

VALUATION OF DIFFICULT PROPERTY

Family Law Practice Institute
University of Houston Law Foundation
September 1997

Jimmy L. Verner, Jr.
Verner & Brumley, P.C.
3131 TurtleCreek Blvd.
Suite 1020
Dallas, Texas 75219
214.526.5234
214.526.0957.fax
jverner@vernerbrumley.com
www.vernerbrumley.com

- I. INTRODUCTION
- II. VALUATION STANDARDS
- III. BUSINESS VALUATION
 - A. Excess Earnings Method
 - 1. Background
 - 2. The Method by Steps
 - B. Goodwill
 - 1. Goodwill Defined
 - 2. The *Nail* Doctrine/Sole Proprietorships
 - 3. Multi-Shareholder Corporations
 - 4. Partnerships
 - 5. Single-Shareholder Corporations
 - 6. Summary

C. Establishing and Excluding Personal Goodwill

1. Pattern Jury Charges
2. No Covenant Not to Compete
3. Factors Showing Commercial Goodwill

D. Summary

IV. VALUING *JENSEN* REIMBURSEMENT CLAIMS

A. The Evolution of *Jensen*

B. Pattern Jury Charge

C. Applying *Jensen*

1. Determining Actual Compensation
2. Determining Adequate Compensation

D. Summary

V. EXPERT TESTIMONY

A. Qualifying the Expert

B. The Expert's Testimony

1. The Evidence Rules
2. Expert Testimony

C. *Daubert per Robinson*

VI. CONCLUSION

Table of Cases

I. INTRODUCTION. This article discusses the standards and techniques necessary for valuation of certain property interests that can be difficult to value. The article first examines the legal standards governing valuation of property upon divorce. The article then turns its attention to two particularly difficult valuation issues: (1) the valuation of a closely held business or professional practice; and (2) the valuation of a *Jensen* reimbursement claim based upon the

contribution of time, toil, talent and effort by one or both the spouses to one spouse's separate property business. Because these issues invariably involve expert testimony, the article concludes by examining the requirements for expert testimony and the potential changes in those requirements wrought by the *Daubert* doctrine.

II. VALUATION STANDARDS. In any divorce case, the court is charged with dividing the community estate between the parties "in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage." Family Code § 3.63(a). To perform its duty, the court must have some idea of the community property's worth. Further, the court may take into account the size of the parties' separate estates in deciding how to divide the parties' community property even though the court has no power to divest either party of separate property. *See, e.g., Murff v. Murff*, 615 S.W.2d 696 (Tex. 1981). Thus, assets of substantial value in the community estate, and sometimes in a party's separate estate, must be valued.

Assets must be valued at their "present value." "Present value" is a term of art. The present value of an asset is best defined in 5 Pattern Jury Charges 203.01:

The present value of an asset is its market value unless it has no market value.

"Market value" is the price the asset will bring when it is offered for sale by one who desires to sell, but is not obliged to sell, and is bought by one who desires to buy, but is under no necessity of buying.

If an asset has no market value, its present value is the value of its ownership as determined from the evidence.

In short, the present value of an asset is its market value unless it has no market value.

"Market value" is clearly defined in PJC 203.01 and in the case law. Less clearly defined is the "value of its ownership" test, which sometimes is referred to as "actual" or "intrinsic" value and frequently is referred to as "value to the owner." The relatively vague measure of value under this test is "the actual value of the property to the owner." *Beavers v. Beavers*, 675 S.W.2d 296, 299 (Tex. App. - Dallas 1984, no writ). This measure of value is appropriate only when it can be shown that there is no market value for the asset. *E.g., Taylor County v. Olds*, 67 S.W.2d 1102, 1104 (Tex. Civ. App. - Eastland 1934, writ dismissed). This concept was applied in *Beavers*, *supra*, in which a court was asked to value shares of stock. The shares were subject to a restriction

that they be offered first to other shareholders at book value. Experts from both parties testified that essentially because of this restriction, the market value of the stock was zero. . . . While market value is usually the best evidence of the value of the personal property, in the absence of a market value, the actual value of the property to the owner may be shown.

Beavers, 675 S.W.2d at 299 (citations omitted).

Regardless of which measure of present value is appropriate for the case, it is critical to use and follow the correct definition of present value. Using the wrong definition, or failing to follow that definition, may render opinion evidence of present value inadmissible. *E.g., State of Texas v. Zaruba*, 418 S.W.2d 499, 503 (Tex. 1967)(expert's opinion "founded on an improper measure of valuation is of no probative force").

III. BUSINESS VALUATION. Valuing a going business is a complex endeavor. One must determine the price at which a dynamic legal entity would change hands. Valuation of a business requires determining the value of both the business' tangible and intangible assets, the latter being goodwill in the case of a professional practice. Under settled Texas law, goodwill attributable to the person of a professional must be excluded from the valuation of a practice's intangibles because personal goodwill is not property subject to division upon divorce.

This section of the article first outlines a common method of valuing a going business, the excess earnings method. The article then reviews the law governing personal and commercial goodwill. This section of the article concludes by discussing factors to be taken into account when including or excluding personal goodwill.

A. Excess Earnings Method. Many methods exist by which a business may be valued. *See, e.g., S. Pratt, R. Reilly, & R. Schweihs, VALUING A BUSINESS* (3d ed. 1996). Probably the best method to use when valuing a professional practice is the excess earnings method. *Id.* ch. 13. This method is particularly suited to the valuation of professional practices because it was specifically designed to provide a measure of value for goodwill.

1. Background. The United States government established the excess earnings method as a result of Prohibition. With the ratification in 1919 of the Eighteenth Amendment to the United States Constitution, a number of breweries and distilleries in the United States were put out of business. As one might imagine, the value of the breweries and distilleries included some amount attributable to the goodwill attached to the alcoholic beverages sold by those breweries and distilleries. Some calculation had to be made to ascertain the lost value of these breweries and distilleries for tax purposes, including the value of no-longer-extant goodwill.

To resolve this problem, the United States Treasury Department promulgated Appeals and Review Memorandum No. 34 ("ARM 34"). ARM 34 set forth the excess earnings method of valuation. Over the years, the method has been widely used in business valuation. In 1968, the IRS updated and restated ARM 34 in the form of Revenue Ruling 68-609. Revenue Ruling 68-609 remains in effect today although the capitalization rates included within it have been criticized as outdated.

2. The Method by Steps. Revenue Ruling 68-609 contemplates valuing a business by establishing a value for tangible assets and a separate value for intangible assets. The two values are then combined to give a total value for the business in question. Utilizing this method of valuation requires carefully following a number of steps. Those steps, together with comments about them, are:

Step 1: Determine the earnings of the business per annum.

Comment: Several calculations are available to determine normalized earnings of a business per annum. These calculations are based

upon the business' prior earnings. Revenue Ruling 68-609 requires that the past earnings utilized in the valuation "should fairly reflect the probable future earnings." Revenue Ruling 68-609 also states that the period considered "should not be less than five years." Over that period, one may simply average earnings if no earnings pattern is apparent. If a pattern exists which may be extrapolated into the future, it may be more appropriate to use a weighted average, which means that an index of importance is applied to more recent years. The average is calculated by the total of the numbers used in the index rather than by the total number of years. For example, the most recent year's earnings could be multiplied by five, the previous year's earnings by four, and so on, with the sum of five years' earnings divided by fifteen, which is the sum of five plus four plus three, *etc.* The trend line method may be used when the most recent year's earnings rose or fell sharply. As another example, one may use the projected growth rate in earnings method when a trend in earnings exists, and it is highly probable that the trend will continue. See R. Cocanower, *How to Value a Going Business Concern*, at B-5 to B-7, in HOW TO DETERMINE AND PROVE THE VALUE OF A BUSINESS (SBOT 1991).

Further requirements for establishing normalized income are to remove nonoperating income from the earnings base and to utilize after-tax income, except possibly in the case of a Subchapter S corporation. In addition, "a reasonable amount for services performed by the owner or partners engaged in the business" should be made from the earnings of a sole proprietorship or partnership business. Revenue Ruling 68-609. Further, "abnormal compensation should be adjusted to a normal level." S. Pratt, R. Reilly, & R. Schweihs, VALUING A BUSINESS at 291 (3d ed. 1996).

Step 2: Identify and value the tangible assets of the business.

Comment: For a professional practice such as a law firm, these assets would consist of items such as computers, books and furniture. Also included would be assets such as bank accounts. Because the intangible asset the excess earnings method attempts to value is goodwill, assets ordinarily regarded in a strict sense as intangible in nature would be considered tangible assets. Such assets might include, for example, leaseholds, patents or copyrights. S. Pratt, R. Reilly, & R. Schweihs, VALUING A BUSINESS at 287 (3d ed. 1996).

Several methods exist by which to value tangible assets. One common accounting method which should *not* be used is book value. The book value of an asset is the cost of the asset less depreciation and amortization. The use of book value to determine the value of tangible assets is inappropriate because book value typically is less than market value. An asset may have no book value at all if fully depreciated or amortized, yet still have significant market value. A better measure of value for tangible assets is adjusted book value which values tangible assets at their market value.

Step 3: Estimate a capitalization rate for the tangible assets.

Comment: The capitalization rate for the tangible assets should equal the rate of return one reasonably would expect to receive for the use of the tangible assets. According to Revenue Ruling 68-609, the rate of return for tangible assets should equal between 8% and 10%. However, Revenue Ruling 68-609 goes on to state that these figures are merely examples and that the rate of return should “be the percentage prevailing in the industry involved at the date of the valuation,” based on the facts of each case. The capitalization rates set forth in Revenue Ruling 68-609 are low because Revenue Ruling 68-609 was promulgated at a time when investment yields were low.

Step 4: Multiply the capitalization rate for the tangible assets times the value of the tangible assets.

Comment: This calculation will yield the amount of the annual earnings of the business attributable to the tangible assets.

Step 5: Subtract the amount of the annual earnings of the business attributable to the tangible assets from the yearly earnings of the business.

Comment: What is left is the “excess” earnings of the business, or in other words, the amount of the business’ earnings attributable to intangibles which in the case of a professional practice will be goodwill.

Step 6: Determine a capitalization rate with respect to the excess earnings of the business.

Comment: The capitalization rate should reflect the rate of return an investor would demand to invest in the business, taking into account the level of risk involved. On selecting a capitalization rate, Revenue Ruling 68-609 states: “Factors that influence the capitalization rate include (1) the nature of the business, (2) the risk involved, and (3) the stability or irregularity of earnings.” The Revenue Ruling suggests a capitalization rate in the range of 15% to 20%, but bear in mind the economic conditions prevalent when the IRS promulgated Revenue Ruling 68-609. *See* comment to Step 3.

On this important subject, S. Pratt states:

In general, investors are not willing to pay cash up front for more than one to five years’ worth of earnings from commercial goodwill, sometimes even less. The length of expected future earnings from goodwill for which investors are willing to pay depends primarily on the perceived persistence of those earnings in the future, independent of further investment of time and effort to perpetuate them.

S. Pratt, R. Reilly, & R. Schweih, VALUING A BUSINESS at 293 (3d ed. 1996). Thus, an implied capitalization rate may be calculated as “the reciprocal of the number of years’ expected excess earnings for which the investor would be willing to pay cash up front.” *Id.* Using this technique, the capitalization rate when an investor would pay cash for four years’ earnings would be 1/4, or 25%. In service businesses, capitalization rates are more likely to equal 20% to 100% than the 15% to 20% set forth in Revenue Ruling 68-609. A warning is appropriate: “Using capitalization rates that are too low inevitably results in overstating the value of the entity.” *Id.* at 296.

Step 7: Divide the excess earnings by the capitalization rate selected.

Comment: The quotient is the value attributed to intangible assets, or goodwill.

Step 8: Add the value of the business' tangible assets (Step 2) and the value of the business' intangible assets (Step 7) to determine the value of the business.

Comment: Finished at last!

Because the excess earnings method separately calculates the value of a business' tangible and intangible assets, one may point to the value of the business' intangible assets as constituting the business' goodwill. However, Texas law requires an additional valuation step, segregation of that goodwill into goodwill personal to the business owner and commercial goodwill attached to the business. Upon divorce, one must exclude personal goodwill from calculation of the value of a spouse's interest in a business.

B. Goodwill. The valuation of closely held business interests and professional practices will depend upon the extent to which a business owner participates in the business and the form - sole proprietorship, partnership, or corporation - of the business. It is assumed - although not always true - that one who owns an interest in a closely held business also works for the business. In that event, the evaluator must address what part of the business' goodwill is attributable to the person of the business owner spouse and exclude that portion of the business' goodwill from the calculation of the value of that spouse's interest in the business.

1. Goodwill Defined. The Business Valuation Standards of the American Society of Appraisers define goodwill to be:

That intangible asset which arises as a result of name, reputation, customer patronage, location, products and similar factors that have not been separately identified and/or valued but which generate economic benefits.

American Society of Appraisers, BUSINESS VALUATION STANDARDS at 4 (1992). Texas law generally follows this definition. For example, in *Taormina v. Culicchia*, 355 S.W.2d 569, 574 (Tex. Civ. App. - El Paso 1962, writ ref'd n.r.e.), the El Paso Court of Appeals stated: "Goodwill is generally understood to mean the advantages that accrue to a business on account of its name, location, reputation and success."

2. The Nail Doctrine/Sole Proprietorships. The present Texas law requiring the exclusion of personal goodwill in valuing a business originated with *Nail v. Nail*, 486 S.W.2d 761 (Tex. 1972). Dr. Nail, the husband, was a medical doctor specializing in ophthalmology. He practiced as a sole proprietor. Upon divorce, the trial court divided the community interest in Dr. Nail's medical practice, including the goodwill associated with it. The trial court awarded Ms. Nail \$40,000 for her community interest in the medical practice and ordered Dr. Nail to pay this sum to Ms. Nail over a twenty-four month period.

On appeal, Dr. Nail attacked the monetary award as impermissible alimony. Dr. Nail claimed that the award constituted alimony because it was not referable to any community property of the parties. Although the trial court valued the medical practice at \$131,759.64, the entire sum, except for hard assets valued at \$735.47, consisted of goodwill. Dr. Nail claimed that his personal goodwill was not property which could be divided by a court upon divorce.

The Texas Supreme Court agreed with Dr. Nail. The Court held:

[I]t cannot be said that the accrued good will in the medical practice of Dr. Nail was an earned or vested property right at the time of the divorce or that it qualifies as property subject to division by decree of the court. It did not possess value or constitute an asset separate and apart from his person, or from his individual ability to practice his profession. It would be extinguished in event of his death, or retirement, or disablement, as well as in event of the sale of his practice or the loss of his patients, whatever the cause.

Id. at 764. The Court concluded that Dr. Nail's goodwill could not be property subject to division upon divorce.

The Court limited its holding by stating:

It is to be understood that in resolving the question at hand we are not concerned with good will as an asset incident to the sale of a professional practice, or that may exist in a professional partnership or corporation apart from the person of an individual member, or that may be an element of damage by reason of tortious conduct.

Id. Thus, the Court left open the possibility that professional partnerships or corporations might possess goodwill in which the community would be entitled to share. However, a sole proprietorship simply has no goodwill unassociated with the solo practitioner because no entity other than the person of the solo practitioner can be associated with the goodwill. Goodwill cannot be included as an element of value when a sole proprietorship is valued upon divorce.

3. Multi-Shareholder Corporations. In *Geesbreght v. Geesbreght*, 570 S.W.2d 427 (Tex. Civ. App. - Fort Worth 1978, writ dismissed), the Fort Worth Court of Civil Appeals applied the principle that a corporation might have goodwill apart from the person of an individual professional. In *Geesbreght*, Dr. Geesbreght and another physician had incorporated a business called Emergency Medicine Consultants, P.C., which engaged in the business of supplying emergency room physicians to hospitals on a contract basis. After excluding goodwill personal to Dr. Geesbreght, the Fort Worth Court of Civil Appeals nevertheless concluded that commercial goodwill existed in Emergency Medicine Consultants, P.C., which the trial court had failed to value and to award. The court therefore reversed the case and remanded it for an "appropriate property division." *Id.* at 436.

4. Partnerships. The Dallas Court of Appeals applied *Nail* to a partnership composed of lawyers in *Finn v. Finn*, 658 S.W.2d 735 (Tex. App. - Dallas 1983, writ ref'd n.r.e.) (en banc). In *Finn*, the Dallas Court of Appeals proposed a two-pronged test to determine whether goodwill is capable of being divided upon divorce:

First, goodwill must be determined to exist independently of the personal ability of the professional spouse. Second, if such goodwill is found to exist, then it must be determined whether that goodwill has a commercial value in which the community estate is entitled to share.

Id. at 741. Applying this test to the law firm Thompson & Knight, the court concluded that the firm possessed goodwill exclusive of Mr. Finn. But the court held that, because of the restrictive provisions of the firm's partnership agreement, the goodwill had no commercial value in which the community estate was entitled to share. The court stated that Mr. Finn could realize his firm's goodwill only by continuing to practice law with the firm. Thus, the firm's goodwill amounted to "no more than an expectancy entirely dependent on the husband's continued participation in the firm." *Id.* at 742.

A concurring opinion contended that the lack of any provision in the firm's partnership agreement to realize Mr. Finn's goodwill upon divorce should not prevent that goodwill from being valued and awarded in the event of divorce. *Id.* at 749. The Fort Worth Court of Appeals adopted this reasoning in *Keith v. Keith*, 763 S.W.2d 950 (Tex. App. - Fort Worth 1989, no writ). In that case, the court held that the terms of a partnership agreement cannot limit the existence or amount of commercial goodwill that may exist in the partnership for purposes of valuation upon divorce.

5. Single-Shareholder Corporations. The El Paso Court of Appeals applied *Nail* to a one-person professional corporation in *Hirsch v. Hirsch*, 770 S.W.2d 924 (Tex. App. - El Paso 1989, no writ). The *Hirsch* court agreed with Mr. Hirsch that the trial court erred in its charge to the jury because the charge should have instructed the jury to exclude personal goodwill from the value of Mr. Hirsch's one-person law practice. The court further observed: "Where the entity is a one person professional corporation conducting business in that person's name, it would be difficult to get past the first prong of the [*Finn*] test." *Id.* at 927.

6. Summary. *Nail* has been applied to both sole and multi-shareholder corporations as well as to partnerships. *Nail* precludes any finding of goodwill in a sole proprietorship because the sole proprietorship's goodwill is inseparable from the goodwill of the proprietor. Partnerships may have commercial goodwill apart from the personal goodwill of individual partners. To establish and value this goodwill, one must first determine that goodwill independent of the person of the partner in question exists; and if so, one must then determine what, if any, value that commercial goodwill has. Corporations also may have commercial goodwill. As with partnerships, one must exclude any personal goodwill of corporate shareholders in valuing a shareholder's interest in the corporation. It is theoretically possible that a one-person corporation

could have goodwill apart from its single shareholder, but as a practical matter, any such commercial goodwill will be non-existent.

C. Establishing and Excluding Personal Goodwill. Whether goodwill exists is a question of fact. *Simpson v. Simpson*, 679 S.W.2d 39, 41 (Tex. App. - Dallas 1984, no writ). The appellate courts accordingly have granted trial courts substantial flexibility in how to exclude goodwill when valuing businesses upon divorce. A trial court need not necessarily arrive at a value for the business including goodwill, then subtract the value of the goodwill to reach that part of the business' value considered community property. "It is only necessary that the trial court's findings show clearly that the value found by the court excluded such factors." *Rathmell v. Morrison*, 732 S.W.2d 6, 18 (Tex. App. - Houston [14th Dist.] 1987, no writ). The El Paso Court of Civil Appeals did follow the "subtraction" procedure in *Trick v. Trick*, 587 S.W.2d 771, 774 (Tex. Civ. App. - El Paso 1979, writ dism'd), where the evidence specifically identified the value of the business attributable to goodwill. In contrast, in *Hirsch v. Hirsch*, 770 S.W.2d 924, 927 (Tex. App. - El Paso 1989, no writ), the El Paso Court of Appeals stated that Ms. Hirsch's expert witness should have been requested to value Mr. Hirsch's professional corporation by excluding personal goodwill from his valuation altogether.

1. Pattern Jury Charges. The Pattern Jury Charges appear to follow the *Hirsch* approach. PJC 203.02 states, in full, as follows:

You are to determine the present value of the ownership interest in the business as if the party participating in it will no longer continue to do so and will be free to compete directly with it.

The comment following this charge provides:

In valuing a business or an interest in a professional firm or partnership, the value attributable to certain factors should be excluded. These factors include the personal goodwill of a party (at least if that person is a professional, *Nail v. Nail*, 486 S.W.2d 761 (Tex. 1972); *Geesbreght v. Geesbreght*, 570 S.W.2d 427 (Tex. Civ. App. - Fort Worth 1978, writ dism'd)); the time, toil, and talent of the party to be expended following the divorce; and the party's willingness not to compete with the business, *Rathmell v. Morrison*, 732 S.W.2d 6, 18 (Tex. App. - Houston [14th Dist.] 1987, no writ). The Committee believes that the foregoing instruction excludes those factors.

PJC 203.02 comment.

2. No Covenant Not to Compete. One must determine the present value of the closely held business or professional practice "as if the party participating in it will no longer continue to do so and will be free to compete directly with it." PJC 203.02. This requirement of the law severely constrains the value one may place on a closely held business. Typically, when such

businesses are sold, the new owner insists on a covenant not to compete to protect his investment. But a court has no power to impose a covenant not to compete in a divorce case. *Ulmer v. Ulmer*, 717 S.W.2d 665 (Tex. App. - Texarkana 1986, no writ).

It is critical that a business be valued on the assumption that the spouse participating in the business not only will no longer do so but will be free to compete with the business. Ignoring the fact that the participating spouse would be free to compete with the business would be reversible error. *Rathmell v. Morrison*, 732 S.W.2d 6, 19 (Tex. App. - Houston [14th Dist.] 1987, no writ). This rule of law follows directly from *Nail's* holding that the right to practice one's profession is not a property right subject to division.

3. Factors Showing Commercial Goodwill. The *Nail* doctrine poses significant problems to establishing more than minimal commercial goodwill when valuing a professional practice. However, *Nail's* burdens are not necessarily insurmountable. There are a number of factors an appraiser may consider in attributing commercial goodwill to a professional practice. Some of them are:

Telephone Number	If a professional practice acquires a significant number of its clients or patients by utilization of a long-standing or heavily advertised telephone number, then it can be inferred that clients or patients come to the practice for reasons other than the reputations of individual practitioners.
Location	Similarly, the location of a practice may account for many or most clients or patients. Consider the personal injury/consumer bankruptcy/divorce/DTPA practice thriving across the street from a factory in contrast to the practice of an attorney known to be preeminent in a particular field. The former practice undoubtedly prospers because of its location, while the latter practice would rely almost exclusively on the reputation of the individual practitioner.
Business Name	If the firm's name includes the name of a certain practitioner, then it is more likely that a significant proportion of personal goodwill exists in the practice of that individual. Attorneys are placed in the letterheads of larger firms either because they long ago founded the firm or because they are rainmakers.
Number of Employees	The case law makes clear that the more employees there are of a business, the more likely it is that commercial goodwill exists. <i>Hirsch</i> , in which the lawyer was the only employee of a professional corporation, concluded that the existence of commercial goodwill was theoretical only. In contrast, when

an individual lawyer's interest in a large law firm such as Thompson & Knight must be valued (*Finn v. Finn*), some amount of commercial goodwill almost certainly will exist.

Referral Base

The source of a practice's referrals can constitute significant evidence of personal or commercial goodwill. Anesthesiologists, for example, meet their patients only briefly, if they meet them at all, because anesthesiologists are selected by the surgeons who operate on the patients. If a surgeon simply picks from a group of anesthesiologists without regard to which physician he draws, then it is likely that the personal reputation of the individual physician is less important than that of the group, leading to the conclusion that the individual physician has little, if any, personal goodwill attached to his practice.

D. Summary. Many methods exist by which a business may be valued. The excess earnings method is especially appropriate for the valuation of closely held businesses and professional practices because it enables one to perform a separate calculation to determine the value of the goodwill associated with the business or professional practice. But goodwill must be segregated into personal and commercial goodwill and the former excluded from the value determined for the business or professional practice. Only then can one begin to assign a value to a spouse's interest in a closely held business or professional practice upon divorce.

IV. VALUING JENSEN REIMBURSEMENT CLAIMS. Suppose that a spouse's business is his or her separate property. Given that the spouse's interest in the business cannot be divided upon divorce because it is not community property, what theory of recovery might the non-owner spouse utilize to attempt to obtain some value from the business? One such theory is a claim for reimbursement of community time, toil, talent and effort invested by the owner spouse in his or her business for which that spouse was not adequately compensated. This theory commonly is referred to as "*Jensen*" reimbursement after *Jensen v. Jensen*, 665 S.W.2d 107, 109 (Tex. 1984), in which the Texas Supreme Court addressed time, toil, talent and effort reimbursement.

This section of the article first outlines the case law establishing this doctrine, culminating in *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984). The article next sets forth the Pattern Jury Charge on reimbursement to set the stage for determining exactly what a party must prove to establish a *Jensen* claim. Finally, the article reviews the post-*Jensen* case law in an effort to list the factors that

may and may not be taken into account in establishing the owner spouse's actual compensation and whether that compensation was adequate.

A. The Evolution of *Jensen*. The *Jensen* doctrine finds its theoretical basis in the proposition that the community estate is entitled to the fruits of the spouses' labor. This long-standing rule of law was discussed in *Norris v. Vaughn*, 152 Tex. 491, 260 S.W.2d 676 (1953), in which the Texas Supreme Court quoted *DeBlane v. Hugh Lynch & Co.*, 23 Tex. 25 (1859), as follows:

The principle which lies at the foundation of the whole system of community property is, that whatever is acquired by the joint efforts of the husband and wife, shall be their common property.

Norris, 260 S.W.2d at 682 (quoting *DeBlane*, 23 Tex. at 29). The Court continued: "Any property or rights acquired by one of the spouses after marriage by toil, talent, industry or other productive faculty is community property." *Id.* (citation omitted).

At issue in *Norris* was the characterization of rights under oil leases and farmout agreements when the rights were acquired during coverture but drilling was funded with separate property funds. In *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982), the Texas Supreme Court recognized that a reimbursement claim could be pressed when a business owner had devoted his time, toil, talent and effort to the running of an incorporated restaurant business, some of the stock of which was the restauranteur's separate property. Observing that it could be unfair to the community estate if the restauranteur had utilized community time, toil, talent and effort to improve his separate estate, yet unwilling to characterize the increased value of the separate property stock as community property, the Court stated:

When separate property is combined with community time, talent and labor, and both the community and the separate estate make claim upon the increment, the courts are confronted with conflicting principles of marital property law. It is fundamental that any property or rights acquired by one of the spouses after marriage by toil, talent, industry or other productive faculty belongs to the community estate. Nevertheless, the law contemplates that a spouse may expend a reasonable amount of talent or labor in the management and preservation of his or her separate estate without impressing a community character upon that estate. . . .

Id. at 458 (citations omitted). The Court then held:

A right of reimbursement arises when the funds or assets of one estate are used to benefit and enhance another estate without itself receiving some benefit. . . . We hold it also arises when community time, talent and labor are utilized to benefit and enhance a spouse's separate estate, beyond whatever care, attention, and expenditure are necessary for the proper maintenance and

preservation of the separate estate, without the community receiving adequate compensation.

Id. at 459 (citations omitted). Justice Sondock, joined by three other justices, dissented, concluding that the majority had elevated form over substance. Justice Sondock noted that had the restaurant remained unincorporated, the increased value of what would have been a sole proprietorship would have been community property. *Id.* at 460 (Sondock, J., dissenting).

Vallone clearly established the concept of reimbursement to the community estate for time, toil, talent and effort used by a spouse to enhance his or her separate property corporation. It remained to determine how to measure a reimbursement claim. Should the measure of reimbursement equal merely the amount, if any, by which the spouse owning the separate property had been undercompensated, or should it instead equal the increase in value of the separate property stock? In *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984), the Texas Supreme Court chose the former measure when it adopted

the rule that the community will be reimbursed for the value of time and effort expended by either or both spouses to enhance the separate estate of either, other than that reasonably necessary to manage and preserve the separate estate, less the remuneration received for that time and effort in the form of salary, bonus, dividends and other fringe benefits, those items being community property when received.

Id. at 109. The Court explained its rationale as follows:

This rule is a reasonable means of assuring that the community will be fully reimbursed for the value of community assets, i.e., time and effort expended, while at the same time providing that the property interest of the separate estate is also protected and preserved. As a practical matter, this rule will obviate the need for the trial court to undertake the onerous and quite often impossible burden that would be placed on it under the community ownership theory of attempting to determine just what factors actually contributed to the increase in value of the stock and in what proportion.

Id. at 109. Thus, in pressing a reimbursement claim, one must subtract compensation the owner spouse actually received from what compensation the owner spouse should have been paid. The difference, if any, is the amount of the reimbursement claim.

B. Pattern Jury Charge. There are several types of reimbursement other than *Jensen* reimbursement, but the Pattern Jury Charges include only one instruction on reimbursement, PJC 204.01. This one instruction includes the various types of reimbursement. The part of PJC 204.01 dealing with *Jensen* reimbursement states:

Texas law allows reimbursement if a marital estate expends funds, assets, or services to benefit another marital estate. The measure of reimbursement is set forth below.

.....

A claim for reimbursement to the community estate for the spouses' time, toil, talent, or effort expended to enhance a spouse's separate estate is measured by the value of such community time, toil, talent, and effort other than that reasonably necessary to manage and preserve the separate estate, and for which the community did not receive adequate compensation. From the value of the time, toil, talent, and effort expended is to be subtracted the compensation paid to the community in the form of salary, bonuses, dividends, and other fringe benefits.

PJC 204.01. As can be seen, *Jensen's* holding is repeated in a straightforward fashion. However, the case law demonstrates that while the *Jensen* mandate may be articulated easily, application of that mandate can prove difficult in practice.

C. Applying *Jensen*. To measure a *Jensen* claim, a court must ascertain what compensation the owner of the business received in exchange for his or her efforts, then determine whether that spouse was adequately compensated. On these issues, the courts have spoken as follows:

1. Determining Actual Compensation. According to *Jensen* and PJC 204.01, compensation must include salary, bonuses, dividend and other fringe benefits. Two cases have discussed what these other fringe benefits might be. In *Jacobs v. Jacobs*, 669 S.W.2d 759 (Tex. App. - Houston [14th Dist.] 1984), *aff'd and rev'd in part*, 687 S.W.2d 731 (Tex. 1985), the Fourteenth Court of Appeals found it important that the husband's corporation had "contributed to his employee benefit plans and provided him with an automobile." *Id.* at 761. The Texas Supreme Court affirmed the Fourteenth Court of Appeals' analysis, reversing only for a redivision of the community estate.

The El Paso Court of Appeals set forth a more detailed listing of fringe benefits in *Trawick v. Trawick*, 671 S.W.2d 105 (Tex. App. - El Paso 1984, no writ). In *Trawick*, a widow pressed a reimbursement claim against her husband's estate. In calculating the amount of that claim, the court observed:

The corporation paid \$17,000.00 in life insurance premiums, proceeds from which went to [Ms. Trawick]. Club membership dues for [Ms. Trawick] and the deceased amounted to \$5,432.66. The deceased had the use of a new automobile, with no specific value appearing in the record. [Ms. Trawick] received \$5,000.00 in company death benefits.

Id. at 109. Each of these items was included in calculating the husband's compensation.

Equally important is what may not be included as compensation. On this subject, *Trawick* also is instructive. *Trawick* excluded rental income on separate property rented to the business because the rental income had nothing to do with the husband's time, toil, talent and effort and was community property. Also excluded were Ms. Trawick's salary, vehicle and expense account as a corporate employee because these sums were attributed to her labor, not to that of her husband. Finally, Mr. Trawick's expense account was to be excluded "absent proof that his draws upon the account exceeded actual expenditures in his day-to-day conduct of company affairs." *Id.* at 109.

2. Determining Adequate Compensation. *Jensen* next requires one to determine in what amount the community estate should have been compensated for the time, toil, talent and effort exerted by the owner spouse. From this amount the actual compensation received must be subtracted to determine the amount of the reimbursement claim. Again, *Trawick v. Trawick*, 671 S.W.2d 105 (Tex. App. - El Paso 1984, no writ), is instructive. *Trawick* stated that evidence that the spouse's "salary and fringe benefits were in appropriate proportion to those of the other corporate officers and employees" could be evidence of adequate compensation. *Id.* at 109. However, the court warned that such evidence might merely show "across-the-board undercompensation for labor and 'excessive' retainage of value in the corporate entity." *Id.* *Trawick* did approve testimony by a certified public accountant that, based upon valuations of other area businesses in the same lines of work, with similar levels of sales and profits and with similar corporate structures, the husband's compensation should fall within a range of figures, exclusive of fringe benefits. *Id.*

In *Jones v. Jones*, 699 S.W.2d 583 (Tex. App. - Texarkana 1985, no writ), the Texarkana Court of Appeals identified a number of factors demonstrating that the husband had been undercompensated from his business, beginning with the fact that the husband and his brother were the corporation's primary managing and operating officers as well as the sole common stockholders. The court continued:

The various audit reports, income tax reports, and expert testimony support the fact that the business grew in sales, size, assets and profits by means not accountable to mere existence of inflation. The evidence indicated that after 1977, Mr. Jones' salary and the one time bonus payment was much lower than his actual value to the corporation, and ample funds were available to justly compensate Mr. Jones as well as his brother for increased salary purposes. And, primarily, most of Mr. Jones' time, talent and effort were occupied by this corporate business or other partnership ventures related to or arising from the business interests or properties of the N.E. Jones Oil Co. corporation.

Id. at 586.

One must not rely primarily upon percentage of ownership in determining the adequacy of the business owner spouse's compensation. *Jensen* itself most specifically discussed this point, noting that

The only evidence offered at trial to establish the reasonableness of Mr. Jensen's compensation was the testimony of Mr. T. Wesley Hickman. Mr. Hickman was an expert in the field of corporate evaluation. It was his opinion that Mr. Jensen was reasonably compensated, but he based that opinion "primarily upon Mr. Jensen's percentage of the stock ownership." He further stated that without the stock ownership he seriously doubted that Mr. Jensen would have stayed with RLJ. His opinion as to reasonable compensation was primarily based upon Mr. Jensen's stock ownership and not upon the salary, bonuses and dividends received by the community due to the time, toil and effort of Mr. Jensen. Therefore the trial court's finding that Mr. Jensen's compensation was reasonable is without adequate support.

Jensen, 665 S.W.2d at 110.

D. Summary. A spouse may pursue a reimbursement claim on behalf of the community estate against the separate property business of the other spouse when the owner spouse has contributed his or her time, toil, talent and effort to that spouse's separate property business, but that spouse has not been adequately compensated. Such a claim may be pressed because the community estate is entitled to the time, toil, talent and effort of both spouses during marriage. One must include salary, bonuses, dividends and other fringe benefits in determining the owner spouse's actual compensation. What compensation should have been received by the owner spouse will depend upon a number of factors but may not be based primarily upon what percentage of the business the spouse owns.

V. EXPERT TESTIMONY. Valuing a business or presenting a *Jensen* reimbursement claim invariably will require expert testimony. Accordingly, this article discusses expert qualifications and the bases for expert testimony. The article considers the effect of the United States Supreme Court's *Daubert* decision, and the Texas Supreme Court's recent adoption of *Daubert*, in this section.

A. Qualifying the Expert. Before a person may testify as an expert, he must be "qualified as an expert by knowledge, skill, experience, training, or education." Tex. R. Civ. Evid. 702. Not only must the expert be qualified as an expert, but his expertise must be such that it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Tex. R. Civ. Evid. 702. Prior to permitting the expert to testify, the court "must be satisfied that the witness has specific qualifications not possessed by the jury, which can aid them in their determination of an issue before them." *Trick v. Trick*, 587 S.W.2d 771, 773 (Tex. Civ. App. - El Paso 1979, writ dismissed). If no specialized or technical knowledge is necessary to understand the evidence or to determine a fact in

issue, then it is error to admit expert testimony. *Story Services, Inc. v. Ramirez*, 863 S.W.2d 491, 499 (Tex. App. - El Paso 1993, writ denied).

Rule 104(a) provides that the court shall decide preliminary questions “concerning the qualification of a person to be a witness.” Tex. R. Civ. Evid. 104(a). This procedure is accomplished by laying a foundation for the expert's testimony in the courtroom. The court may permit opposing counsel to voir dire the proposed expert. The decision whether to permit voir dire is committed to the sound discretion of the trial court. *Brook v. Brook*, 865 S.W.2d 166 (Tex. App. - Corpus Christi 1993), *aff'd mem.*, 881 S.W.2d 297 (Tex. 1994). The trial court may deny voir dire to opposing counsel so long as opposing counsel is later permitted to cross-examine the witness about the witness' qualifications to be an expert.

Historically, it has been difficult to prevent an expert from testifying at trial. There have been exceptions to this generalization, such as *Naegeli Transportation v. Gulf Electroquip, Inc.*, 853 S.W.2d 737 (Tex. App. - Houston [14th Dist.] 1993, writ denied) (expert testimony excluded when trial court determined that testimony would be based on mere guess or speculation). Moreover, permitting an unqualified expert to testify may be reversible error. *E.g., Estate of Brown v. Masco Corp.*, 576 S.W.2d 105 (Tex. Civ. App. - Beaumont 1978, writ ref'd n.r.e.).

Once the expert has been qualified as an expert, one still must demonstrate that the expert's professional qualifications permit that expert to give the opinion counsel wishes to adduce from the expert. Although one may call a well-qualified expert, if the area of the witness' expertise does not closely match the subject matter of the opinions the expert would give, then the expert's testimony will not be allowed.

This problem has been addressed repeatedly in the case law. For example, in *James v. Hudgins*, 876 S.W.2d 418 (Tex. App. - El Paso 1994, writ denied), plaintiff tendered a medical doctor as an expert on swimming pool safety but never qualified the physician as such an expert. The trial court properly permitted the physician's testimony about the medical aspects of a drowning but not about swimming pool safety issues. Similarly, in *Nail v. Laros*, 854 S.W.2d 250 (Tex. App. - Amarillo 1993, no writ), a pharmacist was offered as an expert, but not on pharmacology. The pharmacist sought to testify on the use of antibiotics to treat an infection resulting from a bone implant. The court ruled that the pharmacist's affidavit could not raise a fact issue when the defendant physician moved for a summary judgment in a medical malpractice suit. *See also Missouri Pacific Railroad Co. v. Buenrostro*, 853 S.W.2d 66 (Tex. App. - San Antonio 1993, writ denied) (otherwise qualified expert not competent to testify about FELA interstate requirements).

B. The Expert's Testimony. Once the expert has been qualified, the expert gives his or her opinions. The Texas Rules of Civil Evidence permit an expert to state the facts or data underlying his opinion. The facts or data need not be admitted into evidence or even be admissible into evidence. Thus, an opportunity exists to place all kinds of otherwise unadmitted or inadmissible evidence before the trier of fact. Most courts have interpreted the evidence rules to try to minimize this potential abuse.

1. The Evidence Rules. At one time, the facts or data upon which the expert based his opinion had to be admitted into evidence. The law changed somewhat with *Moore v. Grantham*, 559 S.W.2d 287 (Tex. 1980), which held that an expert's opinions could be based partially on hearsay provided that those opinions also were based upon facts or data which had been introduced into evidence. But the Texas Rules of Civil Evidence have completely removed the requirement that the expert's opinions be based upon facts or data in evidence:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or reviewed by the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Tex. R. Civ. Evid. 703. Rule 703 “effectively rejects the *Moore* rule.” *Baylor Medical Plaza Services Corp. v. Kidd*, 834 S.W.2d 69, 76 (Tex. App. - Texarkana 1992, writ denied). See *St. Paul Medical Center v. Cecil*, 842 S.W.2d 808, 815 (Tex. App. - Dallas 1992, no writ); *Liptak v. Pensabene*, 736 S.W.2d 953, 957 (Tex. App. - Tyler 1987, no writ) (evidence rules “overturned” *Moore*). Thus, an expert may rely even upon inadmissible evidence in formulating his opinions.

Furthermore, the expert is given great latitude in testifying at trial. The Texas Rules of Civil Evidence state:

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise.

Tex. R. Civ. Evid. 705. The potential for abuse has been immediately apparent. If experts may recite the facts and data underlying their opinions, and the facts and data need not be admitted or even be admissible, then what an expert may repeat in court theoretically is almost unlimited.

2. Expert Testimony. The courts have followed Rule 703 to permit experts to give opinions based upon facts or data which have not been admitted into evidence. In *Welder v. Welder*, 794 S.W.2d 420, 430 (Tex. App. - Corpus Christi 1990, no writ), the Corpus Christi Court of Appeals stated that expert testimony is admissible even though the facts or data underlying the expert's testimony may not be admissible. In *Seaside Industries, Inc. v. Cooper*, 766 S.W.2d 566 (Tex. App. - Dallas 1989, no writ), the Dallas Court of Appeals observed that “Rule 703 provides that an expert's opinion need not be based upon admissible evidence.” *Id.* at 571. The *Seaside* court permitted an expert to testify based upon business records alleged to be hearsay. In *Moore v. Polish Power, Inc.*, 720 S.W.2d 183 (Tex. App. - Dallas 1986, writ ref'd n.r.e.), the Dallas Court of Appeals ruled that an expert should have been permitted to testify at trial even though the expert relied upon unadmitted evidence in forming his opinion. *Cf. Almaraz v. Burke*, 827 S.W.2d 80 (Tex. App. - Fort Worth 1992, writ denied) (court finessed the issue by concluding that double hearsay upon which expert relied was admissible as excited utterance under Tex. R. Civ. Evid. 803(2)).

In *State of Texas v. Resolution Trust Corp.*, 827 S.W.2d 106 (Tex. App. - Austin 1992, writ denied), the Austin Court of Appeals took Rule 703 one step further. An expert appraiser gave his opinion on the value of real estate at trial based substantially upon unaccepted offers to purchase the realty. The court recognized that unaccepted offers to purchase are inadmissible to prove value but nevertheless held that the trial court correctly permitted the expert to state his opinion based partially upon unaccepted offers to purchase. *Id.* at 108. Thus, the court permitted expert testimony to be based upon *affirmatively inadmissible* evidence, not merely upon evidence which might have been admitted had a proper predicate been laid.

In this same vein, the San Antonio Court of Appeals, in *Texas Workers' Compensation Comm'n v. Garcia*, 862 S.W.2d 61 (Tex. App. - San Antonio 1993), *rev'd on other grounds*, 893 S.W.2d 504 (Tex. 1995), flatly stated: "Opinions based entirely on inadmissible facts or data may be admitted if the facts or data are of a type reasonably relied upon by experts in the field." *Id.* at 105. But the court found no error in the trial court's refusal to admit the tendered testimony because a study upon which the testimony would be based was "infected by untrustworthy data." *Id.*

C. *Daubert per Robinson.* In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the United States Supreme Court held that under Rule 702 of the Federal Rules of Evidence, scientific expert testimony must be shown to be both relevant and reliable to be admissible. In *E.I. duPont de Nemours & Co. v. Robinson*, 38 Tex. Sup. Ct. J. 852, 95 WL 359024 (1995), the Texas Supreme Court followed *Daubert* to hold that Rule 702 of the Texas Rules of Civil Evidence contains the same requirement. Although *Robinson* was a products liability case that dealt with expert testimony regarding damage to pecan trees by a fungicide, its expansive holding could (and perhaps should) be interpreted to extend to valuation testimony in divorce cases.

In *Robinson*, plaintiffs called a horticultural expert to testify that the fungicide plaintiffs used on their pecan orchard was contaminated and that the contamination caused damage to the pecan trees. Prior to trial, duPont filed a motion to exclude the expert's testimony on a number of grounds, all relating to the reliability of the expert's testimony. The trial court granted the motion, then directed a verdict in favor of duPont.

The Texas Supreme Court affirmed the trial court's disposition of the case, holding

that in addition to showing that an expert witness is qualified, Rule 702 also requires the proponent to show that the expert's testimony is relevant to the issues in the case and is based upon a reliable foundation. The trial court is responsible for making the preliminary determination of whether the proffered testimony meets the standards set forth today.

95 WL 359024, at 8. Among the factors that a trial court may consider in determining whether expert testimony is reliable are:

- (1) the extent to which the theory has been or can be tested;

- (2) the extent to which the technique relies upon the subjective interpretation of the expert . . . ;
- (3) whether the theory has been subjected to peer review and/or publication;
- (4) the technique's potential rate of error;
- (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
- (6) the non-judicial uses which have been made of the theory or technique.

Id. at 8-9.

Why should a case discussing limitations on the admissibility of scientific expert testimony be included in an article on divorce valuation techniques? The reasons are three-fold: First, although the Texas Supreme Court articulated the issue before it as “determining the appropriate standard for the admission of scientific expert testimony,” *id.* at 5, its holding is not so restricted. Second, *Robinson* already has been applied by some members of the Texas Supreme Court to expert testimony about repressed memory syndrome in a sexual abuse case, indicating that *Robinson* may well be applicable to experts testifying in fields other than the physical sciences. *S.V. v. R.V.*, 39 Tex. Sup. Ct. J. 386, 1996 WL 112206, at 28 (1996) (Gonzalez, J., concurring), & at 30 (Cornyn, J. concurring). Finally, perhaps *Robinson* should be applied to valuation experts to avoid the practice of permitting an expert to tender an opinion based upon evidence not only not admitted but affirmatively inadmissible.

In the past, the Texas Supreme Court has been careful to state that an expert's opinion testimony must be “based on proper legal concepts.” *Birchfield v. Texarkana Memorial Hospital*, 747 S.W.2d 361, 365 (Tex. 1987). To be based upon “proper legal concepts,” an expert's opinion must assume a “legally correct definition” of the matter on which the expert will testify. Otherwise, the expert's opinion is not admissible. *E.g., Harvey v. Culpepper*, 801 S.W.2d 596, 601 (Tex. App. - Corpus Christi 1990, no writ).

The “proper legal concept” to which a valuation expert must adhere is the definition of present value. Present value usually is market value, which is defined as follows:

“Market value” is the price the asset will bring when it is offered for sale by one who desires to sell, but is not obliged to sell, and is bought by one who desires to buy, but is under no necessity of buying.

PJC 203.01. Under this standard, evidence of the price an asset would bring at a “distress sale” would be inadmissible to determine market values because distress sales do not meet the “willing

seller/willing buyer” test the law requires. *See, e.g., Wendlandt v. Wendlandt*, 596 S.W.2d 323 (Tex. Civ. App. - Fort Worth 1980, no writ). For the same reason, evidence of unaccepted offers to purchase is not admissible. *E.g., State of Texas v. Clement*, 252 S.W.2d 587 (Tex. Civ. App. - El Paso 1952, no writ). But evidence may come in as “expert hearsay,” or in other words, as facts or data an expert relied upon in arriving at an opinion of market value.

At the very least, the law is inconsistent. Evidence deemed irrelevant on its own merits can become, in effect, admissible if an expert relies upon that same, inadmissible evidence in formulating his or her mental impressions and opinions. The courts’ construction of the evidence rules has circumvented well-considered legal principles, such as the rule stating that if an expert’s opinion on value is “founded on an improper measure of valuation it is of no probative force.” *State of Texas v. Zaruba*, 418 S.W.2d 499, 503 (Tex. 1967).

The Texas Supreme Court decided *Robinson* by a five-to-four vote. That vote exemplifies the divided opinions concerning to what extent a trial judge should serve or even is capable of serving as a “gatekeeper” for expert testimony. Regardless of one’s views on those subjects, one should be aware of the potential for invoking *Robinson* in a family law context not only with respect to numbers-oriented experts such as business appraisers but also to practitioners of social sciences.

VI. CONCLUSION. This article has articulated the measure of present value as it applies to valuation issues in divorce cases. Valuation techniques have been examined with respect to the valuation of closely held businesses and professional practices and with respect to the measurement of reimbursement claims based upon time, toil, talent and effort when one spouse owns an interest in a business as his or her separate property. Finally, the Texas Rules of Civil Evidence governing expert testimony, and the case law interpreting them, have been reviewed.

As a given, valuation of closely held businesses and professional practices, as well as valuation of reimbursement claims, requires one to become well-acquainted with the complex law and sophisticated techniques involved. This article has attempted to set forth some of these legal principles and techniques and also to give some practical guidance as to how they can be applied. In closing, it should be apparent that valuation issues are fact intensive. In litigating valuation issues, one must be sure to conduct thorough investigation or discovery in order that the pertinent facts are unearthed.

Table of Cases

Almaraz v. Burke, 827 S.W.2d 80 (Tex. App. - Fort Worth 1992, writ denied)

Baylor Medical Plaza Services Corp. v. Kidd, 834 S.W.2d 69 (Tex. App. - Texarkana 1992, writ denied)

Beavers v. Beavers, 675 S.W.2d 296 (Tex. App. - Dallas 1984, no writ)

Birchfield v. Texarkana Memorial Hospital, 747 S.W.2d 361 (Tex. 1987)

Brook v. Brook, 865 S.W.2d 166 (Tex. App. - Corpus Christi 1993), *aff'd mem.*, 881 S.W.2d 297 (Tex. 1994)

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)

DeBlane v. Hugh Lynch & Co., 23 Tex. 25 (1859)

E.I. duPont de Nemours & Co. v. Robinson, 38 Tex. Sup. Ct. J. 852, 95 WL 359024 (1995)

Estate of Brown v. Masco Corp., 576 S.W.2d 105 (Tex. Civ. App. - Beaumont 1978, writ ref'd n.r.e.)

Finn v. Finn, 658 S.W.2d 735 (Tex. App. - Dallas 1983, writ ref'd n.r.e.) (en banc)

Geesbreght v. Geesbreght, 570 S.W.2d 427 (Tex. Civ. App. - Fort Worth 1978, writ dism'd)

Harvey v. Culpepper, 801 S.W.2d 596 (Tex. App. - Corpus Christi 1990, no writ)

Hirsch v. Hirsch, 770 S.W.2d 924 (Tex. App. - El Paso 1989, no writ)

Jacobs v. Jacobs, 669 S.W.2d 759 (Tex. App. - Houston [14th Dist.] 1984), *aff'd and rev'd in part*, 687 S.W.2d 731 (Tex. 1985)

James v. Hudgins, 876 S.W.2d 418 (Tex. App. - El Paso 1994, writ denied)

Jensen v. Jensen, 665 S.W.2d 107 (Tex. 1984)

Jones v. Jones, 699 S.W.2d 583 (Tex. App. - Texarkana 1985, no writ)

Keith v. Keith, 763 S.W.2d 950 (Tex. App. - Fort Worth 1989, no writ)

Liptak v. Pensabene, 736 S.W.2d 953 (Tex. App. - Tyler 1987, no writ)

Missouri Pacific Railroad Co. v. Buenrostro, 853 S.W.2d 66 (Tex. App. - San Antonio 1993, writ denied)

Moore v. Grantham, 559 S.W.2d 287 (Tex. 1980)

Moore v. Polish Power, Inc., 720 S.W.2d 183 (Tex. App. - Dallas 1986, writ ref'd n.r.e.)

Murff v. Murff, 615 S.W.2d 696 (Tex. 1981)

Naegeli Transportation v. Gulf Electroquip, Inc., 853 S.W.2d 737 (Tex. App. - Houston [14th Dist.] 1993, writ denied)

Nail v. Laros, 854 S.W.2d 250 (Tex. App. - Amarillo 1993, no writ)

Nail v. Nail, 486 S.W.2d 761 (Tex. 1972)

Norris v. Vaughn, 152 Tex. 491, 260 S.W.2d 676 (1953)

Rathmell v. Morrison, 732 S.W.2d 6 (Tex. App. - Houston [14th Dist.] 1987, no writ)

St. Paul Medical Center v. Cecil, 842 S.W.2d 808 (Tex. App. - Dallas 1992, no writ)

Seaside Industries, Inc. v. Cooper, 766 S.W.2d 566 (Tex. App. - Dallas 1989, no writ)

Simpson v. Simpson, 679 S.W.2d 39 (Tex. App. - Dallas 1984, no writ)

State of Texas v. Clement, 252 S.W.2d 587 (Tex. Civ. App. - El Paso 1952, no writ)

State of Texas v. Resolution Trust Corp., 827 S.W.2d 106 (Tex. App. - Austin 1992, writ denied)

State of Texas v. Zaruba, 418 S.W.2d 499 (Tex. 1967)

Story Services, Inc. v. Ramirez, 863 S.W.2d 491 (Tex. App. - El Paso 1993, writ denied)

S.V. v. R.V., 39 Tex. Sup. Ct. J. 386, 1996 WL 112206 (1996)

Taormina v. Culicchia, 355 S.W.2d 569 (Tex. Civ. App. - El Paso 1962, writ ref'd n.r.e.)

Taylor County v. Olds, 67 S.W.2d 1102 (Tex. Civ. App. - Eastland 1934, writ dism'd)

Texas Workers' Compensation Comm'n v. Garcia, 862 S.W.2d 61 (Tex. App. - San Antonio 1993),
rev'd on other grounds, 893 S.W.2d 504 (Tex. 1995)

Trawick v. Trawick, 671 S.W.2d 105 (Tex. App. - El Paso 1984, no writ)

Trick v. Trick, 587 S.W.2d 771 (Tex. Civ. App. - El Paso 1979, writ dism'd)

Ulmer v. Ulmer, 717 S.W.2d 665 (Tex. App. - Texarkana 1986, no writ)

Vallone v. Vallone, 644 S.W.2d 455 (Tex. 1982)

Welder v. Welder, 794 S.W.2d 420 (Tex. App. - Corpus Christi 1990, no writ)

Wendlandt v. Wendlandt, 596 S.W.2d 323 (Tex. Civ. App. - Fort Worth 1980, no writ)