
FIDUCIARY DUTIES
in
FAMILY LAW

Written by:

RICHEL RIVERS
and
MARY EVELYN MCNAMARA
Brown McCarroll, L.L.P.
111 Congress, Suite 1400
Austin, Texas 78701
(512) 472-5456

Presented by:

RICHEL RIVERS, *Austin*
Brown McCarroll, L.L.P.

and

CHARLES M. WILSON III, *Dallas*
Law Office of Charles M. Wilson III

State Bar of Texas
FIDUCIARY LITIGATION 2008
April 24 – 25, 2008
Dallas

CHAPTER 9

TABLE OF CONTENTS

I.	FIDUCIARY DUTY IN THE MARITAL CONTEXT.....	1
II.	FAMILY CODE PROVISIONS RE: SPOUSAL DUTIES.....	1
II.	FAMILY LAW FIDUCIARY CASES.....	2
A.	Duty to Spouses & Families	2
	Conversion, Breach of Fiduciary Duty, Constructive Fraud, Imposition of Constructive Trust.....	2
	Breach of fiduciary duty: non-disclosure of property ownership	2
	Breach of fiduciary duty: parent as trustee of child's property	3
	Economic Duress.....	3
	Life Insurance	3
	Fiduciary Duty does not extend to a spouse's separate property and terminates on dissolution of marriage:	3
	Invasion of privacy: Videotaping	4
	Wiretapping	4
	Fraud: H kept W from probating a will to her detriment.....	4
	Life Insurance	5
	Constructive Fraud: fraudulent transfer to child.....	5
	Fraudulent intent not shown re: gifts to children.....	5
	Excessive Gift to Child.....	5
B.	Economic Torts.....	6
	Fraud on the community not an independent cause of action.....	6
	But an attorney's fraud is very actionable!	6
	Fraudulent transfers of property	6
	Life Insurance policy purchased during separation subject to characterization rules.....	6
	Fraud on the community: exemplary damages not available under <i>Schlueter</i>	7
	Alter Ego Proved	7
	Fraud on the community: undisclosed distribution of dividends did not change value of shares in a partnership.....	7
	Fraud on the community: wasting and mismanagement of community funds	8
	Fraud on the community: wasting/diversion of community assets.....	8
	Claim of fraudulent debt rejected	8
	Fraudulent conveyance of funds to paramour finding not upheld	9
	Presumption of constructive fraud rebutted – no evidence of intent to defraud & Wife could have learned of facts deliberately kept from her.....	9
	Alter Ego not found because of unclean hands.....	9
	Fraudulent transfer to paramour	10
	Fraudulent encumbrance: questionable investments secured by community stock.....	10
	Depletion of community estate improper	10
C.	Business Entities.....	11
	Reverse Piercing/Alter Ego	11
	Alter Ego.....	11
	Reverse Piercing/Alter Ego	12
	Alter Ego.....	13
	Alter Ego.....	13
D.	Paramours & Other Third Party Exposure.....	13
	Breach of fiduciary duty: property sold after divorce.....	13
	Post divorce fraud claim barred by res judicata.....	14
	Intrinsic Fraud not Actionable in Post-divorce against 3 rd Party	14
	Breach of Fiduciary Duty: sale of residence.....	14
	Wife's 3 rd party fraud claim not covered by husband's partnership agreement to arbitrate	15
	Fraudulent conveyance of community property (lottery ticket to paramour).....	15
	Fraud on the Community: transfers to paramour.....	15

FIDUCIARY DUTIES IN FAMILY LAW

I. FIDUCIARY DUTY IN THE MARITAL CONTEXT

As we have moved into a more conservative legal climate with its increasing emphasis on the protection of the financial underpinnings of our society, it is interesting to note how our judiciary has reflected a heightened sensitivity to the respective duties of people to one another. This trend is reflected in a revival of the law of fiduciaries which addresses individual expectations that a fundamental sense of fairness will guide our courts' resolution of matters of trust.

As a general rule, individuals have no duty to aid or protect another person. See RESTATEMENT (SECOND) OF TORTS § 315 (1965). However, the courts have found exception to this general rule when a special relationship of confidence and trust exists between the parties. Thus, a fiduciary relationship imposes a duty on the part of a fiduciary to act in the interests of the beneficiary of the duty, and consequently opens a field of litigation to compensate victims when the fiduciary duty is breached.

The marital relationship in general as well as certain specific trustee positions have presented a variety of factual contexts for judicial commentary on the nature of fiduciary duties in the family law context. This paper primarily provides case summaries that address fiduciary concepts and issues as they have developed in Texas family law. For a more comprehensive discussion of the underlying principles of fiduciary law as they apply to family law litigation, see *Fiduciary Litigation – Family Law* by John F. Nichols, Sr. and *Fiduciary Litigation Issues in Family Law* by Warren Cole, Jo Chris Lopez and Charles M. Wilson (State Bar of Texas 2006 Fiduciary Litigation Course).

II. FAMILY CODE PROVISIONS RE: SPOUSAL DUTIES

The Texas Family Code does not directly impose a fiduciary duty of spouses toward one another. However, the Code includes various expressions of public policy in support of the marriage relationship and parentage, and it sets out presumptions intended to serve those policies. For example, every marriage is presumed to be valid (unless it's void, voidable or annulled as provided by the Code) so as to provide stability for those entering into the marriage relationship in good faith and to provide for an orderly determination of parentage and security for the children of the relationship. *Family Code* §1.101 *et seq.* And, the Code directs that each spouse has the duty to support the other spouse, and further provides that a spouse who fails to discharge the duty of support is liable to any person who provides necessities to the spouse to whom support is owed.

Family Code §2.501. The Code establishes a presumption that property possessed by either spouse during or on dissolution of marriage is presumed to be community property, and establishes a high burden of proof by clear and convincing evidence in order to establish that property is separate property. *Family Code* §3.003.

The Family Code establishes rules for the management, control and disposition of marital property. *Family Code* §3.101 *et seq.* The Code particularly sets out protections for third persons, providing that they are entitled to rely on a spouse's authority to deal with the property if the third party is not a party to a fraud on the other spouse or another person and if the third party does not have actual or constructive notice of the spouse's lack of authority. *Family Code* §3.104(b). Of course, evidence of either circumstance involving the third party – participation in the fraud or notice of a spouse's lack of authority – would negate the ability of the third party to rely on a spouse's authority to transfer in interest in marital property.

The Family Code also establishes a fraud-type burden of proof concerning a claim of improper transfers and debts while a divorce action is pending. It provides that a transfer of real or personal community property during divorce or a debt incurred that subjects the other spouse or 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. *Family Code* §6.707. The statute goes on to impose a requirement that a person dealing with the transferring or debtor spouse have notice of the intent to injure the rights of the other spouse, and to place the burden of such proof on the spouse seeking to void a transfer or debt.

In one specific instance, the Family Code imposes a fiduciary obligation on the part of a former spouse. The Code sets out a procedure for a party affected by a Decree of divorce providing for a division of property to request enforcement of that Decree by filing a suit to enforce. The Code specifically addresses the circumstance of an award of the right to receive installment payments or a lump-sum payment due after the Decree is entered, on the maturation of an existing vested or nonvested right to be paid in the future. It provides that “[t]he 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.” *Family Code* §9.011(b).

For the most part, the Family Code sets out procedural provisions for resolution of disputes involving the marital and parental relationship. But the underlying policy provisions bolstering the marital relationship, coupled with specific evidentiary presumptions and burdens of proof, coincide with

judicial precedent pertaining to the fiduciary obligations of spouses toward one another.

II. FAMILY LAW FIDUCIARY CASES

The law of fiduciary relationships between spouses in Texas has evolved through the application of both common law and equitable principles of fairness to create duties of varying scope, depending on the factual circumstances of the parties' disputes. This evolution has culminated in a number of expressions of the fiduciary duty spouses owe to one another in dealing with the community estate. *See, e.g., Southwest Texas Path. Assocs. v. Roosth*, 27 S.W.3d 204, 208 (Tex. App.—San Antonio 2000, no pet.); *Connell v. Connell*, 889 S.W.2d 534, 541 (Tex. App.—San Antonio 1994, writ denied); TEXAS PATTERN JURY CHARGES – FAMILY PJC 206.01, 206.02A, 206.03A, and 206.04A (2006). *See also Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998) (Court inherently recognized spouses have a duty not to commit fraud on the community estate); *Mazique v. Mazique*, 742 S.W.2d 805, 808 (Tex. App.—Houston [1st Dist] 1987, no writ) (same); *Spruill v. Spruill*, 624 S.W.2d 694 (Tex. App.—El Paso 1981, writ dismissed) (“a trust relationship exists between husband and wife as to that community property controlled by each spouse and a presumption of constructive fraud arises when a spouse unfairly disposes of the other spouse’s one-half interest in community property.”); *In re Matter of McCurdy*, 489 S.W.2d 712 (Tex. Civ. App.—Amarillo 1973, writ dismissed) (court’s discussion implies that husband had a duty to not deplete community funds by giving a large portion of the community estate to the minor child, and depriving Wife a means of supporting herself).

This paper provides summaries of cases dealing with fiduciary responsibilities of spouses, arranged in four broad categories: general duties to spouses and families, economic torts, business entities, and paramours and other third party exposures.

A. Duty to Spouses & Families

Conversion, Breach of Fiduciary Duty, Constructive Fraud, Imposition of Constructive Trust

Wilz v. Flournoy, 228 S.W.3d 674 (Tex. 2007).

Wilz and Flournoy divorced in 1973 and Flournoy, the father, was awarded custody of their son, Jon. Years later, Jon suffered incapacitating injuries in a car accident. Flournoy sued Ford Motor Company individually and on Jon’s behalf. A settlement was reached. Flournoy received \$379,300 on Jon’s behalf and \$95,000 personally. As guardian of Jon’s person and estate, Flournoy and his new wife purchased a 110-acre farm. The mortgage was \$961 per month. For years, the Flournoys regularly withdrew roughly \$960 from Jon’s account. When that account was depleted, the Flournoys institutionalized Jon. Wilz, the mother,

then became Jon’s guardian. She sued the Flournoys on Jon’s behalf for conversion, breach of fiduciary duty, and constructive fraud, tracing several checks drawn on Jon’s account to the Flournoys’ personal account. In response, the Flournoys invoked the Fifth Amendment privilege against self-incrimination and claimed they used Mr. Flournoy’s settlement money for the farm’s down payment. A jury found that Mr. Flournoy breached his fiduciary duty and committed constructive fraud and that the Flournoys converted Jon’s property with malice. The trial court therefore imposed a constructive trust on the entire farm. The court of appeals reversed in part, affirming the constructive trust but limiting it to an undivided 35 percent of the farm.

A party seeking to impose a constructive trust has the initial burden of tracing funds to the specific property sought to be recovered. When Wilz met that burden, the burden shifted to the Flournoys to demonstrate what portion of the farm’s purchase price came from their own funds. Because the Flournoys failed to obtain a jury finding on their affirmative claim that part of the purchase money came from personal funds, the claim is waived on appeal unless they conclusively established it. The only evidence was the father’s interested witness testimony, which was contradicted by the mother. Because the jury was free to disregard the father’s deposition testimony as not credible, there was no abuse of discretion in imposing a constructive trust on the entire farm.

Breach of fiduciary duty: non-disclosure of property ownership

Solares v. Solares, 232 S.W.3d 873 (Tex. App.—Dallas 2007, no pet.).

As part of the parties’ mediated settlement agreement, Husband agreed to convey to Wife his half interest in some real property. The settlement was announced in court in September 1998, and the decree was signed in December 1998. On November 3, 1998, Husband executed a warranty deed conveying the entire property to a partnership in which he was one of the partners. There was evidence that the deed was recorded and returned to Wife on July 29, 1999.

In November 2002, Wife sued Husband, Husband’s partner, and the partnership for, among other claims, breach of the deed’s warranty of title, fraud based on the special relationship between husband and wife. A jury found that Wife should have discovered breach of the deed on July 29, 1999; that Husband failed to comply with the deed, awarding \$250,000 to Wife for this failure; and that Husband committed fraud, awarding \$350,000 to Wife for Husband’s fraud.

On appeal, Husband asserted that the breach of warranty of title claim was barred by statute of limitations, which everyone agreed was four years.

The court of appeals concluded the evidence did not show that Husband's partner was positively asserting superior title on November 3, 1998. The partner wrote to Wife's attorney in January 1999 requesting Wife's commitment to a sales price for the property, which was some evidence he recognized her ownership interest.

Concerning the fraud claim, Husband asserted that as a matter of law, he owed no duty to Wife to disclose the property's true ownership. Wife's claim of fraud was based on non-disclosure of the property ownership during the divorce proceedings. Because their divorce was contested and they were independently represented by counsel, the fiduciary duty between spouses terminated. *Toles v. Toles*, 113 S.W.3d 899, 916 (Tex. App.—Dallas 2003, no pet.). Absent a confidential or fiduciary relationship, there was no duty to disclose. The jury found a relationship of trust and confidence between Husband and wife that Husband had breached his fiduciary duty, but the jury found no damages for the breach (which Wife did not challenge). Accordingly, the court of appeals held that the judgment awarding fraud damages was barred as a matter of law.

Breach of fiduciary duty: parent as trustee of child's property

Rodriguez v. Rodriguez, No. 04-07-00252-CV, 2007 Tex. App. LEXIS 8802 (San Antonio Nov. 7, 2007, no pet.) (mem. op.).

In a post-divorce contempt action, Fred Rodriguez contended that his ex-wife Lisa Rodriguez breached her fiduciary duty to their child. Pursuant to the decree, Lisa was ordered to transfer the ownership of a duplex to herself as trustee for their child. Fred filed a contempt action contending she failed to fulfill the transfer. The court found that these terms of the decree were vague and unenforceable and entered a clarifying order requiring Lisa to establish a savings account for the child with her as trustee, ordering that all income from the duplex be deposited into the account, and designating Lisa as constructive trustee for the minor child. The court further explained at the hearing that being trustee imposed a fiduciary duty on Lisa.

Thereafter, Lisa sold the duplex and used \$22,268 of the proceeds to pay a debt to her parents and another \$4,787 to pay a judgment to Fred pursuant to the first contempt action. In a second contempt action, the court found that Lisa had breached her fiduciary duty as constructive trustee for her son because funds were removed from the trust to satisfy personal debts with her knowledge. A third party was designated as trustee for the child's trust. The court of appeals affirmed on the ground that the record evidence was more than factually sufficient to sustain a finding of breach of fiduciary duty and the amount owed to the trust.

Economic Duress

Sudan v. Sudan, 199 S.W.3d 291 (Tex. 2006).

Pursuant to an agreed decree, Husband agreed to pay Wife monthly alimony over a period of several years. At some point, Husband threatened to stop paying the alimony. The wife, after consulting with an accountant and an attorney, negotiated a lump sum payment, which the parties memorialized in an amendment to their settlement agreement.

Several months later, Wife sued Husband to rescind the amendment, alleging, among other things, intentional infliction of emotional distress, fraud in the inducement, and tortious interference. The trial court granted summary judgment in favor of Husband. A divided court of appeals reversed the summary judgment, finding evidence of economic duress.

The supreme court found no economic duress. After Husband threatened to stop paying alimony, Wife consulted with an accountant and an attorney and chose to negotiate the amendment of which she complains instead of seeking to enforce the existing agreement. Therefore, Husband's threat did not render her incapable of exercising free agency, *Dallas County Comm. College Dist. v. Bolton*, 185 S.W.3d 868, 877 (Tex. 2005) or cause imminent restraint. *Id.* at 879.

Life Insurance

Camacho v. Montes, No. 07-05-0003-CV, 2006 Tex. App. LEXIS 8181 (Tex. App.—Amarillo Sept. 15, 2006, no pet.) (mem. op.).

This was a suit to determine the ownership of the proceeds of a life insurance policy. Decedent's ex-wife purchased a \$100,000 term policy on his life. She was named the beneficiary. When they divorced, decedent was awarded ownership of the life insurance. Nevertheless, his ex-wife continued to pay the monthly premiums, and kept the policy in her possession. Decedent remarried and died three days later. At first, the trial court found that the new wife would be unjustly enriched by payment of the policy proceeds to her, and imposed a constructive trust on the policy proceeds in favor of the ex-wife. On the motion to correct the judgment, the trial court rendered judgment awarding the policy proceeds to the new wife's heirs-at-law. The court of appeals found no error in the trial court's failing to impose a resulting trust on the policy proceeds based on the ex-wife's later payment of premiums, because the formal fiduciary relationship between ex-wife and decedent terminated upon their divorce.

Fiduciary Duty does not extend to a spouse's separate property and terminates on dissolution of marriage:

In re Marriage of Notash, 118 S.W.3d 868, 873 (Tex. App.—Texarkana 2003, no pet.).

The parties were divorced under an Iranian decree. Wife later filed an action to divide the

community estate, which had not been divided. Included in her action was an allegation that her husband had breached his fiduciary duty to her for failure to share profits from separate property lots. The jury found a 60/40 community property division in favor of Wife. The jury also found Husband had breached his fiduciary duty owed to Wife. The jury found the profit derived from the operation of the business was \$150,000 and awarded \$100,000 in exemplary damages for the breach.

The court of appeals found no evidence that Husband transferred property to third parties, made excessive gifts to third parties, or used community property to benefit his separate estate while the parties were separated but before they were divorced. After the parties were divorced, Husband owed no fiduciary duty to Wife. Exemplary damages were improper both because there was no evidence of breach of fiduciary duty and because fraud on the community is not an independent tort under *Schlueter*. The court of appeals, however, upheld the disproportionate division of the community estate.

Invasion of privacy: Videotaping

Clayton v. Richards, 47 S.W.3d 159 (Tex. App.—Texarkana 2001, pet. denied).

Husband brought an invasion of privacy suit against a private investigator who was hired by Wife to spy on Husband. The trial court granted the private investigator's motion for summary judgment and appealed.

The private investigator, at Wife's request, concealed a video camera in a radio. The wife then placed the radio/camera in her and her husband's bedroom. The wife then made a trip out of town. The wife made arrangements for a neighbor to let the private investigator into the parties' home for the purpose of changing the video tape. Upon returning home and viewing the tape, Wife filed for divorce. Because the private investigator was acting as an agent for Wife, the court of appeals examined whether Wife committed the tort of invasion of privacy by videotaping Husband in their bedroom without his knowledge. The court of appeals reversed the summary judgment, holding:

- a. Invasion of privacy is a valid cause in Texas.
- b. A married person has a right of privacy even from his/her spouse.
- c. When a person enters into his/her bedroom, he/she has a right to expect privacy and seclusion.
- d. Videotaping by a spouse of his/her spouse in the parties' bedroom without the other's consent can be a tort.
- e. A spouse doesn't have the right to video tape the other spouse (without consent) when the

videotaped spouse has an expectation of privacy. Note that the tort is completed when the video is made - you don't have to publish or even view the tape privately.

- f. The concurring opinion goes a step further to equate videotaping with wire tapping and holds that any video taping without the subject's consent is an invasion of privacy.

Wiretapping

Collins v. Collins, 904 S.W.2d 792 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

Husband, after being appointed temporary sole managing conservator, recorded conversations between Wife and their minor child. The recordings of conversations with the child were admitted during trial to impeach Wife concerning the issue of custody.

The court of appeals determined that the recordings were illegal because Wife did not give her consent. The court of appeals determined that the tape-recorded conversations were not admissible because the criminal statute dealing with the use of the intercepted communications criminalizes their dissemination, and the civil statute provides a method to prevent dissemination. "To permit such evidence to be introduced at trial when it is illegal to disseminate it would make the court a partner to the illegal conduct the statute seeks to proscribe."

Fraud: H kept W from probating a will to her detriment

Buckner v. Buckner, 815 S.W.2d 877 (Tex. App.—Tyler 1991, no writ).

For four years after her father-in-law died, Wife tried to persuade her husband to probate his father's will. He told her each time that probating the will was not necessary. While the parties' divorce was pending, a jury trial was held on the issue of whether the delay in filing the application for probate was the result of fraud by Husband. The jury found in favor of Wife

At issue was 264 acres of land. Under the will, Husband and wife each received ¼ of the acreage, with the other ½ going to the widow. Under intestate succession, the widow retained a life estate, with the land then going, in whole, to Husband. The husband told Wife that probate was not necessary because the land was "ours" anyway. Ordinarily, legal opinions will not support an action for fraud. One exception is a fiduciary or confidential relationship of trust between the communicating parties, which exists between a husband and his wife. Husband, who made the representations to Wife, then had the burden of demonstrating the fairness of the transaction.

The court of appeals held that because of Husband's repeated representations that probate of the will was not necessary, there was sufficient evidence of a material misrepresentation by Husband to support the submission of the issue to the jury.

Life Insurance

Redfearn v. Ford, 579 S.W.2d 295, 297 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

Husband changed the beneficiary of his life insurance policies from his wife to his infant child without the knowledge or consent of wife. Husband and wife had separated and wife was living with another man. The child remained in the care of Husband. When husband died, the child's paternal grandmother sued wife and the insurance companies in her capacity as guardian of Husband's estate. The wife brought a cross-action alleging constructive fraud by her deceased husband by changing the insurance beneficiary so that Wife only received \$25,000 upon husband's death. Husband paid for the insurance premiums with community funds.

The Court of Appeals upheld the trial court's judgment that Husband reasonably provided for his child by making the child the beneficiary of the insurance policies.

Constructive Fraud: fraudulent transfer to child

Carnes v. Meador, 533 S.W.2d 365 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

After her husband died intestate, the widow disagreed with the decedent's daughter from a previous marriage concerning claims to certain assets of the estate, specifically a \$10,000 gift to the daughter's husband and a \$15,000 certificate of deposit and \$9,000 bank account that were in the joint names of the decedent and his daughter. The jury determined that all three of these were community assets and awarded them to the widow.

The daughter contended on appeal that the jointly held CD and bank account constituted a gift to her. The court of appeals disagreed. Because the jury found that the decedent alone exercised control over the funds, the contention of a gift was precluded. The daughter further asserted that she had claim to the funds under a third-party beneficiary contract. No rights of a survivor appeared in the CD, so the daughter did not have claim to the funds under a third-party beneficiary contract. As to the checking account, the signature card authorized "the survivor" to sign checks, which created a presumption that the decedent intended to enter into a third-party beneficiary contract with the bank under which the daughter was to receive the account funds on decedent's death.

The decedent's disposition of the \$10,000 to the daughter's husband and \$9,000 to the daughter by the checking account was in excess of the decedent's ½ interest in the community estate, raising a presumption of constructive fraud. However, because the trial court erred in denying the daughter her interest in the checking account, the court of appeals reversed the entire case.

Fraudulent intent not shown re: gifts to children

Horlock v. Horlock, 533 S.W.2d 52 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dismissed).

In the parties' divorce, Wife alleged that certain gifts by Husband to his three daughters from a previous marriage constituted fraud on the community. The total gifts were \$131,517. At trial, Husband testified that a tax advantage was the motivation for the gifts but admitted he did not consult Wife before making the gifts and believed she would have protested had she known. The husband also testified that in making the gifts he did not intend any deprivation of his wife's rights. The trial court found that Husband did not perpetuate actual or constructive fraud in making the gifts.

To prove actual fraud, Wife had the burden to demonstrate that the gifts were made for the primary purpose of depriving her of the use and enjoyment of the assets. The evidence was conflicting: Wife would not have approved the gifts, but Husband's intention in making the gifts was to benefit the community and the parties' estates on death. Additionally, the property from which Husband made the gifts was his "special community" (now sole management community), which disposition did not require Wife's approval. Concerning constructive fraud, taking into account the proportional size of the gifts to the size of the estate (13.1571% of a conservative estimate of the estate) and the tax advantages of the gifts, there was no constructive fraud.

Excessive Gift to Child

In re Matter of McCurdy, 489 S.W.2d 712 (Tex. Civ. App.—Amarillo 1973, writ dismissed).

Husband brought divorce action, then appealed the trial court's unequal division of community property and award of attorney's fees to Wife. The trial court found that husband committed constructive fraud by transferring community funds to custodial accounts under his control for the benefit of the children, and awarded wife half the value of the investment.

The appeals court affirmed the trial court, reasoning that: "[E]ven the salutary act of setting up a fund for the child's education out of the community property cannot override the rights of Wife, particularly where her understanding and consent to such a program is in doubt, and such gift is in an inordinate amount in relation to the total community estate. Further, such depletion of the community estate in which she shares, in the absence of her ownership of separate property or resources or prospects for lucrative income, would be detrimental to her primary source of support and maintenance after the dissolution of the marriage, and indirectly beneficial to the father and husband in that such trust fund for the child would serve to diminish the need for funds which he would normally be required to provide for the minor's education and support."

Although the court does not discuss fiduciary duty, the court's discussion implies that husband had a duty to not deplete the community funds by giving a large portion of the community estate to the minor child, and thus depriving Wife a means of supporting herself.

B. Economic Torts

Fraud on the community not an independent cause of action

Schlueter v. Schlueter, 975 S.W.2d 584 (Tex. 1998).

Husband filed for divorce and wife counterclaimed for fraud on the community estate, breach of fiduciary duty, and conspiracy incident to Husband's transfer of community assets to his father shortly before he filed for divorce. The trial court divided the community estate disproportionately in favor of Wife, and rendered judgment against husband and his father for actual and exemplary damages on wife's tort claims.

The Supreme Court found that a wronged spouse has an adequate remedy for fraud on the community through the "just and right" property division upon divorce, and held that there is no independent tort cause of action between spouses for damages to the community estate. In dividing community property, the courts can consider any fraud committed on the community by one of the spouses. Although the Court did not specifically address Wife's claim for breach of fiduciary duty, the court inherently recognized that spouses have a duty towards each other not to commit fraud on the community estate.

But an attorney's fraud is very actionable!

Vickery v. Vickery, No. 01-94-01004-CV, 1997 Tex. App. LEXIS 6275 (Tex. App.—Houston [1st Dist.] Dec. 4, 1997) (mem. op.), *pet. denied*, 999 S.W.2d 342 (Tex. 1999) (Hecht, J. dissenting).

In an interesting sequel to *Schlueter*, the Supreme Court denied a petition for review of the Court of Appeals' affirmance of a trial court's judgment against an ex-husband and the ex-wife's lawyer for fraud and breach of fiduciary duty incident to a divorce action which Husband obtained by, the jury found, fraudulently inducing her to sign a divorce decree by representing to her that they would reunite after a malpractice suit threat had passed. The husband (a lawyer) and wife's attorney (husband's law school friend), were found to have breached their fiduciary duties to Wife, and to have committed actual fraud against Wife and extrinsic fraud unmixed with any negligence on the part of Wife.

Judgment against Husband included \$1.3 million in mental anguish damages, \$1 million in exemplary damages, and \$1.5 million in prejudgment interest on the \$6.7 million in damages awarded for loss of marital property, for a total of \$ 3,821,371 in addition to the court's division of the marital estate. The trial court also rendered judgment against the attorney for \$350,000,

which the jury found to be wife's mental anguish for the attorney's breach of her fiduciary duty to Wife.

The Supreme Court denied Husband's and the attorney's petition for review. Justice Hecht, dissenting from the Supreme Court's interesting denial of a petition for review, commented that he had dissented in *Schlueter*, but felt that nonetheless this case should be reversed in light of *Schlueter*'s holding of no independent tort cause of action in a divorce case and in light of *Douglas v. Delp*'s holding that a party may not recover mental anguish damages from an attorney's breach of fiduciary duty when damages are purely economic.

Fraudulent transfers of property

Sheikh v. Sheikh, No. 01-05-00218-CV; 2007 Tex. App. LEXIS 8757 (Houston [1st Dist.] Nov. 1, 2007, no pet. h.) (mem. op.).

At the bench trial of the parties' divorce, Wife presented evidence that over a 10-year period, Husband, a physician, against her will sent \$2,090,000 to extended family in the United States and Pakistan. The wife testified that her husband earned in his medical practice an additional \$18,000-25,000 every month in cash that he did not report and instructed her that cash payments from self-paying parties were to be kept separate and not declared as income. She also testified that he kept large sums of cash in a safe and earned extra, unreported cash by writing prescriptions for cash. She calculated the total of \$2,090,000, from a small black diary in which her husband recorded all of the transfers he had made to family over 10 years. She was able to look at the diary only when her husband was showering and could not make a photocopy. Additionally, Husband had told her that he was "investing all of his money back home" in Pakistan because he was planning to go back one day. The wife also testified about a pattern of Husband's physical abuse of her. The trial court found that Husband had transferred community funds in cash to his extended family in the total amount of \$2,090,000 and, including this sum, awarded a 53.76%/46.24% property division in Wife's favor. The court of appeals upheld the property division.

Life Insurance policy purchased during separation subject to characterization rules

Granger v. Granger, 236 S.W.3d 852 (Tex. App.—Tyler 2007, pet. filed 1/4/08).

Wife's claim to one-half of her deceased husband's life insurance policy proceeds was denied by the trial court. Wife appealed, claiming that the beneficiaries of the policy failed to prove that the policy was Husband's separate property and, if the policy was community property, the gift of the proceeds was a fraud on the community.

During the parties' marriage, but while the parties were separated Husband purchased two life insurance policies, one of which the trial court found to be community and which was therefore not addressed on appeal. The other policy was found to be separate property on the ground that the only funds available to husband at the time he paid the premiums were separate funds. The wife testified that she saw people pay her husband for carpentry work, but she did not have access to his bank accounts. Other than one check, which was deposited after the withdrawal of the life insurance premium, Wife had no evidence of money Husband earned. Relatives denied that Husband worked as a carpenter regularly during the last year of his life and that the only funds Husband received were SSI disability benefits (which are not subject to division under community property laws) and gifts from family. The court of appeals found this to be sufficient evidence to rebut the community presumption.

Fraud on the community: exemplary damages not available under *Schlueter*

Davenport v. Scheble, 201 S.W.3d 188 (Tex. App.—Dallas 2006, pet. denied).

Wife was awarded in the divorce decree a promissory note for \$400,000. Seven years after divorce granted, Wife sued Husband for failure to pay promissory note, failure to disclose community stock, and fraud. Wife's fraud claim was based on the allegation that Husband knowingly concealed material information from her and made false representations that caused her to rely on the promissory note and consent to the community property division. She requested exemplary damages on the fraud claim because Husband's actions were "willful, wanton, and malicious."

The trial court, on default judgment, rendered judgment for Wife that included the unpaid amount of the promissory note, the value of the undivided stock, and, as part of damages for "fraudulently concealing the existence and subsequent sale of the Undivided Assets . . . and other fraudulent acts," \$350,000 for exemplary damages.

Husband filed a restricted appeal, alleging, among other issues, that the trial court erred in awarding exemplary damages because the exemplary damages award was based on Wife's fraud claim, for which there is no independent tort for fraud. The court of appeals agreed. Because a claim for fraud is not an independent tort giving rise to a cause of action between spouses, Wife was not entitled to exemplary damages. *Schlueter v. Schlueter*, 975 S.W.2d 584, 589 (Tex. 1998). The trial court was able to consider evidence of fraud on the community when it awarded a disproportionate amount of the community estate to

Wife, which disproportionate division Husband did not challenge on appeal.

Alter Ego Proved

Young v. Young, 168 S.W.3d 276 (Tex. App.—Dallas 2005, no pet.).

Husband appealed a finding that DAX Enterprises, Inc., which he owned before marriage, was his alter ego. The evidence supported a finding of alter ego. Concerning the first requirement for piercing the corporate veil, unity between the spouse and the corporation, Husband was the sole employee of the corporation and in charge of its finances. He deposited all of his income into the company account and used the account to pay personal expenses, including daycare expenses for his daughter from a former marriage and payments on a house he owned individually. Concerning the second requirement, that the spouse's misuse of the corporation damaged the community estate, from 1995 through 2000, DAX's gross earnings amounted to \$992,000. During this five-year period, Husband reported officer income of \$40,000, officer loans of \$31,260, and personal checks from the DAX account of \$145,000. He placed the parties' home in DAX's name instead of their names.

The court of appeals did reverse one portion of the trial court's judgment, in which the entirety of partition lien was placed against the entire partnership property. A partner's partnership interest, the right to receive his share of the profits and surpluses from the business, is the only property right a partner has that is subject to a community or separate property characterization. *Marshall v. Marshall*, 735 S.W.2d 587, 595 (Tex. App.—Dallas 1987, writ ref'd n.r.e.). The husband owned one-half of the partnership. Accordingly, it was error to place an entirety of partition lien against the entirety of the partnership property.

Fraud on the community: undisclosed distribution of dividends did not change value of shares in a partnership

Ricks v. Ricks, 169 S.W.3d 523 (Tex. App.—Dallas 2005, no pet.).

The parties settled their divorce in mediation, and a decree was entered based on the mediated settlement agreement. The wife requested a motion for new trial after learning that the previous year Husband had received a substantial sum in dividends for his shares in a medical center. The trial court denied the motion for new trial. The wife appealed, urging that the trial court should have granted her request for a new trial because Husband misrepresented the true value of the medical center shares during their mediation thereby committing fraud and breaching the fiduciary duty he owed to her.

The court of appeals affirmed. There was no evidence in the record that Husband represented a

value for the shares other than the value assigned by their experts and the comparable sales value arrived at during mediation, nor did Wife present any evidence of a different value for the shares. Also, Wife failed to show how the dividend income changed the value of the shares.

Fraud on the community: wasting and mismanagement of community funds

Lucy v. Lucy, 162 S.W.3d 770 (Tex. App.—El Paso 2005, no pet.).

Husband challenged disproportionate division of property, 73/27 in Wife's favor. The wife had alleged that Husband had committed economic torts against the community and spousal torts against her personally.

The appellate court affirmed because Husband admitted to receiving rental payments that were community funds, cashing the checks, then using them to pay the mortgage and living expenses instead of giving any portion of the funds to his wife. Although the trial court improperly labeled the award a reimbursement claim, it did not matter because the elements of fraud on the community were met to support a disproportionate division. Affirmed.

Fraud on the community: wasting/diversion of community assets

Loaiza v. Loaiza, 130 S.W.3d 894 (Tex. App.—Fort Worth 2004, no pet.).

Husband, a major league baseball player, began an affair two weeks before he was married. After the parties were married, Husband took his paramour and some of his cousins on a trip to a resort, bought an expensive car for the paramour, cars for family members, and, after filing for divorce but before Wife knew about the divorce filing, signed a contract with the paramour to lease a house and put \$75,000 in community funds as a down payment for the purchase option on the house. The husband also purchased several Rolex watches for teammates, a car for his mother, and two cars for himself. During the parties' separation, Husband continued his affair with the paramour, who had his baby, paid all of her medical bills, and paid the paramour's mother \$72,000 a year to care for the baby during the day. Also during the parties' marriage, Husband entered into a contract with the Toronto Blue Jays, which guaranteed Husband payments of \$4 million in 2001 and \$5.8 million in 2002.

The parties were divorced in April 2002. At the trial of the case, the trial court found that Wife did not prove by a preponderance of the evidence that Husband wasted community assets, breached fiduciary duties owed to appellant, or committed fraud on the community. Additionally, the trial court determined that the post-divorce payments under the Toronto Blue Jays contract were Husband's separate property

because he was required to complete his services as a baseball player before he was entitled to the money.

Wife appealed. The court of appeals held that although the trial court's fact findings on Wife's individual tort actions appear to conflict with its finding that it took the fraud and waste factors into consideration in making the property division, the trial court's 16 listed findings for a 73/27 community division in favor of wife show that the trial court's judgment is based upon the later findings, not former. Therefore, the trial court's insufficiency findings regarding Wife's tort claims are superfluous. Because those findings were unnecessary they did not result in an improper judgment and do not require a reversal of the divorce decree.

Concerning the baseball contract, the court of appeals held that because Husband's right to payment under the contract did not accrue until he performed his services, the payments due under the contract after the date of divorce were correctly characterized as Husband's separate property and were not subject to divestment by the trial court except under the limited circumstances set out in the fact findings.

Claim of fraudulent debt rejected

Sprick v. Sprick, 25 S.W.3d 7 (Tex. App.—El Paso 1999, pet. denied).

After a bench trial of Linda and Michael Sprick's divorce, the trial court awarded to Michael a sole proprietorship, valued at \$108,500, as well as an unsecured personal debt for a \$118,900 loan. Taking the personal loan into account, the community property division was 76%/24% in Linda's favor.

Linda sought a motion for new trial on the ground that the debt for the unsecured loan to Michael from Maurita Johnson, an 81-year-old family friend, was fraudulent and resulted in an unjust property division. Part of Linda's evidence was a recorded telephone conversation with Johnson, in which she denied lending Michael any money. Johnson's deposition testimony was also introduced, in which she stated that although she had made the money available, she was unaware of whether the money had been used. She further testified that after her telephone conversation with Linda, Michael (who had a general power of attorney over Johnson's estate) informed Johnson that he had used the money to cover some business and personal expenses. Johnson further testified that she would seek repayment of the debt. The trial court denied Linda's request for a new trial.

Linda appealed the trial court's failure to find fraud on the community. The court of appeals found that although there was some evidence to support a finding that the loan was fraudulent, there was sufficient evidence to support a finding that the loan was valid and necessary. In addition to Johnson's testimony, Michael testified that he deposited the funds

and applied them to outstanding debts. Michael's accountant testified that the loan was valid and that he was able to trace the funds. Linda's accountant testified that the business records showed a correlation between the dollar amounts from the loan and deposits into the business account. Although the evidence was conflicting, it was within the province of the trial court to evaluate the credibility of the witnesses' testimony.

Concurrence by Justice Ann Crawford McClure: Justice McClure's concurrence explained the background of the concept of fraud on the community and economic torts in the divorce context. She includes mention of the "community opportunity doctrine" and the "community jeopardy doctrine." The topic was in the forefront at the time this opinion came out in 1999, one year after *Schlueter* and within a month after Justice Hecht's dissent from the denial of petition for review in *Vickery*, in which Justice Hecht expressed that *Schlueter* would require that the actual and punitive damages awards be remanded for the trial court to consider a just and right division of the community estate. Justice McClure, although concerned about the current state of the law for economic torts against the community, agreed with the majority's holding. "Where the evidence is conflicting and of sufficient magnitude that the decision of the fact finder could have gone either way," she was "hard pressed to conclude that the trial court erred in failing to find a fraud on the community."

Fraudulent conveyance of funds to paramour finding not upheld

Thomas v. Casale, 924 S.W.2d 433 (Tex. App.—Fort Worth 1996, writ denied).

During the parties' divorce, Wife named Patricia Thomas, Husband's paramour, as a co-respondent, on the ground that Husband fraudulently transferred community funds into an account in Husband and Thomas's name. After a bench trial, the trial court granted the parties' divorce and ordered Thomas ordered to surrender \$61,753 of the money in her bank account.

Thomas appealed on the ground that the evidence was insufficient to prove that she knew about Husband's fraudulent intent or that the money deposited into her account was community property. The court of appeals reversed, stating that although Thomas shared the bank account with Husband, Thomas had no notice of Husband's intent to defraud his wife or injure her rights to community assets. Further, although there was proof that Husband put community funds into Thomas's account, there also is proof that he withdrew about the same amount and spent it. The court of appeals concluded that the evidence left the trial court with nothing more than speculation about the extent of Thomas's knowledge of whether the deposits made were community property

and about Husband's possible motives for placing the money into her bank account when he had accounts of his own.

Presumption of constructive fraud rebutted – no evidence of intent to defraud & Wife could have learned of facts deliberately kept from her

Connell v. Connell, 889 S.W.2d 534, 541 (Tex. App.—San Antonio 1994, writ denied).

Wife alleged various theories of fraud and conspiracy against her husband, his paramour, and a corporation established for the operation of a community property ranch. While the divorce was pending, Husband and the ranch filed for and received a discharge in bankruptcy. The bankruptcy trustee then intervened in the divorce, joining with Wife in contending that Husband fraudulently depleted the community estate before his discharge in bankruptcy by transferring community assets to his girlfriend and others. The trial court granted a directed verdict against the third party defendants, granted the divorce, and divided the little property remaining. Wife and bankruptcy trustee appealed.

The court of appeals found no error in the grant of a directed verdict. Unfairly disposing of community property results in a presumption of constructive fraud. But, the evidence established that the real value of the assets disposed was less than what was actually paid, so did not establish proof of fraudulent conveyances. Further, the evidence did not establish any intent to defraud creditors. Although the corporate books were flawed, there was no evidence that Wife was prevented from learning facts about the business that were deliberately kept from her. Further, there was no evidence of actual fraud, that is, any dishonesty of purpose or intent to deceive by Husband. The court of appeals was also mindful that the bankruptcy court had jurisdiction to investigate claims of fraud.

Alter Ego not found because of unclean hands

Southwest Livestock & Trucking Co. v. Dooley, 884 S.W.2d 805 (Tex. App.—San Antonio 1994, writ denied).

Before marriage, Husband owned part of Southwest Livestock. During marriage, both Husband and wife were officers and directors of Southwest Livestock. The wife filed for divorce and joined Southwest Livestock in the suit, alleging that Southwest Livestock was the alter ego of Husband. She asked that the community estate be reimbursed for community funds expended to enhance Husband's separate interest in Southwest Livestock. Southwest Livestock counterclaimed that Husband and wife breached their fiduciary duties to the company. The trial court denied Southwest Livestock's claims.

The court of appeals disagreed and found that as a matter of law, Husband and wife breached their

fiduciary duties to the company and that a substantial amount of property divided as community funds was acquired with corporate funds. During marriage, the couple used funds of the corporation to pay for personal ranch expenses, condominiums on South Padre, cars, gambling debts, and incidental expenses. The wife wrote checks to herself from the company totaling \$94,000. She also invested \$75,000 of corporate funds to purchase stock in a local bank. Because of Wife's actions, she could not avail herself of the equitable doctrine of alter ego because a person seeking equity must have clean hands.

Fraudulent transfer to paramour

In re Marriage of DeVine, 869 S.W.2d 415 (Tex. App.—Amarillo 1993, writ denied).

Husband filed for divorce after the parties had been married 48 years. Late in the parties' marriage, in the mid- to late-1980s, they invested in several money-losing real estate developments put together by their daughter's boyfriend, Jack Counts. Wife subsequently had an affair with Counts and set up a corporation through which Counts received investment money for real estate ventures and personal expenses. More than \$1.39 million flowed through the corporation's bank accounts over a 4-year period during which the corporation showed losses on its tax returns. During this period, Wife transferred the stock in the corporation to a non-profit entity also set up during marriage.

A jury found that Wife had committed actual fraud (\$100,000 to fairly compensate the community estate) and constructive fraud (\$400,000). The court of appeals affirmed the judgment. Concerning the \$100,000 actual fraud award, Wife persuaded her husband to invest more than \$100,000 in Counts' real estate developments without disclosing her relationship with Counts. Concerning the \$400,000 constructive fraud award, the jury could have presumed that more than \$700,000 in deposits were transferred for the benefit of Counts. "Where the managing spouse has received community funds, and the time has come to account for such funds, the managing spouse has the burden of accounting for their proper purpose." *Mazique v. Mazique*, 742 S.W.2d 805, 808 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.). The wife was unable to do so. The wife also challenged the 60/40 division of the estate in Husband's favor (which included in the community the \$500,000 in awards for fraud and constructive fraud). The court of appeals also upheld the property division, which served to compensate Husband for his lost interest in the community estate.

Fraudulent encumbrance: questionable investments secured by community stock

Massey v. Massey, 807 S.W.2d 391, 401 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

Husband appealed the property division and award of monetary damages for intentional and negligent infliction of emotional distress and constructive fraud, as well as attorneys' fees to Wife.

Husband asserted that because there was no evidence of physical injury, Wife could not recover for intentional and negligent infliction of emotional distress in a divorce. The holding in this case that Wife could recover for *negligent* infliction of emotional distress has since been overruled by *Twyman* and *Broyles v. Kerr*. Concerning the emotional distress, at trial Wife testified that, over the term of their marriage, Henry was abusive, explosive, and rageful. He constantly engaged in verbal abuse such as criticism and blaming, and he belittled her in front of her children. He had temper tantrums and physical outbursts which sometimes involved the destruction of property. Although he stopped short of physically assaulting Wife, his physical outbursts caused her to experience intense anxiety and fear.

The court of appeals also upheld the constructive fraud claim. The evidence showed that Husband created in excess of \$400,000 in community debt to make investments in his name and for his daughters and collateralized the debt with community property stock. He pledged another \$900,000 in community bank stock for loans but "the purpose of many of these transactions was unclear as was the disposition of the proceeds from the loans." Further, Husband on appeal did not point to "any evidence in the record which would indicate that he met his burden to establish the fairness of the transactions questioned."

Depletion of community estate improper

Mazique v. Mazique, 742 S.W.2d 805, 808 (Tex. App.—Houston [1st Dist.] 1987, no writ).

Wife claimed that Husband had fraudulently depleted the community estate. The trial court found for Wife and awarded her both actual and exemplary damages. The husband admitted to having several affairs and spending money from the community estate on the women. For example, Husband continuously withdrew cash receipts from his medical practice without informing his wife, the federal government, or the mortgage company.

The Court of Appeals acknowledged that although a managing spouse does not have to obtain approval for expenditure of community assets, there exists a trust relationship between spouses as to that portion of the community property controlled by the managing spouse. The court held that "[i]f the managing spouse violates his or her duty to the other spouse, a personal judgment for damages may provide a means

for recoupment of the value lost to the community as a result of the constructive fraud.” (citing *Belz v. Belz*, 667 S.W.2d 240, 247 (Tex. App.—Dallas 1984, writ ref’d n.r.e.).

The Court of Appeals upheld the trial court’s actual and exemplary damage award. Although not explicitly stated in the opinion, the court’s decision recognized a spouse’s fiduciary duty (the trust relationship) not to commit fraud on the community estate and to account for the expenditure of community assets.

C. Business Entities

Reverse Piercing/Alter Ego

Boyo v. Boyo, 196 S.W.3d 409 (Tex. App.—Beaumont 2006, no pet.).

As part of the divorce, Wife sued Husband and two companies, ABNL, Ltd., a foreign limited liability company established under Nigerian law, and ABNL, Inc., a Delaware corporation doing business in Texas, alleging that Husband used the two companies to divert community assets to deprive her of a just and right division of the community estate. Husband testified that ABNL, Inc. was formed to manage money for ABNL, Ltd. for work performed for Shell Petroleum.

The trial court rendered default judgment against ABNL, Ltd. The trial court further found that the two companies were alter egos of Husband, that Husband conspired with the companies to deplete the community through fraudulent transfers, and that Husband and the companies were jointly and severally liable for a \$1.25 million damages award in wife’s favor. All findings against ABNL, Ltd. were reversed and remanded for further proceedings on jurisdictional grounds.

As to ABNL, Inc., it was incorporated after marriage, the parties’ ownership interest in the corporation is community property. Concerning fraudulent transfers, Wife testified that Husband made wire transfers from corporate accounts to third parties, vehicle transfers, and “questionable” transfers to friends, relatives, and business associates. The court of appeals held that there was some evidence to support the fraud and alter ego findings as to Husband and ABNL, Inc. As part of its holding, the Beaumont Court of Appeals added an additional element for reverse piercing claims:

- (1) there is a unity of the corporation and the spouse;
- (2) the spouse’s improper use of the corporation has damaged the community estate; and
- (3) the loss cannot be remedied by reimbursement [new element].

The court of appeals reversed the \$1.25 damages award. The damage amount was tied to a purported

ABNL, Ltd. \$34 million contract with Shell but not tied to the transfer or loss of any other specific asset asserted to be a part of the community estate. The husband testified that Shell had canceled the contract and that his interest in ABNL, Ltd. was lost to a bank. The wife testified that the contract was still performing and that her husband controlled ABNL, Ltd. and ABNL, Inc., but she did not offer proof from any other source. The court of appeals concluded that the evidence was factually insufficient to uphold the \$1.25 million money judgment against Husband and ABNL, Inc. Husband’s request for a new trial was granted.

Alter Ego

Boaz v. Boaz, 221 S.W.3d 126 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

Before Linda Boaz and Gene Boaz were married, Gene owned a majority of stock in a corporation called CMI. After they were married, Gene started a general partnership with Ralph, his brother, called Brothers Equipment. The partnership owned construction equipment and real property that included a 600-acre ranch. They wound down the partnership during marriage, selling all of the equipment to CMI in exchange for a \$400,000 note receivable. As part of the winding down of the partnership, Ralph took ownership of the ranch and Gene received the \$400,000 note receivable.

Lynda subsequently filed for divorce. While the divorce action was pending, Gene received a letter of intent from another company for purchase of all of his CMI stock for \$2.5 million. Shortly thereafter, the parties exchanged inventories. Gene listed his CMI stock as his separate property, value “unknown,” \$200,000 (half) of his interest in the partnership as his separate “real property before marriage,” and the other \$200,000 of his interest in the partnership as “community personal property.” In the parties’ agreed decree, Gene was awarded all of the interest in CMI and Brothers Equipment.

Almost two years after the decree was entered, Lynda brought a bill of review proceeding to set aside the final divorce decree, alleging Gene breached his fiduciary duty to her, committed fraud on the community, and his actions constituted extrinsic fraud by concealing assets and perjuring himself on his inventory. The trial court granted a no-evidence summary judgment in Gene’s favor, from which Lynda appealed.

The court of appeals found no extrinsic fraud. Although Gene did not state any value for the CMI stock on his inventory, the value was contested and Lynda had the opportunity to investigate the value. Even if Gene perjured himself, the perjury would not constitute extrinsic fraud because Lynda had the opportunity to refute it. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984). Additionally, perjured

testimony or testimony withheld is not a sufficient basis for setting aside a final judgment on bill of review. *Hamborsky v. Hamborsky*, 584 S.W.2d 330, 332 (Tex. Civ. App.—San Antonio 1979, no writ). Further, Gene owed no fiduciary duty to Lynda because each was represented by counsel in the divorce. Concerning Lynda's fraud on the community claim, the record showed that Lynda and her attorney were aware of community funds expended for CMI.

Reverse Piercing/Alter Ego

Lifshutz v. Lifshutz, 61 S.W.3d 511 (Tex. App.—San Antonio 2001, pet. denied).

Kymerly Lifshutz asserted on appeal that the trial court abused its discretion by awarding her only 25% of the marital estate. In a separate appeal, several companies in which James had a separate property interest appealed the trial court's failure to award damages for breach of fiduciary duty by James and the trial court's finding that they are the alter ego of James and the ensuing trial court's piercing of the corporate entities.

To pierce the veil of the companies, the trial court had to find (1) unity between a separate property corporation and James such that the separateness of the corporation had ceased to exist; and (2) James's improper use of the corporation damaged the community estate beyond that which might be remedied by a claim for reimbursement. The trial court found James breached his fiduciary duty to the corporations by paying personal expenses through the businesses, failing to follow formalities, and purchasing notes for himself and Kymerly in contravention of his duty to the businesses. This activity actually enhanced the community at the expense of the corporations. Because there was no evidence that James's improper activity harmed the community estate by converting community assets into separate property, the trial court improperly pierced the corporate entities. The trial court also improperly pierced James's partnership interest because Under the Texas Revised Uniform Partnership Act, a trial court may not award specific partnership assets to the non-partner spouse in the event of a divorce.

The trial court found that James had breached his fiduciary duty to the entities but denied damages because it found that the entities were the alter ego of James. The case was remanded for a retrial of the breach of fiduciary duty claim and for reconsideration of the property division, which could be affected by the breach of fiduciary claim.

Lifshutz v. Lifshutz, 199 S.W.3d 9 (Tex. App.—San Antonio 2006, pet. denied).

This was the second appeal after the parties' divorce. Upon remand after the first appeal, the trial court reconsidered corporate and partnership entities'

breach of fiduciary duty claim against Husband, James, and also the property division. James brought the second appeal, asserting, among other issues, that the trial court punished him when it reconsidered the property division on remand and the evidence was insufficient to support the trial court's finding that the community estate was entitled to a *Jensen* reimbursement. Several entities owned directly or indirectly by James and his brothers filed a separate appeal, contending that the evidence was legally and factually insufficient to support the trial court's finding that James *did not* breach his fiduciary duty, that the trial court violated the law of the case and the scope of remand by making a finding of alter ego on remand, and the evidence was legally and factually insufficient to support the trial court's findings of ratification and actual and apparent authority.

Concerning the entities' appeal, the court of appeals held that the evidence conclusively established that James breached his fiduciary duty to the entities by diverting opportunities from the entities for personal gain. For example, he failed to offer real estate opportunities to the entities before acquiring them for his personal benefit. He purchased notes with the highest yield for his personal benefit.

The court of appeals agreed with the entities that the law of the case precluded a finding of alter ego on remand, because in the first appeal the court of appeals had sustained the entities' issues "regarding alter ego and piercing." The court of appeals, in reversing the alter ego finding in the first appeal, also concluded that alter ego would be an improper basis for the trial court to deny damages. Accordingly, the law of the case and limited scope of remand precluded the trial court from relying on alter ego as a basis to deny damages on the entities' breach of fiduciary duty claim.

The trial court further erred in finding that the entities ratified James's breach of fiduciary duty based on the usurpation of business opportunities, because there was no evidence of full disclosure to the other shareholders. However, concerning the payment of James's personal expenses by the entities, a ratification finding was supported because there was evidence that the entities had paid family members' personal expenses for years.

Concerning the finding of actual and apparent authority, there was no evidence that the entities intentionally conferred on James the authority to usurp business opportunities, took any action that would enable him to believe he had authority to usurp business opportunities, or failed to exercise ordinary care allowing James to believe he had authority. Because the liability as to the entities' breach of fiduciary claim was contested and damages are unliquidated, the court of appeals remanded for a second time the breach of fiduciary claim.

The court of appeals did not find error in the trial court's property division on remand because the trial court did not ignore the first opinion or violate any legal principle in following the court of appeals' instructions on remand. The court of appeals, however, reversed the *Jensen* claim of reimbursement to the community for the value of time and effort expended by James to enhance his separate estate. Kymberly presented no evidence of the amount of time that was reasonably necessary for James to spend managing and preserving the entities. Because some evidence was required, the evidence was legally insufficient to support the trial court's award of the *Jensen* reimbursement.

The court of appeals remanded the case for a second time for reconsideration of the entities' breach of fiduciary claim against James and correspondingly reconsideration of the property division.

Alter Ego

Zisblatt v. Zisblatt, 693 S.W.2d 944 (Tex. App.—Fort Worth 1985, no writ).

As part of the divorce, Wife filed a third-party action against Dispo, a corporation owned by Husband before the parties were married, on the theories of alter ego, transfers of community property to the corporation in fraud of Wife's rights, and for reimbursement of the community for community labor and services provided to Dispo. The trial court held there was no fraudulent transfer of community property, that Dispo was not the alter ego of Husband, and that the community was not entitled to any reimbursement from Dispo. The wife appealed.

The court of appeals reversed, finding that Dispo was the alter ego of Husband. The parties' house, furniture, and an automobile were Dispo's only assets. The only income earned by Dispo, except for rent the parties paid for the house, came from Husband's commissions, which he deposited into the company. Dispo had no other source of income. The court of appeals found alter ego: "to uphold the fiction of Dispo as an entity separate from Jack Zisblatt would be a clear and material prejudice to the rights of Irene and the community estate and an evasion of an existing legal obligation of Jack to devote his time, talent and industry to the community." Further, the trial court improperly characterized the assets of Dispo as not being community property. "In the present case, we have a spouse who has attempted to change the character of earned income by forming a corporation and then depositing such income into the corporate accounts. Dispo was nothing more than a series of accounts into which were deposited the majority of the commissions earned by Jack over the course of the marriage. This is clearly a fraud on the rights of the community."

Alter Ego

Spruill v. Spruill, 624 S.W.2d 694 (Tex. App.—El Paso 1981, writ dismissed).

In their divorce action, Wife joined Husband's corporation, which owned the entire community estate. When Husband's partner foreclosed upon the corporation, it eliminated the complete community estate, including the family home, furniture, and vehicles. The trial court held that the corporation was the alter ego of Husband and that Husband executed notes in favor of his business partner and pledged the corporate stock to create a false community debt with the intent to defraud Wife of her community interest in the stock. The trial court awarded Wife ownership of the stock certificates, the home, and its contents.

The Court of Appeals affirmed the judgment, noting that "a trust relationship exists between husband and wife as to that community property controlled by each spouse and a presumption of constructive fraud arises when a spouse unfairly disposes of the other spouse's one-half interest in community property."

D. Paramours & Other Third Party Exposure

Breach of fiduciary duty: property sold after divorce

Chafin v. Montgomery, No. 02-06-00340-CV, 2007 Tex. App. LEXIS 3827 (Tex. App.—Fort Worth May 17, 2007, no pet.) (mem. op.).

Pursuant to the parties' agreed final decree of divorce, Husband was to receive the marital interest in a house that the couple owned with Husband's mother and Wife was to receive the marital residence, which was to be sold and the proceeds divided between Husband and wife (with an additional \$10,000 to wife for her portion of the equity in the other property).

After the divorce, Wife refinanced the marital residence mortgage, increasing the debt and reducing the equity. The property was put on the market. The real estate agent for the property, Wife's sister, presented a sales contract to Husband. He realized that the equity in the property was lower. He returned the signed contract to the real estate agent, to hold in trust until Wife has signed a quit-claim deed of her interest in the other property. The real estate agent delivered the contract unconditionally, and the sale closed.

Husband sued the real estate agent and her broker for fraud and breach of fiduciary duty. The defendants moved for summary judgment on the ground that husband was already divested of any title to the property before it was sold. The trial court granted summary judgment in the defendants' favor. The court of appeals reversed, because the defendants failed to conclusively negate an essential element of each of Husband's causes of action.

Post divorce fraud claim barred by res judicata

Rangel v. Rangel, No. 02-05-411-CV, 2007 Tex. App. LEXIS 834 (Tex. App.—Fort Worth Feb. 1, 2007, no pet.) (mem. op.).

During the parties' divorce, a receiver was appointed to oversee the sale of a company formed during marriage. The parties were divorced and several months later, after the sale of the property was closed, Wife moved to set aside the sale. The trial court endorsed the receiver's actions, approved and ratified the sale, and denied Wife's motion to set aside the sale. The wife later brought suit against her ex-husband, the receiver, and the purchaser, asserting that she was deceived and defrauded by the sale. The trial court granted summary judgment in favor of the defendants.

The court of appeals determined that summary judgment was proper because Wife's claims were barred by res judicata. First, there was a final judgment. Second, the parties were identical in both cases. Although Wife claimed the receiver was not an adversary in the divorce case, the receiver was cast as an adversary when Wife moved to set aside the sale. Third, the issues in the subsequent suit were the same as the issues in the motion to set aside the sale. Despite Wife's claim that new facts had come to light, at the time of her motion to set aside the sale, she could have exercised reasonable diligence to gather facts she relied on in her claims against the defendants.

Intrinsic Fraud not Actionable in Post-divorce against 3rd Party

Henderson v. Chambers, 208 S.W.3d 546 (Tex. App.—Austin 2006, no pet.).

In 1993, during Dymra Henderson and Timothy Chambers' marriage, Chambers and his father created a Texas partnership to develop a piece of real estate. In 1995, they hired a law firm to draft an "Amended and Restated Partnership Agreement," which established that Chambers' interest in the partnership was to be his separate property, a gift from his parents as evidenced by a gift letter from his parents prepared at the same time. The amended partnership agreement and gift letter were backdated to the 1993 original date that the partnership was formed.

In 1997, Henderson filed for divorce. During the divorce, Henderson argued that Chambers had attempted to defraud her out of her share of community property by fraudulently recharacterizing community property as his separate property. The parties entered into a settlement agreement and signed a Memorandum of Understanding that gave all interest in the partnership to Chambers, which was memorialized in the decree.

In 2001, Henderson brought suit against Chambers' father and the law firm that prepared the partnership paperwork, alleging that they defraud her

of her community interest in the partnership assets. She added Chambers as a defendant in an amended petition. The trial court granted the defendants' motion for summary judgment on the basis that Henderson's claims were an impermissible collateral attack on the divorce judgment.

On appeal, Henderson asserted that although her claims are related to the matters at issue in the divorce, her claims are extrinsic to the decree and thus do not constitute a collateral attack. The court of appeals, relying on *Browning v. Probstok*, 165 S.W.3d 336 (Tex. 2005), explained the difference between extrinsic fraud and intrinsic fraud. Extrinsic fraud is fraud that denies a losing party the opportunity to fully litigate at trial all of the rights or defenses that could have been asserted, generally including wrongful conduct occurring outside of the adversarial proceedings. Intrinsic fraud "relates to the merits of the issues [that] were presented and presumably were or should have been settled in the former action." When the fraudulent acts themselves are in issue, or could have been in issue in the prior proceeding, the fraud is intrinsic.

Because the record demonstrated that the alleged fraudulent conduct at issue was known and at issue in the divorce proceeding, the claims of fraudulent conduct are intrinsic to the divorce proceeding and are barred as an impermissible collateral attack on the decree.

Breach of Fiduciary Duty: sale of residence

Toles v. Toles, 113 S.W.3d 899, 916 (Tex. App.—Dallas 2003, no pet.).

During the parties' divorce, Husband was ordered to pay the mortgage on the marital residence. He missed several payments on the mortgage and filed bankruptcy while the divorce was pending. The lender sought to foreclose on the mortgage. The wife sought and obtained a TRO preventing the foreclosure sale. A receiver was appointed to sell the residence. After Wife refused to approve the sale and move from the house, the trial court ordered that packers move all items from the house and ordered Wife to sign all papers necessary to complete the sale.

After the divorce was granted, the ex-Wife filed a separate suit against her ex-husband, his attorneys, and the receiver, alleging causes of action for negligence, wrongful deprivation and destruction of homestead rights and eviction, tortious interference with contract (against the attorneys only), abuse of litigation process, breach of fiduciary duties (against the receiver), and breach of contract (against Husband only). The trial court granted summary judgment in favor of the attorneys, the receiver, and Husband.

The court of appeals reversed in part, reversing the trial court's judgment on the claims against the attorneys for aiding and abetting a breach of fiduciary duty and civil conspiracy. The court also reversed the

judgment as to the claims for abuse of litigation and litigation process, abuse of process, invasion of privacy, aiding and abetting a breach of fiduciary duty, civil conspiracy, and breach of contract against Husband.

Wife's 3rd party fraud claim not covered by husband's partnership agreement to arbitrate

Southwest Texas Path. Assocs. v. Roosth, 27 S.W.3d 204, 208 (Tex. App.—San Antonio 2000, no pet.).

Husband was a partner in pathology partnerships. A few months after he filed for divorce, a partnership agreement was amended to permit a partner to be expelled without cause by a unanimous vote of the partners. The amendments also added a new provision requiring arbitration of disputes arising out of the partnership agreement. About a month later, all of the partners signed a resolution giving Husband the opportunity to resign from the partnerships or, if he did not resign, be expelled. Husband was expelled from the partnerships and filed a motion to modify the temporary support orders on the basis that he was unemployed. Wife added the partnerships as third-party defendants, alleging that the partnerships were co-parties in carrying out a plan of actual fraud, constructive fraud, or breach of fiduciary duty.

The partners sought to compel arbitration under the partnership amendments, which was denied. The trial court concluded that it possessed the power to adjudicate Wife's claims because she was not a signatory to the amendments containing the arbitration provisions. The court of appeals affirmed, stating that if it were to require Wife to submit to arbitration, and she were successful in proving her conspiracy theory or in proving the pathology defendants were co-parties to Husband's fraudulent acts, the court would have bound Wife to an arbitration provision that was wrongfully added to the partnership agreement as a result of the conspiracy/complicity between the pathology defendants and Husband. Because Wife's claims did not require reliance on the terms of the partnership amendments, she was not bound to arbitrate.

Fraudulent conveyance of community property (lottery ticket to paramour)

Mayer v. Stewart, 11 S.W.3d 440 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

While the parties were separated, Husband bought a lottery ticket and won \$3.5 million. Realizing he would have to share the proceeds with his wife, Husband entered into an agreement with Ms. Mayer, in which Ms. Mayer would claim the ticket as hers and recover the twenty years of installments. Although the winnings would be in Ms. Mayer's name, Husband would be able to spend the proceeds as he pleased. At the divorce trial, Mayer and Husband testified that the

lottery ticket was Mayer's. The court determined that the lottery winnings were not at issue in the divorce.

Husband eventually told his ex-wife the truth about the lottery winnings. The ex-wife then filed suit against her ex-husband and Mayer for claims of fraud, conspiracy, and breach of fiduciary duty. In a jury trial, the jury awarded the ex-wife \$1,785,714 for the value of her community interest in the lottery winnings and further assessed punitive damages against Ms. Mayer in the amount of \$20 and the ex-husband in the amount of \$50,000. Mayer appealed the judgment.

The court of appeals affirmed. The ex-wife did not have actual knowledge of the fraud before the divorce was granted. Mayer contended that the ex-wife could not assert a separate claim for fraud on the community against her because fraud on the community is considered in the division of the community estate, but the court of appeals disagreed, holding that the ex-wife could maintain a cause of action against Mayer, a third party, for fraudulent conveyance of community property.

Fraud on the Community: transfers to paramour

Osuna v. Quintana, 993 S.W.2d 201 (Tex. App.—Corpus Christi 1999, no writ).

The court awarded Wife a joint and several liability judgment in the amount of \$460,000, representing gifts that the court found Husband had given to his mistress in fraud of the community estate. The court of appeals upheld most of the judgment. Because the money used to purchase gifts for the mistress was community property, the community estate was defrauded. Neither Husband as the disposing spouse, nor the mistress's burden as the donee, met their burden to prove the gifts were not capricious, excessive, or arbitrary.