Texas Wesleyan Law Review

Volume 12 | Issue 2 Article 9

3-1-2006

Can the Texas Economic Contribution Statute Be Reconciled With the Inception of Title Doctrine?

Emilia Pirgova

DOI: https://doi.org/10.37419/TWLR.V12.I2.8

CAN THE TEXAS ECONOMIC CONTRIBUTION STATUTE BE RECONCILED WITH THE INCEPTION OF TITLE DOCTRINE?†

† Class of 2005, Texas Wesleyan School of Law; BBA in Accounting 2001, Henderson State University; Certified Public Accountant. Special thanks to the following individuals: Jim Penn for his assistance in identifying the topic and shaping the Comment; Sandra Sprott for her valuable critiques and editing help; and Kurt for his patience and support throughout law school.

I. INTRODUCTION

Jill and Jack, after 20 years of marriage, are going through a divorce. During the trial, the division of the home, in which they have lived for the past 20 years, becomes an issue. Jack purchased the house two years prior to the marriage for the total price of $300,000. Just out of law school, Jack was broke and had to assume a mortgage for the total purchase price secured by the property. During the two-year period before the marriage, Jack paid only the interest on the mortgage because he had to make payments on his student loans. Jack and Jill agree that the community paid $100,000 on the principal of the loan and that the fair market value of the house is $500,000. They cannot agree, however, as to who should get the house. After living in the house for twenty years, Jill insists that she should get the house. She also claims that the community estate paid the mortgage, thus the house should belong to the community estate. However, Jack claims that the house is his separate property because he acquired it prior to the marriage.

In Texas, title to property is determined under the Inception of Title Rule.[1] According to this rule, the character of the property as separate or community is determined when the right to possession becomes fixed.[2] If Texas law is applied to the example above, the house will be Jack's separate property because he acquired it prior to marrying Jill. Additionally, in Texas, any appreciation in the spouse's separate property remains a part of the separate estate.[3] Thus, Jack will get the house, and he will be entitled to the total appreciation of the house even though he did not put in a dime from his separate estate. As a result of the Inception of Title Rule, the community estate is not

1. *See, e.g.*, Colden v. Alexander, 141 Tex. 134, 147, 171 S.W.2d 328, 334 (1943) ("The fact that community funds were used to pay interest on Mr. Colden's prenuptial purchase-money debt, and taxes, during coverture, cannot alter the status of the husband's title."); Saldana v. Saldana, 791 S.W.2d 316, 319 (Tex. App.—Corpus Christi 1990, no writ); Villarreal v. Villarreal, 618 S.W.2d 99, 100 (Tex. Civ. App.—Corpus Christi 1981, no writ).

2. *See, e.g.*, Welder v. Lambert, 91 Tex. 510, 526–27, 44 S.W. 281, 287 (1898) (stating that a fixed contract right to acquire land under the Spanish law was property); *Villarreal*, 618 S.W.2d at 100 ("Under the inception of title doctrine, the character of the property, whether separate or community, is fixed at the time of acquisition.").

3. *See* TEX. CONST. art. XVI, § 15 ("All property . . . of a spouse owned or claimed before marriage . . . shall be the separate property of that spouse. . . ."); Jensen v. Jensen, 665 S.W.2d 107, 109 (Tex. 1984) (adopting "reimbursement" rather than "community ownership" theory for stock that appreciated during the marriage and holding that any appreciation in separate property would remain that spouse's separate property).

entitled to any interest in the house's appreciation regardless of the fact that the community estate contributed $100,000 to the equity in the house.[4] Jack gets legal title to the house, even though his separate estate did not contribute to the real economic value of the house.

To eliminate these inequities, the Texas courts have long recognized the equitable right of reimbursement to the community estate by Jack's separate estate for the amount contributed by the community estate.[5] In the past, the courts had discretion in considering all the circumstances and facts in determining the amount of reimbursement.[6] The courts could consider the fact that the couple lived in the home for 20 years and did not have to pay rent; the fact that the community income was primarily from Jack's separate estate;[7] the fact that the community estate received tax benefits;[8] and many other factors that the courts deemed relevant.

In 1999, the Texas Legislature enacted the Economic Contribution Statute (the "Statute").[9] The Statute created a statutory equitable interest in situations where the community estate contributed to the spouse's separate estate.[10] Under the new statute, Jack still gets legal title to the house and the house is still characterized as his separate property; however, the community estate has an economic claim for 100% of the home equity.[11] To enforce this claim, the courts *must* impose an equitable lien on the property.[12] In theory, Jack is still the legal owner of the house. In practice, 100% of the value of the house belongs to the community estate, including the appreciation in value.

4. *See, e.g.*, Hilley v. Hilley, 161 Tex. 569, 573, 342 S.W.2d 565, 567 (1961) (stating that the Texas Constitution defines as separate property everything acquired before marriage); *Villarreal*, 618 S.W.2d at 100 ("Under the inception of title doctrine, the character of the property, whether separate or community, is fixed at the time of acquisition."); Grost v. Grost, 561 S.W.2d 223, 228 (Tex. Civ. App.—Tyler 1977, writ dism'd) ("The general rule is that property acquires its status as separate or community . . . at the time of its acquisition.").

5. *See Colden*, 141 Tex. at 147, 171 S.W.2d at 334 (holding that "where the husband purchases land on credit before marriage, and pays the purchase-money debt after marriage out of community funds, equity requires that the community estate be reimbursed."); *Welder*, 91 Tex. at 527, 44 S.W. at 287 (holding that the community estate is entitled to reimbursement of community funds expended for improvements on the spouse's separate estate).

6. *See, e.g.*, Penick v. Penick, 783 S.W.2d 194, 197 (Tex. 1988) (stating that the lower courts are "bound to look at all the facts and circumstances and determine what is fair, just, and equitable" when evaluating a claim for reimbursement).

7. *See id.* at 195 (considering the fact that 90% of the community income was derived from the husband's separate rental properties).

8. *See id.* at 197 (stating that in calculating the reimbursement claim, the court may consider the tax benefit received by the community estate from depreciating the husband's separate rental properties).

9. Act of 1999, 76th Leg., R.S., ch. 692, § 2, 1999 Tex. Gen. Laws 3292 (codified at TEX. FAM. CODE ANN. §§ 3.401–3.406 (Vernon Supp. 2000)).

10. *See* TEX. FAM. CODE ANN. §§ 3.401–3.406 (Vernon Supp. 2000) (current version at TEX. FAM. CODE ANN. §§ 3.401–3.410 (Vernon Supp. 2005)).

11. *See* TEX. FAM. CODE ANN. §§ 3.401–3.403 (Vernon Supp. 2005).

12. *Id.* § 3.406.

The community estate can enforce its right through the equitable lien. If Jill forecloses on the lien, Jack receives nothing from the foreclosure because 100% of the equity belongs to the community estate. In that situation, the divorce decree determines the division of the proceeds from the foreclosure sale and the court must award the economic contribution claim to the community estate.

By enacting the Statute in 1999, the Texas Legislature intended not only to eliminate the confusion of various applicable rules to the equitable right of reimbursement, but also to eliminate the inequities arising from the Inception of Title Rule when one estate contributes for the benefit of the other.[13] This Author believes that Subchapter E, Title I, of the TEXAS FAMILY CODE should be modified or repealed because it produces unfair, illogical, and unconstitutional results.

This Comment will argue that the Texas Legislature should repeal or amend the Statute because it produces results that further the inequities arising from the Inception of Title Rule, which fixes the character of the property as separate or community at the time title to the property is acquired. In addition, the Statute continues to produce confusion and uncertainties that the Texas Legislature sought to eliminate when it changed the old equitable Right of Reimbursement rule. Section II will offer a brief overview of the history of the community property system. Section III will give a summary of the old rules under the equitable Right of Reimbursement in Texas. Further, this Comment will explain the new rules under the Statute in Section IV. Sections V and VI will explain the problems created by the Statute and the proposed solutions to resolve the inequalities created by the Inception of Title Rule and the Statute.

II. COMMUNITY PROPERTY SYSTEM

The community property concept originated many years ago. It evolved from the customs and cultures existing among civilizations at various times and places. This section will give a brief overview of the origination of the community property system, its policies and causes, and the history of the community property system in the State of Texas.

A. *Origin of the Community Property System*

The community property system can be traced back to the law of many ancient civilizations and different regions of the world.[14] It is difficult to point to a single source where the community system

13. *See* HOUSE COMM. ON JUVENILE JUSTICE & FAMILY ISSUES, BILL ANALYSIS, Tex. H.B. 734, 76th Leg., R.S., 1999 Tex. Gen. Laws 3292 (codified at TEX. FAM. CODE ANN. §§ 3.401–3.406 (Vernon Supp. 2000)).

14. WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 15–16 (2d ed. 1971).

originated because its origin did not depend on the fact of whether the nation was civilized or not.[15] The system rather evolved from economic causes that existed at the time and place.[16] It did not develop in one nation and become borrowed by another. Rather, it developed at various times and places from independent causes and was then carried by settlers or conquerors from one part of the world to another.[17]

The community property system in the United States can be traced back to the Visigoths by way of Spain.[18] The Visigoths, nomadic tribes that traveled and fought in Europe, came into Spain in 415 A.D. originally as the allies of Rome to oppose the Vandals and other Germanic tribes.[19] The tribe gradually invaded Spain and introduced its laws and customs to the Spanish people, including the community property system.[20] Later, when Spain conquered parts of North America, it introduced the community property system to those areas under its possession.[21]

The French, interestingly, brought the community property system to Louisiana, which at the time was a French colony.[22] However, when Spain took over possession, Spanish law displaced French law.[23] In 1848, the Louisiana territory, Florida, and Texas joined the United States, where the English common law was predominant; however, the laws in these territories did not change and the existing Spanish Law remained in effect.[24] Soon, the common law of England displaced the community laws in uninhabited areas of these states as more and more settlers moved from England into these areas.[25] In many of these sparsely populated areas, the community laws changed by mere consent and custom among the people.[26] This practice led "the United States Supreme Court . . . [to] declare [ ] that according to world usage, the laws of a territory or province . . . would remain in force until altered by the government of the United States or by the state government, when such territory or province . . . [becomes] a state."[27]

The states of Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington affirmed the community Spanish

15. *Id.*
16. *Id.* at 16.
17. *Id.*
18. *Id.*
19. *Id.* at 43.
20. *Id.*
21. *See id.* at 55.
22. *Id.*
23. *Id.*
24. *Id.* at 55–56.
25. *Id.* at 56.
26. *See id.*
27. *Id.*

laws.[28] In these states, the laws remained in force and unchanged from the property laws of Spain unless they were altered, modified, or repealed by statute.[29] Texas, Nevada, and California continued the community property laws by including those principles in their state constitutions.[30] The constitutional provisions were the continuation of the already existing Spanish community property system.[31] Today, the state legislatures in those states cannot abrogate the community property system or alter the principles of such system at any time because any such attempt would be unconstitutional.[32]

B. *Causes and Policies Behind the Community Property System*

1. Causes and Reasons for the Origin of the Community System

It is common belief that women had superior positions in the civilized, more developed ancient cultures, and that the savage and undeveloped cultures were the tyrants of females.[33] Interestingly, the community system, which recognizes the wife as a person and as an equal partner in the marriage, stems from the customs of the Visigoths at an age when no one would consider them civilized.[34] This lack of refining influences from culture and civilization was not a factor in shaping either the woman's role in domestic life or her property rights.[35] Then, how did the theory of partnership between wife and husband and the theory of equality arise?

The most logical explanation is an economical one.[36] Nomadic and migratory tribes, like the Visigoths, recognized the wife as her husband's partner.[37] Those tribes led a life filled with danger and hardship, and the wife shared in those dangers and hardships shoulder to

28. *Id.* Currently, there are nine community property states. In addition to the eight states that originally adopted the Spanish community property law, Wisconsin adopted the community property system in 1986. *See* Terry S. Kogan & Michael F. Thomson, *Piercing the Facade of Utah's "Improved" Elective Share Statute*, 1999 UTAH L. REV. 677, 690 n.70. Additionally, in 1998, Alaska adopted the Community Property Act, which allows spouses to create community property by agreement. *See* ALASKA STAT. § 34.77.030 (2004).

29. DE FUNIAK & VAUGHN, *supra* note 14, at 56–57.

30. *Id.* at 57; *see* TEX. CONST. art. XVI, § 15 ("All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse . . . ."); CAL. CONST. art. 1, § 21 ("Property owned before marriage or acquired during marriage by gift, will, or inheritance is separate property."); NEV. CONST. art. 4, § 31 ("All property, both real and personal, of a married person owned or claimed by such person before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of such person.").

31. DE FUNIAK & VAUGHN, *supra* note 14, at 57.

32. *See id.*

33. *See id.* at 18.

34. *Id.*

35. *See id.* at 18–19.

36. *Id.* at 19–20.

37. *Id.* at 20.

shoulder with the husband.[38] It was common among the German nomadic tribes for the wife to be present on the battlefield, exhorting and encouraging the husbands in the fight.[39] She was side by side with the husband on the migration path and took part in the government of the tribes.[40] Because "[t]he wi[fe] participat[ed] in the hardships, expeditions and combats of [her] husband[ ], it was believed that [she] should also participate in the prizes taken from the enemy."[41] This

> Germanic idea of marriage . . . placed husband and wife in a relation of mixed rights and duties to one another. . . . The wife was . . . a co-worker with her husband in the family interests, and a partner in his joys and misfortunes. Though legally subject to him, she was . . . [considered] the companion of her husband, who in turn owed her the duties of protection and fidelity . . . .[42]

The community system changed to some extent when the nomadic people settled and the privileged aristocracy arose.[43] It continued to exist among the common masses such as merchants, traders, and small farmers—those who were not wealthy, and those who had to labor from day-to-day to maintain themselves and their children.[44] The community system continues to exist today in democratic societies, where there is primarily one class of people.[45]

In France, for example, the common people managed to preserve the community system to this day, maintaining it through the period of aristocratic class dominance.[46] On the other hand, England completely failed to preserve the community system.[47] The Angles and Saxons brought the community system to England.[48] The Englishmen quickly rejected the idea of the community for two reasons.[49] First, in the twelfth century, the property law was split into two[50] categories: (1) real property, such as land, and (2) personal, or "movable," property. The law of succession of "movables" came under the control of the church tribunals.[51] Second, in England, the law of the "great folks" was the law for all; thus, the upper classes strangled the devel-

---

38. *Id.*
39. *Id.* at 20 n.27.
40. *Id.* at 20.
41. *Id.* at 20 n.27 (quoting 1 PEDRO GÓMEZ DE LA SERNA & JUAN MANUEL MONTALBAN, ELEMENTOS DEL DERECHO CIVIL Y PENAL DE ESPAÑA [Elements of Civil and Penal Law of Spain] 256 (4th ed. México, 1852)).
42. *Id.* (quoting CARLO CALISSE, A HISTORY OF ITALIAN LAW 570 (1928)).
43. *See id.* at 20.
44. *Id.* at 20–21.
45. *See id.* at 21.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *See id.*

opment of the community system among the common masses.[52] In contrast, the United States developed as a country with one class, and the existence of the community system was much more natural to American lifestyles, habits, and customs.[53]

2. The Policy of the Community System

The community property system evolved as a way "to establish equality between husband and wife in the area of property rights."[54] This property system treats a "marriage from the moment of its creation to the moment of its termination as an economic, as well as social . . . partnership."[55] The spouses are not only partners regarding the ownership of the property, but the matter of ownership is also of primary importance, which is contrary to the English common law principle that places the importance on the technical issue of whose name is on the title.[56] Further, the "[c]ommunity property system serves as a vehicle to ensure [that the spouses devote all their resources for] the well-being and future prosperity of the . . . couple . . . ."[57] The community property system recognizes that a marriage is a community and each spouse is a member of the community, equally contributing to its prosperity and equally possessing the right to succeed to the property after its dissolution.[58]

The community system originated as a pragmatic and realistic system.[59] It "recognize[ed] the contribution[s] of a working wife."[60] Historically, the community property system recognized the fact that the wife participated in the battles, migrations, and councils of government. It further recognized the fact that the activity of each spouse was directed towards making the marriage a "going concern"[61]—to

52. *Id.*

53. *Id.*

54. *Id.* at 24.

55. Cynthia A. Samuel & Katherine S. Spaht, *Fixing What's Broke: Amending ERISA to Allow Community Property to Apply upon the Death of a Participant's Spouse*, 35 FAM. L.Q. 425, 427–28 (2001).

56. *Id.* at 428 (citing A.L.I., *Principles of the Law of Family Dissolution: Analysis and Recommendations*, Ch. 4 (2002)).

57. *Id.*

58. *See* Elizabeth De Armond, *It Takes Two: Remodeling the Management and Control Provisions of Community Property Law*, 30 GONZ. L. REV. 235, 239–42 (1995) (providing a history of the development of community property law in the United States).

59. *See* DE FUNIAK & VAUGHN, *supra* note 14, at 24. "The causes which made the wife partner to the husband are of an economic, rather than a moral nature. It grew out of the natural impulse toward a suitable provision for the wife's support and the reaction against the husband's despotic power." *Id.* at 24 n.39 (quoting J. Emmet Sebree, *Outlines of Community Property*, 6 N.Y.U. L. REV. 32, 33–34 (1928–1929)). *See also* Samuel & Spaht, *supra* note 55, at 428.

60. Samuel & Spaht, *supra* note 55, at 428.

61. "Going concern" is a term of art used usually in relation to a commercial enterprise to express the expectation of indefinite continuance. *See* BLACK'S LAW DICTIONARY 712 (8th ed. 2004).

provide for food, shelter, and clothing for the family. Because the goals of the marriage were economic, social, and moral, the best vehicle to attain those goals was the community of the goods doctrine.[62]

Why did some parts of the United States retain the community system? Clearly, Louisiana retained the community system because it adopted the entire civil law structure introduced by the French.[63] The other states retained the community system because the dominant factors that originally produced the community systems existed in those western states.[64] In those states, "[t]he women worked side-by-side with their husbands. . . . When the husband was away from home the wife was head of the household."[65] She cared for the family, took care of the livestock, managed the farm, and in all ways participated with the husband to see the marriage prosper and succeed.[66]

Today, the need for the community system is even greater. While "modern wives may be more likely to work outside the home than their Visigothic counterparts . . . . [modern] wives are [still] primarily responsible for child rearing and home maintenance."[67] The community property system recognizes both spouses' contributions to the marriage and assumes that both spouses seek to ensure that the marriage is a "going concern."[68] Like the states with a community property system, the states with a common law system recognize that the husband and wife are not a single unit, but consider the marriage to be a form of partnership.[69] Those common law states took steps to pass laws that "gave married women the right to own, manage, and possess the property which they acquired during the marriage."[70] These artificial laws, however, fail to recognize the biological differences between husband and wife and the fact that because women are busy raising children they have little opportunity to acquire property.[71] Obviously, the community system is fairer to the wife because it entitles her to

62. *See* DE FUNIAK & VAUGHN, *supra* note 14, at 24 ("[Community of the goods doctrine] regard[s] . . . the industry and common labor of each spouse and the burdens of the conjugal partnership and community of interest.").

63. *See id.* at 25.

64. *Id.* Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington retained the community property system because factors that supported a belief in the equality of the spouses due to the actual contribution of each spouse to the success of the marriage existed in these states. *See id.* By statute, Wisconsin is also a community property state. I.R.S. Pub. 555 (Jun. 2002), *available at* http://www.irs.ustreas.gov/pub/irs-pdf/p555.pdf.

65. DE FUNIAK & VAUGHN, *supra* note 14, at 25.

66. *Id.*

67. De Armond, *supra* note 58, at 241.

68. *Id.*; *see also* DE FUNIAK & VAUGHN, *supra* note 14, at 25.

69. *See* DE FUNIAK & VAUGHN, *supra* note 14, at 26.

70. *Id.* at 26; *see also* Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L.J. 1073, 1082–85 (1994) (discussing Women's Property Acts and the fact that the acts opened the door for recognition of separate property ownership in marriage in common law states).

71. DE FUNIAK & VAUGHN, *supra* note 14, at 26.

half of everything earned during the marriage, and the wife receives her share automatically.[72] Originally established to articulate the feeling of equality, the community property system becomes frustrated when husband and wife are not accorded the status of equals.[73]

C. *Community Property System in Texas*

1. History

Settlers from the United States first obtained permission to settle in the Mexican state of Coahuila and Texas in 1821.[74] At that time, the region was still under Spanish rule.[75] In 1824, Mexico achieved independence from Spain and became a republic.[76] Stephen Austin then made the long trip to Mexico City to obtain a grant of approval from the new government for the settlers to remain in the State of Coahuila and Texas.[77] In the years to follow, many settlers arrived from the United States.[78] Because of the many difficulties and unjust restrictions imposed by the Mexican government, the colonists organized and fought the Texas War of Independence and in 1836 established the Republic of Texas.[79]

Spanish law, which continued to exist in Mexico after its independence from Spain, remained the law of the newly formed Republic of Texas.[80] In 1840, "the Republic adopted the common laws as the law of the Republic" and repealed the old Spanish laws.[81] The Texas Congress, however, retained the Spanish rule that a wife's paraphernalia (the property owned before marriage, in addition to her dower) would remain the wife's separate property, and the profits attributable to her separate property would be community property.[82] In 1845, when Texas joined the United States, the "first state constitution expressly continued the community property system."[83] The Constitution included as "community property," all property acquired by either

72. *See id.* at 27.

73. *Id.* at 28 ("Any provision denying equality is inconsistent with community property—and a modern community property system that contains laws creating inequality can best be described as a bifurcated unity.").

74. *Id.* at 72.

75. *See id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *See id. See generally* John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 TEX. TECH. L. REV. 1089, 1190–93 (1995) (providing a history of the Republic's adoption of the common law).

82. *See* Cornyn, *supra* note 81, at 1190–93 (discussing the fact that when the civil laws were repealed and the common law was adopted, the Congress specifically provided civil law-type protection for married women's property rights).

83. TEX. CONST. of 1845, art. VII, § 19; DE FUNIAK & VAUGHN, *supra* note 14, at 73; *see also* Cornyn, *supra* note 81, at 1193.

spouse during the marriage but excluded property acquired before the marriage and property acquired by gift, devise, or descent.[84] Community property law continues to be the law in Texas, with some statutory modification to meet changing modern conditions.[85]

2. The Basic Principles of the Community Property System in Texas

The Texas Constitution provides that

> [a]ll property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property . . . .[86]

While the Constitution does not define what community property is, it is presumed that everything possessed by the spouses at dissolution of the marriage is community property.[87] If a spouse claims property to be separate, then he or she bears the burden to overcome the presumption by clear and convincing evidence.[88]

Because everything acquired before marriage or afterwards by gift, devise, or descent is separate property of that spouse,[89] the key issue becomes defining the term "acquired," especially in situations where the right to property arose before marriage, but the completion of the acquisition was after marriage. Spanish community law "was one of acquests and gains during the marriage," and whatever properties either spouse had before the marriage continued to be his or her separate property.[90] Interestingly, the Spanish jurisconsults[91] required "that an official record of an inventory of all such properties be made at the time of the marriage contract."[92] The Spanish law clearly established "that where one spouse had initiated the acquisition of title and ownership of property before the marriage, and completed that acquisition after marriage, such property was the separate property of that spouse."[93] Obtaining a fixed contract right to acquire land before the

84. *See* TEX. CONST. of 1845, art. VII, § 19; DE FUNIAK & VAUGHN, *supra* note 14, at 73.

85. *See* TEX. CONST. art. XVI, § 15 (stating that spouses may agree in writing to alter their respective rights).

86. *Id.*

87. TEX. FAM. CODE ANN. § 3.003(a) (Vernon 1998) ("Property possessed by either spouse during or on dissolution of marriage is presumed to be community property.").

88. *Id.* § 3.003(b).

89. TEX. CONST. art. XVI, § 15.

90. DE FUNIAK & VAUGHN, *supra* note 14, at 129.

91. A "jurist" is "[o]ne who has thorough knowledge of the law." BLACK'S LAW DICTIONARY 873 (8th ed. 2004).

92. DE FUNIAK & VAUGHN, *supra* note 14, at 129–30 (including not only tangible and personal property "but also intangibles and choses in action").

93. *Id.* at 130.

marriage created a property right fixing the nature of the land as separate property, even though the land was acquired during the marriage.[94] This was true and undisputed "where the consideration was completely paid and the title transferred before marriage."[95]

It became much more difficult to determine the character of property in situations where the right to the property was initiated and part of the consideration paid before the marriage, but the full acquisition was completed after marriage.[96] If the consideration paid after the marriage was from a separate estate, that property was considered separate in nature.[97] However, if part of the consideration paid after the marriage came from community funds, the states took different routes in determining the nature of the property.[98] Texas and New Mexico chose to follow the Spanish law, which states that the nature of the property, being fixed at the time of the acquisition, does not change its character of separate property during the marriage—the Inception of Title Rule.[99]

The Inception of Title Rule originated as a tool to provide for a readily ascertainable classification of the property.[100] The majority of the community property states follow the Inception of Title Rule.[101] California, however, took a different path in this situation.[102] In California, when a husband and wife acquire property during the marriage with part separate and part community funds, they hold the property as tenants-in-common between the separate and community estates of the parties in proportion to the contributed amounts.[103]

---

94. *See* Welder v. Lambert, 91 Tex. 510, 521, 44 S.W. 281, 284 (1898) (obtaining a contract to acquire lands by compliance with conditions of the contract was an inception of title or property right fixing the nature of the land as separate property when acquired subsequently during the marriage).

95. DE FUNIAK & VAUGHN, *supra* note 14, at 131.

96. *Id.* at 132.

97. *Id.*

98. *See id.* at 133.

99. *Id.*; *see also Welder*, 91 Tex. at 521, 44 S.W. at 284 (holding that a fixed contract right to acquire land under the Spanish law was property); Villarreal v. Villarreal, 618 S.W.2d 99, 100 (Tex. Civ. App.—Corpus Christi 1981, no writ) ("Under the inception of title doctrine, the character of the property, whether separate or community, is fixed at the time of acquisition.").

100. 1 BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY 342 (3d ed. Thompson/West 2005) (1983).

101. *See, e.g.*, Laughlin v. Laughlin, 155 P.2d 1010, 1020 (N.M. 1945) ("[P]roperty . . . takes its status as community or separate property at the very time it is acquired, and is fixed by the manner of its acquisition."); *Villarreal*, 618 S.W.2d at 100 ("Under the inception of title doctrine, the character of the property, whether separate or community, is fixed at the time of acquisition.").

102. *See* 1 TURNER, *supra* note 100, at 341.

103. *See, e.g.*, Moore v. Moore, 618 P.2d 208, 210 (Cal. 1980) ("Where community funds are used to make payments on property purchased by one of the spouses before marriage . . . 'the community [has] a pro tanto community property interest in such property . . . .'"); Forbes v. Forbes, 257 P.2d 721, 722 (Cal. Dist. Ct. App. 1953) (stating that the community has *pro tanto* interest in property acquired before marriage that is paid for with community funds after marriage).

Historically, the Inception of Title doctrine has been a major problem in the division of property.[104] The major problem is that in "a great[er] number of cases [today], a substantial part of the real economic value of an asset is created after legal title is received."[105] Commonly, this occurs when a couple purchases a home with a down payment and a mortgage. Inception of title occurs at payment of the down payment amount, but the economic value of the home is created in future years by paying down the principle on the mortgage.[106] Thus, if property owned before the marriage greatly appreciates during the marriage through marital funds or marital efforts, courts have to ignore the value of the economic contribution and categorize the property under the Inception of Title Rule.[107]

Further, the Texas courts have taken the position that a court may not divest a party to a divorce of separate property.[108] As a result of this decision, courts have been reluctant to impose equitable liens on separate property to secure a claim for reimbursement.[109] There are a few Texas cases where the courts have imposed liens to secure a claim for reimbursement.[110] In these cases, however, the courts held that the lien may be imposed only if the lien fits into one of the categories allowed under the Texas Constitution.[111] The inequities stemming

104. 1 TURNER *supra* note 100, at 339.

105. *Id.*

106. *Id.*

107. *See id.*; Colden v. Alexander, 141 Tex. 134, 147, 171 S.W.2d 328, 334 (1943) ("The fact that community funds were used to pay interest on Mr. Colden's prenuptial purchase-money debt, and taxes, during coverture, cannot alter the status of the husband's title."); Saldana v. Saldana, 791 S.W.2d 316, 319 (Tex. App.—Corpus Christi 1990, no writ); Villarreal v. Villarreal, 618 S.W.2d 99, 101 (Tex. Civ. App.—Corpus Christi 1981, no writ) (finding that a trial court abuses its discretion by characterizing property that is clearly acquired before marriage as belonging to the community when improvements were made to the property with community funds).

108. *See, e.g.*, Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 138, 141–42 (Tex. 1977) (holding that a trial court cannot divest a spouse from his separate property).

109. *See* Fred C. Weekley, *Reimbursement Between Separate and Community Estates—The Current Texas View*, 39 BAYLOR L. REV. 945, 945, 956 (1987).

110. *See, e.g.*, Heggen v. Pemelton, 836 S.W.2d 145, 146 (Tex. 1992) (stating that "trial courts may impose equitable liens on one spouse's separate real property to secure the other spouse's right of reimbursement"); Smith v. Smith, 715 S.W.2d 154, 161 (Tex. App.—Texarkana 1986, no writ) (holding the imposition of equitable lien proper to reimburse wife for improvements to husband's separate property made with community funds).

111. *See, e.g.*, *Heggen*, 836 S.W.2d at 148 (reversing the equitable lien imposed by the trial court and holding that the equitable lien may be imposed only if it fits one of the categories listed in the Texas Constitution—to secure purchase money, tax, or home improvement debts); Rider v. Rider, 887 S.W.2d 255, 259–60 (Tex. App.—Beaumont 1994, no writ) (distinguishing the facts in *Heggen* and affirming an equitable lien to secure a payment of money judgment to secure the spouse's right of reimbursement).

from the Inception of Title doctrine were remedied through the equitable Right of Reimbursement.[112]

III. The Equitable Right of Reimbursement

The Right of Reimbursement originated "from the notion that the community should be responsible for community debts, and a spouse's separate estate should be responsible for the separate debts of that spouse."[113] The "[r]eimbursement is neither an entitlement nor an automatic right"; rather, it is an equitable claim that allows one estate to be reimbursed for contributions to the other spouse's separate estate or the community estate.[114] Prior to the passage of the Statute, Texas courts used the Right of Reimbursement to remedy the inequalities arising from the Inception of Title Rule. However, the courts were split as to the right way to measure the reimbursement. The following section will address the evolution of the Right of Reimbursement in Texas. Further, it will look at other states to determine how they remedy the problems arising where one spouse's separate estate contributes to the community estate or to the other spouse's separate estate.

A. *Equitable Right of Reimbursement in Texas*

Before the passage of the Economic Contribution Statute, Texas courts remedied the inequities arising from the Inception of Title Rule by recognizing a Right of Reimbursement to the contributing estate against the benefited estate.[115] However, the courts struggled with respect to the measure of the reimbursement.[116] The Right of Reimbursement usually arose in cases where (1) one marital estate used funds to make improvements on the other marital estate, and (2) one estate made expenditures on purchase money obligations of the other.[117]

1. Right of Reimbursement When One Estate Used Funds for Property Improvements on the Other Estate

The Right of Reimbursement for purchase price payments or improvements made from the funds of one estate to another estate's real

112. *See Colden*, 141 Tex. at 147, 171 S.W.2d at 334 (Tex. 1943) (holding that "where the husband purchases land on credit before marriage, and pays the purchase-money debt after marriage out of community funds, equity requires that the community estate be reimbursed"); Welder v. Lambert, 91 Tex. 510, 527, 44 S.W. 281, 287 (1898) (holding that the community estate is entitled to reimbursement of community funds expended for improvements on the spouse's separate estate).

113. Stewart W. Gagnon & Christina H. Patierno, *Reimbursement & Tracing: The Bread and Butter to a Gourmet Family Law Property Case*, 49 Baylor L. Rev. 323, 325 (1997).

114. *Id.*

115. *See* 1 Turner *supra* note 100, at 338–40.

116. *See, e.g.*, Weekley, *supra* note 109, at 952.

117. *See, e.g., id.* at 947.

property was long recognized in Spanish and Mexican law.[118] The right was ascertainable at the end of the community, which was at the death of one of the spouses because divorce was virtually unknown.[119] The first case to address this issue in Texas was *Rice v. Rice.*[120] In this case, the couple built their residence on the separate real property of the husband.[121] The husband claimed the house to be his separate property because it was a fixture to his separate real property.[122] The trial court held the house to be community property and appointed a receiver to manage and rent the "improvements" and to distribute the proceeds for the benefit of the children.[123] The Texas Supreme Court, reversing the trial court, held that the improvements were fixtures to the separate property and that they could not be separately divided from the land.[124] The Court, however, awarded a reimbursement claim to the community estate for the cost of the building erected.[125]

Texas courts have consistently recognized the Right of Reimbursement for community improvements on one party's separate estate, regardless of which estate is benefited—the community, the wife's separate estate, or the husband's separate estate.[126] The issue that arose among Texas courts was how to measure the reimbursement amount.[127]

Some courts of appeals held that the measure of reimbursement was the enhanced value of the estate.[128] Other courts of appeals decided that the amount of reimbursement should be the amount expended (cost),[129] and a third group of appeals courts held that the reimbursement amount should be the lesser of cost or enhanced value.[130]

---

118. *See* William A. Reppy Jr., *Acquisitions with a Mix of Community and Separate Funds: Displacing California's Presumption of Gift by Recognizing Shared Ownership or Right of Reimbursement*, 31 IDAHO L. REV. 965, 974 (1995).

119. *Id.*

120. Rice v. Rice, 21 Tex. 58, 58 (1858).

121. *Id.* at 61.

122. *See id.* at 62.

123. *Id.* at 63–64.

124. *Id.* at 66, 69 (stating that "the decree must not divest either party of their title in the lands or slaves.").

125. *Id.* at 66.

126. *See, e.g.*, Weekley, *supra* note 109, at 948.

127. *See id.* at 952.

128. *See* Anderson v. Gilliland, 684 S.W.2d 673, 674 (Tex. 1985) (citing Cook v. Cook, 665 S.W.2d 161, 165 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.) and Harris v. Royal, 446 S.W.2d 351, 352 (Tex. Civ. App.—Waco 1969, writ ref'd n.r.e.)).

129. *Anderson*, 684 S.W.2d at 674 (citing In re Higley, 575 S.W.2d 432, 434–35 (Tex. Civ. App.—Amarillo 1978, no writ)).

130. *See Anderson*, 684 S.W.2d at 674 (citing Hale v. Hale, 557 S.W.2d 614, 615 (Tex. Civ. App.—Texarkana 1977, no writ), Trevino v. Trevino, 555 S.W.2d 792, 799 (Tex. Civ. App.—Corpus Christi 1977, no writ), and Girard v. Girard, 521 S.W.2d 714, 717 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ)).

The Texas Supreme Court resolved the conflict among the courts of appeals in *Anderson v. Gilliland.*[131] In *Anderson*, Mr. Gilliland's surviving daughter sued the wife and the executrix of the estate for reimbursement due to the community estate for improvements the community estate made to the wife's separate estate.[132] The trial court calculated the reimbursement amount based on the enhanced value of the wife's separate estate.[133] The Court of Appeals reversed and held that the reimbursement amount should be the lesser of the enhanced value of the separate estate or the cost of the improvements.[134] The Texas Supreme Court concluded that "a claim for reimbursement for . . . [capital] improvements to another estate is to be measured by the enhancement in value to the benefited estate."[135] The Court further stated that the trial court should "insure that a benefited estate is not required to pay more in reimbursement than the amount it was benefited by the other estate."[136] The Court reasoned that the "cost only" rule would be easy to apply because it would not require proof of the enhanced value.[137] Such a rule, however, "would . . . [enrich] the owner of the benefited estate . . . at the expense of the contributing estate."[138] The "enhancement or cost, whichever is less" rule would permit the maximum recovery in all situations.[139]

2. The Purchase Money Debt Reduction

One of the first cases dealing with the amount of reimbursement in Texas is *Dakan v. Dakan.*[140] The issue in *Dakan* was the characterization and the right of reimbursement regarding four tracts of land.[141] The case was in probate court and involved other issues, but as to the issue of the right of reimbursement, the Texas Supreme Court held that "the principles of reimbursement in accounting between estates appl[ied equally] . . . to both separate and community estates."[142] The Court awarded an amount of reimbursement equal to the extent of the funds used.[143] A major problem that arose from cases involving reimbursement for purchase-money debt reduction was the issue of

131. *Anderson*, 684 S.W.2d 673 (Tex. 1985).
132. *Id.* at 673–74.
133. *Id.* at 674.
134. *Id.*
135. *Id.* at 675.
136. *See id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620 (1935).
141. *See id.* at 308, 83 S.W.2d at 622 (stating the case concerned five tracts of land, four of which had characterizations that were under controversy).
142. *Id.* at 318, 83 S.W.2d at 627.
143. *See id.* at 320, 83 S.W.2d at 628 (stating that Mrs. Dakan is entitled to reimbursement for the amount of her funds used).

whether in measuring the amount of reimbursement a court should consider any offsetting benefits received by the contributing estate.[144]

Penick v. Penick finally resolved the issue of the measure of reimbursement for payment of a purchase-money indebtedness.[145] In this case, the Supreme Court of Texas addressed the proper measure for reimbursement when community funds are used to pay a separate property debt.[146] The Penicks married in 1975.[147] Prior to the marriage, the husband owned several rental properties.[148] During the marriage, he managed and maintained those properties, and ninety percent of the community income was derived from those rental properties.[149] The evidence showed that the community estate paid off $104,500 of the principal debt on those properties, and that the community estate received a benefit from the depreciation claimed on the couple's tax return in excess of this amount.[150] The trial court refused the claim for reimbursement because, it concluded, the community estate received a benefit from the reduction of tax liability.[151] The Court of Appeals reversed and held that the community estate should be reimbursed for every dollar contributed to the principal of the husband's separate property debt.[152] The Texas Supreme Court reasoned that it would be "difficult to announce a single formula, which will balance the equities between each marital estate in every situation and for every kind of property."[153] The Court added that the trial court should have great latitude "in applying [the] equitable principles to value a claim for reimbursement," and the court's discretion

144. *See, e.g.*, Penick v. Penick, 783 S.W.2d 194, 197 (Tex. 1988) (stating that in calculating the amount of reimbursement to the community estate, a court may consider the tax benefit realized by the community estate from the depreciation of the husband's separate rental property); Colden v. Alexander, 141 Tex. 134, 148, 171 S.W.2d 328, 334 (1943) (paying interest on pre-nuptial debt and taxes on separate property land would create right of reimbursement only if "the expenditures by the community are greater than the benefits received"). *But see* Allen v. Allen, 704 S.W.2d 600, 607 (Tex. App.—Fort Worth 1986, no writ) (noting that the Texas Supreme Court permitted reimbursement only upon a showing that expenditures exceeded benefits); Hilton v. Hilton, 678 S.W.2d 645, 648 (Tex. App.—Houston [14th Dist.] 1984, no writ) (requiring full reimbursements of separate funds used to pay community debt).

145. *Penick*, 783 S.W.2d at 195–98 (stating that great latitude must be given to the trial court in applying equitable principals to value a claim of reimbursement); *see also Colden*, 141 Tex. at 148, 171 S.W.2d at 334 (stating that an equitable claim exists only if it is shown that the expenditures by the community were greater than the benefits received); *Dakan*, at 320, 83 S.W.2d at 628 (holding that the right of reimbursement for funds expended on improvements should be limited to the amount of enhancement of the property by virtue of the improvements).

146. *Penick*, 783 S.W.2d at 194.

147. *Id.*

148. *Id.*

149. *Id.* at 194–95.

150. *Id.* at 195.

151. *Id.*

152. *Id.* at 194.

153. *Id.* at 197.

should be as broad as in division of property.[154] The Texas Supreme Court analogized the reimbursement claim to an action for quantum meruit because both doctrines' purposes are to eliminate inequities arising from principles of law.[155] The principle behind both doctrines is that the person receiving a benefit, which was unjust, should make restitution, or reimburse the value of the benefit to the contributing estate.[156] The Court held that the proper measure for reimbursement in this case was to consider the tax benefit received by the community estate.[157]

After the Court's decisions in *Gilliland* and *Penick*, the law regarding the equitable Right of Reimbursement seemed settled. The equitable Right of Reimbursement was measured by the amount of the property's appreciation, and the judge could reduce the reimbursement by the amount of any benefits received by the contributing estate.[158] In addition, this method of calculating the claim of reimbursement was to be used in every case involving purchase money reimbursement or capital improvements.[159]

B. *How Other States Address the Issue When One Marital Estate Contributes for the Benefit of Another Marital Estate*

Only Texas and New Mexico adopted the Inception of Title doctrine as it appeared in the Spanish law.[160] Thus, we look to other states to see how they treat the issue when one marital estate contributes for the benefit of the other.

1. The California Pro Tanto Interest Rule

California never followed the Inception of Title Rule as a strict form.[161] Instead, under California law, if the community estate contributes to a spouse's separate estate, the contributing estate acquires a proportional interest in the ratio that the payments of the purchase price with community funds bear to the payments made with separate funds.[162] This rule is called the *pro tanto* interest rule.

---

154. *Id.* at 198.
155. *Id.* at 197–98.
156. *See id.*
157. *Id.* at 194.
158. *See Penick*, 783 S.W.2d at 194; Anderson v. Gilliland, 684 S.W.2d 673 (Tex. 1985).
159. *See Penick*, 783 S.W.2d at 197 (stating that the advancement of funds by one marital estate to another, under purchase money or capital improvements, is identical and subject to the same kind of measurement).
160. *See* DE FUNIAK & VAUGHN, *supra* note 14, at 133.
161. *See* 1 TURNER, *supra* note 100, at 340.
162. *See, e.g.*, Moore v. Moore, 618 P.2d 208, 210 (Cal. 1980) ("Where community funds are used to make payments on property purchased by one of the spouses before marriage . . . 'the community [has] a pro tanto community property interest in such property . . . .'"); Forbes v. Forbes, 257 P.2d 721, 722 (Cal. Dist. Ct. App. 1953) (stat-

This rule is contrary to the Inception of Title doctrine and California courts have failed to reconcile it with the principles of the community property system requiring community property to be acquired during the marriage.[163] Regardless, the rule has been applied for over forty years,[164] and it has worked very well. By giving equal effect to all contributions, even those made after acquisition of legal title, the rule avoids the traditional community property overemphasis on contributions occurring simultaneously with the inception of title.[165]

In *Moore v. Moore*,[166] the issue was the proper method of calculating the interest obtained by the community as a result of payments made during marriage on the indebtedness of the wife's real property purchased before marriage.[167] The wife purchased the house eight months prior to the marriage for $56,640.[168] She paid $16,640 at closing and obtained a loan for the balance of the purchase price.[169] During the parties' marriage, the community paid $5,986 on the principal of the loan.[170] The California Supreme Court held that where community funds are used to make payments on property purchased by one spouse before marriage, the community property acquires *pro tanto* interest in such property in the ratio that the payments on the purchase price with community funds bear to the payments made with separate funds.[171] The Court then calculated the separate property percentage to be 89.43% of the fair market value of the property.[172] The remaining 10.57% was the community property interest in the house.[173] The *Moore* court did not elaborate on the reasons for giving an ownership interest but based its decision on prior California cases.[174]

In *Vieux v. Vieux*,[175] the California court of appeals explained that "the term 'owner' include[d] any person having a claim or interest in real property, though less than an absolute fee."[176] Thus, the property may be regarded as part community and a part separate based on the manner in which the payments were made, not how the contract was

---

ing that the community has *pro tanto* interest in property acquired before marriage that is paid with community funds after marriage).

163. *See* 1 TURNER, *supra* note 100, at 340–42.

164. *See id.* at 342.

165. *See id.* at 341–43.

166. 618 P.2d 208 (Cal. 1980).

167. *Moore*, 618 P.2d at 209.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 210.

172. *Id.* at 211.

173. *Id.*

174. *See id.* at 210 (listing prior California cases finding a community ownership interest in separate property).

175. Vieux v. Vieux, 251 P. 640 (Cal. Dist. Ct. App. 1926).

176. *Id.* at 643 (quoting Higgins v. City of San Diego, 63 P. 470, 476 (Cal. 1901)).

acquired.[177] The court further stated that the administration of justice required the application of the *pro tanto* rule rather than the application of hard rules of law.[178]

It is worth noting that California community property law is subject to criticism.[179] There are many areas where community property law is unclear or illogical.[180] For example, the California *pro tanto* rule applies only in situations where the community estate advances money to one of the spouses' separate estate involving a mortgage-financing acquisition.[181] In cases where the separate money is used for improvements or repayments of a debt on the community estate, California provides for an interest-free reimbursement.[182]

2. The Rule in the Equitable Distribution States

Some states, which have rejected the common law and the community system, have adopted an equitable distribution system.[183] The equitable distribution system is concerned only with the equitable distribution of property "upon divorce, and it does not regulate property rights while the marriage is still ongoing."[184] Courts in these states begin the property division process by classifying each of the parties' assets as either marital or separate property.[185] Then, the courts divide separate property "according to legal title, while marital property is divided equitably between the parties."[186]

In developing the equitable distribution system, courts in these states rejected the Inception of Title doctrine because this rule is applicable to the community property states only.[187] Instead, they looked to the more practical and logical California rule.[188] With the California rule as a guide, these states developed the Source of the Funds rule.[189] This rule is based not only on practical grounds, but also on the theory behind the equitable distribution statute, which states that if an acquisition rests on "contributions, and the contributions can be made at different times, then the acquisition cannot be a

177. *See id.* at 642–43.
178. *See id.* at 643.
179. *See generally* Reppy, *supra* note 118.
180. *See id.* at 968 (criticizing California community property law).
181. *See id.* at 1005.
182. *See* CAL. FAM. CODE § 2640 (West 2004 & Supp. 2006) (providing for reimbursement for contributions to the acquisitions of community property in the amount contributed "without interest or adjustment for change in monetary values").
183. *See* 1 TURNER, *supra* note 100, at 83 n.3 (listing all equitable distribution states).
184. *Id.* at 343.
185. *Id.* at 82.
186. *Id.*
187. *See id.* at 343.
188. *See id.* at 344.
189. *See id.*

one-time event."[190] In most cases, a "disparit[y] . . . exist[s] between the legal title to an asset and the contributions made to obtain it"; therefore, the new acquisition rule "must be entirely independent of [the acquisition] of legal title."[191] The definition of "acquire" in the equitable distribution states is much broader than the definition of "acquire" in Texas.[192] In the equitable distribution states, "acquisition" is "the on-going process of making payment[s] for acquired property."[193] As a result, property is acquired when the real economic value is created through the efforts of marital partnership and not when the right to the legal title is fixed.[194]

The Source of the Funds rule is not merely an academic theory; it can be reduced to a series of formulas, which in turn can be easily applied to a specific situation.[195] For example, a couple purchases a car for $10,000.[196] If the separate estate contributes $6,000, and the marital estate contributes $4,000, upon divorce the separate estate ownership will be sixty percent and the marital estate ownership will be forty percent.[197] If additional sources are used to improve the property, the appreciation will assume the character of the funds or efforts.[198] However, if the appreciation of the property is a result of reasons beyond the parties' control such as inflation or market forces, the appreciation would assume the same character as the underlying property.[199] If the separate and marital estates own the property 60/40, the estates will own any appreciation of the property in the same proportion.[200] This calculation can be reduced to a simple formula:

$$MI=MC+ (A(MC/TC))$$
$$SI=SC+ (A(SC/TC))$$

Where:

MI—is marital interest,
SI—is separate interest,
MC—is the marital contributions,
SC—is the separate contributions,
TC—is the total contribution, and
A—is the property appreciation.[201]

190. *See id.* (emphasis omitted).
191. *Id.*
192. *Compare supra* Part II.C.2 *with* Part III.B.2.
193. 1 TURNER, *supra* note 100, at 344 (quoting Tibbetts v. Tibbetts, 406 A.2d 70, 77 (Me. 1979), which was overruled on other grounds by Long v. Long, 697 A.2d 1317 (Me. 1997)).
194. *Compare supra* Part II.C.2 *with* Part III.B.2.
195. *See* 1 TURNER, *supra* note 100, at 383.
196. *Id.* at 381.
197. *See id.*
198. *See id.* at 381–82.
199. *See id.* at 382.
200. *See id.*
201. *Id.* at 383.

The value of each estate's interest is the net value of the property multiplied by the ratio between the estate's contribution and the total contributions to the asset. Accordingly, under the Source of the Funds rule, if a marital estate contributed to the property, it should be compensated for its contributions.[202] Moreover, the contributions are not merely interest free loans to be returned when the marriage ends, but investments in property, which like any ownership interest, increase or decrease depending on the value of the property.[203]

IV. ECONOMIC CONTRIBUTION CLAIM STATUTE

A. *History and Amendments to the Texas Statute*

In 1999, the Texas Legislature took steps to improve the rules of marital reimbursement because they determined the rules were producing inequitable results.[204] The Legislature created a new statutory Right of Reimbursement.[205] The 1999 version of the Statute created an "equitable interest" of the community estate in the separate property when the community estate made financial contributions to the separate estate and the contributions enhanced the value of the property.[206] Further, the "equitable interest" was not an ownership interest, but rather a claim against the spouse-owner of the property, which matured upon the dissolution of the marriage.[207] The statutory claim applied only when the community estate contributed to the purchase money debt of a spouse's separate estate.[208]

The "equitable interest" was calculated by multiplying the appreciation of the separate property by the ratio of the community estate's contributions and the total contributions made by the community and separate estate.[209] "[T]he cost of any improvements made to the separate property paid for by either the separate or community estate [was to be] included as part of the principal of the debt."[210]

According to Professor Pamela George,[211] the Statute enacted was "the most controversial marital property statute that . . . [she could]

202. *See id.* at 382.

203. *See id.* at 380.

204. *See* Joseph W. McKnight, *Family Law: Husband and Wife*, 53 SMU L. REV. 995, 1018–20 (2000) (providing an overview of the 1999 version of the statute).

205. *See* Act of 1999, 76th Leg., R.S., ch. 692, § 2, 1999 Tex. Gen. Laws 3292 (codified at TEX. FAM. CODE ANN. §§ 3.401–3.406 (Vernon Supp. 2000)).

206. TEX. FAM. CODE ANN. § 3.401 (Vernon Supp. 2000) (current version at TEX. FAM. CODE ANN. §§ 3.402, 3.406(a) (Vernon Supp. 2005)).

207. *Id.* §§ 3.403(b), 3.406 (current version at TEX. FAM. CODE ANN. §§ 3.404(b), 3.406(a) (Vernon Supp. 2005)).

208. *See* McKnight, *supra* note 204, at 1020 (noting that reference to any other use of community funds is omitted).

209. TEX. FAM. CODE ANN. § 3.402(b) (Vernon Supp. 2000) (current version at TEX. FAM. CODE ANN. § 3.403(b) (Vernon Supp. 2005)).

210. *Id.* § 3.402(c).

211. Pamela George is a marital property professor at South Texas College of Law.

remember in her twenty-five years of experience."[212] The Legislature, under pressure from many attorneys, immediately started working to amend the Statute.[213]

B. *The New Rule*

The first thing the Legislature changed was the name of the Statute.[214] It is no longer titled an "Equitable Interest of Community Estate in Enhanced Value of Separate Property"; instead, it is called a "Claim for Economic Contribution and Reimbursement."[215] The new version provides for six situations in which the claim for economic contribution arises.[216] A marital estate that makes an economic contribution has a claim for the dollar amount of the reduction of:

- The principal on a debt secured by a property when the debt existed at the time of marriage;
- The principal on a debt secured by a property when the property was acquired during the marriage by gift, devise, or descent;
- A home equity loan, if the loan was incurred during the marriage, is secured by a lien on the property, and used for improvements on the property;
- A debt incurred during the marriage, secured by a property, and which is the spouse's separate debt, and used for the improvements on the property;
- Reduction in the debt as a result of refinancing; and
- Capital improvements to property other than by incurring debt.[217]

The Statute specifically excludes from the economic contribution claim any expenditures made for maintenance, repair, taxes, interest, insurance on a property, or contribution by a spouse of toil, time, and talent.[218] The formula to calculate the amount of the claim is set in TEXAS FAMILY CODE section 3.403.[219] The code's complicated formula is as follows:

$$EC = \frac{ECc}{(ECc + ECb + Ef)} \times Edod$$

Where:

EC—is the Economic Contribution Claim,
ECc—is the contributions made by the contributing estate,

212. PAMELA E. GEORGE, TEXAS MARITAL PROPERTY RIGHTS 231 (5th ed. 2006).
213. *See id.*
214. *See* Tex. H.B. 1245, 77th Leg., R.S., 2001 Tex. Gen. Laws 1679.
215. *See* Acts of 2001, 77th Leg., R.S., ch. 838, § 2, 2001 Tex. Gen. Laws 1679.
216. *See* TEX. FAM. CODE ANN. § 3.402(a) (Vernon Supp. 2005).
217. *Id.*
218. *Id* § 3.402(b).
219. *Id.* § 3.403(b)(2).

ECb—is the contributions made by the benefiting estate,
Ef—is the equity in the property when the first contribution was made, and
Edod—is the equity at the time of divorce.

The economic contribution claim may not be offset by a claim for enjoyment and use of the property.[220] Further, to enforce the claim, the courts shall impose an equitable lien on the property that received the benefit or any other property.[221] In section 3.404, the Legislature specifically stated that an economic contribution claim does not change the Inception of Title theory and does not create an ownership interest in the benefiting property.[222] Although the Statute states that it does not change the Inception of Title theory, is this true?

V. Problems Stemming from the Economic Contribution Statute

The Legislature undertook significant steps to correct the confusion and problems created by the Right of Reimbursement claim, and later by the originally enacted statutory Right of Reimbursement.[223] However, this Author believes that the Legislature failed to remedy the old problems. Because the Economic Contribution Claim Statute continues to create unfair results and confuse judges and attorneys, it cannot be reconciled with the Inception of Title theory.

A. *The Statute Implicitly Creates an Ownership Interest in the Property*

Property is characterized as separate or community at the inception of title.[224] Thus, the character "of the property is determined by the origin of the legal title to the property, and not by the acquisition of the final title."[225] When the character of property attaches, it is immaterial that part of the purchase price is paid from community funds because the status is fixed at the time of the acquisition.[226] Texas is one of the few states that strictly follow the Inception of Title Rule as

220. *Id.* § 3.403(e).
221. *Id.* § 3.406(b).
222. *Id.* § 3.404.
223. *See supra* Part IV.A–B (discussing legislative history leading to the creation of the statutory right to reimbursement).
224. *See supra* Part II.C.2.
225. Jensen v. Jensen, 665 S.W.2d 107, 109 (Tex. 1984); *see also* Strong v. Garrett, 148 Tex. 265, 271, 224 S.W.2d 471, 474 (1949); Welder v. Lambert, 91 Tex. 510, 526–27, 44 S.W. 281, 287 (1898); Roach v. Roach, 672 S.W.2d 524, 530–31 (Tex. App.—Amarillo 1984, no writ).
226. *See e.g.*, Hilley v. Hilley, 161 Tex. 569, 573, 342 S.W.2d 565, 567 (1961) (stating that property acquired before marriage is separate property); Villarreal v. Villarreal, 618 S.W.2d 99, 100 (Tex. Civ. App.—Corpus Christi 1981, no writ) ("Under the inception of title doctrine, the character of the property, whether separate or community, is fixed at the time of acquisition.").

originated under Spanish law.[227] The principle of the civil law of Spain and Mexico was that an acquisition was either entirely separate property or entirely community property; it was never considered a co-tenancy comprised of shares owned by both estates.[228] The Spanish-Mexican law strongly favored unified ownership as expressed in the Inception of Title doctrine.[229] The reason behind this rule was that, for most families, the most significant separate property asset was the family home, which the law sought to have pass generation by generation to the eldest son, always remaining in the blood line.[230] If the family home was owned in part by the community estate, rather than by a separate estate, then half of the community share would be owned at the husband's death by the widow, who might remarry and give birth to a child. The child, then, might in turn inherit a fractional ownership in the family home.[231]

Although the Statute specifically states that the economic contribution claim "does not create an ownership interest in the property,"[232] the Statute is clear that courts shall order a division of the economic contribution claim as part of the parties' marital estate.[233] The economic contribution claim might not give the full "bundle of property rights"[234] of ownership interest to the community estate. The Statute, however, does give the contributing estate an equitable interest in the benefiting estate, which is an asset in the marital estate division and an ownership interest that can be enforced through the judicial system.[235] When the community estate has a statutory claim for 100% of the property's equity, in theory, it might not be an ownership interest, but in practice, the community estate owns 100% of the real economic value of the property.[236] Thus, the Legislature created an equitable interest in the property that may preserve the legal title in the property of the benefited estate but completely takes away the real economic value of the property from the owner.[237] If there are no other assets in the spouse's separate estate to satisfy the economic contribution claim, then the court shall impose an equitable lien on the bene-

227. *See supra* Part II.C.2.
228. *See* Reppy, *supra* note 118, at 973.
229. *Id.*
230. *Id.*
231. *Id.*
232. TEX. FAM. CODE ANN. § 3.404(b) (Vernon Supp. 2005).
233. *Id.* § 7.007(a)(1).
234. An ownership of a thing should not be considered as a legal relation between the thing and the owner. J. E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 712 (1996). Instead, it is a series of rights the owner holds against others, which rights can be separated. *Id.* Thus, ownership of a property is best described as a "bundle of rights." *Id.*
235. *See supra* Part IV.B.
236. *See supra* Part IV.B.
237. *See* TEX. FAM. CODE ANN. § 3.404 (Vernon Supp. 2005) (stating that "economic contribution . . . does not create an ownership interest in [the] property, but does create a claim . . . [that] matures on dissolution of the marriage").

fiting property or any other asset in the spouse's estate to satisfy the economic contribution claim.[238]

The fact that the 1999 version of the Statute was entitled "An Equitable Interest of Community Property in Separate Property" for financial contribution is further evidence that the Legislature intended to create an ownership interest.[239] The Texas Constitution gives authority to the Legislature to pass laws that more clearly define the rights of spouses, in relation to their property.[240] The Legislature, however, may not pass laws that change the character of a property.[241] By giving one estate an equitable interest in another marital estate that is equivalent to an ownership interest, the Legislature created a new form of property that is contrary to the Inception of Title doctrine and the Texas Constitution. The Inception of Title doctrine stands for the rule that an acquisition of property is either entirely separate property or entirely community property; the acquisition of property would never be considered a co-tenancy comprised of shares owned by both estates.[242] The Inception of Title doctrine favors unified ownership, and once the legal title attaches to the property, neither the courts nor the Legislature may take away title from the owner, including even equitable title.[243]

The Legislature failed to reconcile the Inception of Title theory with the economic contributions statute. The Inception of Title doctrine existed for centuries, and it worked in the past because living standards were different. Most of the marital assets in the past were acquired by cash payments and no conflict existed between the Inception of Title and the inequities of who will pay the purchase price. Today, when the majority of people purchase property on credit, the Inception of Title theory and the inequities of who pays the price will always create a conflict.

These issues have not yet been raised before the courts. The Statute was passed in 1999, but it was substantially modified and amended in 2001.[244] There are only a few cases referring to any of the relevant sections in the Statute.[245] *McDaniel v. McDaniel*[246] is a good example

238. *Id.* § 3.406.

239. *See* TEX. FAM. CODE ANN. §§ 3.401–3.406 (Vernon Supp. 2000) (current version at TEX. FAM. CODE ANN. §§ 3.401–3.410 (Vernon Supp. 2005)).

240. TEX. CONST. art. XVI, § 15.

241. *See* McElwee v. McElwee, 911 S.W.2d 182, 187 (Tex. App.—Houston [1st Dist.] 1995, no writ) (noting that the "constitutional definition of separate property is exclusive and may not be enlarged by legislative action" (citing Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 140 (Tex. 1977)).

242. *See* Reppy, *supra* note 118, at 973.

243. *See supra* Part II.C.2; Reppy, *supra* note 118, at 973.

244. *See* Tex. H.B. 1245, 77th Leg., R.S., 2001 Tex. Gen. Laws 1679.

245. *See* Boyd v. Boyd, 131 S.W.3d 605, 613, 615 (Tex. App.—Fort Worth 2004, no pet.) (noting that when bringing a claim under TEX. FAM. CODE § 3.403, "a spouse seeking economic contribution must bring forth sufficient evidence for the factfinder to determine the enhancement value" (citing Langston v. Langston, 82 S.W.3d 686,

of how complicated and unclear the Statute really is.[247] In *McDaniel*, the issue was the amount of the economic contribution due to the wife's separate estate from the community estate.[248] The husband complained that the trial court wrongly calculated the fair market value of the house at the time of the first contribution by using the total cost to construct the house, when the construction was completed after the first contribution.[249] The husband argued that the fair market value should have been lower than the cost.[250] The husband, however, did not realize that a lower fair market value at the time of the first contribution would produce a greater economic contribution claim to the wife's separate estate.[251]

In *Langston v. Langston*,[252] the wife argued that under the new statute the court could divest a person from his separate property.[253] The house at issue was the separate property of the husband; however, the house was encumbered with a community debt of $55,530 that exceeded the fair market value of the house.[254] The trial court awarded the house to the wife along with the community debt.[255] The court of appeals held that the economic contribution statutes did not create an ownership interest in the separate property, and the trial court was wrong in divesting the husband of his separate property.[256] The court further stated that the trial court "*may* . . . be required to make a division of a claim for economic contribution . . . . [and] *shall* impose an equitable lien."[257] Section 7.007 of the Family Code, however, provides that the court "shall: (1) order a division of a claim for economic contribution . . . ."[258] The *Langston* court clearly ignored the word "shall" in section 7.007 of the Family Code. In addition, the court

689 (Tex. App.—Eastland 2002, no pet.)); Hailey v. Hailey, 176 S.W.3d 374, 387, 388 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (stating that TEX. FAM. CODE § 7.007 does not require the economic contribution claim to be equally divided); LaFrensen v. LaFrensen, 106 S.W.3d 876, 879 (Tex. App.—Dallas 2003, no pet.) (holding that the trial judge has discretion in how to apportion the economic contribution claim); Bishop v. Bishop, No. 14-02-00132-CV, 2003 WL 21229476, at *5 (Tex. App—Houston [14th Dist.] May 29, 2003, no pet.) (mem. op.) (holding that equitable lien would not be imposed where husband failed to plead economic contribution).

246. No. 03-03-00521-CV, 2004 WL 524475 (Tex. App.—Austin Mar. 18, 2004, no pet.) (mem. op.).

247. *See generally id.*

248. *See id.* at *1.

249. *See id.* at *5.

250. *Id.*

251. *See id.*

252. Langston v. Langston, 82 S.W.3d 686 (Tex. App.—Eastland 2002, no pet.), *sub nom.* Langston v. GMAC Mortg. Corp., No. 11-04-00277-CV, 2005 WL 3436591 (Tex. App.—Eastland Dec. 15, 2005, no pet.).

253. *Id.* at 688.

254. *Id.*

255. *See id.*

256. *See id.* at 688–90.

257. *Id.* at 689 (emphasis added).

258. TEX. FAM. CODE ANN. § 7.007(a)(1) (Vernon Supp. 2005).

failed to provide guidelines as to how much the economic contribution claim would be because the fair market value of the property was less than the equity in the property.[259]

B. *The Statute Produces Unfair Results*

There are many gray areas in which the economic contribution statutes produce unfair or uncertain results.[260] For example, Jack buys a house before marriage for $100,000 and assumes a loan for $50,000, secured by the property. He then marries Jill, and during the marriage, they rent the house. Jack and Jill use the rental proceeds to pay off the mortgage on the house. At the time of the divorce, the fair market value of the house is $200,000.

Under the Inception of Title doctrine, the house is Jack's separate property.[261] However, the community income (the rental income would be community absent a partition agreement between the spouses[262]) paid off the debt on the property; thus, the community estate has a claim for economic contribution.[263] Applying the formula in section 3.403 of the Texas Family Code, the amount of the claim will be:

$$EC = \frac{\$50{,}000}{(50{,}000 + 50{,}000)} \times \$200{,}000 = \$100{,}000.$$

Based on this formula, the community estate would be entitled to an economic contribution claim of $100,000 at the time of the dissolution of the marriage, or fifty percent of the property's appreciation. If Jack had paid cash for the house, Jack would get all of the appreciation of the house. If Jack had assumed a mortgage for the total purchase price, the community estate would be entitled to an economic contribution claim of 100% or $200,000—the total value of the property. If Jack and Jill do not have any other assets to satisfy the community estate's contribution claim, Jack would be forced to sell his separate house to satisfy the economic contribution claim of the community

259. *See generally Langston*, 82 S.W.3d at 686–90.

260. *See generally* Warren Cole, *Economic Contribution and Reimbursement*, ADVANCED FAMILY LAW COURSE, Aug. 18–21, 2003 (providing an overview of the Statute and raising issues not addressed in the Statute); Stewart W. Gagnon et al., *The Burden of Pleading & Proof When Seeking Economic Recovery in Divorce Cases*, *in* NEW FRONTIERS IN MARITAL PROPERTY LAW 13 (2004) (addressing the gray areas in the Statute).

261. *See supra* Parts I, II.C.2.

262. *See, e.g.*, Hilley v. Hilley, 161 Tex. 569, 573–74, 342 S.W.2d 565, 567–68 (1961) (stating that partitioning community property makes it separate property according to the Texas Constitution); Arnold v. Leonard, 114 Tex. 535, 541, 273 S.W. 799, 802 (1925).

263. *See* § 3.402(a)(4).

estate.[264] Thus, under the Inception of Title doctrine, Jack is the legal owner of the house as his separate property because he "acquired" the house prior to marriage. The court may not divest Jack of his separate property,[265] but the court must impose an equitable lien to satisfy the community estate's claim.[266] When Jack is forced to sell the house, he will receive none of its economic value.

Another issue of unfairness created by the Statute is that the court may not consider an offsetting benefit in calculating the economic contribution claim.[267] In the example above, Jack and Jill paid off the mortgage by using the rental proceeds from the house. If the community estate income was mainly from the husband's separate estate, it would be unfair to impose additional liability on the separate estate. If the couple lived in the house for twenty years, then under the old law, this would be considered an offsetting benefit because the community did not have to incur any rental expense due to the enjoyment and benefit from the separate estate.[268] Under the new statute, courts may not offset the economic contribution claim with any benefits received by the contributing estate.[269]

What if Jack sold the house during the marriage and the cash is sitting in a bank account at the time of the divorce? Would the $200,000 cash in the bank be Jack's separate property, or would $100,000 be his separate property and $100,000 community property? Clearly, Texas Family Code section 3.404(b) "does not create an ownership interest in the property" and the "[economic] claim matures on dissolution of the marriage . . . ." The Statute is to be interpreted so that the sale of the property does not extinguish the claim for economic contribution.[270] Jack would still own the $200,000 as his separate property; however, the community estate would have a claim against the cash for the $100,000 economic contribution to Jack's separate real estate.[271] Jill would not have a property interest in the cash;

264. *See id.* § 7.007(a)(1) (noting that courts shall order a division of the economic contribution claim as part of the division of the marital estate).

265. *See* Langston v. Langston, 82 S.W.3d 686, 688–90 (Tex. App.—Eastland 2002, no pet.) (holding the trial court was wrong in divesting the husband of his separate estate).

266. *See* § 3.406(a) (requiring the courts, upon dissolution of marriage, to impose an equitable lien to satisfy economic contribution claim).

267. *See id.* § 3.402 (defining economic contribution); *id.* § 3.403(e) (stating that the use and enjoyment of property during the marriage does not create a claim for an offsetting benefit).

268. This example is similar to the facts in Penick v. Penick, 783 S.W.2d 194 (Tex. 1988) (holding that the claim for reimbursement should be offset by the tax benefit received by the community estate). *See also supra* Part III.A.2.

269. *See* §§ 3.402, 3.403(e).

270. *See* Gagnon et al., *supra* note 260, at 13.

271. *Id.* (noting that this section of the code may be interpreted as meaning that the underlying claim would be satisfied by the cash received; thus, half of the proceeds will be community and the other half will belong to the husband's separate estate).

instead, she would get an equitable lien on the account for $50,000.[272] She would not be able to get her money, and she would have to go through another judicial process to enforce her lien.[273]

What would be the outcome if the proceeds from the sale of the house, in the above example, disappeared or could not be accounted for? Under the statutory language, the economic contribution claim continues to exist even though the underlying asset is gone.[274] What if the proceeds from the sale were used to pay for living expenses? In this case, Jill would still have a claim for economic contribution for $50,000, and if Jack wanted to raise a claim for reimbursement for the proceeds used for living expenses, such claim would be denied.[275]

Another problem arises if Jack and Jill invest the proceeds from the sale of the house in the above example in a new house.[276] Is the economic contribution claim satisfied once the house is sold, or does it attach to the new house? Does the resulting fifty percent economic contribution claim travel with the proceeds and increase in value as the equity in the new house increases? If at the time of the divorce, the new house is valued at $1,000,000, does the community estate have a contribution claim for $100,000, or does the community estate get a claim for $500,000? Or, does the house have a mixed title?

Under the Statute, the claim for economic contribution matures upon the dissolution of the marriage, and no ownership interest is created in the underlying asset by virtue of the claim.[277] However, it is not clear under the Statute whether the claim would travel with the underlying asset.[278] The purpose of the economic contribution claim was to eliminate the dollar-for-dollar reimbursement and to allow the estates to share in the appreciation of the property.[279] If the claim does not travel with the underlying asset, then the contributing estate would not be able to share in the appreciation of the underlying asset.[280] Nevertheless, if the claim travels with the underlying asset,

272. *Id.*

273. *Id.*

274. *See id.* (noting that a strict reading of the Statute means that the economic contribution claim exists, free floating and unripened, until the marriage is dissolved).

275. *See, e.g.*, Norris v. Vaughan, 152 Tex. 491, 502–03, 260 S.W.2d 676, 683 (1953) (holding that the husband is obligated to furnish support for community living, and if no community funds are available, he should use his separate funds, which would be considered a gift to the community).

276. *See* Gagnon et al., *supra* note 260, at 14.

277. TEX. FAM. CODE ANN. § 3.404(b) (Vernon Supp. 2005).

278. *See* Gagnon et al., *supra* note 260, at 14 ("3.404(b) says that the claims mature upon dissolution or death, and that an ownership interest is not created in the underlying asset by virtue of the claim; however, it does not necessarily follow that the ephemeral nature of the claim at the time of the sale prevents it from traveling with the underlying asset . . . into the new asset.").

279. *See id.*

280. *Id.*

then, in practice, it would create an ownership interest that would ripen upon the dissolution of the marriage.[281]

In passing the Economic Contribution Statute, the intent of the Legislature "was to allow an estate, which pays off a secured debt relating to an asset of another marital estate, to share proportionately in the increase or decrease in value of the underlying asset."[282] However, so long as Texas applies the Inception of Title doctrine, it will create problems.

VI. PROPOSED SOLUTION

Although the Legislature undertook major steps to change the Economic Contribution Statute, this Author believes that the Statute cannot be reconciled with the Inception of Title doctrine and that it will continue producing unfair results. The Statute should be repealed, the Inception of Title doctrine should be eliminated, and a new statute should be passed to provide for an ownership interest of the contributing estate in the benefiting estate. In the alternative, the Statute should be amended to provide for a Reimbursement Right based on the simple and practical concept of the value of money.

A. *Repeal the Statute and Dispose of the Inception of Title Doctrine*

The Inception of Title doctrine and the Economic Contribution Statute cannot be reconciled. To remedy the inequities created by the Inception of Title doctrine, as well as by the Economic Contribution Statute, the Legislature needs to repeal the Statute and the citizens of Texas need to amend the Constitution to provide for an ownership interest in the property by the contributing estate. California, using the *pro tanto* rule for over forty years, has resolved this problem.[283] Further, the same principle and theory is being applied in the equitable distribution states.[284] In fact, their formula is the same as the formula set up in the Statute, stated in simpler terms.[285]

Under the Source of the Funds rule, ownership is determined by the ratio that each estate contributes against the value of the assets.[286] If an additional source is used to improve and enhance the value of the property, the appreciation assumes the character of the funds or efforts.[287] If the appreciation is a result of factors outside the parties' control, the appreciation receives the same classification as the under-

281. *See id.* at 13–14.
282. *Id.* at 14.
283. *See supra* Part III.B.1.
284. *See supra* Part III.B.2.
285. *Compare supra* Part III.B.2 *with* Part IV.B (the two formulas presented in Part III.B.2 and Part IV.B represent the same concepts defined in different terms).
286. *See supra* Part III.B.2.
287. *See supra* Part III.B.2.

lying property.[288] Under this rule, the contributing estate does not make an interest free loan to the other estate, but rather it makes an investment, in which each spouse shares in any increase or decrease in the underlying value of the assets.[289] The title to the property is determined when the true economic value of the property is created, not when the legal title attaches.[290] Then, the marital estates own the property based on the relative contributions by each marital estate.[291]

Texas and New Mexico are the only states that apply the Inception of Title doctrine.[292] All other states have rejected the doctrine, including the common law states.[293] The Inception of Title doctrine cannot be reconciled with modern day practices, where the majority of the assets are acquired through financing and paid over a long period of time. In the past, this rule might have worked well, but today it produces inequities that are difficult to remedy. The Texas Legislature tried to remedy those inequities by passing the Economic Contribution Statute,[294] but this Statute cannot be reconciled with the Inception of Title doctrine. If Texas does away with the Inception of Title doctrine and allows for an ownership interest between the contributing and benefiting estate, then the uncertainties and unfairness will be eliminated. The two estates will own the property based on the economic contributions each of them make toward the total value of the property. The shared ownership will assure that both estates share in any increases or decreases in economic value of the property. Thus, if Jack brings a $100,000 house into the marriage, secured by $50,000 mortgage, and if the mortgage is paid off during the marriage with community funds, then upon sale of the property, the community estate will be entitled to fifty percent of the proceeds. If the proceeds are reinvested, the community estate will share in the ownership of the new house and will receive the benefit from any increases in the value of the new property.

B. *Amend the Statute to Give a Right of Reimbursement for the Money Contributed Adjusted with a Risk-Free Interest*

In the alternative, if Texas chooses to keep the Inception of Title doctrine, the better way to deal with the inequities arising when one marital estate contributing to another after the title to the property is fixed, is to provide a statutory right of reimbursement of the amount contributed, adjusted for the appropriate value of money. The inequi-

288. *See supra* Part III.B.2.
289. *See supra* Part III.B.2.
290. *See supra* Part III.B.2.
291. *See supra* Part III.B.2.
292. *See* DE FUNIAK & VAUGHN, *supra* note 14, at 133.
293. *See generally supra* Part II and Part III (showing that common law states have no need for the Inception of Title rule, and the majority of community property law states have rejected the doctrine).
294. *See* McKnight, *supra* note 204, at 1018–20.

ties that the Legislature wanted to avoid arise when the contributions by one estate to the other are reimbursed dollar-for-dollar—essentially, an interest free loan. This would be avoided if the contribution of one estate to the other was considered a loan that must be repaid with the appropriate interest rates for a real estate loan. In this case, a house acquired prior to the marriage, but paid off during the marriage, would still be that person's separate property, and the separate estate would receive the total value of the property's appreciation. The contributions made by the other estate would be treated as an investment and would receive the appropriate rate of return—the interest based on the prevailing real estate loan interest rates. In addition, the contributing estate would have a secured, risk free investment because the investment would not be affected if the real estate market depreciated.

VII. CONCLUSION

The Texas Legislature passed the Economic Contribution Statute to remedy the inequities arising from the Inception of Title doctrine.[295] Texas and New Mexico are the only states, which continue to utilize the old Spanish rule, where the character of property is determined at the time the legal right to title is fixed.[296] The Statute was passed in 1999, and since then, it has been modified and amended at every legislative session.[297] There are many unanswered questions, and it appears that Texas courts will not soon answer these questions. As a result of modern, changing lifestyle, it is time for Texas to move forward and align its marital property laws with those of the other states. To avoid the inequities arising from the Inception of Title and the old Right of Reimbursement rules, Texas needs to amend its Constitution to provide for an ownership interest of the contributing estate in the benefiting estate. This will eliminate many problems because both estates will share in the economic value of the underlying property based on their relative contributions to the economic value of the property.

In the alternative, the Texas Legislature may substitute the current Statute with a different one that provides for repayment of the contribution to the contributing estate with appropriate interest based on prevailing real estate market rates. In this case, there will be no conflict with the Inception of Title doctrine, the contributing estate will be fairly compensated for its contributions to the other estate, and the

295. *See generally id.* (discussing changes to the rules of marital reimbursement).
296. *See supra* Part II.C.2.
297. *See supra* Part IV.A.

benefiting estate will receive the total appreciation or devaluation of the property.

Emilia Pirgova