

# **YOU ARE KNEELING, BUT I AM NOT: INTENTIONAL DETRIMENTAL CONDUCT IN AN EMPLOYMENT SETTING AND ITS EFFECT ON THE DISTRIBUTION OF THE COMMUNITY ESTATE**

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This is why he knelt.<sup>1</sup> Botham Shem Jean, September 6, 2018.<sup>2</sup> Jordan Edwards, April 29, 2017.<sup>3</sup> Philando Castile, July 6, 2016.<sup>4</sup> Alton Sterling, July 5, 2016.<sup>5</sup> Sandra Bland, July 13, 2015.<sup>6</sup> Walter Scott, April 4, 2015.<sup>7</sup> Eric Harris, April 2, 2015.<sup>8</sup> Anthony Robinson Jr., March 6, 2015.<sup>9</sup> Romain Brisbon, December 2, 2014.<sup>10</sup> Tamir Rice, November 22, 2014.<sup>11</sup> Laquan McDonald, October 20, 2014.<sup>12</sup> Eric Garner, July 17, 2014.<sup>13</sup> Victor White III, March 3, 2014.<sup>14</sup> It is highly unlikely that Colin Kaepernick knew the effect that kneeling in protest could potentially have on the distribution of community property between spouses in the event that they terminate their marriage or a spouse dies.<sup>15</sup>

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1. Clark Mindock, *Taking a knee: Why are NFL players protesting and when did they start to kneel?* INDEPENDENT (Feb. 4, 2019), <https://www.independent.co.uk/news/world/americas/us-politics/taking-a-knee-national-anthem-nfl-trump-why-meaning-origins-racism-us-colin-kaepernick-a8521741.html> [perma.cc/2xxk-wp5v].

2. Manny Fernandez & Marina Trahan Martinez, *A Dallas Police Officer Shot Her Neighbor, and a City Is Full of Questions*, N.Y. TIMES (Sept. 14, 2018), <https://www.nytimes.com/2018/09/14/us/botham-jean-dallas-shooting-amber-guyger.html> [perma.cc/J72Y-U3M7].

3. Adeel Hassan, *Joy at Conviction Turns to Ire at 15-Year Sentence for Police Killing of Boy*, N.Y. TIMES (Sept. 2, 2018), <https://www.nytimes.com/2018/08/31/us/jordan-edwards-sentence-shooting.html> [perma.cc/6U9R-AQPU].

4. Mitch Smith, *Video of Police Killing of Philando Castile Is Publicly Released*, N.Y. TIMES (June 20, 2017 Tuesday), <https://www.nytimes.com/2017/06/20/us/police-shooting-castile-trial-video.html> [perma.cc/X3DM-Z84Y].

5. Richard Fausset & Alan Blinder, *Baton Rouge Officer Will Not Be Charged in Alton Sterling's Killing*, N.Y. TIMES (Mar. 27, 2018, 12:54 EST), <https://www.nytimes.com/2018/03/27/us/alton-sterling-baton-rouge.html> [perma.cc/A6BW-DWX8].

6. David Montgomery, *New Details Released in Sandra Bland's Death in Texas Jail*, N.Y. TIMES (July 20, 2015), <https://www.nytimes.com/2015/07/21/us/new-details-released-in-sandra-blands-death-in-texas-jail.html> [perma.cc/U99K-4AG4].

7. Alan Blinder & Timothy Williams, *Ex-South Carolina Officer Indicted in Shooting Death of Black Man*, N.Y. TIMES (June 8, 2015), <https://www.nytimes.com/2015/06/09/us/former-south-carolina-officer-is-indicted-in-death-of-walter-scott.html> [perma.cc/7U4Z-86DV].

8. Ralph Ellis, Christopher Lett & Sara Sidner, *Ex-Oklahoma deputy Robert Bates guilty of killing unarmed suspect*, CNN (Apr. 28, 2016, 7:46 AM), <https://www.cnn.com/2016/04/27/us/tulsa-deputy-manslaughter-trial/index.html> [perma.cc/RY28-HZH2].

9. Richard Pérez-Peña, *No Charges for Wisconsin Officer in killing of Unarmed Teenager*, N.Y. TIMES (May 12, 2015), <https://www.nytimes.com/2015/05/13/us/no-charges-for-wisconsin-officer-in-killing-of-unarmed-black-teenager.html> [perma.cc/5KPY-NZMH].

10. Rebekah Zemansky & Tamar Levin, *Police Shooting in Phoenix Fuels Protesters' Outrage*, N.Y. TIMES (Dec. 5, 2014), <http://www.nytimes.com/2014/12/06/us/phoenix-officer-who-shot-black-suspect-mistook-pill-bottle-for-gun-authorities-say.html> [perma.cc/DXY7-MHX4].

11. Richard A. Oppel Jr., *National Questions Over Police Hit Home in Cleveland*, N.Y. TIMES (Dec. 8, 2014), <http://www.nytimes.com/2014/12/09/us/family-of-boy-killed-by-cleveland-officer-to-pursue-criminal-case.html> [perma.cc/5DQV-GBEN].

12. Mitch Smith, *Chicago on Edge as Officer Who Shot Laquan McDonald 16 Times Faces Trial*, N.Y. TIMES (Sept. 4, 2018), <https://www.nytimes.com/2018/09/04/us/laquan-mcdonald-van-dyke.html> [perma.cc/T9P9-CNR4].

13. Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> [perma.cc/4NEL-2KNU].

14. Nathaniel Rich, *The Preacher and the Sheriff*, N.Y. TIMES (Feb. 8, 2017), <https://www.nytimes.com/2017/02/08/magazine/the-preacher-and-the-sheriff.html> [perma.cc/3PYJ-V785].

15. See discussion *supra* Part VI.

## I. INTRODUCTION

Imagine that it is the Super Bowl.<sup>16</sup> The sold-out stadium buzzes as the season's highlights play on the jumbotron.<sup>17</sup> Both teams emerge from their respective tunnels to take the field.<sup>18</sup> Finally, the crowd erupts as international superstar Beyoncé Knowles confidently strides to midfield to perform the national anthem.<sup>19</sup> Surrounded by cameras, with the world watching, Beyoncé takes a knee.<sup>20</sup> On both sides of the field, players follow suit.<sup>21</sup>

Before the first game of the 2016–2017 season, Colin Kaepernick started what would become one of the most controversial protests in the history of sports.<sup>22</sup> Rather than stand alongside his teammates during the national anthem, on that day, Kaepernick sat alone on the bench for the duration of the anthem's performance.<sup>23</sup> His silent, nonviolent protest went virtually unnoticed until the third game of the season, when he decided to kneel.<sup>24</sup> When asked why he was kneeling while the national anthem played, he unapologetically stated: "I am not going to stand up to show pride in a flag for a country that oppresses black people and people of color. To me, this is bigger than football, and it would be selfish on my part to look the other way."<sup>25</sup> The protest soon became a movement as more NFL players and other professional, collegiate, and high school athletes began kneeling.<sup>26</sup>

At the conclusion of the 2016 season, the San Francisco 49ers gave Kaepernick two options: either opt out of his contract or be released.<sup>27</sup> He opted out.<sup>28</sup> However, the silent protests continued, eventually prompting President Donald Trump to publicly criticize the kneeling players.<sup>29</sup> As team

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16. The author has created this hypothetical for the purposes of this comment.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Mark Sandritter, *A timeline of Colin Kaepernick's national anthem protest and the athletes who joined him*, SBNATION, <https://www.sbnation.com/2016/9/11/12869726/colin-kaepernick-national-anthem-protest-seahawks-brandon-marshall-nfl> [perma.cc/8LBF-HUSU] (last updated Sept. 25, 2017).

23. *Id.*

24. *See id.*; *see also* Will Brinson, *Here's how Nate Boyer got Colin Kaepernick to go from sitting to kneeling*, CBS SPORTS (Sept. 27, 2016), <https://www.cbssports.com/nfl/news/heres-how-nate-boyer-got-colin-kaepernick-to-go-from-sitting-to-kneeling/> [perma.cc/DV3D-J4S7] (explaining that Nate Boyer persuaded Colin to take a knee, similar to the way soldiers kneel for a fallen brother, as a way to show more respect during the national anthem than sitting).

25. Sandritter, *supra* note 22 (quoting Kaepernick explaining that "[t]here are bodies in the street and people getting paid leave and getting away with murder. I have great respect for the men and women that have fought for this country . . . they fight for liberty and justice, for everyone. That's not happening").

26. *Id.*

27. Nick Wagoner, *If Colin Kaepernick didn't opt out, 49ers would have released QB*, ESPN (Mar. 3, 2017), [https://www.espn.com/nfl/story/\\_/id/18808233/sanfrancisco-49ers-released-colin-kaepernick-opt-out](https://www.espn.com/nfl/story/_/id/18808233/sanfrancisco-49ers-released-colin-kaepernick-opt-out) [perma.cc/FPM5-UN2Q].

28. *Id.*

29. Bryan Armen Graham, *Donald Trump blasts NFL anthem protesters: 'Get that son of a bitch off the field,'* THE GUARDIAN (Sept. 23, 2017 6:43 PM), <https://www.theguardian.com/sport/2017/sep/22/donald-trump-nfl-national-anthem-protests> [perma.cc/W5NB-2FKH].

owners began to succumb to political pressure, the NFL proposed a new policy.<sup>30</sup> The new policy permits players to either remain in the locker room while the national anthem plays or stand for the national anthem on the sideline.<sup>31</sup> If a player kneels, the team is fined.<sup>32</sup> The NFL leaves punishment of the kneeling player to the discretion of the organization for which he plays.<sup>33</sup> Christopher Johnson, the owner of the New York Jets, declared that he would stand by his players and bear the cost of any fines imposed from violations of the new policy.<sup>34</sup> In contrast, Dallas Cowboys owner Jerry Jones announced that his team's policy is to "stand at the anthem, toe on the line" and hinted at removing or fining any players who refused to do so.<sup>35</sup>

The NFL and the Players Association are still negotiating a kneeling policy after the Player's Association rejected the NFL's original policy.<sup>36</sup> At the time of this comment, the NFL and the Players Association have yet to establish a clear policy governing national anthem protests.<sup>37</sup> As a result, neither the NFL nor individual teams have stated exactly how much a player will be fined for his decision to kneel.<sup>38</sup> If a team removes a kneeling player from the organization, the detriment to the player's community property could potentially be the remainder of the lost contract, depending on the contractual provisions.<sup>39</sup>

Now imagine that the spouse of a kneeling player does not agree with the player's choice to participate in the protest, mainly out of concern for the financial impact of the fines.<sup>40</sup> This comment will discuss whether a non-managing spouse (i.e., the player's spouse) has a claim against the managing spouse (i.e., the kneeling player) for intentionally engaging in conduct that negatively impacts the community property estate, when "special community property" is at issue.<sup>41</sup> Whether the policies instituted by the NFL or its individual teams are right or wrong, constitutional or

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30. Matthew Futterman & Victor Mather, *Trump Supports N.F.L.'s New National Anthem Policy*, N.Y. TIMES (May 23, 2018, 3:31 PM), <https://www.nytimes.com/2018/05/23/sports/nfl-anthem-kneeling.html> [perma.cc/3QJJ-PGMB] (stating that the policy the NFL implemented had not been approved by the Players Association, therefore the policy is currently being negotiated with the NFL Players Association).

31. *Dolphins Policy Says Players Could Be Suspended for Anthem Protests*, N.Y. TIMES (July 20, 2018), <https://www.nytimes.com/2018/07/19/sports/dolphins-anthem-policy.html>.

32. *Id.*

33. *Id.*

34. *Id.*

35. John Breech, *Cowboys strongly hint that anyone who protests during national anthem will be cut from team*, CBS SPORTS (July 27, 2018), <https://www.cbssports.com/nfl/news/cowboys-strongly-hint-that-anyone-who-protests-during-national-anthem-will-be-cut-from-team/> [perma.cc/SA95-CQNM]; see also *id.* (reporting that the Miami Dolphins may fine or suspend with or without pay for violating the new policy).

36. See *id.*

37. See *id.*

38. See *id.*

39. See *id.*

40. See *infra* Part VI.

41. See *infra* Part VI.

unconstitutional, is beyond the scope of this comment.<sup>42</sup>

To illustrate the significance of the impact that repeated NFL violations could have on the community property estate of a player and his spouse, consider the following hypothetical.<sup>43</sup> When he first decided to kneel in 2016, Colin Kaepernick had a fully guaranteed salary of \$12 million, plus \$1.4 million in bonuses.<sup>44</sup> Assume the fine will amount to at least \$35,096, and \$70,194 for any offense after that, which is the current fine for physical contact with a referee—the highest fine listed on the NFL/NFLPA’s schedule of fines.<sup>45</sup> Each NFL team plays sixteen regular season games; thus, if Kaepernick knelt in every game, he would be fined around \$1,088,006 for the season and would receive just over \$12.3 million of his guaranteed \$13.4 million.<sup>46</sup>

Assume Colin Kaepernick is happily married in Texas—a community property state—and that he did choose to kneel in every game.<sup>47</sup> The couple’s hypothetical community estate consists of only Colin’s 2016 contract, totaling \$13.4 million before fines.<sup>48</sup> Therefore, his wife has a one-half interest (about \$6.7 million) in the community property estate, which includes the earnings she believes he is “squandering” with his protests.<sup>49</sup> After Colin protests against her wishes, she files for divorce to protect her interest in the community property.<sup>50</sup> Does Mrs. Kaepernick have a viable claim against Colin for intentionally engaging in conduct he knew would diminish the community property estate, thereby diminishing her one-half interest?<sup>51</sup> Is the claim available only in a divorce proceeding?<sup>52</sup> Is an

42. This issue is not limited only to a spouse of a kneeling NFL player in a community property state, but is applicable to any spouse where the employee intentionally engages in conduct related to their employment they know to be detrimental to the “community,” in a community property state.

43. The author has created the following hypothetical for purposes of this comment.

44. Jason La Canfora, *Colin Kaepernick can actually earn more money in 2016 with his new contract*, CBS SPORTS (Oct. 16, 2016, 8:23 AM), <https://www.cbssports.com/nfl/news/colin-kaepernick-can-actually-earn-more-money-in-2016-with-his-new-contract/> [perma.cc/25WT-SJ5G].

45. *Fines & Appeals: The NFL/NFLPA’s schedule of infractions and fines, and a process for appeal*, NFL, <https://operations.nfl.com/football-ops/nfl-rules-enforcement/fines-appeals/> [perma.cc/LZJ3-YETS] (last visited Oct. 11, 2018) (using the current fine for physical contact with the officials as basis for predicting the fine for kneeling, which is currently the highest fine available. Under the current policy the fine will vary from program to program but considering the public outcry and the possibility of being removed or suspended it is likely the fine will be on the higher side).

46. *Id.* (“Starting in 2012, fine minimums will increase by 5 percent each year as stipulated in the NFL Collecting Bargaining Agreement. The increases continue throughout the duration of the current CBA); *NFL releases 2018 regular-season schedule*, NFL (Apr. 20, 2018, 5:05 PM), <http://www.nfl.com/news/story/0ap3000000927551/article/nfl-releases-2018-regularseason-schedule> [perma.cc/7EXY-98XA] (\$35,096 (1st offense fine) + (\$70,194 (2nd and repeat offenses fine) x 16 games) = \$1,088,006; \$13,400,000 – \$1,088,006 = \$12,311,994); see *Dolphins Policy Says Players Could Be Suspended for Anthem Protests*, *supra* note 31.

47. An assumption necessary for the purposes of this comment (at the time of this comment, Kaepernick has publicly announced that he is in a relationship).

48. *Id.*

49. Shelly D. Merritt, *Planning for Community Property in Colorado*, 31 COLO. LAW. 79 (June 2002).

50. *Id.*

51. See *infra* Part VI.

52. See *infra* Part VI.

injunction an equitable remedy?<sup>53</sup>

This comment will discuss whether a hypothetical Mrs. Kaepernick has a claim against her husband and how that claim would unfold in a divorce proceeding in Texas.<sup>54</sup> Part II of this comment examines some of the historical background surrounding the development of the community property system and provides a general overview of community property laws among the states that have adopted that system.<sup>55</sup> Part III addresses Texas laws governing community property that would be relevant to Mrs. Kaepernick's claim.<sup>56</sup> Part IV discusses different claims available to protect the community, such as fraud, waste, and breach of fiduciary duty, as well as remedies available to the injured party and how the courts have applied those remedies.<sup>57</sup> Part V examines case law applying the claims available to an injured spouse.<sup>58</sup> Part VI analyzes Mrs. Kaepernick's claim against her husband.<sup>59</sup> Finally, Part VII discusses whether Mrs. Kaepernick, or any spouse, should have a claim against his or her partner for intentionally engaging in conduct detrimental to the community and whether it is a judicial or legislative issue.<sup>60</sup>

## II. GENERAL OVERVIEW OF THE COMMUNITY PROPERTY SYSTEM

Not long ago, society did not consider the woman to be a legal entity.<sup>61</sup> Instead, the husband controlled his wife—as his property.<sup>62</sup> As the roles of women in society evolved, the community property system created laws to protect the woman's interests accumulated in marriage.<sup>63</sup> Community property is premised on the idea that the husband and wife equally commit their life and energy to their marriage, regardless of any disparity in financial contribution between them.<sup>64</sup> The community property system is congruent with the American concept that marriage is a partnership.<sup>65</sup>

The modern community property system was developed predominantly by Spanish, Mexican, and French Law.<sup>66</sup> At the time of this comment, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and

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53. See *infra* Part VII.

54. See *infra* Part VI.

55. See *infra* Part II.

56. See *infra* Part III.

57. See *infra* Part IV, V.

58. See *infra* Part V.

59. See *infra* Part VI.

60. See *infra* Part VII.

61. Michael J. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 32 (1967).

62. *Id.*

63. *Id.*

64. *Id.* at 40–41.

65. *Id.* at 20, 40–41.

66. Merritt, *supra* note 49; see also Kirkwood, *Historical Background and Objectives of the Law of Community Property in the Pacific Coast States*, 11 WASH. L. REV. & ST. B. J. 1, 3–5 (1936) (discussing the historical background of community property in detail).

Washington have all adopted the community property system.<sup>67</sup> Wisconsin effectively operates in a community property system by adopting the Uniform Marital Property Act; however, residents can opt out of the scheme.<sup>68</sup> Alaska also adopted an optional community property system allowing spouses to create community property under a community property agreement or by creating a community property trust.<sup>69</sup> Community property laws are not uniform throughout community property states; in fact, they differ significantly in some areas.<sup>70</sup> However, community property states generally adhere to the rules discussed below.<sup>71</sup>

To be subject to community property laws, at least one spouse must be domiciled in a community property state and the couple's marriage must be valid.<sup>72</sup> Domicile and residence are not necessarily synonymous, although they can be; it is possible to reside in one state and be domiciled in another.<sup>73</sup> Domicile requires a physical presence in a place coupled with the intent to remain there.<sup>74</sup> It is also possible, although uncommon, for spouses to reside in different states.<sup>75</sup> Previously, the "community" could be domiciled in only one place, determined by the husband's domicile.<sup>76</sup> Now, when spouses are domiciled in different states, the spouses' interests are determined by "the law of the state which has the most significant relationship to the spouses and the property."<sup>77</sup> For example, if Colin Kaepernick is domiciled in Texas and Mrs. Kaepernick is domiciled in New York, Colin's wages would be characterized as community property because he is domiciled in a community property state, while Mrs. Kaepernick's wages would be separate property in a divorce proceeding.<sup>78</sup>

Community property is defined as "all property acquired during the marriage other than by gift, devise, or descent, regardless of how property is titled."<sup>79</sup> Community property usually encompasses salary, wages, and other

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67. Merritt, *supra* note 49.

68. *Id.*; see WIS. STAT. § 766.31 (1983).

69. I.R.M. 25.18.1.2.2. (Mar. 4, 2011); see ALASKA STAT. § 34.77.010 (1998).

70. Merritt, *supra* note 49; see M. R. Kirkwood, *supra* note 66.

71. See *infra* Part II.

72. I.R.M. 25.18.1.3.2 (June 6, 2017) (explaining that some community property systems recognize common law marriages established elsewhere or within the state).

73. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989).

74. *Id.*

75. I.R.M. 25.18.1.3.1 (Feb. 2, 2005).

76. *Id.*

77. *Id.* (first citing *Lane-Burslem v. Comm'r*, 659 F.2d 209 (D.C. Cir. 1981); then citing *Siezer v. Sessions*, 940 P.2d 261 (Wash. 1997)).

78. *Id.* (first citing *Comm'r v. Cavanaugh*, 125 F.2d 366 (9th Cir. 1942); then citing *Lane-Burslem*, 659 F.2d 209 (D.C. Cir. 1981)); see also Thomas M. Featherston, Jr., *Separate Property or Community Property: An Introduction to Marital Property Law in the Community Property States*, ACTEC ROCKY MOUNTAIN REG'L (2017), <https://www.baylor.edu/law/facultystaff/doc.php/301687.pdf> [perma.cc/WF9R-8Q7Y] (explaining common law states define marriage assets as belonging to one spouse or another).

79. Merritt, *supra* note 49; see Kirkwood, *supra* note 66; *McCarty v. McCarty*, 453 U.S. 210, 217 (1981); ARIZ. REV. STAT. ANN. § 25-211 (West 2008); CAL. FAM. CODE § 760 (West 1994); IDAHO CODE ANN. § 32-906 (West 2018); LA. CIV. CODE ANN. art. 2338 (2018); NEV. REV. STAT. ANN. § 123.220

forms of labor compensation earned during the marriage.<sup>80</sup> Each spouse has a vested, undivided one-half interest in community property assets, regardless of record of title, distributable only upon death or divisible upon the termination of the marriage.<sup>81</sup> “Separate property” is property acquired by a spouse before marriage or during the marriage if acquired by gift, devise, or descent.<sup>82</sup> Generally, there is a rebuttable presumption that all property owned by either spouse during the marriage or upon the dissolution of the marriage is community property.<sup>83</sup> The burden of proof therefore rests with the party challenging the characterization of the property.<sup>84</sup> The degree of proof necessary to overcome the presumption varies from state to state.<sup>85</sup>

The management rights over community property differ among community property states.<sup>86</sup> Generally, there are two types of community property management systems: sole management and joint management.<sup>87</sup> The managing spouse of sole management community property essentially has the right to control or dispose of the property without the other spouse’s consent.<sup>88</sup> Separate property, which falls under sole management, is managed by whichever spouse owns the asset.<sup>89</sup> Typically, community property subject to sole management is property that the spouse would have owned if he or she were not married, such as wages.<sup>90</sup> This system could be problematic if one spouse has sole management over a larger percentage of the estate as he or she would also have control over a portion of the other spouse’s vested, undivided one-half interest.<sup>91</sup> Community property states have imposed a fiduciary duty on the managing spouse to combat this issue.<sup>92</sup> If the managing spouse breaches the fiduciary duty, the non-managing spouse could have a cause of action when the marriage is terminated by either death or divorce.<sup>93</sup> The joint management system allows for each spouse to have the opportunity to manage property in community.<sup>94</sup>

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(West 2017); N.M. STAT. ANN. § 40-3-8 (West 1990); TEX. FAM. CODE ANN. § 3.002; WASH. REV. CODE ANN. § 26.16.030 (West 2008); *see also* 39 TEX. JUR. 3d *Family Law* § 107 (2018).

80. I.R.M. 25.18.1.3.10 (Feb. 2, 2005).

81. Merritt, *supra* note 49.

82. Featherston, Jr., *supra* note 78.

83. *Id.*

84. Merritt, *supra* note 49.

85. Featherston, Jr., *supra* note 78.

86. *Id.*; Merritt, *supra* note 49.

87. J. Thomas Oldham, *Management of the Community Property Estate During Intact Marriage*, 56-SPG LAW & CONTEMP. PROBS. 99, 106 (1993).

88. Merritt, *supra* note 49.

89. Oldham, *supra* note 87.

90. I.R.M. 25.18.1.3.12 (Feb. 15, 2005).

91. Oldham, *supra* note 87.

92. Featherston, Jr., *supra* note 78.

93. *Id.*

94. Oldham, *supra* note 87.

### III. GOVERNING LAW OF COMMUNITY PROPERTY IN TEXAS

The Texas community property system is derived from Spanish law and is constitutionally based.<sup>95</sup> It is not a product of common law because common law was adamantly opposed to a woman being considered a legal entity.<sup>96</sup> A married couple is subject to community property laws when the spouses are legally married and domiciled in Texas.<sup>97</sup> Texas's community property system recognizes common law marriage.<sup>98</sup> Many high profile individuals, including athletes and entertainers, choose a partner without formally marrying.<sup>99</sup> So, even if Kaepernick never formally married Mrs. Kaepernick, they would nonetheless be subject to Texas's community property system if they agreed to be married and represented themselves as such.<sup>100</sup>

#### A. Community Property & Separate Property

Under the Texas community property system, “[l]abor and skills of a spouse belong to the community”; thus, it follows that any labor or skill-related earnings or personal income acquired during the marriage, up until the marriage is terminated, is community property.<sup>101</sup> Generally, even income produced from separate property is community property.<sup>102</sup>

Characterization of property owned by a married couple or by either spouse as either community property or separate property occurs at the time the property is acquired.<sup>103</sup> Generally, courts primarily look to the spouse's intent, typically shown by the circumstances surrounding the property's acquisition.<sup>104</sup> The standard of proof to overcome the rebuttable presumption

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95. 39 TEX. JUR. 3d *Family Law* § 95 (2018).

96. *Id.*

97. I.R.M. 25.18.1.3.1 (Feb. 15, 2005).

98. TEX. FAM. CODE ANN. § 2.401 (stating there is a rebuttable presumption that the parties did not intend to be married if a proceeding to prove the marriage is commenced after the second anniversary of the day the parties separated); *Nguyen v. Nguyen*, 355 S.W.3d 82, 89 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (explaining that the presumption of an informal or common law marriage increases as time passes, the marriage is acknowledged by other parties, and children are born).

99. *Do Marriages and Pro Athletes Mix?*, ABC NEWS (Aug. 8, 2003) <https://abcnews.go.com/2020/story?id=123669&page=1> [perma.cc/ZT4C-NMKG].

100. TEX. FAM. CODE § 2.401; *Nguyen*, 355 S.W.3d at 89.

101. *Shaw v. Greer*, 194 P.2d 430 (Ariz. 1948); *State Bd. of Equalization v. Woo*, 98 Cal. Rptr. 2d 206, 208 (Cal. Ct. App. 2000); *In re Martell*, 349 B.R. 233, 235 (Bankr. D. Idaho 2005); *Futch v. Futch*, (La. App. 2. Cir. 9/23/94); 643 So. 2d 364, 367; *Garcia v. Mayer*, 1996-NMCA-061, 920 P.2d 522, 524–25; *Sly v. Sly*, 679 P.2d 1260, 1263 (Nev. 1984) (citing *Ormachea v. Ormachea*, 217 P.2d 375, 367 (Nev. 1950)); *State v. Miller*, 201 P.2d 136, 141 (Wash. 1948); *McClary v. Thompson*, 65 S.W.3d 829 (Tex. App.—Fort Worth 2002, pet. denied); see TEX. FAM. CODE ANN. § 3.002; 39 TEX. JUR. 3d *Family Law* § 107 (2018).

102. 39 TEX. JUR. 3d *Family Law* § 129 (2018) (citing *Benavides v. Mathis*, 433 S.W.3d 59, 63 (Tex. App.—San Antonio 2014, pet. denied)).

103. *Id.* § 97 (characterizing property as community or separate property will depend on whether the couple was married at the time the property was acquired, including common law marriage).

104. *Id.* § 106 (citing *Zagorski v. Zagorski*, 116 S.W.3d 309, 316 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)).

of community property and to establish the property acquired during the marriage as separate property is clear and convincing evidence.<sup>105</sup>

Each spouse is an equal co-owner of a vested undivided interest in the community estate, regardless of who manages and controls the community asset.<sup>106</sup> Essentially, each spouse owns a one-half interest in the community property estate that is divisible only upon termination of the marriage or death.<sup>107</sup> The interest is acquired at the exact moment the property is acquired.<sup>108</sup> The spouse owns that interest, uninterrupted until the property is no longer an asset of the community, at which point any proceeds from the former asset become part of the community estate.<sup>109</sup> One spouse's interest is no more important than the other spouse's interest; they are equal in every way, and one spouse cannot own an interest in the other spouse's one-half interest.<sup>110</sup>

### *B. Management Rights*

Section 3.102(a) of the Texas Family Code divides the management of community property into "(1) . . . community property subject to a spouse's sole management, control, and disposition; and (2) that which is subject to the spouses' joint management, control, and disposition."<sup>111</sup> Community property that a spouse would have owned if he or she were single is subject to sole management, control, and disposition.<sup>112</sup> This property is known as sole management community property or special community property.<sup>113</sup> The managing spouse does not need the consent or agreement of the non-managing spouse, even though the non-managing spouse has a vested one-half interest in the asset being managed.<sup>114</sup> Sole management community property includes personal earnings, separate property revenue, and personal injury recovery.<sup>115</sup> Separate property is subject to the sole management, control, and disposition of the managing spouse, who is the spouse that owns the property.<sup>116</sup> The managing spouse is free to sell, rent, lease, gift, or do nothing at all with his or her separate property, but cannot do so fraudulently.<sup>117</sup>

105. TEX. FAM. CODE ANN. § 3.003(b); *see* 39 TEX. JUR. 3d *Family Law* § 108 (2018) (citing *Rusk v. Rusk*, 5 S.W.3d 299 (Tex. App.—Houston [14th Dist.] 1999)).

106. 39 TEX. JUR. 3d *Family Law* § 99 (2018); *Massey v. Massey*, 867 S.W.2d 766 (Tex. 1993).

107. 39 TEX. JUR. 3d *Family Law* § 99 (citing *U.S. v. Stapf*, 375 U.S. 118, 125 (1963) (stating that upon death the surviving spouse's one-half interest vest and the decedent's one-half interest goes to the decedent's estate to be dispersed as according to the decedent's wishes)).

108. *Id.*

109. *Id.* §§ 99, 114.

110. *Id.* § 99.

111. *Id.* § 159; TEX. FAM. CODE ANN. § 3.102.

112. TEX. FAM. CODE ANN. § 3.102(a).

113. *Id.*

114. *Id.*

115. *Id.* § 3.102(a)(1)–(4).

116. *Id.* § 3.101; 39 TEX. JUR. 3d *Family Law* § 158 (2018).

117. *Id.*; *see Snyder-Bell Grocery Co. v. Hamilton*, 276 S.W. 752, 755 (Tex. Civ. App.—Fort Worth 1925, no writ).

If the community property is not: “(1) personal earnings; (2) revenue from separate property; (3) recoveries for personal injuries; . . . [or] (4) the increase and mutations of, and the revenue from, all property subject to the spouse’s sole management, control, and disposition,” then the assets are joint management community property and are subject to equal control by both spouses, unless provided otherwise in writing by power of attorney or another agreement.<sup>118</sup> By granting equal control to both husband and wife, the legislature is attempting to safeguard against one spouse’s conveyance or disposition of certain property without the other spouse’s consent and knowledge.<sup>119</sup> Both spouses must consent to convey or transfer a particular joint management community property asset.<sup>120</sup> The Texas courts of appeals are divided regarding whether a spouse can convey his or her undivided one-half interest.<sup>121</sup> Some courts have held that a spouse may convey their entire one-half interest of a community asset, so long as it is not the homestead.<sup>122</sup>

### C. Nature of the Spousal Relationship

The spousal relationship is a legal entity lawfully dissolvable by divorce or death.<sup>123</sup> Marriage creates a fiduciary relationship between spouses; therefore, each spouse must adhere to a fiduciary duty when handling the community estate.<sup>124</sup> A “fiduciary” is defined as:

Someone who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, loyalty, due care, and disclosure . . . . Someone who must exercise a high standard of care in managing another’s money or property.<sup>125</sup>

The fiduciary duty is terminated in a contested divorce, in which both spouses are represented by counsel.<sup>126</sup> Although a fiduciary relationship exists between spouses, the managing spouse does not need the approval or consent of the non-managing spouse regarding management or conveyance

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118. TEX. FAM. CODE ANN. § 3.102(a)(1)–(4), (c).

119. *Id.* § 3.102; see *In re Marriage of Morrison*, 913 S.W.2d 689, 692 (Tex. App.—Texarkana 1995, writ denied); see also 39 TEX. JUR. 3d *Family Law* § 159 (2018) (expanding on the granting of equal control to both spouses).

120. 39 TEX. JUR. 3d *Family Law* § 165 (2018) (citing *City of Emory v. Lusk*, 278 S.W.3d 77 (Tex. App.—Tyler 2009, no pet.)).

121. *Id.* (citing *In re Marriage of Morrison*, 913 S.W.2d 689, 692 (Tex. App.—Texarkana 1995, writ denied)).

122. *Id.*

123. *Id.* § 76 (citing *Lee v. Hall Music Co.*, 119 Tex. 547 (1913)).

124. *Id.* § 99 (citing *Wheeling v. Wheeling*, 2017 WL 192912 (Tex. App.—El Paso 2017, pet. filed)).

125. *Fiduciary*, BLACK’S LAW DICTIONARY (10th ed. 2014); see *Gonzalez v. State*, 954 S.W.2d 98, 103 (Tex. App.—San Antonio 1997, no pet.); *Solares v. Solares*, 232 S.W.3d 873, 881 (Tex. App.—Dallas 2007, no pet.).

126. *Solares*, 232 S.W.3d at 881 (Tex. App.—Dallas 2007, no pet.).

of sole management community property.<sup>127</sup> However, the managing spouse still owes a duty of good faith, loyalty, due care, and disclosure when making decisions regarding sole management community property because the non-managing spouse holds a vested one-half interest in the asset.<sup>128</sup>

#### IV. PROTECTING THE COMMUNITY CLAIMS

To protect a spouse's one-half interest that may be under the sole management control of the managing spouse, the community property system imposes a fiduciary duty between the spouses.<sup>129</sup> If the fiduciary duty owed to the non-managing spouse is breached by the managing spouse, the non-managing spouse typically has a claim for constructive or actual fraud.<sup>130</sup>

##### A. Breach of Fiduciary Duty

The fiduciary duty exists “as to the community property controlled by each spouse, and breach of this fiduciary duty is called ‘fraud on the community,’ a judicially created concept based on the theory of constructive fraud.”<sup>131</sup> Any conduct that has “the legal effects of actual fraud in that such conduct tends to deceive the other spouse or violate confidences that exist as a result of marriage” will qualify as fraud on the community, even if the conduct is not actually fraudulent in nature.<sup>132</sup>

##### B. Actual Fraud & Constructive Fraud

Generally, common law fraud can be divided into two parts: actual fraud and constructive fraud.<sup>133</sup> The difference between actual and constructive fraud centers around the intent element.<sup>134</sup> Actual fraud requires an intent to deceive or involves a dishonest purpose.<sup>135</sup> The word “actual” indicates fraudulent activity involving moral turpitude or intentional wrong.<sup>136</sup> To successfully plead actual fraud, the plaintiff must prove:

- (1) the defendant made a material misrepresentation; (2) the defendant knew the representation was false or made the representation recklessly without

127. 39 TEX. JUR. 3d *Family Law* § 161 (citing *United States v. Tracts 31a, Lots 31 and 32, Lafitte's Landing Phase Two Port Arthur, Jefferson County Texas*, 852 F.3d 385 (5th Cir. 2017) (applying Texas law)).

128. 39 TEX. JUR. 3d *Family Law* § 165; 3 TEX. PRAC. GUIDE FAM. LAW 3d §§ 16:8-16:10 (2018).

129. *Supra* Part IV.A.

130. *Supra* Part IV.A.

131. *Zieba v. Martin*, 928 S.W.2d 782, 789 (Tex. App.—Houston [14th Dist.] 1996, no writ) (citing *In re Marriage of Moore*, 890 S.W.2d 821, 827 (Tex. App.—Amarillo 1994, no writ)).

132. *Id.*

133. 41 TEX. JUR. 3d *Fraud and Deceit* § 4 (2018) (citing *Saden v. Smith*, 415 S.W.3d 450, 470 (Tex. App.—Houston [1st Dist.] 2013, pet. denied)).

134. *Id.*

135. *See Castleberry v. Branscum*, 721 S.W.2d 270, 273 (Tex. 1986).

136. *Husky Intern. Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1586 (2016).

any knowledge of its truth; (3) the defendant made the representation with the intent that the other party would act on that representation or intended to induce the party's reliance on the representation; and (4) the plaintiff suffered an injury by actively and justifiably relying on that representation.<sup>137</sup>

Conversely, constructive fraud does not require any intent to defraud the other spouse; in fact, the spouse's intent is completely irrelevant.<sup>138</sup> Constructive fraud involves a breach of an equitable or legal duty.<sup>139</sup> "[It] may arise where one person trusts and relies on another, whether the relation is moral, social, or familial, or merely a personal one."<sup>140</sup> The breach is "condemn[ed] as fraudulent because of its tendency to deceive others, violate confidences, or injure public interests."<sup>141</sup>

Fraud, in its most basic form, is simply cheating another out of something that rightfully or lawfully belongs to him or her.<sup>142</sup> An act of fraud may be an act, omission, or concealment resulting in a breach of legal duty.<sup>143</sup> In the context of a marriage, this legal duty may be the trust, confidences, or fiduciary duty between spouses.<sup>144</sup> Fraud is a conclusion drawn from present facts, so it is not itself a fact; thus, it can be found in many different scenarios.<sup>145</sup> "Fraud on the community" alludes to an inequitable or legal infringement on the fiduciary relationship between spouses.<sup>146</sup> Historically, Texas has accepted fraud on the community to be a "wrong by one spouse that the court may consider in its division of the estate of the parties and that may justify an unequal division of the . . . [community property]."<sup>147</sup> Fraud on the community is not an individual tort; rather, it is a means of redressing the deprivation of community assets that should be considered during a divorce proceeding when the community is divided.<sup>148</sup>

Fraud is presumed when a spouse dispossesses the other spouse of his or her one-half interest in the community or the community asset without his or her knowledge or consent.<sup>149</sup> When dealing with sole management community property or special property and allegedly fraudulent activity,

137. *Saden v. Smith*, 415 S.W.3d 450, 470 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (quoting *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 217 (Tex. 2011)).

138. 41 TEX. JUR. 3d *Fraud and Deceit* § 4 (citing *Greco v. Greco*, No. 04-07-00748-CV, 2008 WL 4056328, at \*2 (Tex. App.—San Antonio Aug. 29, 2008, no pet.)).

139. *Id.* (citing *Saden*, 415 S.W.3d 450, 470 (Tex. App.—Houston [1st Dist.] 2013, pet. denied)).

140. *In re Estate of Kuykendall*, 206 S.W.3d 766, 771 (Tex. App.—Texarkana 2006, no pet.).

141. *Saden*, 415 S.W.3d at 470 (citing *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964)).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* (citing *Grace v. Parker*, 337 S.W.2d 518 (Tex. Civ. App.—Austin 1960, writ refused n.r.e.) (citing *Richmond v. Hogg Creek Oil Co.*, 229 S.W. 563, 572 (Tex. App.—Fort Worth 1920, writ dismissed)).

146. *In re Marriage of Moore*, 890 S.W.2d 821, 828 (Tex. App.—Amarillo 1994, no writ).

147. *Miller v. Miller*, 14-17-00293-CV, 2018 WL 3151241, at \*5 (Tex. App.—Houston [14th Dist.] June 28, 2018, no pet.) (quoting *Schlueter v. Schlueter*, 975 S.W.2d 584, 588 (Tex. 1998)).

148. *Id.*

149. *Id.*

courts should consider the managing spouse's rights of disposition.<sup>150</sup> The managing spouse may control and dispose of his or her sole management community property however he or she pleases without the consent of the other spouse, but cannot do so fraudulently.<sup>151</sup> Examples of fraud or waste include gambling debts, expensive gifts, extreme spending from the couple's community funds, major business losses, and making payments for elective surgeries.<sup>152</sup>

Once a presumption of fraud regarding the disposition of the other spouse's one-half interest arises, the burden shifts to the disposing spouse to prove the disposition was fair.<sup>153</sup> The three primary factors for determining the fairness of the disposition are "(1) the size of the gift in relation to the total size of the community estate; (2) the adequacy of the remaining estate; and (3) the relationship of the donor to the donee."<sup>154</sup> Here, the court could consider (1) the amount of the fine in relation to total size of the community estate (Kaepernick's salary); (2) the adequacy of the remaining contract; and (3) the relationship between Kaepernick and the NFL.<sup>155</sup>

### C. Available Remedies

Under section 7.009 of the Texas Family Code, if a judge or jury finds that a spouse committed fraud on the community or actual or constructive fraud, the court must make two calculations: first is the "value by which the community estate was depleted as a result of the fraud on the community," and second is "the amount of the reconstituted estate."<sup>156</sup> The reconstituted estate is the "total value of the community estate that would exist if an actual or constructive fraud on the community had not occurred."<sup>157</sup> Section 7.009 is applicable in instances of a breach of fiduciary duty as well.<sup>158</sup> After the court makes the aforementioned calculations the court must then "divide the reconstituted estate in a manner the court deems just and right."<sup>159</sup> The court may consider a party's fault in the dissolution of the marriage when making

150. Horlock v. Horlock, 533 S.W.2d 52, 56 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dismissed w.o.j.).

151. Massey v. Massey, 807 S.W.2d 391, 400 (Tex. App.—Houston [1st Dist.] 1991), writ denied, 867 S.W.2d 766 (Tex. 1993).

152. *The Dirty Trick of Wasting Marital Assets or Going on a Spending Spree During Your Texas Divorce*, LAW OFFICE OF BRYAN FAGAN, PLLC (Mar. 10, 2017), <https://www.bryanfagan.com/family-law-blog/2017/march/the-dirty-trick-of-wasting-marital-assets-or-going-on-a-spending-spree-during-your-texas-divorce> [perma.cc/3EX9-T7XH].

153. See Cantu v. Cantu, 556 S.W.3d 420, 429 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

154. Zieba v. Martin, 928 S.W.2d 782, 789 (Tex. App.—Houston [14th Dist.] 1996, no writ) (citing Horlock, 533 S.W.2d 52, 55 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dismissed w.o.j.)).

155. See *id.* (applying the facts of the hypothetical to the framework set out by the court in Zieba v. Zieba).

156. TEX. FAM. CODE ANN. §§ 7.001, 7.009(b)(1)–(2); see Cantu, 556 S.W.3d 420, 427 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

157. TEX. FAM. CODE ANN. § 7.009(a).

158. See Slicker v. Slicker, 464 S.W.3d 850, 858 (Tex. App.—Dallas 2015, no pet.).

159. TEX. FAM. CODE ANN. § 7.009(b)(2).

a just and right division.<sup>160</sup> However, the division should not be punitive against the culpable spouse.<sup>161</sup>

The court has a wide range of discretion when making a “just and right” division of the reconstituted estate.<sup>162</sup> The trial court’s decision will be disturbed only if it can be shown that the court clearly abused its discretion.<sup>163</sup> It may grant any legal or equitable relief necessary to accomplish a just and right division, including:

- (1) awarding to the wronged spouse an appropriate share of the community estate remaining after the actual or constructive fraud on the community; (2) awarding a money judgment in favor of the wronged spouse against the spouse who committed the actual or constructive fraud on the community; or (3) awarding to the wronged spouse both a money judgment and an appropriate share of the community estate.<sup>164</sup>

If the community has been made monetarily whole, the court cannot disproportionately divide the estate to make up for the formerly loss asset.<sup>165</sup>

A form of equitable relief is reimbursement, which “is not available as a matter of law but lies in the discretion of the court.”<sup>166</sup> “[W]hen property of one marital estate is expended for the benefit of another marital estate, the question arises whether the first estate is entitled to reimbursement by the benefited estate.”<sup>167</sup> The discretion given to a court assessing a claim for reimbursement is as broad as the discretion given when making a just and right division.<sup>168</sup> However, the court must consider “all the facts and circumstances and determine what is fair, just, and equitable”; it is more than “merely a balancing of ledgers between the [affected] marital estates.”<sup>169</sup> A reimbursement claim typically arises in two contexts: “(1) when community

160. See *Zieba v. Martin*, 928 S.W.2d 782, 789 (Tex. App.—Houston [14th Dist.] 1996, no writ) (stating a court may also consider: “(1) . . . (2) disparity of incomes or of earning capacities; (3) benefits the innocent spouse would have received from the continuation of the marriage; (4) business opportunities, education and training; (5) relative physical conditions and disparity of ages; (6) relative financial conditions and obligations; (7) size of the respective estates and the nature of the property; (8) custody of the children; (9) excessive community property gifts to others or waste of community assets; (10) tax consequences”).

161. *Cantu v. Cantu*, 556 S.W.3d 420, 426–27 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

162. TEX. FAM. CODE ANN. § 7.009(c); see *Schlueter v. Schlueter*, 975 S.W.2d 584, 589 (Tex. 1998).

163. See *Willis v. Willis*, 533 S.W.3d 547, 551 (Tex. App.—Houston [14th Dist.] 2017, no pet.); see also *In re M.C.K.*, No. 14-17-00289-CV, 2018 WL 1955065, at \*4 (Tex. App.—Houston [14th Dist.] Apr. 26, 2018, no pet.) (mem. op.) (explaining the two-prong test for deciding if a court abused its discretion: first, the appellate court considers whether the trial court “had sufficient information upon which to exercise its discretion”; and second, whether the trial court “erred in its application of that discretion”).

164. TEX. FAM. CODE ANN. § 7.009(c)(1)–(3).

165. *Miller v. Miller*, No. 14-17-00293-CV, 2018 WL 3151241, at \*12 (Tex. App.—Houston [14th Dist.] June 28, 2018, no pet.).

166. *Zieba v. Martin*, 928 S.W.2d 782, 787 (Tex. App.—Houston [14th Dist.] 1996, no writ) (quoting *Vallone v. Vallone*, 644 S.W.2d 455, 459 (Tex. 1982)); see Fred C. Weekley, *Reimbursement Between Separate and Community Estates—the Current Texas View*, 39 BAYLOR L. REV. 945, 946 (1987).

167. See Weekley, *supra* note 166.

168. *Zieba*, 928 S.W.2d at 787.

169. *Id.*

expenditures are made on a spouse's separate property purchase money obligation, or (2) when community property is used to improve a spouse's separate real property."<sup>170</sup> However, it is important to note that conflicts between marital estates arise in many different scenarios; thus, a question of reimbursement could be present in other scenarios as well.<sup>171</sup>

Generally, there are two basic defenses to a fraud claim: waiver and ratification.<sup>172</sup> A fraudulent inducement can be expressly waived by either a release clearly expressing the parties' intent to waive the claims, or disclaiming reliance on representations regarding specific disputed matters.<sup>173</sup> Ratification occurs by either conduct or words affirming an agreement or, in this case, the actions of the spouse.<sup>174</sup> For example, Colin Kaepernick may have the defense of ratification if Mrs. Kaepernick was supportive of his decision to kneel at the time he was protesting.<sup>175</sup> Ratification is an affirmative defense in which the defendant has the burden of proof.<sup>176</sup>

#### V. PROTECTING THE COMMUNITY CLAIMS APPLIED

In *Zieba v. Martin*, the court walks through the analysis of constructive fraud presumptions arising out of a spouse's lack of knowledge regarding the whereabouts or use of community funds.<sup>177</sup> The court also addresses a breach of fiduciary duty and constructive fraud claim, regarding the use of community funds to finance an extramarital affair.<sup>178</sup> The court in *Miller v. Miller*, after finding fraud on the community occurred, addresses the argument concerning whether or not the disposition made by the spouse was in fact fair to the community estate.<sup>179</sup>

##### A. Zieba v. Martin

In *Zieba v. Martin*, the court of appeals overruled the trial court's finding that Martin, Zieba's husband, did not breach his fiduciary duty although it found he did in fact owe a fiduciary duty to the community estate and Zieba.<sup>180</sup> In opposition, the court of appeals held that the community property estate was entitled to reimbursement for funds Martin withdrew

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170. See Weekley, *supra* note 166.

171. See *id.*

172. 41 TEX. JUR. 3d *Fraud and Deceit* § 63 (2019).

173. *Id.* (citing *Pleasant v. Bradford*, 260 S.W.3d 546, 553 (Tex. App.—Austin 2008, pet. denied)).

174. *Id.* (citing *Chambers v. Equity Bank, SSB*, 319 S.W.3d 892, 898 (Tex. App.—Texarkana 2010, no pet.)).

175. See *supra* Part IV.C.

176. See *supra* Part IV.C.

177. *Zieba v. Martin*, 928 S.W.2d 782, 789 (Tex. App.—Houston [14th Dist.] 1996, no writ).

178. *Miller v. Miller*, No. 14-17-00293-CV, 2018 WL 3151241, at \*1 (Tex. App.—Houston [14th Dist.] June 28, 2018, no pet.).

179. *Id.*

180. *Zieba*, 928 S.W.2d at 789.

without Zieba's consent or knowledge, spent on affairs with his numerous lovers, and deposited into two certificates of deposit (CDs) in Martin's name.<sup>181</sup>

Zieba contended the "trial court erred in refusing to reimburse the community for (1) approximately \$200,000 in community funds spent by Martin to pay separate debts and obligations arising from his prior marriage and certain personal items; (2) a \$100,000 cash withdrawal from the corporate bank account; and (3) two \$92,000 CDs, one in Martin's own name and the other in his name "as trustee" for their daughter."<sup>182</sup> In this case, the trial court's refusal to reimburse the community estate for \$147,517 for obligations from his prior marriage was not determined to be an abuse of discretion because the obligations were enforced by court order.<sup>183</sup>

Evidence presented specifically and conclusively established that Zieba neither had knowledge of nor consented to Martin depositing community funds into CDs or spending community property funds on his extramarital affairs.<sup>184</sup> Therefore, a presumption of constructive fraud arose and the court abused its discretion by refusing reimbursement for those expenditures when Martin failed to show the fairness of the transactions dispossessing Zieba.<sup>185</sup> While Zieba did have knowledge of the \$100,000 withdrawal from the corporation bank account, there is no evidence supporting the notion that she consented to it.<sup>186</sup> Zieba testified that she did not question Martin, but this is not proof of consent; it amounts to "no more than scintilla."<sup>187</sup> In this case, consent is required because the corporation is a joint management community asset.<sup>188</sup>

Even though there is a presumption of constructive fraud—because Martin dispossessed Zieba of her one-half interest in the community without her knowledge or consent—the burden now shifts to Martin to show "fairness in disposing of community assets."<sup>189</sup> According to the evidence, Martin was unable to meet this burden as he failed to explain the status of the funds at the time of divorce.<sup>190</sup> First, Martin claimed he didn't know about the \$100,000 withdrawal, but later claimed he used it along with another withdrawal to create CDs that were redeposited into the corporate account.<sup>191</sup>

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181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 790 (explaining scintilla to be "when evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and in legal effect, no evidence").

188. *Id.* (stating that trial court found that the corporation from which \$100,000 was withdrawn from was a community asset because "it did not include that property among the property listed in the judgment as 'confirmed separate property'").

189. *Id.*

190. *Id.*

191. *Id.*

No evidence supported his claims.<sup>192</sup> Regarding the \$57,610 spent on personal matters, also known as his extramarital affairs, Martin made little to no attempt to explain the expense.<sup>193</sup> Thus, the court of appeals held that the trial court should have reimbursed the community for \$57,610 spent on his extramarital affairs, the \$100,000 withdrawal, and two \$92,000 CDs because Martin failed to account for the transactions and prove their fairness.<sup>194</sup>

### B. *Miller v. Miller*

In *Miller v. Miller*, the court found that Dr. Brian Terry Miller committed fraud on the estate during a divorce proceeding with Linda Miller, and the estate was owed \$189,672.34.<sup>195</sup> Terry argued to the court that the dispositions were fair to Linda's one-half interest in the community property estate because "the size of the property disposed of in relation to the total size of the community estate was 'inconsequential' as there was 'more than 97% of a \$7.6 million estate remaining to support Linda.'"<sup>196</sup> In support of his argument, Terry cited *Marshall v. Marshall*.<sup>197</sup> In *Marshall*, the court of appeals affirmed the trial court's ruling that the husband's gifting 11.7% of special community funds to his grandson and daughter did not constitute fraud on the community.<sup>198</sup> It agreed with the trial court, stating:

The husband did not intend to deceive the wife, and concluded that the gifts were fair to the wife because the gifts were given to the 'natural objects of [the husband's] bounty,' there was no evidence that the wife had objected to the gifts, and the remaining community funds were sufficient to support the wife.<sup>199</sup>

Here, the estate is valued at \$7,621,044.80, and the amount owed is \$189,672.34, about 2.5% of the entire estate.<sup>200</sup> Terry argues that the 2.5% here is much less than the 11.7% in *Marshall*.<sup>201</sup> However, the court distinguishes *Miller* from *Marshall* by emphasizing that the "record in this case includes evidence that Terry advanced or loaned significant sums of community funds to his business partners—not his own children—without any written documentation or provisions for repayment."<sup>202</sup> Also, unlike the wife in *Marshall*, Linda did not have any knowledge of the dispositions at

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192. *Id.*

193. *Id.*

194. *Id.*

195. *Miller v. Miller*, No. 14-17-00293-CV, 2018 WL 3151241, at \*1 (Tex. App.—Houston [14th Dist.] June 28, 2018, no pet.).

196. *Id.* at \*10.

197. *Id.*; see *Marshall v. Marshall*, 735 S.W.2d 587 (Tex. App.—Dallas 1987, writ ref'd).

198. *Miller*, 2018 WL 3151241, at \*10; see *Marshall*, 735 S.W.2d at 596.

199. *Miller*, 2018 WL 3151241, at \*10; see *Marshall*, 735 S.W.2d at 596.

200. *Miller*, 2018 WL 3151241, at \*10.

201. *Id.*

202. *Id.*

issue here.<sup>203</sup> The court of appeals concluded that, based on the facts present in the case, “the trial court reasonably could have concluded . . . that the amount disposed was not ‘inconsequential.’”<sup>204</sup>

#### VI. DOES MRS. KAEPERNICK HAVE A VIABLE CLAIM?

The real issue here is whether, in community property states, a remedy exists for a spouse whose partner intentionally engages in conduct in an employment setting that he or she knows is likely to result in lost wages or employment, which invariably would harm the community estate.<sup>205</sup> For example, a lawyer is intentionally commingling the client funds with their own, eventually resulting in a lawsuit awarding a substantial amount of damages to the client and the lawyer loses his or her job, decreasing the value of the community.<sup>206</sup> In a divorce proceeding, should the lawyer have to reimburse the community for the value of the wife’s one-half interest in the damages awarded and lost wages?<sup>207</sup> Or, if a spouse who works as a hedge fund manager engages in insider trading that results in termination of his or her employment, should the hedge fund manager’s spouse be able to recover for the impact on the community due to the lost wages during a divorce?<sup>208</sup>

Assuming the Kaepernicks are legally married and at least Colin is domiciled in Texas (a community property state), thus, his income is subject to community property laws.<sup>209</sup> In Texas, Colin’s salary is considered special community property because if he were single, he would still own his salary; therefore, it is sole management community property and he alone has control over it.<sup>210</sup> Mrs. Kaepernick has an undivided one-half interest in all proceeds and income he acquired as quarterback for the Dallas Cowboys during the marriage.<sup>211</sup> Although Colin does not need his wife’s consent or agreement regarding management of his salary, he cannot dispose of it fraudulently.<sup>212</sup>

##### A. Constructive Fraud

Constructive fraud is essentially an equitable doctrine.<sup>213</sup> It can arise as a claim of a breach of duty, equitable or legal, or under a presumption of fraud.<sup>214</sup> There are two claims Mrs. Kaepernick could bring under the

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203. *Id.*

204. *Id.*

205. *See* discussion *supra* Part I.

206. *See* discussion *supra* Part I.

207. *See* discussion *supra* Part I.

208. *See* discussion *supra* Part I.

209. *See supra* text accompanying notes 72–78.

210. *Supra* text accompanying note 101.

211. *Supra* text accompanying notes 80–81.

212. *Supra* text accompanying notes 80–81.

213. *Supra* text accompanying notes 149–52.

214. *Supra* text accompanying notes 149–52.

umbrella of constructive fraud.<sup>215</sup> First, she could claim Colin breached the fiduciary duty created by their marriage by not acting in the best interest of the estate.<sup>216</sup> Second, although unlikely to succeed, she could assert that a presumption of fraud arose because she had no knowledge or consent to the disposition of the property.<sup>217</sup>

### 1. *Establishing a Presumption of Constructive Fraud*

The constructive fraud presumption is not a viable claim for Mrs. Kaepernick in this scenario because neither her consent nor knowledge is required, and it is clear that she has knowledge.<sup>218</sup> However, if Colin was using community funds, rather than special community property to pay the fines without her knowledge and consent, then the presumption would arise and the burden would shift to Colin to show the disposition was fair to the estate.<sup>219</sup>

### 2. *Breach of Fiduciary Duty*

It is a widely accepted principal that, as husband and wife, Colin and Mrs. Kaepernick have a fiduciary duty to act in the best interest regarding the protection and management of the community estate.<sup>220</sup> Specifically, a spouse must use a higher standard of care when handling the other spouse's money.<sup>221</sup> Thus, as courts have held, it logically follows that spending money on an extramarital affair is fraud on the community because invariably spending money on a "paramour" cannot be an exercise of a higher standard of care, nor can it be in the best interest of the community estate.<sup>222</sup>

Arguably, kneeling in protest is not in the best interest of the community because the community decreases in value every time Colin is fined for kneeling.<sup>223</sup> In determining whether or not his actions rise to the level of a breach of fiduciary duty, the court will consider: (1) the amount of the fine in relation to total size of the community estate (Colin's salary); (2) the adequacy of the remaining contract; and (3) the relationship between Colin and the NFL.<sup>224</sup>

Consider again the hypothetical discussed above.<sup>225</sup> Assume the fine will amount to at least \$35,096 for the initial offense, and \$70,194 for any

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215. *Supra* text accompanying notes 149–52.

216. *Supra* text accompanying notes 149–52.

217. *Supra* text accompanying notes 149–52.

218. *Supra* text accompanying notes 149–52.

219. *Supra* text accompanying notes 153–55.

220. *Supra* Part III.C.

221. *Supra* Part III.C.

222. *Supra* Part III.C.

223. *Supra* text accompanying notes 153–55.

224. *Supra* text accompanying notes 153–55.

225. *Supra* text accompanying notes 43–46.

subsequent offense.<sup>226</sup> There are sixteen games in the season.<sup>227</sup> If Colin knelt in every game, he would be fined around \$1,088,006 for the season, receiving just over \$12 million of his guaranteed \$13.4 million.<sup>228</sup> The total fine of \$1,088,006 is just 8.12% of the overall \$13.4 million estate.<sup>229</sup> The 8.12% loss to the estate here is more than the 2.5% loss in *Miller*, which the court held was not inconsequential; however, it is less than the 11.7% loss in *Marshall*, which the court held to be inconsequential.<sup>230</sup> There is no reason why the remaining contract would be in jeopardy, and the remaining \$12 million estate appears to be more than adequate.<sup>231</sup>

The relationship between the NFL and Colin is an employer-employee relationship.<sup>232</sup> An employer-employee relationship is distinguishable from an investor-investee relationship.<sup>233</sup> The distinguishing factor between *Miller* and *Marshall* is that the 2.5% loss was the result of inefficient loans to his business partners or unwise business decisions being made with community funds, while the 11.7% loss was the result of gifts made by the husband to his daughter and grandson.<sup>234</sup> Here, the 7.7% loss is a result of fines paid to an employer for the repetitive and intentional act of kneeling.<sup>235</sup> Payment of the fines is likely a condition of continued employment.<sup>236</sup> Colin's failure to pay the fines would likely have led to a more severe sanction.<sup>237</sup>

While not expressly stated by the courts, it appears that the cause of the loss to the community is a factor in determining whether the duty was breached or fraud was committed.<sup>238</sup> Arguably, at first glance, the cause of the loss suffered by the Kaepernick's community estate is more closely aligned with *Miller* because making loans without any terms of repayment is essentially the equivalent of giving money away.<sup>239</sup> Continuing to subject yourself to fines by kneeling could also be considered "giving money away."<sup>240</sup> While Colin has brought substantial awareness to the protested issues, Mrs. Kaepernick would likely argue that there are better ways to

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226. *Supra* text accompanying notes 43–46.

227. *Fines & Appeals: The NFL/NFLPA's schedule of infractions and fines, and a process for appeal*, *supra* note 45 (using the current fine for physical contact with the officials as a basis for predicting the fine for kneeling, which is currently the highest fine available. Under the current policy the fine will vary from program to program but considering the public outcry and the possibility of removal or suspension, it is likely the fine will be non the higher side.).

228. *NFL Releases 2018 regular-season schedule*, *supra* note 46; *see also Dolphins Policy Says Players Could Be Suspended for Anthem Protests*, *supra* note 31.

229. *See discussion supra* Part IV.A, V.B.

230. *See discussion supra* Part IV.A, V.B.

231. *See discussion supra* Part IV.A, V.B.

232. *See discussion supra* Part IV.A, V.B.

233. *See discussion supra* Part IV.A, V.B.

234. *See discussion supra* Part IV.A, V.B.

235. *See discussion supra* Part IV.A, V.B.

236. *See discussion supra* Part IV.A, V.B.

237. *See discussion supra* Part IV.A, V.B.

238. *See discussion supra* Part IV.A, V.B.

239. *See discussion supra* Part IV.A, V.B.

240. *See discussion supra* Part IV.A, V.B.

combat social injustice.<sup>241</sup> It is important to note that Colin's wages are special community property and thus he can dispose of them essentially in whatever manner he chooses, unless it breaches the fiduciary duty owed to his wife.<sup>242</sup> It is hard to imagine a court finding that Colin's participation in a protest would rise to the level of a breach of fiduciary duty when only 8.12% of the estate is harmed.<sup>243</sup>

It seems that courts will find a breach of fiduciary duty where conduct invariably harms the estate and provides little to no benefit to the estate or society.<sup>244</sup> It cannot logically be argued that knowingly commingling client funds or engaging in insider trading is in the best interest of the community estate or providing a benefit to society.<sup>245</sup> Thus, a spouse should be able to recover for the lost wages caused by the conduct depending on the amount of damage to the estate.<sup>246</sup>

### *B. Actual Fraud*

A claim for actual fraud would be difficult to prove in almost any circumstance in which a spouse intentionally engages in conduct in an employment setting that will be detrimental to the community estate; because actual fraud can only be proven if the injured spouse can show that their partner acted with the intent to deceive, for a dishonest purpose, or caused the injured spouse to justifiably rely on a false material statement made by their partner to the spouse's detriment.<sup>247</sup> Succeeding on a claim of actual fraud would be difficult for Mrs. Kaepernick because she would have to show that by kneeling in protest Colin intended to deceive her or kneeled for a dishonest purpose, rather than simply exercising his First Amendment rights.<sup>248</sup>

Assume that Colin and Mrs. Kaepernick are experiencing marital problems and Colin feels that divorce is on the horizon.<sup>249</sup> Colin does not want Mrs. Kaepernick to walk away with \$6.7 million, so he decides to accrue some hefty fines by kneeling every game.<sup>250</sup> In that case, Mrs. Kaepernick could have a claim for actual fraud because Colin is kneeling to reduce the value of his wife's one-half interest in the community estate, rather than to protest police brutality.<sup>251</sup>

Mrs. Kaepernick could also succeed by showing that Colin knowingly or recklessly made a false material misrepresentation upon which he intended

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241. See discussion *supra* Part IV.A, V.B.

242. See discussion *supra* Part IV.A, V.B.

243. See discussion *supra* Part IV.A, V.B.

244. See discussion *supra* Part IV.A, V.B.

245. See discussion *supra* Part IV.A, V.B.

246. See discussion *supra* Part IV.A, V.B.

247. *Supra* text accompanying notes 133–37.

248. *Supra* text accompanying notes 133–37.

249. *Supra* text accompanying notes 133–37.

250. *Supra* text accompanying notes 133–37.

251. *Supra* text accompanying notes 133–37.

her to rely, and upon which she did justifiably rely, resulting in injury.<sup>252</sup> Assume that Mrs. Kaepernick works as an attorney to supplement the income lost from Colin's kneeling.<sup>253</sup> Colin promises her that he will no longer kneel so that she can quit her job, knowing that he has no intention of abandoning the protest.<sup>254</sup> Mrs. Kaepernick quits her job, and Colin continues to kneel.<sup>255</sup> The claim of actual fraud would not be rooted in his decision to kneel.<sup>256</sup> Instead, the claim would be rooted in his decision to kneel after making a material promise to discontinue his protest, continuing his protest, resulting in financial injury to Mrs. Kaepernick who is now unemployed and going through a divorce.<sup>257</sup> However, Mrs. Kaepernick would likely not have a viable claim for actual fraud for Colin honestly protesting racial injustice by kneeling even if it is decreasing the value of the community estate and she disagrees with his choice.<sup>258</sup> His earnings are subject to his sole management and his decisions do not require her consent or agreement, so as long he does not kneel for a dishonest purpose or cause Mrs. Kaepernick to justifiably rely on a material misrepresentation she has no viable claim for actual fraud.<sup>259</sup>

### C. In Colin's Defense

Assuming actual fraud or breach of fiduciary duty is established, Colin can defend against the claims either by (1) showing the fines were fair to the estate, (2) establishing that Mrs. Kaepernick waived her claims, or (3) proving that Mrs. Kaepernick ratified his actions.<sup>260</sup> If Mrs. Kaepernick encouraged his protest by communicating words of affirmation to him or publicly supporting the protest, Colin could show that she ratified the disposition.<sup>261</sup> Colin would argue that by supporting the protest or the fight against racial injustice, she supported Colin kneeling, and therefore it would be inequitable for her to recover her one-half interest in the fines.<sup>262</sup> Also, if Mrs. Kaepernick waived her rights to bring this claim, Colin would have a defense.<sup>263</sup>

Interestingly, Colin Kaepernick recently signed a deal with Nike endorsing his involvement in the protest.<sup>264</sup> The campaign slogan is "Believe

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252. *Supra* text accompanying notes 133–37.

253. *Supra* text accompanying notes 133–37.

254. *Supra* text accompanying notes 133–37.

255. *Supra* text accompanying notes 133–37.

256. *Supra* text accompanying notes 133–37.

257. *Supra* text accompanying notes 133–37.

258. *Supra* text accompanying notes 133–37.

259. *Supra* text accompanying notes 133–37.

260. *Supra* text accompanying notes 172–76.

261. *Supra* text accompanying notes 172–76.

262. *Supra* text accompanying notes 172–76.

263. *Supra* text accompanying notes 172–76.

264. Dan Cancian, *Colin Kaepernick Net Worth: How Much Will Nike Deal Pay?*, NEWSWEEK (Sept. 4, 2018, 6:57 AM), <https://www.newsweek.com/colin-kaepernick-net-worth-how-much-will-nike-deal-pay-1103437> [perma.cc/VVY2-HNBM].

in something. Even if it means sacrificing everything.”<sup>265</sup> Numerical details of the contract have not surfaced, but the deal includes “his own branded line of gear including shoes, shirts, jerseys and more.”<sup>266</sup> According to Charles Robinson, an NFL reporter for Yahoo, “Kaepernick’s deal is a ‘star’ deal worth millions per year and includes royalties on sales.”<sup>267</sup> Here, the detriment to the estate is roughly \$1.3 million and it is almost certain that the new Nike deal is worth more than \$1.3 million.<sup>268</sup> Colin could argue that but for his protest, his new deal with Nike would not have developed.<sup>269</sup> Therefore, his action of kneeling in protest was fair to the estate because not only did he make the estate whole again, but he increased the entire size of the estate.<sup>270</sup>

#### D. Remedies

If the court found that Colin defrauded the community, it could attempt to remedy this by making a “just and right” division of the remaining community property estate.<sup>271</sup> First, the court would determine the value of the reconstituted estate, which is the value of the community property estate before Colin kneeled; therefore, the reconstituted estate would be \$13.4 million.<sup>272</sup> Mrs. Kaepernick’s one-half interest in the reconstituted estate would be \$6.7 million.<sup>273</sup> The value of the harmed community estate would be roughly \$12.3 million.<sup>274</sup> Thus, the court could award Mrs. Kaepernick \$6.7 million, leaving Colin \$5.6 million.<sup>275</sup> Instead of the 50/50 division the court would have found applicable in the absence of fraud, Mrs. Kaepernick would receive 54% of the community estate.<sup>276</sup>

### VII. CONCLUSION

Fraud against a spouse for conduct occurring in an employment setting that harmed the community estate has not yet been addressed by the courts.<sup>277</sup> Similarly, a claim for fraud against the community regarding detriment to the estate caused by fines as a result of the kneeling protest has not yet been decided by the courts.<sup>278</sup> However, it is likely that if the issue was before the court, fraud would not be found absent a showing of

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265. *Id.*

266. *Id.*

267. *Id.*

268. *Supra* text accompanying notes 172–76.

269. *Supra* text accompanying notes 172–76.

270. *Supra* text accompanying notes 172–76.

271. *Supra* Part IV.C.

272. *Supra* Part IV.C.

273. *Supra* Part IV.C.

274. *Supra* Part IV.C.

275. *Supra* Part IV.C.

276. *Supra* Part IV.C.

277. *See supra* Part III, IV.

278. *See supra* Part III, IV.

fraudulent intent or significant damage to the estate.<sup>279</sup> The court would likely not want to involve itself in policing the conduct of employees; that is a job for the employer.<sup>280</sup>

For example, if the estate was reduced by 50% because of Colin's activism that Mrs. Kaepernick adamantly protested against, there may exist a stronger argument that a just and right division of the estate upon divorce should allow Mrs. Kaepernick to recover a larger portion of the remaining estate.<sup>281</sup> The rule is that because the property at issue is "special" community property, a spouse can dispose of it in any way he or she chooses, except fraudulently.<sup>282</sup> But, if the rule is interpreted in such a way to allow Colin to kneel until little to nothing is left for his spouse just because it's his special community property and there is no intent to defraud Mrs. Kaepernick, maybe the legislature should consider making wages separate property.<sup>283</sup> If wages were separate property, the other spouse would have no expected interest in the spouse's salary upon death or divorce as a means of compensation after death or divorce.<sup>284</sup> However, implementing that change would not be in line with the idea of protecting a spouse in the event of a divorce or death, especially if the only source of income is generated by one spouse's salary.<sup>285</sup>

This issue, absent a showing of intentionally fraudulent conduct, should be addressed by the judiciary because it will likely have to be considered on a case-by-case basis. For example, a person intentionally choosing to engage in insider trading is different than choosing to protest racial injustice and being subsequently fined.<sup>286</sup> In the first instance, the court may consider why they were engaging in insider trading.<sup>287</sup> Maybe the spouse's salary is the only source of income and the family needed extra money because of the other spouse's illness.<sup>288</sup> In the latter instance, the state of Texas would have to consider whether it would be infringing on Colin's First Amendment rights if it found that he did commit fraud on the community and ordered him to reimburse the community.<sup>289</sup> Because the court's analysis could consider very different factors in making its determination, it is best that the judiciary address this issue.<sup>290</sup>

Among other factors the court would analyze "(1) the size of the gift in relation to the total size of the community estate; (2) the adequacy of the

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279. *See supra* Part III, IV.

280. *See supra* Part III, IV.

281. *See supra* Part III, IV.

282. *See supra* Part III, IV.

283. *See supra* Part III, IV.

284. *See supra* Part III, IV.

285. *See supra* Part III, IV.

286. *See supra* Part III, IV.

287. *See supra* Part III, IV.

288. *See supra* Part III, IV.

289. *See supra* Part III, IV.

290. *See supra* Part III, IV.

remaining estate; and (3) the relationship of the donor to the donee.”<sup>291</sup> A statute generally providing a list of factors to be considered in situations such as this could be appropriate.<sup>292</sup> But it is important the list neither be exhaustive nor give more weight to one factor over the other because so far the court has not done either.<sup>293</sup> Instead, the court has used more of a balancing test approach when applying the factors that a statute would need to reflect, should the legislature choose to address the issue.<sup>294</sup>

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291. See *Zieba v. Martin*, 928 S.W.2d 782, 789 (Tex. App.—Houston [14th Dist.] 1996, no writ) (citing *Horlock v. Horlock*, 533 S.W.2d 52, 55 (Tex. App.—Houston [14th Dist.] 1975, writ dismissed w.o.j.)).

292. See *id.*

293. See *id.*

294. See *id.*