift in relation to the total size of the community property, the adequacy of the remaining estate to support the complaining spouse in spite of the gift, and the relationship of donor and donee. *Jackson v. Smith*, 703 S.W.2d 791 (Tex. App.Dallas 1985, no writ); *Estate of Bridges v. Mosebrook*, 662 S.W.2d 116 (Tex. App.-Fort Worth 1983, no writ); *Horlock v. Horlock*, supra. However, a spouse's good faith but unwise investment of community funds with loss to the community estate does not justify an unequal distribution of the remaining community property at divorce. *Andrews v. Andrews*, 677 S.W.2d 171 (Tex. App.-Austin 1984, writ ref'd n.r.e.).

#### 7. Moderate gifts to third parties

A spouse may make moderate gifts, transfers, or expenditures of community property to a third party. *Matter of Marriage of DeVine*, 869 S.W.2d 415, 422 (Tex. App.-Amarillo 1993, writ denied); *Mazique v. Mazique*, 742 S.W.2d 805, 808 (Tex. App.-Houston [1st Dist.] 1987, no writ).

#### 8. Capricious or excessive gifts

A gift of community funds that is capricious, excessive, or arbitrary may be set aside as a constructive fraud on the other spouse. *Osuna v. Quintana*, 993 S.W.2d 201 (Tex. App.-Corpus Christi 1999, no writ); *Horlock v. Horlock*, 533 S.W.2d 52,55 (Tex. Civ. App. Houston [14th Dist.] 1975, writ dism'd w.o.j.).

#### 9. Factors considered by the Court

The factors considered by the court in determining whether a spouse's actions constitute constructive fraud:

(1) the relationship between the spouse and the recipient;

(2) the size of the gift or transfer in relation to the total size of the community estate;

(3) the adequacy of the estate remaining in spite of the gift or transfer; and

(4) any special justifying factors for the gift or transfer.

*Massey v. Massey*, 807 S.W.2d 391, 402 (Tex. App.--Houston [1st Dist.] 1991), writ denied, 867 S.W.2d 766 (Tex. 1993) (*per curiam*).

#### 10. Cases involving constructive fraud

The following cases are examples of constructive fraud.

**a. Change of life insurance beneficiaries**

(1) *Givens v. Girard Life Ins. Co. of America*, 480 S.W.2d 421 (Tex. Civ. App.-Dallas 1972, writ ref'd n.r.e.) (husband replaced wife as beneficiary of life insurance policy with his paramour-insurance proceeds held to be community property and change in beneficiary held to constitute constructive fraud on wife's share of the community estate in the absence of a showing of "special justifying factors")

(2) *Redfearn v. Ford*, 579 S.W.2d 295 (Tex. Civ. App.-Dallas 1979, writ ref'd n.r.e.) (husband had changed beneficiary designation on life insurance policy from wife to their son held transaction was not unfair to wife because it diminished her obligation to provide support for the minor child and was not an unreasonable, excessive or arbitrary transfer)

(3) *Murphy v. Metropolitan Life Ins. Co.*, 498 S.W.2d 278 (Tex. Civ. App.-Houston [14<sup>th</sup> Dist.] 1973, writ ref'd n.r.e.) (change in beneficiary designation constituted constructive fraud on wife even though husband had right of sole management and control of the policy and husband's attempt to gift wife's share of the policy to his mother was set aside)

(4) *Hudspeth v. Stoker*, 644 S.W.2d 92 (Tex. App.San Antonio 1982, writ rer d) (husband who changed life insurance beneficiary from his former wife to new wife violated his legal duty under the decree and trial court was justified in imposing constructive trust on proceeds)

(5) *Korzekwa v. Prudential Ins. Co. of America*, 669 S.W.2d 775 (Tex. App.-San Antonio 1984, writ dis'm'd) (husband changed beneficiary designation of life insurance policy from his wife to his daughter during the divorce action in violation of a temporary restraining order entered by the divorce court. The court held the change was not void even though the policy was community property because the defrauded spouse could be reimbursed from other assets in the estate)

(6) *Madrigal v. Madrigal*, 115 S.W.3d 32 (Tex. App. San Antonio 2003, no writ) (husband acquired a life insurance policy while married to his new wife and changed the beneficiary of the policy to his former wife. Constructive fraud existed because the policy was funded with community funds for the benefit of someone outside the community)

**b. Gifts outside the community**

(1) *In re McCurdy's Marriage*, 489 S.W.2d 712 (Tex. Civ. App.-Amarillo 1973, no writ) (during marriage, husband's gifts to educational fund for parties' children held to be constructive fraud on wife where wife not fully informed of gifts)

(2) *Marshall v. Marshall*, 735 S.W.2d 587 (Tex. App.-Dallas 1987, writ ref'd n.r.e.) (wife's claim of constructive fraud for husband's gifts to his children from a prior marriage was denied where gifts were equal to 11 percent of the husband's total earnings during their brief marriage, and where wife was advised of the gifts and although she did not actively consent, she raised no objection to the gifts at the time they were made)

(3) *Mazique v. Mazique*, 742 S.W.2d 805 (Tex. App.- Houston [1st Dist.] 1987, no writ) (during the 25 year marriage, husband engaged in numerous extramarital affairs which he funded with community funds. Husband paid for trips, meals, gifts and hotels for the third parties with the community funds. No accounting of the gifts was made to the wife. The court found the husband had committed constructive fraud)

(4) *Zieba v. Martin*, 928 S.W.2d 782 (Tex. App.Houston [14th Dist.] 1996, no writ) (trial court found husband owed a fiduciary duty to wife and to community estate at time of divorce, but court failed to find that he breached that duty by not properly accounting for the withdrawal of community funds, wasting community funds, or spending community funds without wife's knowledge or consent)

(5) *Grant v. Grant*, 1999 WL 1063433 (Tex. App.-Houston [1st Dist.] 1999), *unpublished opinion* (husband used community property to fund a trust for his son from a former marriage. Court found gift was constructive fraud because husband failed to prove the disposition was fair to the wife.

**c. Waste**

(1) *Schlueter v. Schlueter*, 975 S. W.2d 584 (Tex. 1998) (1. Hecht dissenting);

(2) *Faram v. Gervitz-Faram*, 895 S.W.2d 839, 844 (Tex. App.-Fort Worth 1995, no writ) (husband committed waste of the community estate by acquiring property, incurring debt, and escalating attorney's fees after separation);

(3) *Reaney v. Reaney*, 505 S.W.2d 338, 340 (Tex. Civ. App.-Dallas 1974, no writ) (court took into account husband's dissipation of community assets when dividing estate);

(4) *Loaiza v. Loaiza*, 130 S.W.3d 894 (Tex. App.-Fort Worth 2004, not pet.) - (wife made claims of waste of assets, breach of fiduciary duty and fraud against husband for expenditures out of community funds without wife's knowledge or consent. The expenditures were made to husband's girlfriend in the amount of \$854,573.59. [husband was professional baseball player] The Court held that husband's expenditures made for the benefit of his girlfriend conclusively established a breach of fiduciary duty and constructive fraud. The Court also held that since the expenditures were made without the wife's knowledge or consent, the burden shifted to the husband to show the fairness in disposing of the community assets)

(5) *Strenk v. Strenk*, 2001 WL 1379924 (Tex. App. Austin 2001), *opinion unreported*. (the court found that husband had wasted community assets by selling stock before the divorce for \$15,000 when the reasonable value was found to be \$168,000).

(6) *Falor v. Falor*, 840 S.W.2d 683 (Tex. App.-San Antonio 1992, no writ) (husband dispersed \$28,000 worth of community assets. The court gave the following reasons for finding waste of community property: (1) the appellant disbursed community funds to his father, brother, and long time friend; (2) the funds were disbursed three days after the appellee left the appellant; (3) the appellee had no knowledge of and did not consent to the disbursement of community funds; (4) some of the debts were not legitimate since the appellant, with his friend and family members, typically bartered services without demanding cash payment; and (5) some of the debts were separate property debts since they were acquired before marriage.

But be cognizant that simply spending money, or losing money in business or investments is not waste. See *Connell v. Connell*, 889 S.W.2d 534, 544 (Tex. App.-San Antonio 1994, writ denied). Generally, a spouse will not be required to account for funds spent during the marriage or lost in trading or business ventures. However, the spouse will be accountable for disposing, wasting or hiding assets in order to defraud the other spouse of his or her interest in the property. See *Reaney v. Reaney*, 505 S.W.2d 338 (Tex. Civ. App.-Dallas 1974, no writ); *Swisher v. Swisher*, 190 S.W.2d 382 (Tex. Civ. App.-Galveston 1945, no writ); *Pride v. Pride*, 318 S.W.2d 715 (Tex. Civ. App.-Dallas 1958, no writ).

#### d. Gifts to paramours

(1) *Spruill v. Spruill*, 624 S.W.2d 694, 697 (Tex. App.-EI Paso 1981, writ dismissed) (court took a dim view toward gifts to paramours and gifts to "strangers" of the marriage, "particularly of the female variety")

(2) *Osuna v. Quintana*, 993 S.W.2d 201 (Tex. App. Corpus Christi 1999, no writ) (joint and several judgment against husband and mistress upheld, which represented total community funds diverted by husband to mistress)

(3) *Fanning v. Fanning*, 828 S.W.2d 135, 148 (Tex. App.-Waco 1992), *aff'd in part, rev'd in part on other grounds*, 847 S.W.2d 225 (Tex. 1993)

(4) *Mazique v. Mazique*, 742 S.W.2d 805 (Tex. App. Houston [1st Dist.] 1987, no writ) (wife awarded \$30,000 in actual damages and \$5,000 in exemplary damages for husband spending varying sums on women for trips out of town, meals, gifts, dresses and local hotel bills)

(5) *Morrison v. Morrison*, 713 S.W.2d 377 (Tex. App. Dallas 1986, writ dismissed) (husband admitted spending substantial amounts on paramours and trial court's disproportionate division of the community estate in the amount of 83 percent to wife was affirmed on appeal)

(6) *Loaiza v. Loaiza*, see "c. Waste" immediately above.

(7) *Zimmerman v. Zimmerman*, 1999 WL 1076981 (Tex. App.-Dallas 1999), *unpublished case*. (husband spent \$10,000 on gifts for his girlfriend and was unable to account for \$16,500 in checks. The court gave wife an unequal portion of the estate based on these facts)

(8) *Ramirez v. Ramirez*, 873 S.W.2d 735 (Tex. App.-EI Paso 1994, no writ) (husband's testimony concerning gifts to paramours was sufficient evidence, standing alone, was sufficient for a finding of constructive fraud)

#### e. Management of community property

(1) *Andrews v. Andrews*, 677 S.W.2d 171 (Tex. App. Austin 1984, no writ); (an investment decision entered into in good faith is not actionable, even if it turns out to be bad). Cf. *Sprick v. Sprick*, 25 S.W.3d 7, 14-15 (Tex. App.-El Paso 1999, pet. denied), and the discussion by Judge Ann Crawford McClure of the various tort doctrines, including the "community opportunity doctrine," which may be described as the duty by a spouse to put the interests of the community estate before the spouse's separate estate when

making investment decisions. For example, if a spouse is faced with the opportunity of making an investment decisions that will deliver a financial result, that spouse has a fiduciary duty to make the investment on behalf of the community estate if funds exist.

(2) *Grossnickle v. Grossnickle*, 935 S.W.2d 830 (Tex. App.-Texarkana 1996, writ denied) (wife who was given right to live in community home during divorce proceeding and did not maintain the home causing serious damage (mildew, leaks, vandalism, neglect, etc.) was held responsible for the \$80,000 damage)

(3) *Massey v. Massey*, 807 S.W.2d 391 (Tex. App.Houston [1st Dist.] 1991), writ denied, 867 S.W.2d 766 (Tex. 1993) (*per curiam*) (court upheld a jury finding that the husband's investments in expenditures operated as a constructive fraud on the wife)

(4) *Jackson v. Smith*, 703 S.W.2d 791 (Tex. App.Dallas 1985, no writ) (husband found to have perpetrated constructive fraud by inducing his common law wife to sign life insurance policy naming husband's sister as beneficiary as a gift for taking care of his children)

#### D. Remedies Available for Fraudulent Conduct

##### 1. Disproportionate division of community estates

A trial court may consider fraudulent conduct as one of the factors in determining a "just and right" division of the community. *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex: 1998). Thus, an innocent spouse may be awarded a disproportionate share of the community estate, including a disproportionate share of the amount which was wrongfully gifted, transferred, wasted or conveyed.

##### 2. Recovery by injured spouse

An injured spouse may recover his or her appropriate share of not only that property existing at the time of the divorce, but also that which was improperly depleted from the community estate. *Id.*

##### 3. Money judgment is viable remedy

A money judgment is a viable remedy for achieving an equitable division of the marital estate of the parties. *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998); see also *Mufff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981) (money

judgment allowed against husband for dissipating the parties savings).

##### 4. Amount of money judgment

A money judgment can only be used as a means for the wronged spouse to recoup the value of that spouses' share of the community estate lost through the other spouses' actions. Since the amount of the judgment is directly referable to a specific value of lost community property, it will never exceed the total value of the community estate. *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998).

##### 5. Owely can equalize awards

A money judgment is also known as an "owely judgment," which means equalization. It may be used to equalize the property division for any reason. See *Massey v. Massey*, 807 S.W.2d 391 (Tex. App.-Houston [1st Dist.] 1991), writ denied, 867 S.W.2d 766 (Tex. 1993) (*per curiam*).

##### 6. Evidence should be presented

In order to obtain a money judgment, evidence of the amount of the gift, transfer or conveyance should be specifically presented. See *Leal v. Leal*, 628 S. W.2d 168 (Tex. App.-San Antonio 1982,no writ).

##### 7. Constructive trust remedy available

A constructive trust is an equitable remedy created by the courts to prevent unjust enrichment or to compensate the victim of a breach of a fiduciary or confidential relationship. *In re Marriage of Loftis*, 40 S.W.3d 160 (Tex. App.-Texarkana 2001, no pet.); *Exploration Co. v. Vega Oil & Gas Co.*, 843 S.W.2d 123, 127 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1992, writ denied); *Hudspeth v. Stoker*, 644 S.W.2d 92 (Tex. App.-San Antonio 1982, writ ref'd). The court will impose a constructive trust over an asset fraudulently conveyed if it is unique or if the estate is inadequate and the asset must be returned to the estate to effect an equitable division. *Carnes v. Meador*, 533 S.W.2d 365 (Tex. Civ. App.-Dallas 1975, writ ref'd n.r.e.); *Hudspeth v. Stoker*, 644 S.W.2d 92 (Tex. App.-San Antonio 1982, writ ref' d).

##### a. Express agreement

An express agreement between the parties is not necessary to create a constructive trust. The constructive trust is imposed by law because the person holding the title to property would profit

by a wrong or would be unjustly enriched if he or she were permitted to keep the property. *Omohundro v. Matthews*, 161 Tex. 367, 341 S.W.2d 401, 405 (1960).

**b. Flexibility**

A constructive trust remedy is flexible and broad. *Sever v. Massachusetts Mut. Life Ins. Co.*, 944 S.W.2d 486, 492 (Tex. App.- Amarillo 1997, writ denied).

**c. Confidential relationship**

Before a constructive trust may be imposed, there must generally be a prior confidential relationship. *Rankin v. Naftalis*, 557 S.W.2d 940, 944 (Tex. 1977). Informal relationships can be sufficient to establish a constructive trust. *Walter E. Heller' Co. v. Barnes*, 412 S.W.2d 747 (Tex. Civ. App.-El Paso 1967, writ refiled n.r.e.) The confidential relationship may arise from moral, social or purely personal relationships. *Weaver v. Stewart*, 825 S.W.2d 183, 185 (Tex. App.-Houston [14th Dist.] 1992, writ denied); *Seymour v. American Grinding Co.*, 956 S.W.2d 49,61 (Tex. App.-Houston [1st Dist.] 1996, writ denied).

**d. Proof**

Before a constructive trust may be imposed, there must be proof of fraud, either actual or constructive. *Talley v. Howsley*, 142 Tex. 81, 176 S.W.2d 158, 160 (1943); *Mangione v. Jaffe*, 61 S.W.3d 591, 593 (Tex. App.-San Antonio 2001, pet. dismissed).

**e. Examples of constructive trust**

Examples of cases where the court applied a constructive trust:

(1) *Andrews v. Andrews*, 677 S.W.2d 171 (Tex. App.Austin 1984, no writ) (court imposed a constructive trust on real property where the court found the fiduciary relationship between a couple who had been seeing each other for seven years and who were living together when they agreed to jointly purchase property for their marital residence, but where the future husband unilaterally took title to the property in his own name only);

(2) *Ford v. Long*, 713 S.W.2d 798 (Tex. App.-Tyler 1986, writ refiled n.r.e. ) (court imposed a constructive trust in favor of a sister and ordered a partition of property to prevent the wrongdoer from profiting from his wrongful act where the husband killed his wife and then claimed a homestead right in the community real property that the wife had left to her sister in the wife's will);

(3) *Hudspeth v. Stoker*, 644 S.W.2d 92 (Tex. App.-San Antonio 1982, writ refiled) (husband who changed life insurance beneficiary from his former wife to new wife violated his legal duty under the decree and trial court was justified in imposing constructive trust on the proceeds of the policy);

(4) *Ragland v. Ragland*, 743 S.W.2d 758 (Tex. App.Waco 1987, no writ) (court held that a constructive trust could not be used to deprive a spouse who murdered another spouse of property lawfully acquired through a community interest already vested);

(5) *In re Marriage of Braddock*, 64 S.W.3d 581 (Tex. App.-Texarkana 2001, no pet.) (court imposed a constructive trust when common-law wife, who lived with ex-husband in her home for five years after being divorced, conveyed real property to husband to use as collateral on a bank loan, which he later refused to reconvey).

**8. Resulting trusts**

Like the constructive trust, the doctrine of the resulting trust is invoked to prevent unjust enrichment. *Nolana Development Assn v. Corsi*, 682 S.W.2d 246, 250 (Tex. 1984); *Savell v. Savell*, 837 S.W.2d 836, 839 (Tex. App.-Houston [14th Dist.] 1992, writ denied).

**a. When resulting trust arises**

A purchase money resulting trust is implied in law when one person pays for the purchase of an asset and the title is taken in another person's name. *Nolana Development Assn v. Corsi*, 682 S.W.2d 246, 250 (Tex. 1984); *In re Marriage of Loftis*, 40 S.W.3d 160 (Tex. App.- Texarkana 2001, no pet.).

**b. Relationship of parties**

The party who paid the purchase money is the equitable owner of the property, and the titleholder is a mere trustee who holds the property for the benefit of those that furnished the consideration. *Masterson v. Hogue*, 842 S.W.2d 696, 697 (Tex. App.-Tyler 1992, no writ); *Osuna v. Quintana*, 993 S.W.2d 201, 210 (Tex. App.-Corpus Christi 1999, no writ).

**c. Resulting trust not applicable.**

A resulting trust does not arise when the transferee is a wife, child, or other natural object of bounty of the person by whom the purchase price was paid. *Osuna v. Quintana*, 993 S.W.2d 201, 210 (Tex. App.-Corpus Christi 1999, no writ); *Amador v. Berrospe*, 961 S.W.2d 205,207 (Tex. App.-Houston [1st Dist.] 1996, no writ).

**d. Burden of proof**

The party claiming the resulting trust bears the burden of proving that:

(1) community funds were used to make a purchase; and

(2) there was no intent of actual ownership to vest in the third party~

*Bell v. Smith*, 532 S.W.2d (Tex. Civ. App.-Fort Worth 1976, no writ).

**e. Proof of actual or constructive fraud**

It is not necessary to prove actual or constructive fraud, although those elements may be involved in the transaction. *Bell v. Smith*, 532 S.W.2d 680 (Tex. Civ. App.-Fort Worth 1976, no writ).

**9. Texas Uniform Fraudulent Transfer Act**

The Texas Uniform Fraudulent Transfer Act (TUFTA), and the Tex. Bus. & Com. Code Ann. §§ 24.001 to 24.012, may be useful in seeking a remedy for breach of fiduciary duty, especially against third parties. *See J. Michael Putman, MD., P.A. Money Purchase Pension Plan v. Stephenson*, 805 S.W.2d 16 (Tex. App.Dallas 1991, no writ) (TUFTA was remedy used to set aside husband's conveyance of real property); see also *Thomas v. Casale*, 924 S.W.2d 433, 437 (Tex. App.-Fort Worth 1996, writ denied) wherein the court, in declining to apply TUFTA, states:

We first conclude that the Uniform Fraudulent Transfer Act is not applicable and that the trial court made no implied finding that it does apply. Although the term "creditor" is defined by section 24.002(4) of the Act, *id.*, it includes a spouse who has a claim for property fraudulently transferred by the other spouse, we presume that the trial court's conclusions of law do not mention the Act because there is no evidence in the record that Robert was insolvent during the time he shared an account with Patricia or that the sharing of the account left Robert with "unreasonably small" assets or debts beyond his ability to pay. The Act does not apply in the absence of such evidence. *See id.* § 24.005 (Vernon Supp. 1996), § 24.006 (Vernon 1987).

The court in *Thomas v. Casale* also refused to apply Tex. Fam. Code § 6.707 because the wife failed to prove that the husband's girlfriend knew about the transfer of community assets.

Recall that the Texas Family Code § 6.707 entitled Transfers and Debts Pending Decree provides:

(a) A transfer of real or personal community property or 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.

(b) 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.

(c) The spouse seeking to void a transfer or debt incurred while a suit for divorce or annulment is pending has the burden of proving that the person dealing with the transferor or debtor spouse had notice of the intent to injure the rights of the spouse seeking to void the transaction.

**a. Creditor defined**

Although it was enacted to cover debtor-creditor issues, "creditor" is defined under TUFTA as a person "including a spouse" who has a claim. *Tex. Bus. & Com. Code Ann.* § 24.002(4). The claim need not be reduced to judgment.

**b. Transfer is fraudulent if elements met**

TUFTA provides that a transfer is fraudulent as to a creditor, whether the creditor's claim arose before or within a reasonable time after the transfer was made, if the debtor made the transfer (1) with actual intent to hinder, delay, or defraud any creditor of the debtor or (2) without receiving a reasonably equivalent value in exchange for the transfer, and the debtor (a) was engaged in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction or (b) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due. *Tex. Bus. & Com. Code Ann.* § 24.005; see *Thomas v. Casale*, 924 S.W.2d 433, 437 (Tex. App.-Fort Worth 1996, writ denied) (TUFTA does not apply absent evidence that the husband was insolvent during the time of sharing an account with his paramour or that sharing the account left husband with "unreasonably small" assets or debts beyond his ability to pay).

**c. Transfer fraudulent as to a creditor**

TUFTA provides that a transfer made by a debtor is fraudulent as to a creditor whose claim

arose before the transfer was made if the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer and the debtor was insolvent at the time or the debtor became insolvent as a result of the transfer. *Tex. Bus. & Com. Code Ann.* § 24.006.

**d. Burden of proof**

The party seeking to set aside the transfer must carry the burden of proof as to the elements of intent. *Rucker v. Steelman*, 619 S.W.2d 5 (Tex. Civ. App.-Houston [1st Dist.] 1981, writ refdn.r.e.); see *Tex. Bus. & Com. Code Ann.* § 24.005(b) for the factors to consider in determining intent.

**e. Remedies**

Under TUFTA, a creditor may obtain the following remedies for relief against a transfer, subject to certain defenses available to the transferee as set forth in Section 24.009 of the Act, *Tex. Bus. & Com. Code Ann.* § 24.008:

(1) avoidance of the transfer to the extent necessary to satisfy the creditor's claim;

(2) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the Texas Rules of Civil Procedure and the Civil Practice and Remedies Code; or

(a) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(b) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(c) any other relief the circumstances may require; and

(d) judgment for the value of the asset transferred as provided by Section 24.009 of the Texas Business and Commerce Code.

10. Election of remedies

The court cannot award a double remedy. Tort damages and a disproportionate division on the same conduct are not allowed. *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993) (both a disproportionate division of the community estate and an award for fraud may be contained in the same judgment, however, the record must reflect evidence to support a disproportionate division of the community estate on grounds other than the fraudulent transfer); *Toles v. Toles*, 45 S.W.3d 252 (Tex. App.-Dallas 2001, pet. denied).

11. Punitive damages

In *Schlueter*, the Texas Supreme Court concluded that since there was no independent tort cause of action for a spouse's wrongful disposition of community assets, the wronged spouse may not recover punitive damages from the other spouse. However, one spouse can still sue another for fraud relating to separate property and recover damages, including mental anguish damages and punitive damages, as in any other case. *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998) (J. Hecht dissenting).

**VI. SCHLUETER V. SCHLUETER - NO INDEPENDENT CAUSE OF ACTION BETWEEN SPOUSES FOR DAMAGES TO THE COMMUNITY ESTATE**

*Schlueter* answered the question of what remedies are available to a spouse alleging "fraud on the community" committed by the other spouse. Here, the husband transferred various community assets to his father shortly before he filed for divorce. The wife brought independent tort claims against her husband and father-in-law, seeking damages for fraud, breach of fiduciary duty and conspiracy in her counterclaim for divorce. Based on favorable jury findings the trial court ordered a disproportionate division of the community estate in favor of the wife, and rendered judgment for the wife against the husband and his father for actual and exemplary damages. Holding that a tort cause of action for fraud on the community exists independent of a divorce proceeding, the Austin Court of Appeals affirmed, 929 S.W.2d 994. The Texas Supreme Court (hereinafter referred to as the "Court") granted petition for review to resolve the conflict among the Courts of Appeals on this question.

**A. No separate cause of action for fraud on the community estate**

There is no separate tort cause of action between spouses for fraud on the community estate independent of divorce proceedings. *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998); *Belz v. Belz*, 667 S.W.2d 240 (Tex. App.-Dallas 1984, writ refd n.r.e.); *Matter of Marriage of Moore*, 890 S.W.2d 821 (Tex. App.Amarillo 1994, no writ); *Harper v. Harper*, 8 S.W.3d 782 (Tex. App.- Fort Worth 1999, pet. denied) (a decedent's estate does not have a cause of action against the surviving spouse or a third party for fraud on the community).

**B. "Just and right" property division**

A wronged spouse has an adequate remedy for fraud on the community through the "just and right" property division upon divorce. *Tex. Fam. Code Ann.* § 7.001; *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998).

**C. Division of marital estate in "just and right" manner**

The community property system in Texas provides that upon divorce, the trial court must enter a division of the married couple's estate "in a manner that the court deems just and right," considering the rights of the parties and any children of the marriage. *Tex. Fam. Code Ann.* § 7.001. Such a standard may at times lead to disproportionate division of assets and liabilities for the parties, depending on the circumstances that courts may consider in refusing to divide the marital estate equally.

**D. "Fraud on the community" damages**

Texas recognizes the concept of fraud on the community, which is a wrong by one spouse that the court may consider in its division of the estate of the parties and that may justify an unequal division. *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998); *Belz v. Belz*, 667 S.W.2d 240, 247 (Tex. App.-Dallas 1984, writ ref'd n.r.e.).

**E. Fraud on the community not abolished**

Although the *Schlueter* case has limited the method and extent of recovery, the doctrine of fraud on the community has not been abolished. Fraud on the community can arise in the following situations: waste/dissipation; improper conveyance; excessive gifts; transfers or gifts to paramours and similar conduct. These claims are based on allegations of breach of fiduciary duty existing between spouses.

**F. Actual fraud regarding separate estates**

Following *Schlueter*, one spouse can still sue another as an independent cause of action for actual fraud concerning the defrauded spouse's separate estate. In such a case, punitive damages should be available. See *Schlueter*, 975 S.W.2d 584 (Tex. 1998) (1. Hecht dissenting).

**G. Personal injury tort claims**

Spouses can still sue each other for personal injury tort claims and this is an independent

cause of action. *Schlueter*, 975 S.W.2d., at 587; *Twyman v. Twyman*, 855 S.W.2d 619, 625 (Tex. 1993) (recovery for personal injuries of a spouse, including pain and suffering, is the separate property of the injured spouse, and therefore does not add to the marital estate). The *Schlueter* Court noted that there was no potential for double recovery for pain and suffering in a personal injury claim because this recovery is the separate property of the injured spouse and does not add to the marital estate. *Schlueter*, 975 S.W.2d, at 587.

**H. Money judgment is available**

The *Schlueter* court held that a court may award a money judgment to one spouse against the other in order to achieve an equitable division of the community estate. *Id.*, at 588 to 589.

**I. Money judgment for fraud on the community estate**

The *Schlueter* court approved of the language contained within *In the Matter of the Marriage of Moore* that stated that a trial court may award a money judgment to one spouse, even as damages for the spouse's fraud on the community. However, that type of personal judgment is merely a means for recouping the defrauded spouse's share of the community property lost as a result of the wrongdoing spouse's breach of the trust relationship. Such a recovery is not awarded as 'separate damages' for an independent cause of action.

See also *Murff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981) (allowing money judgment against husband in division of community property where he had substantial sums in savings before separation that had disappeared by the time of trial).

**J. Amount of money judgment.**

The *Schlueter* court further held that the money judgment can only be used as a means for the wronged spouse to recoup the value of his/her share of the community estate loss through the wrongdoer spouse's actions. *Schlueter v. Schlueter*, 975 S.W.2d 584, 589 (Tex. 1998) (citing *Mazique v. Mazique*, 742 S.W.2d 805,808 (Tex. App.-Houston [1st Dist.] 1987, no writ). The court further noted that because the amount of the judgment is directly referable to a specific value of lost community property, it will never exceed the total value of the community estate. However, the wronged spouse should not suffer

just because, when it is time to divide the community estate, the other spouse has depleted the estate such that there is not enough money or property left to effect a just and right division. *Schlueter v. Schlueter*, 975 S.W.2d 584, 589 (Tex. 1998).

#### **K. Waste of community assets considered**

The *Schlueter* court reasoned that trial courts have wide discretion and are allowed to take many factors into consideration in making a just and right division of the marital estate including waste of community assets. *See also Murff v. Murff*, 615 S.W.2d at 698 to 699. Injured spouses may recover an appropriate share of not only that property existing in the community at the time of divorce, but also that which was improperly depleted from the community estate. *Schlueter*, 975 S.W.2d at 589 to 590).

#### **L. No punitive damages allowed**

As to punitive damages, a recovery of punitive damages requires a finding of an independent tort with accompanying actual damages. *Twin City Fire Ins. Co. v. Davis*, 904 S.W.2d 663, 665 (Tex. 1995). Because there is no independent tort action for actual fraud and accompanying exemplary damages against one's spouse in the context of a deprivation of community assets, if the wronged spouse can prove the heightened culpability of actual fraud, the trial court may consider it in the property division. *Schlueter*, 975 S.W.2d at 589 to 590.

#### **M. The Effect of *Schlueter***

The Court discussed its prior decisions in *Bounds v. Caudle*, 560 S.W.2d 925, 927 (1977), *Price v. Price*, 732 S.W. 2d 316, 319 (1987), and *Twyman v. Twyman*, 855 S.W.2d 619, 624 (1993) and found that the salient characteristics distinguishing *Bounds*, *Price* and *Twyman* from the case at hand was that *Bounds*, *Price* and *Twyman* involved independent causes of action for personal injury torts. *Bounds*, 560 S.W.2d 926 [wrongful death]; *Price*, 732 S.W.2d 316 [negligence claim for personal injury]; and *Twyman*, 855 S.W.2d 621 [intentional infliction of emotional distress].

The Court also compared *Cleaver v. George Staton Co., Inc.*, 908 S.W.2d 468, 471 n.2 (Tex. App.-Tyler 1995, writ denied). *Cleaver* distinguished *Twyman*, which involved outrageous spousal conduct, and noted that the

trial court could sort out the husband's claims against the wife for breach of fiduciary duty and fraud on the community estate in the property division but not by a separate independent cause of action. The Court further reasoned that there was no potential for double recovery for pain and suffering in a personal injury claim because this recovery is the separate property of the injured spouse and does not add to the marital estate.

#### **N. Then along came *Vickery v. Vickery***

In *Vickery v. Vickery*, 999 S.W.2d 342 (Tex. 1999), questions about *Schlueter* and the current state of the law for economic torts committed against the community estate come into play. In *Vickery*, the underlying court of appeals' opinion was unpublished. The Texas Supreme Court denied the petition for review, with Justice Hecht dissenting from the denial in a published opinion which incorporates as an appendix the full court of appeals opinion on the merits. In *Vickery*, the wife filed an action for bill of review to set aside a divorce decree, a redivision of the community estate, and for actual and punitive damages against her husband and a third party. The husband, an attorney, convinced the wife they should divorce to protect their assets from a possible recovery by the plaintiff in a legal malpractice suit which was pending. The husband had another attorney prepare and file a petition for divorce on behalf of the wife without the wife's consent. The attorney also filed an answer and cross-petition for divorce for the husband. A few weeks later, the plaintiff in the malpractice suit offered to settle that claim within the limits of husband's malpractice insurance coverage, and the husband never disclosed this to wife. Meanwhile, he insisted to her that they divorce. She reluctantly agreed and signed a property settlement agreement that awarded her only a small fraction of the community estate. Within a few months, the husband married his wife's best friend.

##### 1. Jury award upheld.

The jury found the husband liable for fraud and breach of fiduciary duty and assessed the wife's damages at \$6.7 million for loss of marital property and \$1.3 million for mental anguish, plus \$1 million as punitive damages. The court of appeals affirmed the trial court's judgment, which was prior to the supreme court's ruling in *Schlueter*, and the supreme court denied petition for review after its ruling in *Schleuter*.

## 2. Dissent's view

Justice Hecht was critical of the supreme court's refusal to follow the decision in *Schlueter*. As Justice Hecht noted in his dissent, applying *Schlueter* would require that the actual and punitive damages awarded against the husband be reversed and the case remanded to the trial court to reconsider what division of the community is just and right, in which case the trial court may consider the husband's "dishonesty of purpose or intent to deceive" and "the heightened culpability of actual fraud" as found by the jury. The fact that the supreme court, by denying review, allowed the actual and punitive damages to stand, gives some concern as to what the current state of the law is for economic torts committed against the community estate.

## VII. DAUBERT AND "EXPERTS" ON FIDUCIARIES

Although the full extent of the reliability and admissibility of experts is beyond the scope of this article, it is important to understand that on the fiduciary relationship issues that permeate the spouses' duties, an expert is not necessarily allowed or needed. See Hon. Steve M. King and Mary C. Burdette's article, *Daubert - The Impact on Estate and Fiduciary Litigation*, State Bar of Texas 28th Annual Advanced Estate Planning and Probate Course (2004), Chapter 15, at pages 8-9 for a good discussion on this issue.

### A. Threshold Question

The court as gatekeeper must always ask the threshold question: Does this expert have anything relevant and admissible to add to this case? If the answer is "no," then the expert should be excluded.

### B. Questions of law

Even if an expert can pass muster under *Robinson*, testimony in certain instances is *per se* inadmissible. Expert testimony may not be used to instruct the jury as to the law or as to the application of law to the specific facts of the case. A witness may not give legal conclusions or interpret the law to the jury. *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000); *United Way of San Antonio v. Helping Hands Lifeline Foundation, Inc.*, 949 S.W.2d 707, 713 (Tex. App.-San Antonio 1997, writ denied.)

Since the trial court is presumed to have specialized competency in all aspects of the law,

legal conclusions are almost never admissible. *Holden v. Weindenfeller*, 929 S.W.2d 124, 133-134 (Tex. App.-San Antonio 1997, writ denied).

The following are examples of when courts have found expert opinions on "questions of law" inadmissible:

a) Testimony as to whether fiduciary duties were actually breached. *Askanase v. F atjo*, 130 F 3d 657, 673 (5<sup>th</sup> Cir. 1998).

b) Testimony as to whether a party actually owed a duty. *Puente v. ASI Signs*, 821 S.W.2d 400,402 (Tex. App.-Corpus Christi 1991, writ denied).

c) Testimony as to the existence and extent of a trustee's duty. *Harrison v. Wells Fargo Bank Texas*, N.A., 1999 WL 130176 (Tex. App.-Houston [14<sup>th</sup> Dist.] March 11, 1999), *unpublished opinion*.

d) Testimony as to whether fraud was committed, *Connell v. Connell*, 889 S.W.2d 543, 545 (Tex. App.-San Antonio 1994, writ denied).

e) Testimony that a fiduciary duty exists, to what extent it actually exists and the applicable standard of care. *Brown v. McCleskey*, 1999 WL 795478 (Tex. App.-Amarillo 1999), *unpublished opinion*.

f) Testimony concerning domestic law. *Holden v. Weidefeller*, 929 S.W.2d 124, 133-134 (Tex. App.-San Antonio 1996, writ denied).

g) Testimony concerning whether certain statements were disparaging in a business disparagement case. *United Way of San Antonio v. Helping Hands Lifeline Foundation, Inc.*, 949 S.W.2d 707, 713 (Tex. App.-San Antonio 1997, writ denied).

## VIII. CONCLUSION

Our clients understand a no fault divorce and generally accept guideline child support calculations, but when 'spousal bad conduct' affects the bottom dollar, then our clients 'need' to 'blame' someone and they want damages. And in these instances, we as attorneys have the greatest influence on the stature of the case in the courtroom because the client knows nothing of the claims that may be asserted.

This requires you to be aware of what claims are permitted or prohibited and their necessary elements. Rationally apply the law to your client's unique facts prior to recommending a course of action that may make them whole or make you lose.

