GRATUITOUS TRANSFERS OF COMMUNITY PROPERTY TO THIRD PERSONS

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Under the community property system as it has evolved in Texas each spouse has a vested, equal ownership right in the community property,[1] and each enjoys full power of testamentary disposition over his or her one-half interest therein.[2] It follows that neither husband nor wife has any power of testamentary disposition over the one-half interest belonging to the other spouse,[3] and any attempt to make such disposition is ineffective in the absence of express ratification by the surviving spouse.[4]

Despite this concept of equal ownership, the Texas statutes have traditionally vested in *one* of the spouses, until most recently the

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1. The new Texas Family Code, Tex. Laws ch. 888, § 5.01 at 2726, defines community property as "the property, other than separate property, acquired by either spouse during marriage." The same section provides that a spouse's separate property consists of (1) the property owned or claimed by a spouse before marriage; (2) the property acquired by the spouse during marriage by gift, devise or descent; (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage. Except for the third category, dealing with personal injury recoveries, the separate property definition merely restates prior law defining separate property, with certain "omissions" which were felt to be so firmly established by case law as part of the separate property as to not require their specific inclusion in the Code's definition. Such "omissions" include mutations in form of separate property, and "increase" in such separate property (in the sense of increase in value). With regard to personal injury recoveries, an earlier statute providing that such recoveries by the wife, except for hospital and medical expenses accumulated against the husband, were her separate property, was held unconstitutional as being without the definition of the wife's separate property found in article 16, section 15 of the Texas Constitution. Northern Tex. Traction Co. v. Hill, 297 S.W. 778, 780 (Tex. Civ. App.—El Paso 1927, writ ref'd). The new Family Code provision (and its immediate predecessor, article 4615 of the Matrimonal Property Act of 1967) represents a legislative effort to bring the statutory classification of personal injury recoveries within the aforementioned constitutional definition.

For an excellent discussion of the classification of personal injury recoveries as separate or community property, *see* McKnight, *Personal Injury As Separate Property—A Legislative History and Analysis of the New Article 4615*, 3 TRIAL LAWYERS FORUM 7 (1968).

2. Rompel v. United States, 59 F. Supp. 483, 487 (W.D. Tex. 1945), *rev'd on other grounds*, 326 U.S. 367 (1945).

3. Carroll v. Carroll, 20 Tex. 731, 744 (1858); Rompel v. United States, 59 F. Supp. 483 (W.D. Tex. 1945), *rev'd on other grounds*, 326 U.S. 367 (1945).

4. Campbell v. Campbell, 215 S..W., 134, 136 (Tex. Civ. App.—Dallas 1919, writ ref'd). But where the decedent spouse makes testamentary disposition of the community interest of the surviving spouse, and also devises or bequeaths to the surviving spouse property to which the surviving spouse would not otherwise be entitled, the equitable doctrine of election will permit the surviving spouse to take the latter property in lieu of the former, thus giving effect to the decedent spouse's testamentary disposition of the survivor's community interest.

husband as to most of the community estate,[5] the powers of management, control, and disposition over the community property. The husband's managerial powers were consistently construed to include the power to make inter vivos gifts of community property to third persons, unless such gifts were in fraud of the property rights of the wife.[6] Thus, what the husband could not do by testamentary disposition, he could do by inter vivos transfer, subject, of course, to the test of fraud.

Though management powers over the general community property clearly resided in the husband, it was often said that certain segments of the community property—namely the wife's personal earnings and the revenues from her separate property (and this was usually referred to as the "special community property")—were under the management, control, and disposition of the wife.[7] The extent of these management powers in the wife were not nearly so clearly defined as the extensive management powers confided in the husband over the general community, and her power to make gifts to third parties of the special community was both untested and dubious.[8]

5. Until enactment of the Matrimonial Property Act of 1967, effective January 1, 1968, article 4619 of the Revised Civil Statutes provided that during the marriage the common property could be disposed of by the husband only, and case law clearly established that the husband's powers over the community property were those of "management, control, and disposition."

6. Martin v. McAllister, 94 Tex. 567, 63 S.W. 624 (1901); Dunn v. Vinyard, 234 S.W. 99, 103 (Tex. Civ. App.—Texarkana 1921), *aff'd as to this point*, 251 S.W. 1043.

7. Except for a brief period from 1913 to 1925, when the wife was given express statutory powers of management over certain enumerated categories of community property, her management powers over the special community property were inferred from other statutory provisions, one exempting such property from liability for the husband's debts and the other impliedly making the special community liable for the wife's contractual undertakings. (These were articles 4616 and 4621 of the Revised Civil Statutes as they existed prior to the Matrimonial Property Act of 1967.)

8. Although the Texas courts (including the Texas Supreme Court, most recently in Moss v. Gibbs, 370 S.W.2d 452, 455 (Tex. 1963).) stated on various occasions during this pre-1968 era that the special community property was under the wife's "exclusive control," most of the cases arose in the context of a creditor seeking recourse to the property on a debt contracted by the husband (Bearden v. Knight, 149 Tex. 108, 228 S.W.2d 837 (1950); Hawkins v. Britton State Bank, 122 Tex. 69, 52 S.W.2d 243 (1932).), and not with reference to the wife's affirmative management powers over it. In Gohlman, Lester & Co. v. Whittle, 114 Tex. 548, 273 S.W. 808 (1925), a married woman's contract concerning bales of cotton grown on her separate property was held binding on her, but the facts of this case occurred during the period of express statutory management authority in the wife. In Pottorf v. J.D. Adams Co., 70 S.W.2d 745 (Tex. Civ. App.—El Paso 1934, writ ref'd), the court held that the wife no longer had the power to contract with reference to her personal earnings, in view of the omission from the 1925 statutes of express management powers in her over certain categories of community property.

Despite later broad expressions by the courts with reference to the wife's management powers over the special community property (in cases where her affirmative powers were not directly in issue), the state of the law was uncertain prior to 1968 as to the extent and nature of these powers, and one can only hazard a guess as to whether her implied powers included that of making inter vivos gifts of the special community, a question never presented to the courts.

The Matrimonial Property Act of 1967[9] promulgated significant changes in the managerial powers delegated to the spouses over community property. These changes were carried forward in Chapters 4 and 5 of the Family Code,[10] effective January 1, 1970. In view of these statutory changes affecting gratuitous transfers of community property, and in light of important case law developments in the area during the last decade, a new look at the power of each spouse to dispose gratuitously of the common property to third persons is in order.

PROPERTY SUBJECT TO INTER VIVOS DISPOSITION BY HUSBAND OR WIFE

As above noted, the husband's powers of management, control, and disposition over the general community property has always been construed to include the power to make inter vivos gifts thereof. The new Family Code expressly confers on *each* spouse the sole power of management, control, and disposition over certain portions of the community. Section 5.22(a) of the Code provides:

> (a) During marriage each spouse has the sole management, control, and disposition of the community property that he or she would have owned if single, including but not limited to:
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> (1) personal earnings;
> (2) revenue from separate property;
> (3) recoveries for personal injuries;
> (4) the increase and mutations of, and the revenue from, all property subject to his or her sole management, control, and disposition.

The effects of this provision would appear to be twofold: First, the statute makes clear that the wife's management powers are qualitatively equivalent to those of the husband. There is no reason to believe that such powers, where expressly and unequivocally conferred, should be any less extensive in the wife than in the husband,[11] and it is no longer necessary to rely upon inference in assessing the quality of the wife's powers. Whatever may have been the case prior to 1968, it now seems

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9. Tex. Laws 1967, ch. 309 (effective Jan. 1, 1968).

10. Tex. Laws 1969, ch. 888, § 1, at 1.

11. That the management powers of the husband and wife over their respective segments of the community property are intended to be qualitatively equal is supported by section 5.61(b) of the Family Code, which provides:

> (b) Unless both spouses are liable by other rules of law, the community property subject to a spouse's sole management, control, and disposition is not subject to:
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> . . . .
>
> (2) any nontortious liabilities that the other spouse incurs during marriage.
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> . . . .

clear that the wife's powers of management, control, and disposition will, like the husband's powers, include that of making inter vivos gifts of the community property committed to her control (subject, of course, to the same limitations upon such powers as are imposed upon the husband).

The second consequence of the statute is to somewhat diminish the portion of the community property subject to the husband's control, and to correspondingly augment the segment subject to the wife's authority. Although, as earlier noted, the wife was said to have the power to manage her personal earnings and the revenue from her separate property (whatever may have been the quality of that power), it was clear that such powers she had in this regard did not extend to special community property mutations. In *Moss v. Gibbs*,[12] the Texas Supreme Court held that lots purchased with special community funds were subject to execution to satisfy a debt contracted by the husband, thus refusing to extend one of the principal elements implying control in the wife over the special community beyond the literal wording of the then applicable statute.[13] Presumably, then, the wife's earnings and revenues from her separate property remained under her control only so long as they remained in their original, unaltered form, and once they were invested in other forms of property[14] they fell under the management of the husband.

Subsection (4) of section 5.22(a) makes it clear that the wife's control will extend to mutations of her personal earnings and revenues from her separate property, as well as to the increase in, and the revenues from, such property in either its original or altered form.

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12. 370 S.W.2d 452 (Tex. 1963).

13. TEX. REV. CIV. STAT. ANN. art. 4616 (1960) (as it existed prior to 1968).

14. One possible exception to the rule that special community property did not remain under the wife's control after a change in form was recognized by the court in *Moss v. Gibbs*. This involved a reconciliation by the court of apparently conflicting decisions in two earlier cases, Hawkins v. Britton State Bank, 122 Tex. 69, 52 S.W.2d 243 (1932), and Strickland v. Wester, 131 Tex. 23, 112 S.W.2d 1047 (1938). In the *Hawkins* case certain farm implements used by the wife on land which was her separate property had been purchased with special community funds. These implements, though mutations of special community property, were held to remain under the wife's control and not subject to mortgage by the husband. The *Moss* court, in following the *Strickland* rule that special community mutations were not under the wife's control, pointed out that the *Hawkins* court had relied heavily on its view that the mutations (implements) there involved were essential to, and used in connection with, management of her separate estate (authority over which was given her by statute), and that control over her seprate property "would be effectually defeated if she were prevented from using the revenues from such separate property to provide the necessary equipment to operate her separate estate." 370 S.W.2d at 458. No such circumstances existed in *Strickland* and *Moss*, said the court, where the special community mutations involved were not "essential to or used in connection with the operations of the wife's separate estate." *Id.*

As to subsection (3) of the quoted statutory provision, if the Code scheme of classifying personal injury recoveries withstands constitutional tests,[15] the only portion of such recoveries falling into the community property classification will be awards for loss of earning capacity during marriage. Just as the wife will have authority over her personal earnings, she will also have control of the compensation awarded to her for the loss thereof. Such control previously resided in the husband.[16]

Whereas prior to 1968 all of the community property was subject to the management of only *one* of the spouses, section 5.22(b) of the Family Code (and its predecessor statute in the Marital Property Act of 1967[17]) provides for a new concept—that of joint management—over some of the community property. That subsection states:

> (b) If community property subject to the sole management, control, and disposition of one spouse is mixed or combined with community property subject to the sole management, control, and disposition of the other spouse, then the mixed or combined community property is subject to the joint management, control, and disposition of the spouses, unless the spouses provide otherwise by power of attorney or other agreement in writing.

This provision presents several problems of construction. First, when do community properties subject to the management of different spouses become "mixed or combined" so as to require joint management? The drafters apparently did not intend that "mixed or combined" is to be given the same meaning, with reference to mixtures of community property, as is ascribed to the word "commingling" in situations involving admixtures of separate and community property,[18] *i.e.*, that the

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15. Sec. 5.01 of the Family Code makes personal injury recoveries the separate property of the injured spouse, except for recoveries for loss of earning capacity during marriage. For a brief discussion of the Constitutional problems involved, *see* note 1 *supra*.

16. In Glen Falls Ins. Co. v. Yarbrough, 369 S.W.2d 200 (Tex. Civ. App.—Waco 1963, no writ), the court held that workmen's compensation benefits for injuries sustained by the wife were community property subject to the management and control of the husband, and a settlement agreement relative thereto executed by the wife alone was voidable because of the husband's failure to execute same.

17. TEX. REV. CIV. STAT. ANN. art. 4621 (1960), as amended by Tex. Laws 1967, ch. 309 (effective Jan. 1, 1968).

18. The Commentary of the Drafting Committee of the State Bar of Texas, relative to art. 4621 of the Marital Property Act of 1967 (which contained virtually the same language as section 5.22(b) of the Family Code) included the following statements:

> "The only other type of mixture contemplated is that of community properties subject to the management of each spouse . . . . The Council has avoided the word 'commingling' since it is usually used in the context of mixing separate and community property (an ownership rather than management dichotomy) and is sometimes used to indicate traceable—in other contexts untraceable—mixing whether unintentional or deliberate."

property formerly subject to the control of one spouse is no longer traceable or identifiable. If that had been the intention, it would have been easy enough to say so, either by use of the word "commingling" or, if it were thought desirable to avoid use of that word in the management context, by simply spelling out in the statute that intention.

It seems, then, that "mixed or combined" should be given the ordinary meanings of those terms, and combinations of community properties subject to the control of different spouses will become subject to joint management, even where the segments are readily identifiable or traceable.

The phrase "*joint* management, control, and disposition" gives rise to another problem of construction. Leaving out consideration of the rights of third persons who may rely on indicia of management powers,[19] and considering only the powers of the joint managers as between themselves, just what does the requirement of joint management mean in terms of alienation? Is it intended that both spouses must participate in order to effectively alienate any portion of the mixed community property? If so, an attempted alienation of the mixture by one spouse would presumably fail *in toto*. Or, borrowing from the law of joint tenancy (on the theory, not necessarily plausible, that a "joint manager" should have powers of alienation similar to a "joint tenant"), would a joint manager have the power to alienate a fractional part of the mixed property without the joinder of his co-manager?[20] If so, what fraction—only that over which he originally had sole management powers (which would be in keeping with the established Texas view that the power of alienation over community property is derived from the broader powers of "management, control, and disposition"), or his community one-half ownership interest?

Alternatively, do we look to the law of partnerships, so that each spouse would be deemed an agent of the marital partnership for the

19. Sec. 5.24 of the Family Code sets up a presumption that community property standing in the name of one spouse or, in the case of property not subject to evidence of ownership, being in the possession of one spouse, is presumed to be subject to such spouse's control. It further provides that a third person dealing with a spouse is entitled to rely on the presumption where such third person is not a party to fraud on the other spouse and does not have notice of the spouse's lack of authority. This provision applies to the rights of bona fide purchasers and creditors, and presumably would invest no third party rights in donees, at least in the absence of some change in position, following a purported gift, taken in reliance on the presumption created by the statute.

20. At common law joint tenants were said to hold *per my et per tout*, meaning by the half and by the whole. They were seized of the entire estate for purposes of tenure and survivorship, but of only a particular part or interest for the purpose of immediate alienation. A joint tenant may alienate his interest in the jointly held property, which has the effect of terminating the joint tenancy and constituting the new owner a tenant in common with the other owner.

purposes of "partnership business"? If so, the alienation of all or any part of the mixed community property by only one of the spouses, if done for "partnership purposes," would be effective where the third party involved has no notice of lack of authority in the alienating spouse. The last clause of 5.22(g), requiring written agreements to alter the joint management arrangement, would not appear to be consistent with the implied agency approach.

These are problems the courts will have to face, probably in short order, and it would seem by far the best solution to adhere to the view that once a spouse has permitted community property subject to his control to become mixed or combined (though not necessarily "commingled") with community property subject to the control of his mate, management (at least in the sense of alienation) requires the participation of both spouses as to any portion of the mixture. Such an interpretation would forestall some of the many difficult problems that would be presented by the fractional control approach or by the application of partnership concepts of alienation, would avoid confusion of ownership and management principles, and would be in keeping with sound rules of statutory construction.[21] Of course, alienation by one spouse would be upheld in the event he had written agency powers from the other spouse, or in the cases of ratification or estoppel.

These questions pertaining to the general powers of alienation by a joint manager over mixed community properties far transcend the narrower problem presented by attempted gifts of such property by a joint manager acting alone. But if the above interpretation of the statute is accepted, then no gift of mixed community properties would be effective as to any part thereof unless both spouses participated in the gift, even if the gift were not in fraud of the ownership rights of the now-participating spouse. If it is not accepted, then we are back to the problem of ownership versus management—would such a gift be given effect as to the donor spouse's one-half ownership interest, or as to that property originally under his control?

Of course, the construction here suggested might give rise to questions concerning joint bank accounts. For example, if a husband and wife are both employed and each deposits his salary in a joint checking account, are their respective personal earnings, originally

21. It is the opinion of the author that the word "joint" has acquired no special or technical meaning in the law, except in combination with other words (*e.g.*, joint tenancy, joint venture, joint liability, etc.). This being so, rules of statutory construction call for the word "joint" to be given its ordinary meaning according to the rules of grammar and common usage. The most common definition of the word, as an adjective, found in standard dictionaries is: "involving the united activity of two or more."

subject to each spouse's sole management, now subject to the joint management of both by virtue of having been "mixed or combined" in a joint account? Could the husband, for instance, make any effective gift out of such account, even though not fraudulent as to the wife's ownership interest, without her participation? Or could he, for that matter, individually dispose of money in the account for any purpose, without the wife's participation?

Before the mind boggles in contemplation of the inconveniences that could arise from such an application of the statute to joint checking accounts, it is suggested that the last clause of section 5.22(b) provides an answer to the problem before it arises. The typical account signature card, authorizing withdrawals by husband *or* wife, should constitute an "agreement in writing" that each spouse is to have the power to dispose of all of the funds in such account upon the authority of his or her individual signature. A gift out of such account by one spouse, though within his individual management powers by virtue of the "agreement in writing," would still, of course, be subject to the test of fraud.

IS THE DISPOSITION TRULY INTER VIVOS?

The question of whether an effective inter vivos disposition has been made may arise in several contexts.[22] One of these occurs in Texas because of the earlier noted rule that a managing spouse may make inter vivos dispositions of community property,[23] but has no testamentary power over the other spouse's community interest.

A complex body of law, involving the application of legal principles from several distinct fields, has developed in this area. The judicial tendency has been to uphold transfers as inter vivos, despite the fact that few, if any, incidents of ownership were fully terminated in the transferor prior to his death, if it appears that the transferor had the requisite donative intent. There is considerable justification for this tendency in many of the contexts in which the question arises. Under our fundamental concepts of private property ownership, one of the most important property rights is that of selecting successors in ownership. Exercise of that right should generally be given effect where possible.

22. For example: (1) Is the property in question part of the estate of a decedent, available for distribution to his heirs or devisees, or did he effectively dispose of it to other prior to his death? (2) Was the dispositive instrument required to be executed with the formalities required for a will, or only those required of inter vivos transfers? (3) Is the property in question subject to death taxes upon the death of the decedent? (4) Is the property in question subject to forced heirship or elective rights, in those states in which such rights exist in the surviving spouse as to the property in the decedent spouse's estate?

23. If not fraudulent as to the other spouse.

Thus, if an owner of property executes an instrument during his lifetime which, though lacking testamentary character, can be upheld as an inter vivos transfer, public policy dictates that a court so uphold it, if such appears to be in keeping with the transferor's intentions, even though the property rights passing to the transferee prior to the death of the transferor are gossamer at best.

Such policy considerations should not exist, however, where the transferor is not the sole owner of the property in question, but owns only a community interest therein. The context here is not the power of a sole owner of property to dispose of it as he wishes, but whether the transfer of someone else's property—the community interest of the other spouse—will be upheld. In this situation policy considerations should shift to the opposite side of the scale.

Nevertheless, the Texas courts have upheld a number of gratuitous transfers of community property as inter vivos, and within the powers of the managing spouse, despite the tenuousness of the rights moving to the transferee prior to the transferor's death. In doing so, they have utilized legal principles largely developed in the more sympathetic inter vivos versus testamentary settings.

The thread of consistency which runs through the cases, regardless of the theory applied to sustain the transfer as inter vivos, is the requirement that an "interest" in the property be received by the transferee during the life of the transferor. That "interest" is a highly flexible term needs scarcely to be mentioned.

When the law of gifts alone is looked to for determining whether an inter vivos disposition has been made, finding that an "interest" has vested in the transferee may sometimes be difficult. For example, assume that A executes a deed of gift of a chattel directly to B, reserving the power to revoke. Since the concepts of a completed gift and revocability are mutually exclusive, no effective gift has been made. The donor must intend to part irrevocably[24] with title and dominion, and such title must pass immediately and unconditionally.[25] In this situation, any "interest" to be found in B is dependent on the law of gifts, and since the requisite elements of an effective gift are not satisfied, it cannot be said that A, by any inter vivos act, created an "interest" in B.

On the other hand, assume that C deposits money in a bank savings account which he opens in the names of "C or D, or the survivor." Assuming that C intended to give D a joint ownership interest in the

24. Wilson v. Hughes Bros. Mfg. Co., 99 S.W.2d 411, 413 (Tex. Civ. App.—Fort Worth 1936, no writ).

25. Fleck v. Baldwin, 141 Tex. 340, 172 S.W.2d 975, 978 (1943).

account, together with the right to sole ownership of the account upon C's prior death,[26] and that the requirements of delivery,[27] actual or constructive, are satisfied, it can be forcefully argued that an "interest" in the account has presently vested in D under the law of gifts. The fact that C, as the other joint owner, has the power to defeat the gift to D by withdrawing the funds himself, does not detract from the fact of D's "interest" until that event occurs. Consequently, if C were a Texas spouse transferring community property over which he had inter vivos management powers to the joint account (D being a third party not C's spouse), such transfer could be upheld on gift principles as within C's management powers if not in fraud of his spouse's rights.

While Texas courts have recognized that an "interest" may be created in the transferee, in the joint bank account situation, under the law of gifts,[28] so as to sustain the transactions as inter vivos and defeat testamentary claims, they have frequently discovered the law of gifts too demanding, in terms of donative intent and delivery, to find the requisite "interest" passing to the transferee inter vivos.[29] Instead the courts have turned to other areas of the law in which such requisite "interest" in the transferee can be more readily found.

One of these areas is the law of third party beneficiary contracts, wherein a donee beneficiary may enforce a contract made between others for his benefit. Three Texas Supreme Court cases[30] decided in the last decade make it clear that one holding the rights of a donee beneficiary to enforce a contract made for his benefit has received a sufficient "interest" to characterize the transfer by the donor as inter vivos, despite the fact that such "interest" is defeasible until the donor's death. These cases all involved joint savings accounts, *i.e.*, essentially the C-D hypothetical discussed above. In all three the courts held that the contract between the depositor (C) and the bank (or savings and loan assocation) created in the donee beneficiary (D) a sufficient "interest" to

26. Apparently this may be inferred from the opening of the account unless it is shown that it was intended as a mere "convenience account." *See* Krueger v. Williams, 163 Tex. 545, 359 S.W.2d 48 (1962), which upheld a transfer to a joint account as inter vivos on what appears to be a third party beneficiary theory, but in which the court found that the facts surrounding the opening of the account created a presumption of donative intent on the part of the depositor.

27. The question of the requisite delivery of a joint ownership interest in a savings account often turns on whether there has been delivery of a passbook to the donee.

28. Shroff v. Deaton, 220 S.W.2d 489 (Tex. Civ. App.—Texarkana 1949, no writ).

29. Krueger v. Williams, 163 Tex. 545, 359 S.W.2d 48 (1962); Fleck v. Baldwin, 141 Tex. 340, 172 S.W.2d 975 (1943).

30. Quilter v. Wendland, 403 S.W.2d 335 (Tex. 1966); Krueger v. Williams, 163 Tex. 545, 359 S.W.2d 48 (1962); Davis v. East Texas Sav. & Loan Ass'n., 163 Tex. 361, 354 S.W.2d 926 (1962).

sustain the transaction as a valid inter vivos transfer. In *Krueger v. Williams* the court expressly rejected the gift theory for according inter vivos treatment to the transaction.[31] In *Quilter v. Wendland* the court "assume(d) without deciding" that the facts did not justify a finding that the requisite elements of a gift were present.[32] Yet in each the "interest" requirement was held satisfied by the third party beneficiary rights which moved to the donee beneficiary, although such interest could be defeated by the transferor until his death by withdrawal of the funds.

Of the three cases, only in *Krueger* was the exercise of a spouse's inter vivos management powers over community property in issue.[33] In that case Williams, using community funds, purchased a $10,000 investment share account in a savings and loan association. The account was purchased in the names of "W.T. Williams and/or Ila Mae Krueger or payable to the survivor of either." Mrs. Krueger was Williams' daughter by a prior marriage. In upholding the daughter's claim to the account following her father's death, as against the claim of Williams' widow that no effective inter vivos disposition had been made by Williams under his management powers, the court made it clear that the third party beneficiary theory would be applied to accord inter vivos treatment to dispositions by a managing spouse of community property.

The third party beneficiary concepts have been applied as well to sustain as inter vivos gratuitous transfers of forms of property other than joint bank accounts. In *Edds v. Mitchell*[34] the purchase of United States Savings Bonds issued in survivorship form was upheld as an inter vivos transfer because of the third party beneficiary rights which were created at the time of the purchase contract.

In addition, the third party beneficiary theory seems clearly the most logical upon which to accord inter vivos treatment to the designation of a life insurance policy beneficiary, with the power to change the beneficiary retained until the death of the policy owner. This

31. 359 S.W.2d at 50.

32. 403 S.W.2d at 337.

33. In the *Davis* case a husband created the joint account with right of survivorship, using his separate property, between himself and a second wife. Upon Davis' death the issue was whether the account belonged to the widow under the survivorship provisions, or passed to a daughter by a previous marriage under the terms of Davis' will. Although Davis could have defeated the wife's rights up until the time of his death by withdrawing the funds, the court held that the contract between Davis and the bank vested in Mrs. Davis "a present, though defeasible, interest in the deposit." In *Quilter* a widow deposited funds in certain survivorship joint accounts, and the controversy upon her death was between the donee beneficiaries of such accounts on the one hand, and the executor of her estate.

34. 143 Tex. 307, 184 S.W.2d 823 (1945).

was recognized by the Texas Supreme Court in dictum in the *Edds* case where the court said:

> A life insurance policy for the benefit of another is perhaps the best illustration of a contract for the benefit of a donee beneficiary. When the insurance is effected in favor of a third person, his rights under the policy *vest* immediately . . . . If the policy gives the insured the power to change the beneficiary, the right of the beneficiary named in the policy is *not indefeasible but it is nevertheless a vested right.*[35]

Since the third party's rights to the policy proceeds vest immediately the requisite "interest" is created inter vivos.

Consequently, if a managing spouse designates a third party (*i.e.*, not his spouse) as beneficiary of a community life insurance policy, reserving the right to change the beneficiary until the death of the managing spouse, it would seem that the transaction, if it is to be upheld as an inter vivos transfer of the right to the policy proceeds (and thus within the powers of the managing spouse), should be accorded such treatment based on third party beneficiary concepts.

Although more recent decisions have sustained such transactions as within the managing spouse's powers to make inter vivos dispositions of community property, if not fraudulent as to the other spouse, the opinions have not been phrased in terms of the vested "interest" received by third party beneficiaries. Instead, the courts have merely cited the power of the managing spouse to make non-fraudulent *gifts* of the community to third persons.[36] In two of the cases[37] the courts quoted with approval the following language of the Texas Supreme Court in *Brown v. Lee*,[38] an insurance case in which the wife was named beneficiary of community life insurance policies and in which the issue was disposition of the proceeds where the spouses died simultaneously:

> When (the insurance policy is) purchased with community funds, the ownership of the unmatured chose logically belongs to the community, unless it has been irrevocably given away under the terms of the policy, *i.e.* where the purchaser has, without fraud, foreclosed

35. 184 S.W.2d at 830. (Emphasis added). The court cited as authority for this statement Washington Life Ins. Co. v. Berwald, 97 Tex. 111, 76 S.W. 442 (1903); Splawn v. Chew, 60 Tex. 532 (1883); and 2 S. WILLISTON, CONTRACTS § 369, at 1079-80 (2d ed. 1936).

36. Davis v. Prudential Life Ins. Co., 331 F.2d 346 (5th Cir. 1964); Kemp v. Metropolitan Life Ins. Co., 205 F.2d 857 (5th Cir. 1963); Alexander v. Alexander, 410 S.W.2d 275 (Tex. Civ. App.—Houston 1966, no writ).

37. Davis v. Prudential Life Ins. Co., 331 F.2d 346 (5th Cir. 1964); Alexander v. Alexander, 410 S.W.2d 275 (Tex. Civ. App.—Houston 1966, no writ).

38. 371 S.W.2d 694 (Tex. 1963).

> any right to change the beneficiary . . . . The proceeds at maturity are likewise community in character, except where the named beneficiary is in fact surviving, *in which case a gift of the policy rights to such beneficiary is presumed to have been intended and completed by the death of the insured.*[39]

It is difficult to see how the requisites of donative intent and delivery are more easily satisfied in the insurance cases than in the joint bank account cases, and it would appear that in the interest of consistency the inter vivos nature of the disposition of insurance policy proceeds should be upheld, if at all, on the theory of the vested rights moving to a third party beneficiary at the time that a contract is made for his benefit.

Another body of law that may be applied to support inter vivos treatment of gratuitous transfers is that of joint tenancy. Technically, the survivorship aspects of common law joint tenancies have been abolished in this state by section 46 of the Texas Probate Code. But the section authorizes joint owners of property to agree in writing that the interest of either of them who dies will survive to the other joint owner.

In theory, then, when an owner of property designates himself and another as joint owners of the property, and they both execute a written agreement that the interest of each will survive to the other, the transferee has received contractual rights to the property, in the event of the earlier death of the transferor, which satisfy the requirement (for inter vivos treatment) that an "interest" vest in the transferee by lifetime acts of the transferor. It should be noted, however, that application of this theory is partially dependent on the law of gifts in these circumstances. In order for the donee joint owner to attain his status of joint ownership it is necessary that a joint interest in the property has been given to him. Unless it has, prior to or contemporaneously with the execution of the written survivorship agreement, it would seem that the requirements of the statute have not been satisfied, and that there would be no consideration flowing from him to support the contract from which he derives his "interest."

Perhaps it is for this reason that the courts have tended to treat the joint bank account cases from a third party beneficiary approach, even in those cases where there was a survivorship agreement as to the account signed by both parties.[40] Under this approach the "interest" requirement in the third party is satisfied by contractual obligations

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39. *Id.* at 696. (Emphasis added).

40. Davis v. East Texas Sav. & Loan Ass'n., 163 Tex. 361, 354 S.W.2d 926 (1962); Brown v. Lane, 383 S.W.2d 649 (Tex. Civ. App.—Dallas 1964, writ ref'd).

flowing from the bank rather than from the depositor, and the elements of gift become less crucial. Of course where there is no written agreement signed by *both* the depositor and the other named joint owner of the account, as in *Krueger v. Williams*,[41] discussed earlier, it is not possible to apply the joint tenancy theory because of the requirements of section 46.

Finally, a gratuitous transfer of property may be upheld as inter vivos, even though the interest passing to the beneficiary is defeasible by virtue of the settlor's retained power of revocation, under the law of trusts. Consequently, a managing spouse may, during his lifetime, place community property in trust for third persons, retaining the power to revoke the trust or to alter the beneficiaries, and the disposition will be sustained if not in fraud of the non-managing spouse's rights.

The law in this area was amply reviewed in the recent landmark case of *Land v. Marshall*.[42] In that case Marshall, a married man, transferred shares of community property corporate stock in trust to his daughter, Mrs. Land. Income was to be paid to Marshall for his life, then to his wife for her life, with remainder over to Mrs. Land. Marshall retained the power to revoke, together with extensive other powers, including the right to consume the principal and to control the trustee in her management of the trust property.

The court of civil appeals had held that the trust was an unauthorized testamentary disposition of the wife's community property interest.[43] In discussing this point, and in distinguishing between inter vivos and testamentary trusts, the supreme court pointed out that "if a trust is created during the lifetime of the trustor, even though he reserves the power to revoke, *a trust may presently be created*."[44] And the court cited the Restatement of Trusts, wherein it is said:

> Where an *interest* in the trust property is created in a beneficiary other than the settlor, the disposition is not testamentary and invalid for failure to comply with the Statute of Wills merely because the settlor reserves a beneficial life interest or because he reserves in addition the power to revoke the trust in whole or in part, and a power to modify the trust, and a power to control the trustee as to the administration of the trust.[45]

41. 163 Tex. 545, 359 S.W.2d 48 (1962).
42. 426 S.W.2d 841 (Tex. 1968).
43. 413 S.W.2d 820 (Tex. Civ. App.—Dallas 1967).
44. 426 S.W.2d at 844. (Emphasis added).
45. RESTATEMENT (SECOND) OF TRUSTS § 57(1) (1959). (Emphasis added).

Moreover, rejecting the contention of the widow that the trust must fail because it did not meet the criteria of a completed inter vivos gift,[46] the court held that a valid inter vivos trust may be created without compliance with the common law requirements of a gift inter vivos. The opinion quoted with approval the essence of the United States Supreme Court decision in *Commissioner v. Guggenheim*,[47] which was summarized in a subsequent case as follows:

> A power of revocation accompanying delivery would make a gift inter vivos a nullity, for dominion and control over the property would thereby be retained by the donor. But, according to the decisions, a settlor who executes an instrument creating a trust may successfully divest himself of title and transfer it to others, though reserving the power of revocation.[48]

The opinion then expressly holds that the husband, as the managing spouse,[49] has the power to create an inter vivos trust in favor of third persons in the community property as part of his managerial powers over the wife's share. Under the Family Code it seems clear that such power would also reside in the wife as to community property over which she is given management powers. Any transfers to the trust would, of course, be subject to the test of fraud against the other spouse's interest.[50]

However, the court in *Land* draws a limit to the amount of control

46. The widow's contention was largely based on the holding of the Texas Supreme Court in Fleck v. Baldwin, 141 Tex. 340, 172 S.W.2d 975 (1943). In that case Mrs. Baldwin had opened various bank accounts in her own name "in trust" for others, *i.e.*, the typical "Totten trust" situation. (These trusts take their name from the case *In re* Totten, 179 N.Y. 112, 71 N.E. 748 (1904).). Mrs. Baldwin, after opening the accounts, had continued to make withdrawals and deposits therefrom, had retained exclusive possession of the account passbooks, and had received the dividends from the accounts and used them for her own purposes. The court, in holding that the "beneficiaries" of the accounts were not entitled to the funds upon Mrs. Baldwin's death, in that no completed gift to them had been made, had stated:

> The principal difference between such a trust and a gift lies in the fact that in the case of a gift the thing given passes to the donee, while in the case of a voluntary trust only the equitable or beneficial title passes to the cestui qui trust. In each case the equitable title must pass immediately and unconditionally and the transfer thereof must be so complete that the donee might maintain an action for conversion of the property. Absent a completed gift of the equitable title, no trust is created, for an imperfect gift will not be enforced as a trust merely because of its imperfection. 172 S.W.2d at 978.

47. 288 U.S. 280 (1933).

48. Cleveland Trust Co. v. White, 134 Ohio St. 1, 15 N.E.2d 627 (1938).

49. The case arose at a time when the husband was the statutory manager of the general community property.

50. The question of fraud against Mrs. Marshall's community ownership rights was held to be not properly before the Texas Supreme Court because the trial court's summary judgment in favor of the daugher recited that the original allegations of fraud by the widow had been withdrawn, and that part of the judgment was not thereafter questioned.

that may be retained by a managing spouse over trust community property, if inter vivos treatment within the spouse's management powers is to be sustained. Drawing on the doctrine of illustory trusts, developed in jurisdictions in which the wife is given elective rights to take a forced statutory share of her intestate husband's property,[51] the court held that the Marshall trust was invalid because the plethora of powers retained by Marshall during his lifetime made the trust illusory rather than real. "Marshall had and could exercise every power over the corpus of the trust after the creation of the trust that he possessed before its creation," the court said.[52]

Perhaps the most important aspect of the *Land* decision is the court's recognition that policy considerations may play a part in determining whether a transfer with retained powers should be upheld as inter vivos. In rejecting as not controlling cases cited by the daugher's attorneys, in which powers equivalent to those retained by Marshall were held not to render the trust testamentary, the point was made that all of such cases involved property over which the settlor had the power of testamentary disposition, if in fact such power was exercised with the requisite formalities. "The scheme of our community property law[53] brings additional policy considerations to bear."[54]

The opinion then goes on to quote extensively from a treatise pointing out policy considerations in non-community property states in which the surviving spouse is given forced heirship or elective rights in the estate of the decedent spouse, another situation in which the settlor-spouse has no power of testamentary disposition over part of the property transferred to the trust.[55] But the policy considerations against

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51. The leading case is Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937).

52. 426 S.W.2d at 847.

53. In which, as has been noted, neither spouse has any power of testamentary disposition over the community interest of the other spouse.

54. 426 S.W.2d at 849.

55. The quoted passage is from Scott, *Trusts and the Statute of Willis*, 43 HARV. L. REV. 521, 537 (1930). It reads as follows:

> Thus far it has been assumed that the settlor had power to dispose of the property by will. Suppose, however, that he has not this power. By statute in many states, if a married person dies, the surviving spouse is entitled to a distributive share of the estate of the deceased spouse of which he or she cannot be deprived by the will of the decedent. The question has arisen in several cases whether the surviving spouse is entitled to a distributive share in property transferred by the decedent inter vivos upon trusts for the decedent for life and on his death for a designated beneficiary. If the trust is irrevocable, it is settled that the surviving spouse is not entitled to a distributive share. The same result has been reached, however, where the trust is revocable. *It would seem that even though such a disposition is not so far testamentary as to be invalid under the Statute of Wills it might well be held to be so far testamentary as not to bar the surviving spouse; it might*

inter vivos treatment of lifetime gratuitous transfers with powers retained until death are even stronger when community property is involved, although the court does not note this. This is because transfer of community property by one spouse involves disposition of property not *owned* by the transferor, whereas in the forced heirship cases ownership of the property fully resided in the transferor.

It is suggested that *Land v. Marshall* may signify the beginning of a trend toward a sterner judicial view of gratuitous dispositions of community property by a managing spouse, when power is retained to defeat the disposition during the life of such spouse. Such a trend, in the opinion of the author, would have considerable justification.

One other question remains. If a purported transfer of community property by one spouse is held, as in *Land*, not to be an effective inter vivos disposition within the spouse's management powers, to what extent will it be set aside? Suppose the disposing spouse is survived by his wife or husband and one child, and that the purported transfer was to his mother. Should the disposition be given effect as to the disposing spouse's one-half community interest, so that the mother would be entitled to one-half the property with the wife being entitled to the other one-half? Or should the disposition fail *in toto* so that the child would inherit the husband's community interest under section 45 of the Texas Probate Code, assuming the intestacy of his parent?

Land v. Marshall does not provide a clear-cut answer. Though the court held that the entire trust failed, so that Marshall's community interest passed under the laws of descent and distribution, this holding was grounded in the court's view that the invalidity of the trust as to the wife's community interest disrupted the settlor's entire trust scheme. While this result seemed proper here, by analogy to the "widow's election" situation, whereby a survivor who elects to take her community interest in property rather than taking under her spouse's will is not permitted to also enjoy the benefits of the latter[56] (since Mrs. Marshall would have enjoyed a life estate in her husband's one-half interest in the trust property had the trust been given effect as to the half), it does not necessarily follow that the disposition should be wholly set aside in all circumstances.

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well be argued that it is against the policy of the statute to allow the decedent to have the practical advantages of entire ownership as long as he lives and yet deprive the surviving spouse of a distributive share. (Emphasis added).

56. This analogy is discussed in detail in Jones, *The Illusory Trust and Community Property: A New Twist to an Old Tale*, 22 Sw. L.J. 447, 464 (1968).

It would seem that in dealing with the community interest of the disposing spouse, policy considerations would again shift so that the disposition of this interest should be given effect where possible. This assumes that the disposing spouse had the requisite inter vivos management powers over the community property in question. If the disposing spouse had no management powers over the property disposed of, the entire disposition should be set aside, since to hold otherwise would render nugatory the management powers accorded the respective spouses over community property acquired by their efforts and by investments of their separate properties.

IS THE DISPOSITION FRAUDULENT AS TO THE OTHER SPOUSE?

It has been noted on several occasions throughout this article that a gratuitous disposition of community property by a managing spouse to third persons will be upheld only if it is not fraudulent as to the other spouse. This section will examine the circumstances under which such dispositions are considered fraudulent.

It was at one time the law of this state that the only gratutitous dispositions of community property by the husband (the then manager of the general community) which were fraudulent as to the wife were those by which the husband actually *intended* to defraud his spouse, *i.e.*, where the disposition was made for the purpose of defeating ownership claims of the wife.[57] Thus, an allegation of fraud by the wife required that she prove the husband's subjective intent to defraud her, often a very difficult thing to do.[58]

Despite stirrings in some cases[59] and commentary[60] as to the injustice of this rule, it continued to be the prevailing view in Texas until the decision in *Kemp v. Metropolitan Life Insurance Co.*[61] Accepting Professor Huie's analogy to the defrauded creditor cases,[62] the court in

57. Martin v. McAllister, 94 Tex. 567, 63 S.W. 624 (1901); Dunn v. Vinyard, 234 S.W. 99 (Tex. Civ. App.—Texarkana 1921, no writ); Krenz v. Strohmeir, 177 S.W. 178 (Tex. Civ. App.—Austin 1915, writ ref'd); Rowlett v. Mitchell, 114 S.W. 845 (Tex. Civ. App. 1908, no writ).

58. Occasionally this subjective intent was inferred from the husband's actions. *See* Moore v. California-Western States Life Ins. Co., 67 S.W.2d 932 (Tex. Civ. App.—Amarillo 1934, writ dism'd).

59. Allen v. Brewster, 172 S.W.2d 192 (Tex. Civ. App.—Dallas 1943), *rev'd*, 142 Tex. 127, 176 S.W.2d 311 (1943); Watson v. Harris, 130 S.W. 237 (Tex. Civ. App. 1910, no writ). 240

60. Huie, *Community Property Laws as Applied to Life Insurance*, 18 TEXAS L. REV. 121 (1940).

61. 205 F.2d 857 (5th Cir. 1953). At the time of this case, the Texas Supreme Court had not spoken decisively as to whether affirmative proof of the husband's subjective intent was essential, though most of the civil appeals cases required such a showing.

62. *Huie, supra* note 60, at 131.

that case reasoned that the wife was protected under article 3996 of the civil statutes[63] from transfers of her interest made with intent to defraud her, and that in the case of gratuitous transfers fraudulent intent could be presumed from the acts of the husband and the facts surrounding the disposition. "Apparently Texas recognizes the right of the husband to make moderate gifts for just causes, but excessive or capricious gifts made with intent to defraud the wife are void or at least voidable upon her insistence," the court stated.[64]

Thus was born into the reasoning, if not into the terminology, of these cases the concept of constructive fraud, and it is now consistently recognized that the husband's gratuitous dispositions (and presumably those of the wife as to property over which she is given management powers) of community property may be set aside if either actual or constructive fraud, as against the other spouse, is present.

What criteria, then, will the courts look to in determining whether a gratuitous transfer by a managing spouse is constructively fraudulent as to the other spouse? One of them clearly is whether the property given to third persons is excessive when compared to the community estate as a whole. In *Davis v. Prudential Insurance Co. of America*,[65] where the husband named his mother beneficiary of a community life insurance policy and the proceeds of the policy exceeded 98 percent of the community estate, the court found the gift clearly excessive and capricious. In *Hartman v. Crain*[66] the husband used community funds to establish a joint bank account between himself and his sister, and on the husband's death the money in such account was more than double the husband's share of other community property which passed to the wife by his will. The court held the donation to the sister excessive and capricious and presumptively fraudulent.

On the other hand, in *Krueger v. Williams*[67] the Texas Supreme Court found no fraud on the part of the husband, in disposing of his wife's community interest in $10,000 placed in a joint survivorship account between the husband and a daughter by a previous marriage, when measured with the hindsight available following his death and

63. TEX. REV. CIV. STAT. ANN. art. 3996 (1966) which provides, in part:
Every gift, conveyance . . . of . . . any estate, given with intent to . . . defraud creditors, purchasers, *or other persons* of or from what they are, or may be, *lawfully entitled to*, shall, as to such creditors, purchasers or other persons, their representatives or, assigns, be void. (Emphasis added).

64. 205 F.2d at 863.

65. 331 F.2d 346 (5th Cir. 1964).

66. 398 S.W.2d 387 (Tex. Civ. App.—Houston 1966, no writ).

67. 163 Tex. 545, 359 S.W.2d 48 (1962).

testamentary disposition to the wife of an interest in his separate property equal in value to her community interest in the money placed in the account.

And in *Brown v. Brown*,[68] the court found no constructive fraud against the wife where the husband named his children (all except one by a previous marriage) and grandchildren beneficiaries of community life insurance policies to the extent of approximately $30,000 of the proceeds. The evidence showed the value of the community estate on the husband's death to be not less than $250,000, and the appellate court upheld the trial court's findings that the wife "was amply provided for" and "in all reasonable probability her one-half of the community estate will be more than sufficient in value to take care of her throughout the remainder of her natural life." Thus, said the court, the gifts were not "excessive, fraudulent or capricious."[69]

The language of the *Brown* case may be construed to mean that one of the primary tests for fraud, in cases where the disposing spouse is deceased at the time of the determination, is whether the surviving spouse has adequate means of support despite the gift of his or her interest. If this is the case, it is interesting to speculate on the application of this test.

Would an inter vivos gift by the husband of one-half of a $1 million community estate be upheld if the other half were still on hand at his death and the life expectancy of the widow not too great? Presumably under the *Brown* holding it might be, since the widow's half interest in the remaining $500,000 would probably be sufficient for her support. On the other hand, an inter vivos gift by the husband of one-half of a $100,000 estate would probably be considered fraudulent, particularly where the widow had a considerable life expectancy at the husband's death.

And under the *Brown* test, would a *wife's* inter vivos gift of a substantial amount of community property under her control be more readily sustained as nonfraudulent, after her death, than would a similar disposition by the husband? In the typical husband-wife situation, the former has a greater earning capacity than the latter. Would a court, then, be satisfied if a smaller amount of community property remained at the wife's death "to take care of" the husband for the remainder of his life?

Whether the result reached in the *Brown* case, under those particular facts, was justified or not, it is suggested that the language of

68. 282 S.W.2d 90 (Tex. Civ. App.—Waco 1955, writ ref'd n.r.e.).
69. *Id.* at 92.

the court in reaching that result was unfortunate. Gratuitous dispositions of a substantial fraction of the community property by only one spouse should be considered fraudulent in most, if not all, cases, regardless of the amount of community property remaining on hand after the disposition or upon the death of the disposing spouse. The disposition is, after all, of property not belonging to such disposing spouse to the extent of one-half thereof, and effectively deprives the non-disposing spouse of testamentary powers over her interest.

Another consideration in testing for fraud in these cases is the identity of the donee in relation to the donor. In this connection it is interesting to note that when the Matrimonial Property Act of 1967 was enacted by the Legislature the one provision recommended by the legislative drafting committee which was *not* adopted read as follows:

> The spouses shall join in, or the non-joining spouse shall consent to, disposition of community property to a third person when the disposition is without substantial consideration *and is not in discharge of a legal, moral or civic obligation.*[70]

Despite the rejection of this statute,[71] its substance represents the law as it has developed in the fraud cases. Gifts of community property to discharge moral obligations of the disposing spouse have received fairly sympathetic treatment by the courts. For example, upon remand of the *Kemp v. Metropolitan Life Insurance Co.* case[72] the federal district court sustained the husband's acts, in naming his sisters beneficiaries of a life insurance policy partly paid for with community funds, on the grounds that he owed and was fulfilling a moral obligation to his sisters, who were apparently needy. This decision was affirmed by the Fifth Circuit.[73] And the fact that the dispositions by the husband, in both the *Brown* and *Krueger* cases, were to his children undoubtedly influenced the courts in sustaining the transfers.

Conversely, the courts have taken a dim view toward gifts by the

70. This provision was recommended, by the drafting committee of the Family Law Section of the State Bar of Texas, as article 4623 of the revised statutes. It was not adopted. (Emphasis added).

71. The provision was not resubmitted to the legislature as part of the Family Code.

72. The United States Court of Appeals, Fifth Circuit, had reversed the original trial court judgment, which was against the wife because of her inability to show actual intent to defraud, and remanded the case to the district court for retrial on the constructive fraud issue. 205 F.2d 857 (5th Cir. 1953).

73. Kemp v. Metropolitan Life Ins. Co., 220 F.2d 952 (5th Cir. 1955).

husband to "strangers," particularly of the female variety,[74] and to putative second wives, the first marriage being undissolved.[75]

Gifts to worthwhile charitable, church or civic organizations, if reasonable in amount, should receive sympathetic treatment. Gifts in support of capricious enterprises will undoubtedly have rough sledding.

If the gratuitous disposition by the managing spouse is found to be fraudulent, to what extent will it be set aside? When the question of fraud arises after the death of the disposing spouse and the community has been dissolved, the prevailing view is that the disposition will be invalidated only as to the interest of the surviving spouse.[76] When the disposition is attacked during the existence of the community, it appears that the entire gift will be set aside, including that of the disposing spouse's interest,[77] presumably on the theory that the community is entitled to the benefits to be derived from the interests of both spouses so long as it remains undissolved.

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74. Allen v. Brewster, 172 S.W.2d 192 (Tex. Civ. App.—Dallas 1943), *rev'd*, 142 Tex. 127, 176 S.W.2d 311 (1943); Watson v. Harris, 130 S.W. 237 (Tex. Civ. App. 1910, no writ). 268

75. Roberson v. Roberson, 420 S.W. 495 (Tex. Civ. App.—Houston 1967, writ ref'd n.r.e.); Alexander v. Alexander, 410 S.W.2d 275 (Tex. Civ. App.—Houston 1966, no writ).

76. Davis v. Prudential Ins. Co. of American, 331 F.2d 346 (5th Cir. 1964); Kemp v. Metropolitan Life Ins. Co., 205 F.2d 857 (5th Cir. 1953); Aaron v. Aaron, 173 S.W.2d 310 (Tex. Civ. App.—Texarkana 1943, err. ref'd w.o.m.); Gutheridge v. Gutheridge, 161 S.W. 892 (Tex. Civ. App.—Amarillo 1913, no writ). *But cf.* Moore v. California-Western States Life Ins. Co., 67 S.W.2d 932 (Tex. Civ. App.—Amarillo 1934, writ dism'd).

77. Mahoney v. Snyder, 93 S.W.2d 1219 (Tex. Civ. App.—Amarillo 1936, no writ).