



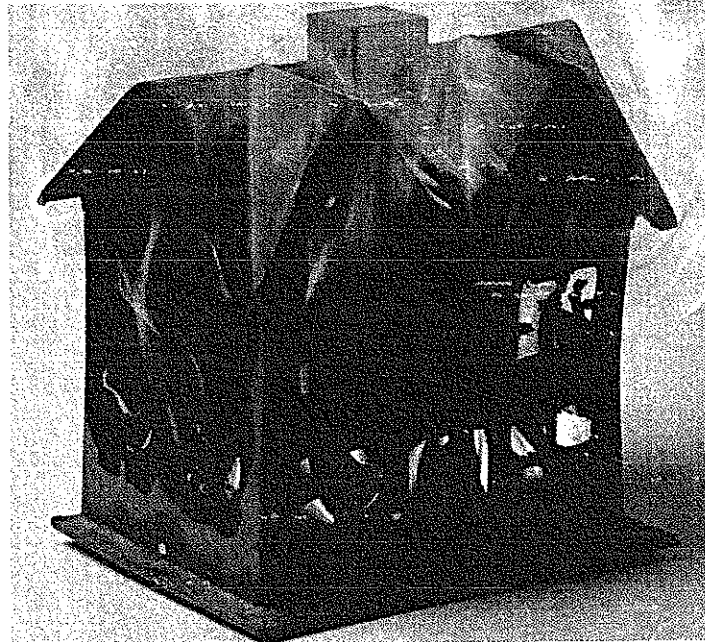
Legal Beat

By MICHAEL SEAN QUINN

Insurance, Arson and the American Family

You may not deliberately burn down your own buildings in order to collect the insurance money. Not only is such conduct in poor taste—indeed, trashy and criminal—it voids the insurance policy and is therefore completely self-defeating. At least if you are caught.

Arson violates the venerable "Principle of Fortuity," and if anything ever constituted a moral hazard, it is the intentional, for-gain destruction by the insured of his own property. It is fraudulent to file an insurance claim when you know you've destroyed your property on purpose and for profit. So obvious is it that insurance does not cover arson, that the law does not require an



express exclusion in the insurance contract.

But, what if Husband (H), acting quite alone, deliberately burns down the family home? Can Wife (W) collect? For a long time, the common law said No. Why not? (Incidentally, it is almost always H who torches the lodge. W almost never does.)

Centuries ago, England's Law Lords ordained that husbands and wives somehow constituted a single entity. That view rested upon superstition and magic dressed up as respectable religion. Eventually, it died away (mostly). Thank the Lord!

Thereafter, however, common law judges said that H's intent was automatically W's intent. The more penetrating must have realized that this rule was pure fiction. They must have also realized that it was ridiculous as a realistic account of marriage. The position withered, like its progenitor, at least. Later yet, the judges held that since W had chosen H in the first place, she was stuck with her choice and hence his decisions. This view was hardly any better than its

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absurdly metaphysical forbearers.

After all, H might have changed over the years, and W might be hanging onto the marriage for all sorts of reasons—children, integrity, good sex, religious scruple—H's other dimensions ("Thaddeus was always very polite to me"), social position and so forth. Besides, H might have kept some of his darker sides hidden from W and even from himself.

Finally, beginning midway through the last century, judges said that it would be unjust for any member of the family unit to collect insurance money from arson, since

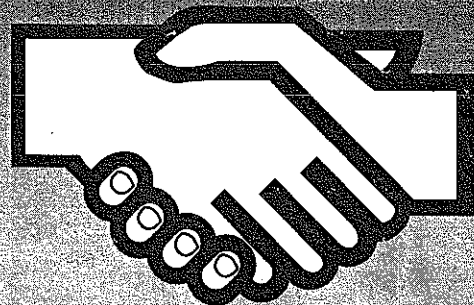
(as a practical matter) that meant that H would profit from his misdeeds. For generations courts have intoned, No man shall profit from his own wrong doing. Indeed, this principle is the foundation of the law of restitution, a.k.a. quasi-contract.

About a half century ago, American courts began rejecting this idea. They began to realize that marriage is a relationship between individuals. When the priest says "I now pronounce..." no new invisible, immaterial entity pops into being. "Marriage as union" is really a metaphor. There is no marital entity to bear responsibility.

There are only married individuals.

Courts began to say that it would be unjust to deprive W of her share of the proceeds when she had committed no inequity. Of course, the path of the courts has been eased by the fact that many times, when H burns the homestead, W kicks him out and does so as the ashes still smolder.

In 1986, the Texas Supreme Court joined the modern trend in *Kulubis v. Texas Farm Bureau Underwriters*. It said that "the more enlightened reasoning dictates that the illegal destruction of jointly owned property by one co-insured shall not bar recovery under an insurance policy by an innocent co-insured." The language of the opinion was quite general, but the property in *Kulubis* was the separate property of W.



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***Under the modern rule,
often called the
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How, then, should community property be handled? One court said that if W kicks H out, and there is a divorce decree making the insurance proceeds her separate property, then W can collect. But what if H and W don't get a divorce? Or what if the property is the separate property of H, but W has an insurable interest? Under the modern rule, often called the "Innocent Spouse Rule," W's rights under an insurance contract are determined by the language of that contract. Contract rights are no longer canceled out by archaic, arcane and fictional notions of property law. Yet community property is a meaningful and influential social institution in Texas, not just dead-letter law.

Now consider the situation of Kris and Terri Kizer. They owned a residence in Flower Mound. On Feb. 2, 1993, fire destroyed the dwelling and its contents. The local fire department concluded it was a set fire. Chubb, the couple's insurer, denied coverage.

Many facts were contested. Although both Kris and Terri were at work when the fire was reported, Kris left for work after

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Terri did, and the fire department determined that the house was locked at the time of the fire. The Kizer's contended that someone had broken in through a glass patio door, but Chubb contended that the fire broke the glass door.

The fire department found accelerants present, but the Kizers explained that they kept kerosene on the patio for a camping heater. The fire department investigator said

that there were multiple points of origin, as did the insurance company investigator, but the Kizer's expert rejected that proposition and contended that the origin of the fire was not incendiary but the result of faulty electric equipment.

All valuables usually in the house before the fire appeared to be there afterward, and no sacred family mementos, such as pictures, had been removed. Chubb tried to make an issue out of the fact that Terri took her dog to work that morning, but the truth was she took her dog everywhere, even to depositions in the case.

At the same time, while the Kizers did not face immediate financial disaster, they were under substantial and protracted pressure. They had even transferred a business they owned to another, in order to avoid creditor pressure. That transaction looked shady. In addition, Terri had transferred her ownership in the house, in order to secure a commercial loan. Thus, she did not have a deeded property interest in the house. It was, on the surface, at least, entirely Kris's separate property.

In the end, the jury decided that Kris had burned the house down but Terri had not. On the basis of the earlier transfer of her

In Texas the "Innocent Spouse Rule" does not apply in community property.

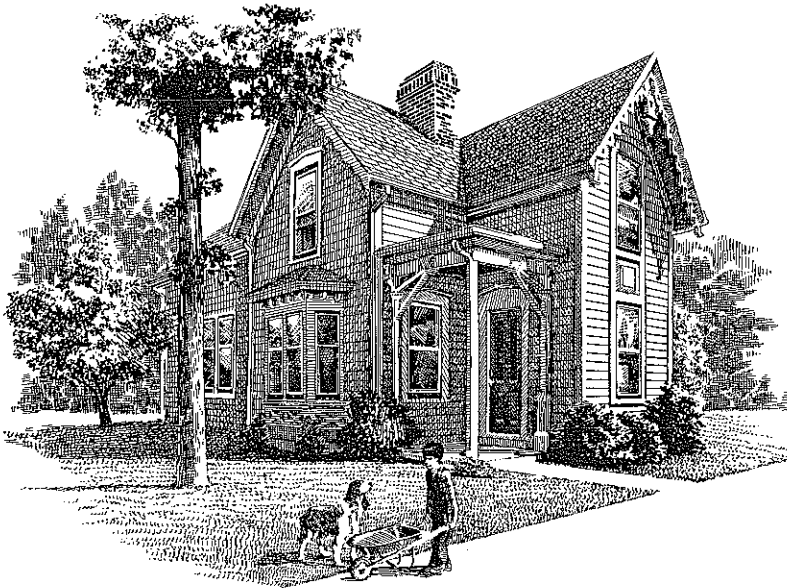
interest, the court refused to order any payment to Terri on the dwelling but ordered that she receive half the value of the contents. Everyone appealed.

Chubb said it shouldn't have to pay Terri anything. Terri said she should get half the value of the house. And Kris said he didn't torch his home and that the evidence didn't come close to proving he did.

The pivotal appeal was that of Terri. She said that she had an insurable interest in the house because, as a practical matter, she lived there and depended on the house for shelter. In 1963, the Texas Supreme Court said that if a person "derives pecuniary benefit or advantage by the preservation and continued existence of the property or would sustain a pecuniary loss from its destruction," then that person has an insurable interest in the property.

Moreover, under Texas property law, Terri had some community interest in the dwelling because she had a right to reimbursement for any contributions to its purchase and maintenance. That right of reimbursement is an important one, and it will support the imposition of a lien, although it does not affect or change the status of the title to the asset. Moreover, since there was a mortgage in place on the house at the time of the transfer, it is unclear what the extent of her transfer really was.

The Fort Worth Court of Appeals refused to apply the "Innocent Spouse Rule," in *Chubb Lloyds v. Kizer*. If Terri had an interest in the property, it would be a community property interest, so that any money paid to her would in part belong to Kris.



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The consequence of applying the "Innocent Spouse Rule" to situations involving community property, therefore, is that the arsonist would profit from his wrongdoing. Such a consequence is absolutely intolerable, and so the court reversed the judgment of the trial court giving Terri half the value of the contents, and refused to consider whether Terri had an insurable interest in the dwelling.

Chubb was happy with that result, but the Kizers tried to interest the Texas Supreme Court in the case. They failed, and there the matter rests. Thus, in Texas the "Innocent Spouse Rule" does not apply in community property. If one member of a marriage deliberately destroys community property, the other spouse suffers an uninsured loss. The court of appeals took this to be an unavoidable consequence of community property law. Any other result would end up rewarding the arsonist.

In effect, the court judged that it's better to deprive an innocent spouse of what is hers, than to permit a miscreant spouse to recover. Property law has triumphed over contract law. One of the clichés of twentieth century jurisprudence is "Maine's Maxim": the central tendency of modern law has been the victory of contract over status. Has the clock been turned back?

The result in Kizer presents the discerning insurance agent with some delicate problems, which one hopes she does not encounter too often. Suppose H comes to her desirous of substantially increasing the amount of insurance on a dwelling which is community property. (Or, suppose H is really clever and he sends W—who is ignorant of H's plot—in his place.) The agent knows that the couple is in serious financial difficulty. She smells arson in the wind, as well she might.

Does the agent warn the insurance company of her suspicions? The chances are she is its legal agent; if so, she is also its fiduciary. Does she risk a suit for slander instituted by H if she shares her suspicions with a prospective insurer? Does she try to explain to W—who is (let's say) a friend of hers—what might be going on? After all, she might be her legal agent, too, and therefore her fiduciary.

The answers to these questions are not easy. The courses of conduct which those answers might require are both difficult and subtle. Relationships are important but so is truth, fairness and the law. Perhaps now is the time for the agent to break down and call her lawyer. Perhaps she could help just a little. ■

Quinn is an Austin-based attorney with the law firm of Sheinfeld, Maley & Kay, which also has offices in Houston and Dallas.

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