

Chapter 1

The Texas Marital Property System

A. Introduction

Although the general principles which govern Texas marital property law have existed for more than 150 years, this is an area of law that is ever in flux, usually in the most subtle of ways. This edition of the text was necessitated by the many changes in the law that were made in the 2011, 82nd Texas Legislative Session. Most notably, the right to maintenance—the Texas version of alimony—was broadened, albeit ever so slightly. Nonetheless, these changes should make this remedy available to more divorce litigants, a group which was seriously limited under previous statutes. In addition, the 2011 legislature also considered the issue of fraud on the community and came up with the concept of dividing what is now referred to as the “reconstituted estate.”

Not only were there legislative changes since the last edition, the Texas Supreme Court also issued some definitive opinions in the marital property area. Perhaps the most significant opinion issued in the past decade, was *Holmes v. Beatty*, 290 S.W.3d 852 (Tex. 2009) wherein the Court explained how the 1987 amendment to the Texas Constitution, art. XVI § 15 interacts with Texas Probate Code §§ 451-62, all of which deal with spousal rights of survivorship. The case explains how the current constitution allows for a departure from previous cases wherein it was established that spouses could not create rights of survivorship in community property.

While this text will present and address all current law, it cannot be ignored that Texas marital property law enjoys a rich history, a history that cannot be ignored because it is viable and applicable today. The study of marital property law focuses upon the effect that marriage has upon property ownership. From ownership springs the right to manage property during marriage. Along with ownership, the right to manage property may affect whether or not the property will be liable for debts or obligations incurred prior to or during a marriage. Likewise, the disposition of property on death or divorce is affected by its ownership.

In essence, a marital property system governs ownership, management, liability, and disposition of all property possessed during and upon dissolution of a marriage. Texas marital property is governed by community property principles derived from Spanish law. Texas is one of only nine community property states. Originally, there were eight community property states: Texas, Arizona, California, Idaho, Louisiana, Nevada, New Mexico and Washington. With its enactment of the Wisconsin Marital Property Act, which was effective January 1, 1986, Wisconsin became the ninth community property state.¹

Although the basic discipline of community property is consistent from community property state to community property state, the narrower principles encompassed within each state can differ greatly from state to state. In addition, you will discover that in Texas, community property is constitutionally driven. For that and other reasons, the community property determinations of other states and the underlying rationale may not be transferable to Texas. Although the opinions of other state courts and certain federal cases will be peripherally mentioned, this text will focus on Texas law. The opinions of other jurisdictions are included only when there is an undecided issue or a concept that may be clarified in a manner consistent with or which might impact the Texas rationale.

¹ Howard S. Erlanger & June M. Weisberger, *From Common Law to Community Property: Wisconsin's Marital Property Act Four Years Later*, 1990 WIS. L. REV. 769, 770, 790. (Wisconsin is the first and only state to base its marital property system on the Uniform Marital Property Act).

1. An Overview of the Texas Constitution and Marital Property

As Justice Walker of the Texas Supreme Court has explained, in Texas “[a]ll marital property is . . . either separate or community.” *Hilley v. Hilley*, 342 S.W.2d 565 (Tex. 1961). That is, Texas marital property is owned by a spouse separately or by the community; although ownership can be held by a combination of separate and community ownership interests.

The Texas Constitution specifically defines separate property. See TEX. CONST. art XVI, §15. Although the current Texas Constitution, adopted in 1876, has been amended numerous times, the basic separate property definition has remained constant. The amendments to art. XVI § 15 have removed gender based references and have broadened the means of acquiring separate property, but have not changed the original basic separate property definition which has existed for more than 150 years, predating the constitution of 1876.² Simply put, separate property is that owned or claimed before marriage or that acquired after by gift, devise, or descent. The evolution of TEX. CONST. art XVI, §15 will be set forth within this text. Likewise, very early cases which address the ownership of marital property are included within Chapter 1 of this text and less frequently throughout the remainder of the text. Because the basic definition of separate property has not changed since 1876, the early cases do not merely provide an historical perspective; rather, they provide viable precedent, often cited in current opinions. These early cases will be viewed in light of the constitution as it existed at the time the opinions were rendered.

The Texas Constitution does not specifically define community property. As we progress through the text, we will see that case law has provided some guidance as to how we recognize community property. It has been said that “[t]he 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.” *De Blane v. Hugh Lynch & Co.*, 23 Tex. 25, 29. (1859). This principle is also known as acquisition under the doctrine of onerous title. *Graham v. Franco*, 488 S.W.2d 390, 392 (1972). In contrast, community property has also been simply defined as that property which does not meet the Texas Constitution definition of separate property, utilizing the doctrine of implied exclusion. *Arnold v. Leonard*, 273 S.W.2d 799, 802 (1925). Although these analytical doctrines can co-exist, it will become evident that sometimes they are mutually exclusive.

The Texas Constitution is the touchstone for the characterization of marital property. The one thing that must never be forgotten is that the constitutional definition of separate property reigns supreme and cannot be impinged upon by either the legislature or husband and wife. See *Arnold v. Leonard*, 273 S.W.2d 799, 801 (1925); *Kellett v. Trice*, 95 Tex. 160, 66 S.W.2d 51 (1902). While holding that the constitutional definition of marital property cannot be changed by legislation or by contract, the courts have recognized that the constitutional definition encompasses more than literal interpretation would allow. The constitution does provide that laws may be passed to more clearly define the wife’s rights in her separate property, as well as that property held as community property with her husband. So, while the constitution does not address the concepts of marital property management or of liability, the courts have also sustained the power of the Legislature to enact statutes dealing with management and liability of marital property. This first chapter will introduce this balancing of strict construction against the legislature’s power to define.

² See TEX. CONST. art. 7 §19 (1845). (First Texas state constitution contained like separate property language).

2. An Overview of the Statutes and Marital Property

The Texas Constitution does not define community property. Even though the Texas Constitution only provides a definition of separate property, the legislature, within the Texas Family Code, has provided not only a separate property definition, but a community property definition as well. The definition of separate property is found in TEX. FAM. CODE § 3.001 which, except for subsection (3), tracks, the definition found in TEX. CONST. art. XVI § 15. Specifically, TEX. FAM. CODE § 3.001, titled “Separate Property,” provides:

A spouse’s separate property consists of:

- (1) the property owned or claimed by the spouse before marriage;
- (2) the property acquired by the spouse during marriage by gift, devise or descent.
- (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.

The definition of community property is found in TEX. FAM. CODE § 3.002, which provides:

Community property consists of the property, other than separate property, acquired by either spouse during marriage.

Of course, the legislature did not stop with mere definitions of separate and community property. Indeed, entire chapters of the Texas Family Code are dedicated to marital property matters, most notably: Chapter 1 - Marital Property Rights and Liabilities §§ 3.001-3.410; Chapter 4 - Premarital and Marital Property Agreements §§ 4.001-4.206; Chapter 5 - Homestead Rights §§ 5.001-5.108; Chapter 7 - Award of Marital Property §§ 7.001-7.008; Chapter 8 - Maintenance §§ 8.001-8.305. These chapters of the Texas Family Code, along with other chapters relevant to this course can be found in the Appendix at the end of this text.

3. The Community Property Presumption and Characterization

The goal in most marital property cases is to determine whether marital property is a spouse’s separate property or community property. The term “characterization” or the phrase “to characterize” means to determine whether marital property was acquired at a time or in a manner which would deem it separate property of a spouse or whether it will simply be presumed community property. The task of characterization begins with the application of a primary principle known as the community property presumption. The community property presumption provides the first step in the analysis of every marital property case, whether during marriage or upon dissolution of a marriage by death or divorce. This presumption has served as the cornerstone for case analysis since the Texas Legislature adopted the Spanish model of community property laws in 1840.³ The presumption, a product of the common law, is now codified at TEX. FAM. CODE § 3.003(a) which provides:

Property possessed by either spouse during or on dissolution of marriage is presumed to be community property.

In applying this presumption, the operative word is “possessed.” The presumption is not limited to property purchased or otherwise acquired during marriage. Thus, upon death or divorce all property possessed by the spouses is presumed to be community property.

³ William O. Huie, *The Texas Constitutional Definition of the Wife’s Separate Property*, 35 TEX. L. REV. 1054 (1957).

This presumption can only be rebutted by clear and convincing proof that the property in question is separate property. TEX. FAM. CODE § 3.003 (b). If the property, by application of constitutional or statutory definitions or judicial precedent, is characterized as separate property, then the community property presumption has been rebutted.

Many practical reasons exist for characterizing marital property as either separate or community property. Upon dissolution of the marriage, different criteria control the disposition of separate property and of community property.

In a death case, the testate deceased spouse can devise only his separate property and one-half of the community property. Likewise, the separate property and the community property of the intestate deceased spouse will descend under different sections of the Probate Code and will be distributed in different manners.

In a divorce case, the trial court has broad discretion in the division of community property, but cannot divest title to separate property. In addition, during marriage, characterization is essential in identifying the spouse or spouses with power to manage marital property under TEX. FAM. CODE §§ 3.101, 3.102, and §§ 3.201-3.309. Characterization is also essential in determining, under section TEX. FAM. CODE § 3.202, the extent to which marital property is liable for obligations incurred either before or after marriage by a spouse to a third party, as well as the order in which property is subject to execution under section TEX. FAM. CODE § 3.203.

The cases that follow provide lessons in characterization and in rebutting the community property presumption. The cases may seem ancient, but they are still viable and still cited by counsel and courts, alike.

Question

A potential client pulls up in front of your office driving a new (paper tags) red Corvette. Client enters your office and states, simply, that a divorce is desired and that when the marriage began Client had an estate of \$500,000 which, in the single year the marriage has endured, has been reduced to \$300,000. Client just wants out of the marriage and let's you know that in Client's opinion the divorce should be very simple because no community property was acquired. Client further explains that the estate was less at the end of marriage, which can be proved by looking at the reduction to \$300,000, and that all should be awarded to Client. How would you respond to Client?

B. The Constitution of 1876

1. Article XVI § 15 as effective 1876-1947

The Texas Constitution of 1876, article XVI § 15, defines separate property as follows:

All property, both real and personal of the wife, owned or claimed by her before marriage, and acquired afterward by gift, devise or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.

The above constitutional provision begins the study of Texas marital property law. This same definition of separate property appeared without change in the earlier Constitutions of 1845, 1861, and 1866. The provision was omitted from the Reconstruction Constitution of 1869 which merely provided that the rights of married women to their separate property should be protected by law. For a discussion of the early background and history of the provision, see *Arnold v. Leonard*, 273 S.W. 799, 800-801 (Tex. 1925); William O. Huie, *The Texas Constitutional Definition of the Wife's Separate Property*, 35 TEX. L. REV. 1056 (1957). Notably, the definition of separate property has been expanded but not significantly altered since that time. See TEX. CONST. art. XVI § 15 (1948); TEX. CONST. art. XVI § 15.

Questions

1. What appears to be the single most limiting aspect of the 1876 definition of separate property set forth above?
2. Women were not in the Texas Legislature and, in fact, could not vote when the above definition was adopted. Why would a government run by men extend such property rights to women?

2. Statutes and Decisions, 1845-1947

The first case in this section *De Blane v. Hugh Lynch & Co.*, is more than a century and a half old. The issue is the character of cotton grown during marriage on the separately owned lands of the wife. Character of these crops is in issue because creditors levied against the bales of cotton to satisfy a debt owed by husband. At the time, only the separate property of the wife would have been safe from creditors. As noted in the introduction, the definition of separate property has not substantively changed since 1845; likewise, the analysis and application of that definition has also remained constant for more than 150 years. This case provides precedent for the current characterization of crops. As you read *De Blane*, think of situations to which the case might be applied today; realize that the precedent is more than 150 years old. Also note that this case was recently cited by the Austin Court of Appeals in *Winger v. Pianka*, 831 S.W.2d 853 (Tex. App.—Austin 1992, writ denied).

DeBlane is followed in *Stringfellow v. Sorrells*, which guides us in the characterization of livestock and their progeny and *Arnold v. Leonard* which addresses the characterization of rents and revenues. *Kellett v. Trice* introduces the strict interpretation of the Texas Constitution as it relates to

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De Blane v. Hugh Lynch & Co.

Character of Crops

marital property and the restrictions that such an interpretation places upon individuals; extension of the restrictions to the legislature is seen in *Arnold v. Leonard*. Once again, the analysis within these opinions is as viable today as when written. This section culminates with *North Texas Traction Co. v. Hill*, which focuses upon the characterization of personal injury recoveries; although the decision would probably stand today, the characterization of the recovery would be different as will be established in the next section by *Graham v. Franco*.

DE BLANE
v.
HUGH LYNCH & CO.
23 Tex. 25
(1859)

BELL, JUSTICE.

On the 27th day of October, 1847, Hugh Lynch & Co. obtained judgment in the district court for Liberty County, against Volizard DeBlane, for the sum of one hundred and twenty-three dollars and eighty cents, debt, and seventeen dollars and fifteen cents, costs.

On this judgment an execution was issued, and levied on ten bales of cotton. The cotton was claimed by the present appellant as her separate property. The appellant is the wife of Volizard DeBlane, the defendant in the execution. There was a trial of the right of property. The proof was, that the ten bales of cotton levied on was the crop, or a portion of the crop, of the year 1848, grown upon land which was the separate property of Madame DeBlane, and produced by the labor of slaves which were also the separate property of Madame DeBlane.

Under the instruction of the court, the Hon. C.W. Buckley presiding, the jury returned a verdict that the cotton was liable to the execution. There was judgment accordingly, and from that judgment Madame DeBlane has appealed.

The only question presented is, whether the cotton grown upon the land of the wife, by the labor of the slaves of the wife, remained her separate property, or became the common property of the husband and wife. If the cotton was common or community property, it was, of course, subject to the exception; if it remained the separate property of the wife, it was not subject to the execution.

We are of opinion that the cotton was community property, and subject to the execution.

So far as I am informed, the proposition that crops produced on the land of the wife, remain the separate property of the wife, is founded and supported upon what is supposed to be the true import of the term "increase of land," used in the act of 1848, better defining the marital rights of parties.

It will be observed that the act of January 20, 1840, did not use the expression "increase of land." That statute provided "that neither the lands nor slaves which the wife may own, or to which she may have any right, title, or claim, at the time of her marriage, nor the lands or slaves to which she may acquire, during the coverture, any right, title, or claim, by gift, devise, or descent, nor the increase of such slaves, in each case, nor the paraphernalia as defined at common law, which the wife may have at the time of the marriage, or which she may acquire during the coverture, as aforesaid, shall, by virtue of the marriage, become the property of the husband, but shall remain the separate property of the wife."

The statute of 1848 provides, that “all property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise or descent, as also the increase of all lands or slaves thus acquired, shall be the separate property of the wife.”

In an etymological sense, it cannot be doubted, that the word “increase,” as applied to land, or to the soil, means that which grows out of it, or that which is produced by the cultivation of it. The word is frequently employed in this sense in the English Bible. Instances of it will be found in the twenty-fifth chapter of the book of Leviticus. It is there said, “and for thy cattle, and for the beast that are in thy land, shall all the increase thereof be meat.” Again, it is said; “behold, we shall not save nor gather in our increase.” So, in the sixty-seventh Psalm, the expression occurs, “then shall the earth yield her increase.” That the word was properly used as applying to the produce of the soil cannot be doubted, when it is remembered, that the translators of King James’ Bible have perhaps never been surpassed in accurate scholarship. But to adopt this meaning of the word “increase”, as used in our statute, and to interpret the statute accordingly, would, we think, lead to results wholly inconsistent with the recognized principles of law upon which the system of community property is based. It would also lead to results inequitable and unreasonable. If it be admitted, that the “increase of land” meant by our statute, is the product of the soil itself, then it would follow, that a crop grown on the land of her husband, by the labor of the slaves of the wife, would be the separate property of the husband, because it was the “increase” of his land. The husband has, by the statute, the control and management of the separate property of the wife; and if the husband owned land, as separate property, and the wife owned slaves, as separate property, the husband could always employ the wife’s slaves in the cultivation of his own land, and thus add to his separate property by the use of her separate property.

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. It would be an unnecessary consumption of time, to quote authorities for this proposition.

It is true, that in a particular case, satisfactory proof might be made, that the wife contributed nothing to the acquisitions; or, on the other hand, that the acquisitions of property were owing wholly to the wife’s industry. But from the very nature of the marriage relation, the law cannot permit inquiries into such matters. The law, therefore, conclusively presumes that whatever is acquired, except by gift, devise or descent, or by the exchange of one kind of property for another kind, is acquired by their mutual industry. If a crop is made by the labor of the wife’s slaves on the wife’s land, it is community property, because the law presumes that the husband’s skill or care contributed to its production; or, that he, in some other way, contributed to the common acquisitions.

It cannot be objected, that this rule will subject the *corpus* of the wife’s estate to be diminished for her support, while the husband enjoyed the proceeds or fruits of her property. The law (HART. DIG. art. 2416) provides, that the wife may have so much of the proceeds of her separate property set apart for the support of herself, and for the nurture and education of her children, as the courts of the country may deem necessary, under the circumstances of any particular case. On the other hand, as was before said, a literal construction of the words of the statute, “the increase of land,” would enable the husband to make acquisitions of separate property, by the use of the separate property of his wife. And in this way his children by another wife might become rich, while her children by another husband might remain comparatively poor. The judgment of the court below is affirmed.

Notes, Comments & Questions

1. *De Blane* contrasts with a California decision of the same period which, applying a constitutional provision identical to that of the Texas Constitution, held that dividends from separate property of the

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Character of Livestock

wife were the wife's separate property. *George v. Ransom*, 15 Cal. 322 (Cal. 1860). Texas courts have adhered strictly to the doctrine that dividends, interest, rent, and other income derived from separate property of a spouse are community property. See *Estate of Wyly v. Commissioner*, 610 F.2d 1282 (5th Cir. 1980). But see art. XVI, § 15 of the Texas Constitution as amended, effective November 25, 1980, and § 3.005 of the Family Code, originally enacted as § 5.04 and originally effective September 1, 1981.

2. What does the court perceive to be the inequity of crops grown on separate property being characterized as separate property?
3. What does the court identify as the "principle which lies at the foundation of the whole system of community property?" This "principle" should be kept in mind as you continue to read cases. What is a descriptive name for the "principle"?
4. Keep Madame De Blane's situation in mind as you progress through the text. Consider whether the decision would have been different if the case had been decided at a later time.

STRINGFELLOW

v.

SORRELLS

18 S.W. 689

(Tex. 1891)

MARR, JUSTICE.

Before and at the time of her marriage to W.J. Sorrells in the year 1884 the appellee, Mrs. C.V. Sorrells, owned in her own right, together with other separate property, two mules. These animals were then colts, and worth \$35 each; and a portion of their present value, as a result of their growth and avoirdupois as the years rolled on, is the subject of this controversy. The appellant, in the year 1888, held a just debt, merged into a valid judgment, for a small sum against the husband of the appellee, and in satisfaction of which he caused a writ of execution to be levied upon these mules of the wife during that year. At the time of the levy the animals were grown, and each of them worth in the market \$75, instead of \$35 as originally. The husband had managed and cared for the mules since the marriage, and the community estate furnished the provender for the animals during the intermediate time.

The appellee replevied the property, and duly made her claim thereto under the statute, "to try the rights of property." The case came up to the district court from a justice court, and the former court rendered a judgment in favor of the wife. The appellant insists that the enhanced value of the mules, which has resulted from the attention of the husband and the food furnished by the community since the marriage, and amounts to \$80, is an *increase* of the separate estate of the wife, and consequently is community property, and liable to his execution. There is a modicum of plausibility in his contention, based upon the construction given by the Supreme Court to "the increase of the lands" of the wife, but these decisions were inspired by the necessity of protecting, not of destroying, her estate. *De Blane v. Lynch*, 23 Tex. 25; *Forbes v. Dunham*, 24 Tex. 611; *White v. Lynch*, 26 Tex. 195; *Cleveland v. Cole*, 65 Tex. 402; *Epperson v. Jones*, *id.* at 425; *Braden v. Gose*, 57 Tex. 37; *Carr v. Tucker*, 42 Tex. 336.

The Supreme Court has often decided what is not "the increase of the wife's lands," but, so far as we are aware, have not decided what *is*; and we are not required to do so now. The rule contended for would be most impracticable in application. The equitable criterion, if any were admissible in cases

like the present, should be the expenses to the husband or the community, regarded as an investment of rearing the mules, not the increased value, which may be due to other causes, subject to be offset by the value of their use, if anything. This would add to “confusion worse confounded.” As applied to livestock belonging to the wife, “the *increase*” of such property has been invariably (ever since the decision of the Supreme Court in *Howard v. York*, 20 Tex. 670) recognized in the reported cases to denote the progeny of the original stock or their descendants. This construction comports with the etymology of the term, and accords with the universal understanding. *De Blane v. Lynch, supra*. The record therefore develops no “increase” of these particular mules in the sense that would add to or constitute a part of the community estate. They are still the same animals which the wife owned at the time of her marriage, and, mule like, they have stubbornly refused “to bring forth after their kind.”

The sex of these particular mules, nor their capacity for reproduction, if any, is not disclosed by the record, but the general rule, founded on common knowledge, with possibly some sporadic exceptions, must be recognized that mules do not “increase, multiply, and replenish the earth,” according to the ordinary laws of procreation and the generic command. It would seem, therefore, that there can be no “increase” of the wife’s separate estate, if composed solely of specific mules at the time of her marriage. In cases of other live stock, his interest, recognized by law, in the offsprings thereof, compensates the husband and the community, but the erratic mule standeth apart, “like patience on a monument, smiling at grief.” It would tend to entirely destroy the corpus of the wife’s estate, consisting of live personal property, to declare that an augmentation in weight or value should be deemed an “increase” of the property itself, so as to constitute a part of the community to that extent. Suppose it should decline under the ministrations of the husband, what, then, would compensate the wife? Fortunately she does not hold her separate property by so precarious a tenure as to depend upon the fluctuations of weight or the prices in the market. If she did, then the alert creditor would only need to abide his time in confidence of ultimately seizing, upon a ruthless execution, the flock, the drove, and feathered tribe of the wife. The law too closely guards “with flaming sword and cherubim” the sacred rights of the good housewife in her own “separate property” to admit of such grave consequences.

We need only to add that the use of the mules, and the products of their labor, may be supposed to compensate the community for the provender consumed, and the husband would scarcely demand any recompense for the felicity of teaching them how “to work in the traces.”

We conclude that the judgment of the district court is a most righteous one, and ought to be affirmed.

STAYTON, CHIEF JUSTICE. Affirmed, as per opinion of Commission of Appeals.

Notes, Comments & Questions

1. The Texas Supreme Court in *Stringfellow v. Sorrells* declines to decide what is an “increase of the wife’s lands.” What do you think “an increase of the wife’s lands” is?
2. Take note of the court’s next to the last sentence in *Stringfellow v. Sorrells*. Think about what that sentence might foreshadow.
3. Under the Texas statutes, as interpreted by early decisions, the husband possessed sole management powers over all the marital property, including the separate property of the wife, except that the wife’s joinder was required in deeds conveying real estate which was homestead or which was separate property of the wife. The husband’s creditors could reach the husband’s separate property, and the community property but not the wife’s separate property.

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Kellet v. Trice

Spousal Power to Change Character

4. The husband's control over the wife's separate property could easily be used to his advantage and to her ultimate disadvantage. The Texas Supreme Court expressed this concern in *De Blane*. Do you recall that argument? Another such situation arose in *Kellet v. Trice*. Keep *Kellet* in mind throughout the course, especially when the most recent amendment to TEX. CONST. art. XVI, § 15 is discussed. See also TEX. FAM. CODE §§ 4.201-.206.

KELLET
v.
TRICE
66 S.W. 51
(Tex. 1902)

[In *Kellet v. Trice*, husband and wife, shortly prior to divorce, joined in execution of a deed conveying separate property of the wife to a trustee "for the purpose of divesting the separate estate and title of us in and to the property (hereinafter described) in which each of us shall hereafter own . . . an equal undivided community interest. . . ."]

On the following day the trustee conveyed the property to the husband as the community property of the husband and wife, through a deed containing the recital that it had been executed for the same purpose as the prior deed. In post-divorce litigation between the former husband and wife, the court held that the deeds were not effective to change the separate property of the wife to community property. The court said:]

. . . On the other hand, the policy of the law protects the wife's property from liability for her husband's debts, and she cannot make it subject to them by mere agreement not amounting to some kind of legal conveyance. *Magee v. White*, 23 Tex. 180. Her property is protected also against alienations by the husband, and she cannot, by power of attorney or other mere agreement, enable him to divest her title. *Cannon v. Boutwell*, 53 Tex. 626.

The power to convey does not, therefore, enable her to contract generally with reference to her separate property, but only to dispose, in whole or in part, of her title; and the only operation which her conveyances have is to pass such title or some interest in it. *Wadkins v. Watson*, *supra*.

The effect of her conveyances, as well as those of others, is governed by the law applicable to the existing facts under which they are made; and the case therefore resolves itself into the inquiry: Did the facts essential to make the property in question community property exist when the transaction took place; and, if not, could the husband and wife, by their mere volition, make it such in the manner attempted?

Property of husband and wife in this state gets its character as belonging separately to one of them or in common to both from the statutes defining their separate and community estates. Property which either of them owns before marriage and that which he or she acquires afterwards by gift, devise, or descent is his or her separate property. Property acquired by either after marriage otherwise than by gift, devise, or descent is their common property. By construction, property which is acquired after marriage in exchange for separate property, or which is purchased with separate funds, is held to belong to that estate which furnished the consideration. Separate property of either spouse may be conveyed to the other in such way as to become his or her separate property, and community property may be so conveyed by the husband to the wife as to make it hers separately. This is true, not because the parties chose to name the property separate, but because the facts transpire to bring it within the

statutory definition; and the law, operating upon such facts, vests title in accordance with them. The act of the parties is such as the law defines as necessary to create the separate right. Therefore, the question whether particular property is separate or community must depend upon the existence or nonexistence of the facts, which, by the rules of law, give character to it, and not merely upon the stipulations of the parties that it shall belong to one class or the other. Thus, when one spouse passes to the other by gift his or her title to separate property, it could not become the community property of both, because the law declares that property so acquired shall be the separate property of the donee; and a gift by the husband to the wife of his interest in community property would become the separate property of the donee for the same reason. And so property acquired in the name of either spouse during marriage, otherwise than by gift, devise, or descent, or in exchange for separate property, would, by force of the statute, be community property. It is true that in the acquisition or afterwards, the husband may give to the wife all his interest in the property, and thus, by gift, make it hers; but at last this would be true only because the facts defined in the law exist and the separate right is derived through a gift, the husband having full power over the community estate.

If the deeds in question were without consideration, and passed title to the husband, under these rules of law they would vest in him a separate title to the land, because it is the wife's separate title that is attempted to be conveyed, and the conveyance would be a gift. Yet the deeds in effect declare that they shall not have this, but a different, operation. The one power the wife had was to convey her title, and, by her conveyance, invest her grantee with the right conveyed. The power she tried to exercise was, by the form of a conveyance, to make a contract changing the legal character of the property. As we have seen, the power of conveying does not include the power to do any such thing. It has been held in several cases that husband and wife cannot, by their mere agreements, alter the character given to property by the law acting upon the facts under which it is acquired. *Cox v. Miller*, 54 Tex. 27; *Green v. Ferguson*, 62 Tex. 529.

The admissions made in these cases that community property in existence, or as it comes into existence, may be made the separate property of the wife by gift from the husband, are thoroughly consistent with what we have said. The gift fulfills the requirements of the law under which the title of one is transferred to the other so as to become separate. Here the attempt of the wife is to make a gift without at the same time so conveying her title as to make the gift have its proper effect.

Recurring to the principles already stated, we see that, while a married woman, through the intervention of a trustee, may give or sell her property to her husband so as to make it his and, therefore, subject to his control and to his debts, and may also mortgage it to secure his debts, the power is withheld from her, while retaining, to empower him to alienate it, or to subject it to his debts. A more effectual method of defeating the last-named restrictions could not be devised than that employed in this case if it were upheld. All the mischiefs sought to be guarded against would at once flow from such a transaction, and this shows that the objections to it are not of a merely technical character. In our opinion, such transactions have no place in our laws regulating marital rights.

A statement of the effect of a real conveyance by the wife of her separate property, through the medium of a trustee, to her husband, such as has been upheld by this court, will serve to illustrate the difference between it and the transaction in question. By such a conveyance, the wife's title, or a part of it, to the whole or a part of the property would pass to and vest in the husband, and such interest as was conveyed would become his separate property. If only a part were conveyed, the remainder would continue to be her separate property, and would be protected from her husband's debts, as well as from alienation by him. Here the wife, while she pretends to divest her whole separate title, does not convey it to her husband, but declares that the instrument shall only operate to make the property belong to the community estate, the effect of which would be to vest in her husband an interest and in herself an interest of a different character from that which she owned and pretended to convey, and to

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Kellet v. Trice

Spousal Power to Change Character

put the whole forever beyond her control, and subject to that of the husband alone. This makes it apparent that this is not really a conveyance of her title such as she could make, but only an agreement by which a change in the character of such title is attempted, without the existence of the facts necessary, under the law, to effect the change.

The wife may hold the title to community property, legally acquired, as well as the husband. If, without consideration, she and her husband should execute such an instrument to a trustee upon the trust that he should reconvey the property to her, and should provide that it should thereby become community property, would it not be evident that the entire substance of such instruments would be the agreement to change the property from separate to community, and that in reality there would be no conveyance of her separate title? We instance a case in which there is no consideration because we do not wish to go beyond the facts of this case.

It is not necessary to hold that a married woman's separate property may not be so conveyed as to become, in law, community property. It may be that a purchase may be made of such property by the husband with community funds, so that the consideration will belong to the wife separately, and the property taking its place will belong to the community estate. If this is true, it is because the law, and not the mere agreement, would give such effect to the transaction. No such case is presented here.

The deeds are without valuable consideration. The recitals of money paid are evidently merely formal and nominal (*Lewis v. Simon*, 72 Tex. 475, 10 S.W. 554); and, besides, according to the recitals, equal sums were paid to each party, so that the wife received no more than she paid. The other recitals merely give the reasons and purposes actuating the parties and show no benefit to the wife, or detriment, disadvantage, or inconvenience to the husband whatever. The transaction, if the instrument should have effect, would operate wholly to the benefit of the husband without pecuniary consideration received by the wife.

We conclude that the transaction did not change from separate to community the property mentioned in the deeds, and this, with what we have said, answers the questions asked.

Notes, Comments & Questions

1. If spouses wanted to transform separate property into community, what were the available means in 1902?
 2. Take a quick look at the Texas Family Code, *see* Appendix, and determine whether the means to transform separate property into community have been expanded.
 3. If there has been an expansion of the means to transform separate property into community, when and how did such expansion occur?
-

3. Statutory Changes, 1911-1917

Between 1911 and 1921, several newly enacted statutes were intended to enlarge the rights and powers of married women with respect to marital property

Tex. Laws 1911, Ch. 52, at 92 empowered a married woman to obtain an order from the district court to remove her disabilities of coverture and to declare her feme sole for mercantile and trading purposes.

Tex. Laws 1913, Ch. 32 at 61 effected the following changes in articles 4621 and 4622 as they had existed previously:

- (1) The wife acquired the power to manage her separate property, except that the joinder of the husband was required for the conveyance of real estate or the transfer of stocks and bonds.
- (2) The wife acquired the power of control, management, and disposition of what was later termed the “special community property” consisting of the personal earnings of the wife, the rents from the wife’s real estate, the interest on bonds and notes belonging to her and dividends on stocks owned by her.
- (3) Exemption from liability for debts contracted by the husband was extended to the wife’s special community property as well as to her separate property. The wife’s separate property was held to be exempt from debts incurred by the husband’s prior to the 1913 statute.

Tex. Laws 1915, Ch. 54, at 103 added a completely new section to the statute, which provided as follows:

All property or moneys received as compensation for personal injuries sustained by the wife shall be her separate property, except such actual and necessary expenses as may have accumulated against the husband for hospital fees, medical bills and all other expenses incident to the collection of said compensation.

Finally, Tex. Laws 1917, Ch. 194, at 436 further amended article 4621 to define rents and revenues derived from separate property of either spouse as separate property of that spouse.

The case of *Kellet v. Trice* combined with these statutory changes set the stage for *Arnold v. Leonard*.

ARNOLD
v.
LEONARD
273 S.W. 799
(Tex. 1925)

GREENWOOD, JUSTICE.

The Court of Civil Appeals states the nature and facts of this case and the question which the Supreme Court is requested to determine as follows:

The suit was brought by the appellee, Mrs. Adele E. Leonard, a married woman, joined pro forma by her husband, St. Clair Leonard, for an injunction to restrain the appellant, Gus I. Ar-

Chapter 1. The Texas Marital Property System

Arnold v. Leonard
Implied Exclusion

nold, as administrator of the estate of Gus Schultz, deceased, from seizing or attempting to subject certain rents and revenues from a number of pieces of real estate in the city of Galveston, all being the separate estate of the wife, Mrs. Adele E. Leonard, to the payment of a judgment owned and held by the appellant against St. Clair Leonard, the husband.

The facts alleged in the bill for injunction were agreed to be true by both parties to the suit, and showed, as recited, that all the real property involved is owned by Mrs. Adele E. Leonard, the wife, as her separate estate; that the judgment held and owned by the appellant in his capacity as administrator of the estate of Schultz was against the husband, St. Clair Leonard, and represented a community indebtedness; that in these circumstances the administrator was seeking, by threatening the issuance of writs of garnishment on the judgment against various renters and tenants of Mrs. Leonard's separate real estate, to subject the rents and revenues thereof to the payment of this judgment.

The appellant in the trial court answered the petition and prayer for an injunction with a special exception to the effect that it appeared from the allegations of the petition itself that the rent and revenues, the collection of which was so sought to be enjoined, constituted the community estate of Mrs. Adele E. Leonard and her husband, St. Clair Leonard, and by virtue of the Constitution of Texas, Article 16, § 15, the rents and revenues of the separate estate of the wife are community property and subject to the debts of the husband, and that Article 4621, Chapter 3, Title, 68, of the Revised Statutes of Texas of 1911, and the amendment thereof by the act of the regular session of the Thirty-Seventh Legislature, Chapter 130, Section 1, which undertakes to declare the rents and revenues of the wife's separate real property to be her separate estate, is contrary to the terms of the Constitution referred to, and is therefore void.

The trial court overruled the special exception of the appellant and granted the injunction prayed for by the appellees, restraining the appellant from in any manner undertaking to have the rents and revenues from the separate real property of the appellee, Mrs. Adele E. Leonard, applied to the liquidation of the judgment so held against her husband, holding that the rents and revenues of her separate estate constituted her separate property and were beyond the reach of a creditor of the community estate of the husband and wife.

It being obvious that the sole question involved in the case is as to the constitutionality of said Revised Statutes, Article 4621, because of the importance of the question and of some doubt entertained by different members of this court as to the correctness of the trial court's determination of it, we deem it advisable to certify for your decision the following question:

Is the act of the Legislature above stated, which declares the rents and revenues of the wife's separate real property to be her separate estate, violative of Article 16, Section 15, of our State Constitution? In this connection we call attention to the case of *Rudasill v. Rudasill*, 219 S.W. 843.

* * *

Section 15 of Article XVI of the Constitution declares:

All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.

This section is found, without a single word changed, in the Constitutions of 1845, 1861, and 1866. Section 19, Article VII, Constitutions of 1845, 1861, and 1866; Vol. IV, SAYLES' TEXAS STATUTES, pages 209, 246, 321.

* * *

The plain and obvious import of the language of the Constitution is to prescribe a test by which to determine when an acquist by the wife becomes a portion of the wife's separate estate. The test during coverture relates to the method by which the property is acquired. If the method be by gift, devise, or descent to the wife, then the Constitution makes the property belong to the wife's separate estate. If the method of acquiring during marriage be different, then the property falls without the class of separate estate of the wife, as fixed by the Constitution. We think the Supreme Court was doing no more than giving effect to the words of the Constitution when it said, through CHIEF JUSTICE WILLIE, "But of the property which a wife may acquire during marriage, none becomes her separate estate except such as is derived by gift, devise or descent." *Ezell v. Dodson*, 60 Tex. 332.

We have no doubt that the people in adopting the Constitution in 1845, as in 1876, understood that it was intended to put the matter of the classes of property constituting the wife's separate estate beyond legislative control. Thereby both the wife and the husband were given constitutional guaranty of the status of all property derived by means of or through the wife. Our duty is plain to give effect to the people's will. COOLEY'S CONSTITUTIONAL LIMITATIONS (7th Ed.) p. 89.

It is a rule of construction of constitutions that ordinarily, when the circumstances are specified under which any right is to be acquired, there is an implied prohibition against the legislative power to either add to or withdraw from the circumstances specified. *Koy v. Schneider*, 110 Tex. 378, 218 S.W. 479, 221 S.W. 880; *Dickson v. Strickland* (Tex. Sup.) 265 S.W. 1015; *Ex parte Vallandigham*, 1 Wall. 252, 17 L.Ed. 589; COOLEY'S CONSTITUTIONAL LIMITATIONS, p. 99; 6 R.C.L. § 43. Hence, when the Constitution says that as to property, not owned or claimed by the wife at marriage, it becomes her separate property when acquired in one of three specified modes, the Legislature is prohibited from saying that property acquired after marriage in some other mode may also become the wife's separate property.

The rule of implied exclusion is no more binding in construing statutes than in interpreting constitutions. In *Howard v. York*, 20 Tex. 672, in an opinion of Judge Roberts, it is said that for the Legislature to preserve to the wife's separate property increase of land and slaves "impliedly negatives the idea that the increase of any other property becomes separate property."

Had it been the purpose of the Constitution to empower the Legislature to add to the wife's separate property, it is hardly to be doubted that the power would have been conferred, when the framers of the Constitution were expressly authorizing the enactment of laws to more clearly define the rights of the wife in relation to both her separate property and community property.

* * *

Since rents and revenues derived from the wife's separate lands are entirely without the constitutional definition of the wife's separate property, and since the Legislature can neither enlarge nor diminish such property, it follows that the portions of the Acts of 1917 and 1921, which undertake to make rents and revenues from the wife's separate lands a part of her separate estate, are invalid.

* * *

By an Act approved March 21, 1913, it was provided that "neither the separate property of the wife, nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings shall be subject to the pay-

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Arnold v. Leonard Implied Exclusion

ment of debts contracted by the husband;” and the act committed the classes of property enumerated as exempt from payment of the husband’s debts to “the control, management, and disposition of the wife alone,” provided the joinder of the husband was necessary in an incumbrance or conveyance of the wife’s separate lands, and in a transfer of her stocks and bonds, unless she was authorized to act alone by an order of the District Court, and provided that the husband and wife must join in a conveyance of the homestead. The Acts of 1917 and 1921 retain each and all of the above provisions of the Act of 1913.

There can be no doubt that the Act of 1913 left the rents and revenues of the wife’s separate lands assets of the community estate. *Red River Nat’l. Bank v. Ferguson*, 109 Tex. 290, 206 S.W. 923; *Whitney Hardware Co. v. McMahan*, 111 Tex. 245, 231 S.W. 694; *Scott v. Scott* 170 S.W. 273; *Tannehill v. Tannehill* 171 S.W. 1051. Nor can there be any doubt that the act of 1913 and the subsequent acts intended to exempt rents of the wife’s separate lands from payment of a community debt contracted by the husband. The provision of the Acts of 1917 and 1921, declaring the exemption, is separate and distinct from the portions of the Acts undertaking to change the ownership of rents and revenues from the wife’s separate lands. Hence such provision might be operative in each Act despite failure of the purpose to make the rents separate property of the wife. *Western Union Tel. Co. v. State*, 62 Tex. 633.

The Supreme Court of the United States upholds the validity of legislation conferring on the wife not only the right to manage but the right to dispose of community property, so long as the husband’s interest attaches to the proceeds of such property.

Speaking through CHIEF JUSTICE WHITE, the Court states its conclusions as follows:

The Legislature could as well have provided that the wife could convey, as the husband; and if it had power to say that either could dispose of the community interest of the other, it could say that neither could do so. Changing the manner of conveyance did not alter the status of ownership. It could not make the interest of either spouse in community lands greater or less.

* * *

It is a misconception of that system to suppose that because power was vested in the husband to dispose of the community acquired during marriage, as if it were his own, therefore by law the community property belonged solely to the husband. The conferring on the husband the legal agency to administer and dispose of the property involved no negation of the community, since the common ownership would attach to the result of the sale of the property. *Warburton v. White*, 176 U.S. 484, 20 S. Ct. 404, 44 L. Ed. 555.

To the same effect is *Arnett v. Reade*, 220 U.S. 318 to 320, 31 S. Ct. 425, 55 L. Ed. 477, 36 L.R.A. (N.S.) 1040.

These conclusions harmonize with the conceptions underlying the Texas decisions that the wife’s capacity to own and hold property is as complete as that of the husband; that each marital partner owns an estate in the community property equal to that of the other partner; and that statutes empowering the husband to manage the wife’s separate lands and community assets make the husband essentially a trustee, accountable as such to the separate estate of the wife, or to the community. *Edrington v. Mayfield*, 5 Tex. 366 to 368; SPEER’S LAW OF MARITAL RIGHTS IN TEXAS, § 296; *Richardson v. Hutchins*, 68 Tex. 89, 3 S.W. 276; *Dority v. Dority*, 96 Tex. 224 to 226, 71 S.W. 950, 60 L.R.A. 941; *Waggoner Bank & Trust Co. v. Warren*, 111 Tex. 322, 234 S.W. 387.

We see no escape from the deduction that if the Legislature may rightfully place such portions of the community as it may deem best under the wife's separate control and make same subject to disposition by her alone, it may likewise exempt the same from payment of the husband's debts, without the exemption being open to successful constitutional attack by either the husband or his creditors.

* * *

The sum of our conclusions is: The Legislature, in defining the wife's rights in and to her separate property and property held in common with her husband, could lawfully deprive the husband of the power granted him for many years to manage and control the wife's separate property and portions of the community property which were derived from use of the wife's separate property or from her personal exertions, and could confide the management, control, and disposition thereof to the wife alone, and could exempt, not only her separate property, but said portions of the community from payment of the husband's debts. In making this grant of enlarged rights to the wife and working the corresponding diminution in rights to be exercised by the husband, the Legislature was lawfully defining the wife's rights in both her separate estate and common property, as expressly authorized by the Constitution. But the Legislature could not divest the husband of all interest in and to property which, under the Constitution, was guaranteed either to the community or to the husband's separate estate, and use the same to enlarge the wife's separate estate beyond its constitutional limits.

We, therefore, answer to the certified questions that so much of the Act of 1917 and of the Act of 1921 as undertook to declare the rents and revenues of the wife's separate realty to be her separate estate was violative of Section 15, of Article XVI, and of Section 35, of Article III of the Constitution, but that the provisions of said Acts, and of the prior Act of 1913, are valid, which render the rents and revenues of the wife's separate lands free from liability to forced sale for the payment of debts contracted by the husband.

Questions

1. What rule arises from *Arnold v. Leonard*?
 2. In what way does this case comport with *Kellet v. Trice*?
 3. What if Madame De Blane's case had been heard concurrently with *Arnold v. Leonard*?
 4. Why is the limit on legislative power irrelevant to the outcome of *Arnold v. Leonard*?
 5. What would be the only means to accomplish the change attempted by the Legislature, but disallowed by the Texas Supreme Court in *Arnold v. Leonard*?
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NORTHERN TEXAS TRACTION CO.
v.
HILL
297 S.W. 778
(Tex. Civ. App.—El Paso 1927, writ ref'd)

PELPHREY, CHIEF JUSTICE.

Appellee, joined by her husband, T.A. Lambert, originally filed this suit in the Sixty-Eighth district court of Dallas county, Tex., against appellant. She thereafter, under the name of Mrs. Nettie Hill (joined by her husband, R.H. Hill), filed her second amended original petition.

She alleged in said amended petition that at the time of the original filing of the suit she was the wife of T.A. Lambert, but that since said filing she had been divorced from said Lambert and had married R.H. Hill, who was joined as plaintiff.

Appellee alleged that on or about October 24, 1923, appellant owned, operated, and controlled a system of interurban electric railway extending from the city of Dallas to the city of Fort Worth; that on said date while riding in an automobile driven by her then husband, T.A. Lambert, an interurban car, owned and operated by appellant, collided with said automobile, and as a result of such collision appellee suffered certain injuries.

Appellee more particularly alleged that appellant was guilty of negligence per se in that it had failed to keep the crossing in the condition required by the ordinances of the city of Dallas, and that the motorman failed and neglected to warn appellee as the ordinances required, and that the motorman failed to keep a proper lookout for vehicles approaching the crossing where the accident occurred.

Appellant answered by general demurrer, special exceptions to appellee's petition, general denial, and contributory negligence on the part of appellee and her then husband, T.A. Lambert. Appellee filed a supplemental petition containing special exceptions and a general denial. The case was tried before a jury, and resulted in a verdict in favor of appellee for \$7,500. From a judgment on said verdict the Northern Texas Traction Company has appealed to this court.

Appellant bases its appeal on 34 separate propositions, all of which we deem it unnecessary to discuss.

Appellant specially excepted in its first amended original answer to appellee's petition because T.A. Lambert, who was the husband of the appellee at the time of the accident, was not made a party plaintiff. This exception was by the court overruled, and appellant assigns error thereto. We agree with appellant in its contention and hold that T.A. Lambert was a necessary party plaintiff, and that appellant's exception should have been sustained.

The right to sue for damages for a tort is a choice in action and property, within the legal sense of that term. *Ezell v. Dodson*, 60 Tex. 331; 2 BISHOP ON MARRIED WOMEN, art 271; SPEER ON LAW OF MARRIED WOMEN, art 193. The right to sue, being property in the legal sense of the term, was the community property of appellee and T.A. Lambert, unless by law it is made her separate property.

Article 4615, Revised Statutes of 1925, reads as follows:

All property or moneys received as compensation for personal injuries sustained by the wife shall be her separate property, except such actual and necessary expenses as may have accumulated against the husband for hospital fees, medical bills, and all other expenses incident to the collection of said compensation.

It is contended by appellant that this statement is in contravention of article 16, § 15, of the Constitution, and in support of its contention cites a decision of our Supreme Court in the case of *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799.

The constitutional provision is as follows:

All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.

As said by the court in *Arnold v. Leonard*, *supra*:

But the Legislature could not divest the husband of all interest in and to property which under the Constitution, was guaranteed either to the community or to the husband's separate estate and use the same to enlarge the wife's separate estate beyond its constitutional limits.

It is a rule of construction of Constitutions that ordinarily when the circumstances are specified under which any right is to be acquired there is an implied prohibition against legislative power to either add to or withdraw from the circumstances specified. *Koy v. Schneider*, 110 Tex. 378, 218 S.W. 479, 221 S.W. 880; *Dickson v. Strickland*, 114 Tex. 176, 265 S.W. 1015; *Ex parte [Vallandigham] Vallandigham*, 1 Wall 252 [17 L. Ed. 589]; COOLEY'S CONSTITUTIONAL LIMITATIONS, p. 99; 6 R.C.L. § 43. Hence, when the Constitution says that as to property, not owned or claimed by the wife at marriage, it becomes her separate property when acquired in one of three specified modes, the Legislature is prohibited from saying that property acquired after marriage in some other mode may also become the wife's separate property."

The court held in the above-cited case the acts of the Legislature, which undertook to make the rents and revenues from the wife's separate bonds a part of her separate property, invalid.

We think the same reasoning applies in the present case, and hold article 4615, R.S. 1925, to be unconstitutional. Article 4619, Revised Statutes 1925, reads as follows:

"All property acquired by either the husband or wife during marriage, except that which is the separate property of either, shall be deemed the common property of the husband and wife, and during coverture may be disposed of by the husband only.

By this article the cause of action, not being the separate property of either, became the community property of T.A. Lambert and appellee, vesting in each a half interest therein. *Fort Worth & R.G. Ry. Co. v. Robertson*, 55 Tex. Civ. App. 309, 121 S.W. 202; *Id.*, 103 Tex. 504, 121 S.W. 202, Ann. Cas. 1913A. 231, Judge Dunklin so held in construing a similar statute in a dissenting opinion in the above case, and the Supreme Court agreed with his opinion in 103 Tex. 504, 131 S.W. 400, Ann. Cas. 1913A, 231. Therefore T.A. Lambert, having a half interest in the right of action, was necessary party plaintiff. Appellant pleaded contributory negligence on the part of T.A. Lambert, and appellee in her supplemental petition specially excepted to said plea on the ground that the negligence of the husband is not imputable to the wife.

This exception was by the court sustained, and appellant assigns error to the court's action. If we are correct in our conclusion that the right of action was the community property of T.A. Lambert and appellee, then we must also conclude that the negligence of Lambert, if he was negligent, would be a defense to this action, for to hold otherwise would be to allow him to recover regardless of his own

Chapter 1. The Texas Marital Property System

Northern Texas Traction Co. v. Hill
Implied Exclusion Applied

negligence. As was said by the Supreme Court in *Gulf C. & S. R. Ry. Co. v. James S. Greenlee et ux.*, 62 Tex. 344:

Under the circumstances of this case it is quite clear that Mrs. Greenlee might well rely upon the prudence and caution of her husband in making the approach to, as well as crossing, the railroad. The correlative of the proposition is also true, that she would be bound by his negligence or want of due care.

See also Mo. Pacific Ry. Co. v. White, 80 Tex. 202 15 S.W. 808.

* * *

In our opinion, it is unnecessary to discuss the other assignments.

The judgment of the trial court is reversed and the cause remanded.

Notes, Comments & Questions

1. *Northern Texas Traction* is not the end of the road on the characterization of personal injury damages. After reading *Graham v. Franco*, consider whether the holding in *Northern Texas Traction* would be sustained under that later analysis.
2. Was the doctrine of implied exclusion properly applied in *Northern Texas Traction*? Come back to this question after you read *Graham v. Franco*.
3. In 1925 a series of statutes were passed which describe the roles and rights of husband and wife as regards ownership and management of marital property. These statutes controlled until January 1, 1968, when the Matrimonial Property Act of 1976 became effective. The most interesting of these excerpts deal with Litigation and conveyance of real estate, and are set forth below:

Litigation

Art. 1983. [1839] [1200] [1204] For wife's separate property.

The husband may sue either alone or jointly with his wife for the recovery of the separate property of the wife; and, in case he fails or neglects so to do, she may sue alone by authority of the court. [Acts 1840, p. 3; G.L. Vol. 2, p. 177; P.D. 4636.]

Art. 1984. [1840] [1201] [1205] Against husband and wife for necessaries.

The husband and wife shall be jointly sued for all debts contracted by the wife for necessaries furnished herself or children, and for expenses which may have been incurred by the wife for the benefit of her separate property. [Acts 1848, p. 77; G.L. Vol. 3, p. 78; P.D. 4643.]

Art. 1985. [1841] [1202] [1206] For wife's debts, etc.

The husband shall be joined in suits for separate debts and demands against the wife, but no personal judgment shall be rendered against the husband. [Acts 1846, p. 363; G.L. Vol. 2, p. 1669; P.D. 9]

Conveyance of Real Estate

Art. 1299. [1114] [635] [559] Conveyance of separate lands of wife.

The husband and wife shall join in the conveyance of real estate, the separate property of the wife; and no such conveyance shall take effect until the same shall have been acknowledged

by her privily and apart from her husband before some officer authorized by law to take acknowledgments to deeds for the purpose of being recorded, and certified to in the mode pointed out in articles 6605 and 6608. [Acts 1897, p. 41; G.L. Vol. 10, p. 1095.]

Art. 1300. [1115] [636] [560] Conveyance of homestead.

The homestead of the family shall not be sold and conveyed by the owner, if a married man, without the consent of the wife. Such consent shall be evidenced by the wife joining in the conveyance, and signing her name thereto, and by her separate acknowledgment thereof taken and certified to before the proper officer, and in the mode pointed out in articles 6605 and 6608. [*Id.*]

Art. 6605. [6802] [4618] [4310] Acknowledgment of married woman.

No acknowledgment of a married woman to any conveyance or other instrument purporting to be executed by her shall be taken, unless she has had the same shown to her, and then and there fully explained by the officer taking the acknowledgment on an examination privily and apart from her husband; nor shall her husband certify to the same, unless she thereupon acknowledges to such officer that the same is her act and deed, that she has willingly signed the same, and that she wishes not to retract it. [Acts 1846, p. 156; P.D. 1003; G.L. Vol. 2, p. 1462.]

Art. 6606. [6803] [4619] [4311] Certificate of officer.

An officer taking the acknowledgment of a deed, or other instrument of writing, must place thereon his official certificate, signed by him and given under his seal of office, substantially in form as hereinafter prescribed.

Art. 6607. [6804] [4620] [4312] Form of certificate.

The form of an ordinary certificate of acknowledgment must be substantially as follows:

“The State of _____”;

“County of _____”.

“Before me _____ (here insert the name and character of the officer) on this day personally appeared _____, known to me (or proved to me on the oath of _____) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.”

(Seal) “Given under my hand and seal of office this _____ day of _____, A.D. _____.”

Art. 6608. [6805] [4621] [4313] Form by a married woman.

The certificate of acknowledgment of a married woman must be substantially in the following form:

“The State of _____”;

“County of _____”.

“Before me _____ (here insert the name and character of the officer) on this day personally appeared _____, wife of _____, known to me (or proved to me on the oath of _____) to be the person whose name is subscribed to the foregoing instrument, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said _____, acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

(Seal) “Given under my hand and seal of office this _____ day of _____, A.D. _____.”

Chapter 1. The Texas Marital Property System

Northern Texas Traction Co. v. Hill
Implied Exclusion Applied

4. Special attention should be paid to Art. 6608 as set forth above. At a time when young people were attending Woodstock, women in Texas were finally (as of 1968) being liberated from the requirement of Articles 1299, 1300, 6605 and 6608, that they be taken separate and apart from their husbands to have explained to them and to privately sign acknowledgments, be they general or specifically for conveyance of their separate real estate or homestead.

5. The doctrine of implied exclusion, as explained in *Arnold v. Leonard*, continued to be utilized in response to attempts by private parties to change the character of property or acquire separate property by means not recognized in TEX. CONST. art. XVI § 15.

(a) In *Gorman v. Gause*, 56 S.W.2d 855 (Tex. Comm. App. 1933, judgment adopted) the court applied the doctrine of implied exclusion to a prenuptial agreement (or postnuptial, as the date executed was disputed). The agreement in *Gorman* declared that no property acquired during the marriage would be community. The court viewed this agreement as an attempt by the parties to fix the character of marital property by means different from that recognized in the state constitution, holding the agreement to be void and unenforceable. The court, depending upon *Arnold v. Leonard*, reasoned:

[I]f the legislature is powerless to enact a law enlarging the wife's separate estate beyond its constitutional limits, it is clear that . . . such enlargement [cannot be] accomplished by mere agreement of the parties made in contemplation of marriage.

(b) In *Strickland v. Wester*, 112 S.W. 2d 1047 (Tex. 1938), the court held that a deed executed by a husband conveying property to his wife was effective as a gift. Prior to reaching this result, the court disposed of another contention of counsel, saying:

According to the testimony of Mrs. Wester, she purchased this lot from her husband with money which she had earned as a school teacher. She had been teaching 27 years at the date of the trial, and many years ago she and her husband, who was also a teacher during his lifetime, entered into an agreement that her personal earnings should be her separate property. That agreement was not valid, for the community property law cannot be changed by contract.

(c) In *King v. Bruce*, 201 S.W. 2d 803 (Tex. 1947), a husband and wife attempted to partition their community property into the separate property of each via an elaborate series of transactions. The court held the couple's attempt ineffective, as it was not recognized by the Texas Constitution as a means of acquiring separate property.

According to some authorities, *King v. Bruce* gave rise to TEX. CONST. art. XVI § 15 (1948) which finally enlarged the rights of spouses to partition and exchange their community property to create separate property.

6. Although the doctrine of implied exclusion and the analysis resting thereon are still used today, the impact is weakened as will be demonstrated in *Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972).

7. What license have you seen, thus far, taken with the separate property parameters established by the Texas Constitution?

C. The Constitution as Amended in 1948

1. Article XVI § 15 as effective 1948-1980

TEX. CONST. art. XVI, § 15 (1948)

§ 15. Separate and Community Property of Husband and Wife

All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of the wife; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband; provided that husband and wife, without prejudice to pre-existing creditors, may from time to time by written instrument as if the wife were a feme sole partition between themselves in severalty or into equal undivided interests all or any part of their existing community property, or exchange between themselves the community interest of one spouse in any property for the community interest of the other spouse in other community property, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property of such spouse.

This Amendment is self-operative, but laws may properly be passed prescribing requirements as to the form and manner of execution of such instruments, and providing for their recordation, and for such other reasonable requirements not inconsistent herewith as the Legislature may from time to time consider proper with relation to the subject of this Amendment. Should the Legislature pass an Act dealing with the subject of this Amendment and prescribing requirements as to the form and manner of the execution of such instruments and providing for their recordation and other reasonable requirements not inconsistent herewith and anticipatory hereto, such Act shall not be invalid by reason of its anticipatory character and shall take effect just as though this Constitutional Amendment was in effect when the Act was passed.

Notes, Comments & Questions

1. By what two means may spouses create separate property?
 2. Explain the difference between those means.
 3. How are creditors protected?
 4. Although the right to partition or exchange community property has been expanded in the most recent versions of the Texas Constitution, the strictness with which the courts met initial efforts to partition and exchange cannot be ignored. As you read the following notes and cases, be mindful of the precise application of the Constitutional requirements by the Texas courts.
-

2. Statutes and Decisions, 1948-1967

In the classic case of *Hilley v. Hilley*, 342 S.W. 2d 565 (Tex. 1961), the court held that community property could not be used to create a joint tenancy with right of survivorship between the spouses. Such a transaction was not an interspousal gift, but was an attempt to transfer a survivorship right or interest in community property between the spouses for a valuable consideration. Because consideration paid by each spouse is derived from the community estate, the right or interest which each acquired would remain part of the community estate. Thus, the court held that the attempted transaction did not comport with the constitutional requisites and that the property remained community property. The court pointed out, however, that the spouses could make an effective survivorship agreement with reference to separate property owned by either or both. Six years later, after section 46 of the Probate Code had been amended, *Hilley* was followed in *Williams v. McKnight*, 402 S.W. 2d 505 (Tex. 1966).

As we will see, per a 1987 amendment to the Texas Constitution which was effective January 1, 1988, spouses are now allowed to agree that all or part of their community property will become the separate property of the surviving spouse on the death of the other spouse. Tex. Const. art. XVI, §15. Today, the two step process of partition and then establishment of a joint tenancy with right of survivorship is not needed. The Texas Supreme Court has recently made this clear in *Holmes v. Beatty*, 290 S.W. 3d 852 (Tex. 2009) which will be considered, in depth, later in the course. *Hilley v. Hilley*, *Williams v. McKnight*, and their progeny are the most important cases of the period following the 1948 amendment to the Texas Constitution. In 1948, spouses were given the right to create separate property by partition or exchange. This new right to create separate property was taken too far by the legislature and spouses who overstepped constitutional boundaries, bypassing partition or exchange, in an attempt to create separate property. The cases that follow are relevant not only for an understanding of the evolution of Texas marital property law, but also because they exemplify the strict interpretation of Tex. Const. art. XVI, §15. These cases can be used to persuade a court that, historically, a liberal interpretation of Tex. Const. art. XVI, §15 has been rejected and that a strict interpretation has, historically, been utilized and should continue to be so used.

Notes, Comments & Questions

1. In *Davis v. East Texas Sav. & Loan Ass'n*, 354 S.W.2d 926 (Tex. 1962), the court held that the spouses could utilize separate property to create a valid joint tenancy with right of survivorship, with the spouses as joint tenants. In *Krueger v. Williams*, 359 S.W.2d 48 (Tex. 1962), the court held that a spouse, utilizing community property, could create a valid joint tenancy with right of survivorship with the spouse and a third party as joint tenants.
2. Much later, *Williams v. McKnight* was followed in *Maples v. Nimitz*, 615 S.W.2d 690 (Tex. 1981) which confirmed that a two-step process was required to establish a joint tenancy with right of survivorship from community property. That is, there must first be a partition of the community property into separate property of the wife and the husband and then, second, a joint tenancy with right of survivorship can be created.
3. Perhaps the most strict application of the constitutional partition requisites can be found more recently in *Jameson v. Bain*, 693 S.W.2d 676 (Tex. App.—San Antonio 1985, no writ). In this case, the partition/joint tenancy card was signed in the wrong order; that is, the spouses did not *first* partition the property, but rather, did so *after* creating a joint tenancy. The attempt was not successful, even under the 1980 amendments to the Constitution. Although today joint tenancies can be obtained by

partitioning community funds, these strict precedents cannot be ignored when determining whether one has complied with constitutional requisites.

3. Statutes and Decisions, 1968-1980

This section begins with *Few v. Charter Oak Fire Ins. Co.*, where attorney for an injured wife took the bold step of suing for worker's compensation damages in wife's own name. What is of interest here is the balance between rules of procedure and statutes, as well as the basic rights of management and control that are finally being extended to women. At first glance, the next case of *Graham v. Franco* appears to be simply a case characterizing personal injury damages sought by wife. However, the more important aspect of the case is the court's determination of whether a statute that characterizes personal injury recoveries as separate property is constitutional, especially in light of earlier case law, including *Arnold v. Leonard*. The historical and constitutional underpinnings of the opinion cannot be ignored. This section culminates with *Williams v. Williams*, a premarital agreement opinion out of the Texas Supreme Court that reiterates the importance of complying with TEX. CONST. art. XVI, §15. This principle endures today even though TEX. CONST. art. XVI, §15 has been greatly expanded. Do not consider *Williams* to be simply a homestead case; rather it is a case in which only the homestead clause of the premarital agreement was upheld because the remainder was found to be unconstitutional. The analysis of the Texas Supreme Court provides a template for future cases.

FEW
v.
CHARTER OAK FIRE INS. CO.
463 S.W.2d 424
(Tex. 1971)

POPE, JUSTICE.

Mary Frances Few, joining her husband pro forma, sued Charter Oak Fire Insurance Company for total and permanent incapacity suffered in the course of her employment with Safeway Grocery in Mineola, Texas. The trial court awarded judgment for the plaintiffs, naming both Mary Frances and her husband in the judgment. The court of civil appeals, with a divided court, reversed the judgment for plaintiffs and remanded the cause for re-trial, holding that the husband was an indispensable party and that he was not joined as a real party.

* * *

Mary Frances Few and her husband, Milburn Few, had been married for many years prior to her accident on June 20, 1968, and they are still married. For this reason her workmen's compensation award was their community property. *Pickens v. Pickens*, 125 Tex. 410, 83 S.W.2d 951, 953 (1935). Community ownership may also be called a joint ownership. *Dillard v. Dillard*, 341 S.W.2d 668 (Tex. Civ. App. 1961, writ ref. n.r.e.); *Hitchcock v. Cassel*, 275 S.W.2d 205 (Tex. Civ. App. 1955, writ ref. n.r.e.). Rule 39, Texas Rules of Civil Procedure, as it was worded at the time of the trial,² provided that persons having a joint interest shall be made parties. It was this rule which prompted the court

² The rule was changed, effective January 1, 1971.

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Few v. Charter Oak Fire Ins. Co.

A Wife Can Sue

of civil appeals to hold that the wife's husband was an indispensable party. The court relied upon our recent opinion in *Petroleum Anchor Equipment Co., Inc. v. Tyra*, 406 S.W.2d 891, 892-893 (Tex. 1966), in which we applied Rule 39. In that case we held that persons who hold a joint interest shall or must be made parties and are indispensable parties.

If only Rule 39 were involved in the case before us, our decision would be controlled by our earlier decision in *Petroleum Anchor*. However, we are now faced with two relevant statutes enacted by the legislature. Article V, Sec. 25, of the Texas Constitution, VERNON'S ANN. ST. vests in the Supreme Court the power to establish rules of procedure "not inconsistent with the law of the State." Legislative authority for this power is found in Article 1731a, Sec. 2. Rule 39 was established pursuant to this power. As the constitutional provision indicates, this is a limited power; and when a rule of the court conflicts with a legislative enactment, the rule must yield. *Missouri, K. & T.R. Co. v. Beasley*, 106 Tex. 160, 155 S.W. 183 (1913), *rehearing denied*, 106 Tex. 160, 160 S.W. 471.

Articles 4621 and 4626 are the statutes which control this case. Enacted by the 60th Legislature and effective January 1, 1968, they provided:

Art. 4621.

* * *

During marriage each spouse shall have sole management, control and disposition of that community property which he or she would have owned if a single person, including (but not limited to) his or her personal earnings, the revenues from his or her separate property, the recoveries for personal injuries awarded to him or her, and the increase, mutations and revenues of all property subject to his or her sole management, control and disposition; the earnings of an unemancipated minor are subject to the management, control and disposition of the parents or parent having custody of the minor; if community property subject to the sole management, control and disposition of one spouse is mixed or combined with community property subject to the sole management, control and disposition of the other spouse, the mixed or combined community property is subject to the joint management, control and disposition of the spouses unless the spouses otherwise provide; any other community property is subject to the joint management, control, and disposition of the husband and wife.

Art. 4626.

* * *

A spouse may sue and be sued without the joinder of the other spouse. When claims or liabilities are joint and several, the spouses may be joined under the rules relating to joinder of parties generally.

Articles 4621 and 4626 were designed to correct an anomalous situation concerning the rights of a Texas wife. Almost from the beginning of Texas history, the right of a wife to own property has been recognized, but it has taken more than a century to give the wife managerial powers over that which she owns.

The Constitution of 1836 recognized the community property system of Mexico and Spain and on January 20, 1840, the Fourth Congress of the Republic determined to follow that system in matters of marital property. 2 GAMMEL LAWS OF TEXAS 177-178 (1840). The system has proved to be much fairer in its recognition of the wife's rights of ownership than that afforded her by the common law. 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, Sec. 3 (1943).

The common law had visited upon a wife an intolerable state of civil disability both in owning and managing property. As expressed by Vaughn, that system “suspended the wife’s legal existence during the marriage, or at least consolidated it into that of the husband.” Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 Bay. L. Rev. 20, 48-49 (1967). At common law, the husband and wife were one, and the husband was that one. *Murphy v. Coffey*, 33 Tex. 508 (1870). The woman’s legal existence, according to BLACKSTONE, was merged into that of her husband, “under whose wing, protection, and cover, she performs everything; and is therefore called in our law—French, a feme covert, and is said to be under the protection and influence of her husband, her baron, or lord, and her condition during her marriage is called her coverture.

* * *

If the wife be injured in her person or her property, she can bring no action for redress without her husband’s concurrence, and in his name, as well as her own.”

* * *

ERLICH’S BLACKSTONE, pp. 83, 84 (1959).

The Republic treated the wife’s right to manage her property differently from her right to own that property. The same act of the Fourth Congress which recognized the community property system of ownership, took from the wife any powers to manage what she owned and gave the sole management of the wife’s property to the husband. 2 GAMMEL, *LAW OF TEXAS* 178 (1840). It has been the law of Texas for more than a century that, except in limited situations, only the husband could bring suit for community recoveries arising out of a wife’s loss of earning capacity. *Roberts v. Magnolia Petroleum Co.*, 142 S.W.2d 315 (Tex. Civ. App. 1940, writ ref., (135 Tex. 289, 143 S.W.2d 79)); *Loper v. Western U. Teleg. Co.*, 70 Tex. 689, 8 S.W. 600 (1888); *Gallagher v. Bowie*, 66 Tex. 265, 17 S.W. 407 (1886); *Ezell v. Dodson*, 60 Tex. 331 (1883); *Murphy v. Coffey*, *supra*; *Firence Footwear Co. v. Campbell*, 406 S.W.2d 516, 411 S.W.2d 636 (Tex. Civ. App. 1967, writ ref. n.r.e.); *Urban v. Field*, 137 S.W.2d 137 (Tex. Civ. App. 1940, no writ).

Seventy years ago Judge Ocie Speer deplored the situation which recognized the wife’s equality of ownership, yet denied that equality with respect to a wife’s management of what she owned. He wrote:

The foolish fiction that her existence is merged in that of her husband has given way to the more enlightened recognition of her identity as an individual, and her consequent capacity to own property, to make contracts, and to sue and be sued. Yet, as though fearing serious consequences of much moment, it has not altogether removed her fetters, but is slowly, yet surely, tending, through the course of legislative acts and judicial interpretations, toward the enlargement of her rights and powers, which will in time culminate in a proper recognition of all her civil rights. SPEER, *THE LAW OF MARRIED WOMEN IN TEXAS*, § 25 (1901).

Efforts to rectify the wife’s inferior legal powers as the manager of her property have been infrequent; and over-broad corrective legislation changing the definition of community property has been stricken down on constitutional grounds. See Huie, § 11, *Commentary-Community Property Law*, 13 VERNON’S TEX. STATS., p. 39; *Northern Texas Traction Co. v. Hill*, 297 S.W. 778 (Tex. Civ. App. 1927, writ ref.).

The disabilities of coverture remained as a remnant of the common law until 1967. During the intervening years, the wife in fact was still covert; her husband was still lord and baron. The 60th Legislature, in enacting Articles 4621 and 4626, avoided the constitutional difficulties arising from an attempt to modify legislatively the constitutional definition of community property. These statutes leave undisturbed the definition of community property, but more clearly define the managerial rights

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of each spouse. Article 4621 gave the injured spouse powers to manage that community which she would have owned if a single person, including recoveries for personal injuries. Article 4626 authorized the wife to sue without joining her husband, but it also provided that in the case of joint and several claims, the spouses “may be joined under the rules relating to joinder of parties generally.”

Charter Oak argues that Rule 39(a) is the rule of joinder to which Article 4626 referred in its phrase “under the rules relating to the joinder of parties generally.” However, the statute, unlike Rule 39(a) is permissive in terms. It is our opinion that the legislature, in using permissive terms, was recognizing that while the spouses’ ownership interest in certain property may be joint, the managerial interest in the same property would be several. The legislature surely did not intend by the use of the phrase “may be joined” in Article 4626 to take away the sole managerial authority which it had just established in Article 4621. In terms of the facts presently before us, Mr. Few would be a proper party to the suit because of his ownership interest in the workmen’s compensation benefit. However, he was not an indispensable party in view of his wife’s sole managerial interest in the benefit. *See*, 23 S.w.L.J. 55 (1969); 22 S.w. L.J. 132 (1968). We hold that Mary Frances Few properly sued without joining her husband for the recovery of workmen’s compensation benefits arising out of her own injury.

* * *

Notes, Comments & Questions

1. Why was the worker’s compensation claim summarily characterized as community property?
2. Is there a general rule of legal analysis that emerges from this case?
3. Review TEX. FAM. CODE § 3.001(3).

GRAHAM

v.

FRANCO

488 S.W.2d 390

(Tex. 1972)

GREENHILL, CHIEF JUSTICE.

The writ of error was granted in this case to pass upon the constitutionality of a statute which provides: “The recovery awarded for personal injuries sustained by either spouse during marriage shall be the separate property of that spouse except for any recovery for loss of earning capacity during marriage.” We hold that the statute, as construed, is constitutional. We also hold that the acts of negligence of the husband as found by the jury are not imputed to the wife so as to bar her recovery.

This action arises out of a rear end collision. The car in which the plaintiffs, Mr. and Mrs. Franco, were riding was struck from the rear at night by a truck owned by Bill Graham and driven by Roosevelt Tillis. The Francos testified that Mr. Franco was driving down the right side of the highway with lights burning. As to the rear lights, the testimony was that they had recently been checked and found to be in good order. The truck driver testified that the Franco car was stopped on the highway with its lights off.

The jury found that the truck driver was negligent in failing to keep a proper lookout. It also found that the acts of Mr. Franco in stopping his car on the highway and in having the car upon the highway without a rear light burning constituted negligence. Each of such acts was found to be a proximate cause. There were no allegations or findings that the wife, Mrs. Franco, was guilty of negligence in any respect.

The jury found that Mr. Franco's damages were "zero." It also found that Mrs. Franco's medical expenses were \$2,212.92; but her damages, resulting from the occurrence in question, were likewise found to be "zero." The trial court entered judgment for the defendants.

As to Mr. Franco, the Court of Civil Appeals affirmed. His contributory negligence was held to have barred his recovery, and the question of his damages became immaterial. As to Mrs. Franco, that court reversed and remanded for a new trial. It found that the answer to the damages issue of "zero" was against the great weight and preponderance of the evidence. It recited, among other things, that she was in the hospital for 13 days, several of which were in intensive care.

The Character of Recovery for Personal Injury

The Court of Civil Appeals, in holding the statute constitutional, held that a wife would be entitled to recover, as her separate property, damages for injury to her body, including disfigurement, loss or impairment of the use of the body, and physical pain and suffering, both past and present. It excluded from her separate recovery loss of earnings, medical expenses, and "all other damages." These latter items were held to be recoverable by the community of the husband and wife.

In arriving at a proper solution of this problem, it is necessary to begin with law as it existed at the time of the adoption of our Texas constitutions and to ascertain the purpose of those portions of the constitutions which provide for the separate and community estates. Generally speaking, our civil procedure and our rules of necessary parties were adopted from the English; but the substantive rights of the spouses in separate and community property were taken from Spain and Mexico. In England, the spouses were one; and generally, the husband was dominant. He generally controlled the property of the wife and most litigation. He, at least, was generally a necessary party.

The problem in this litigation begins with the early Texas case of *Ezell v. Dodson*, 60 Tex. 331 (1883). The court had before it the right of a wife to sue alone for her personal injuries growing out of an assault. The defendant filed exceptions on the ground that the husband was a necessary party. The wife refused to amend, and the trial court dismissed her suit. This Court affirmed. We have examined the transcript in that case, and the only question was one of necessary parties. The character of the recovery, if any, whether separate or community, was not at issue. Nevertheless, by dictum, the court added that the assault and battery upon the wife gave rise to a chose in action; that the chose in action was property; and since it was acquired after marriage and not by way of gift, devise or descent, it would be community property. Thus the dictum was that an injury to the wife constitutes an asset or claim of the community estate.

The holding of *Ezell* was correct on the parties question as the law then existed. But we are of the opinion that its dictum was wrong for the reasons set out below and as ably discussed by Dean Leon Green in his analysis of the Texas Death Act in 26 Texas Law Review 461 at 466 et seq.

After *Ezell*, the question as to the character of the recovery for personal injuries, whether separate or community, was not examined in depth. The courts simply followed the dictum of *Ezell*.

The basic question is the interpretation of Section 15 of Article 16 of the Texas Constitution. With the key words underscored by us, it provides:

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All *property*, both real and personal, of the wife, *owned* or claimed by her before marriage, and that *acquired* afterward by gift, devise or descent, shall be the separate property of the wife; . . .

This Court in *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925), held unconstitutional a statute which attempted to declare as separate property the rents and revenues from the wife's separate realty. The holding of that case is so limited; and in view of the history of our community property system and laws, it was a correct decision. The language of the opinion, however, is broad. The reasoning of the court in *Arnold v. Leonard*, and of cases following it, is one of implied exclusion; i.e., if property was acquired during marriage by any other means than gift, devise, or descent, it was and is necessarily community.

A much later case of this Court reverted to a test more akin to that prevailing under the Spanish and Mexican law, and several early opinions of this Court, dealing with community property. It applied an affirmative test; i.e., that property is community which is acquired by the work, efforts or labor of the spouses or their agents, as income from their property, or as a gift to the community. Such property, acquired by the joint efforts of the spouses, was regarded as acquired by "onerous title" and belonged to the community. *Norris v. Vaughan*, 152 Tex. 491, 260 S.W.2d 676 (1953); *De Blane v. Lynch*, 23 Tex. 25 (1859); *Smith v. Strahan*, 16 Tex. 314 (1856); *Epperson v. Jones*, 65 Tex. 425 (1886); DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY (1971) § 62; MOYNIHAN, COMMUNITY PROPERTY, 2 AMERICAN LAW OF PROPERTY (1952) § 7.16. Under this reasoning, it is clear that the personal injuries to the wife are not "acquired" by the efforts of the spouses and would not belong to the community. Thus in *Norris v. Vaughan*, *supra*, JUSTICE SMITH wrote for this Court that:

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.

It is not necessary, however, to here make a decision on the correctness or applicability of *Norris v. Vaughan* and related cases and the concept of "onerous title."

The dictum of *Ezell* reasoned, as indicated, that if the wife were injured after marriage, this created a chose in action; that a chose in action [a cause of action for personal injuries] was property; that this property (chose in action) was acquired after marriage; and since it was not acquired by gift, devise or descent, it belonged to the community.

There is a large body of law, including cases by this Court, that a chose in action (a cause of action) for injuries to the *person* (as contrasted to injuries to *property*) was not regarded as *property* at the time of the adoption of our constitution. . . .

* * *

The *Ezell* opinion cites two authorities for the proposition that a chose in action for personal injuries is property: 2 BISHOP ON MARRIED WOMEN § 271, and *C.B. & Q. RR. Co. v. Dunn*, 52 Ill. 260 (1869). Bishop does not say that a chose in action for personal injuries is *property*. It says only that "the right to sue for a tort which one has suffered is a chose in action," and that after marriage the suit must be brought in the joint names of the husband and wife,—the *procedural* point before the *Ezell* court. Bishop continues, "But where the injury is in whole or in part to the wife, the right to sue for the injury to her is her postnuptial chose in action."

The other authority cited in *Ezell*, the *Dunn* opinion by the Illinois court, is one based on the construction of the intent of the Illinois Legislature in enacting a statute to change the common law. That opinion demonstrated that the Illinois Legislature intended that the cause of action for damages arising

out of personal injuries should become *property*. Moreover, contrary to *Ezell*, the Illinois court said that it was *the wife's property*:

Who is the natural owner of the right? Not the husband, because the injury did not accrue to him; it was wholly personal to the wife. It was her body that was bruised; it was she who suffered the agonizing mental and physical pain. 52 Ill. at 264.

Assuming that a chose in action arising out of a personal injury to a spouse is, or created, "property," the character of the "property" was personal to the one spouse injured at common law.

MCKAY, in his work on COMMUNITY PROPERTY cited above, says, at page 269, that in a personal injury, the right violated is to personal security; that no right is more intensely separate than this; and that the violator of this separate right gives rise to a separate cause of action. "This right belonged to the wife at common law, and so did the cause of action for its violation. There has never been any mistake about this in the common law authorities . . ."

Similarly under Spanish law, an injury to the wife gave rise to rights in *her*, for her separate estate, not to the community. . . .

* * *

It was also recognized at the time of the adoption of our various constitutions including that of 1876, that as to property which was exchanged for other property, and damages which were awarded to the separate property of a spouse, the recovery would be separate in character. *Love v. Robertson*, 7 Tex. 6 (1851); *Rose v. Houston*, 11 Tex. 324 (1854); *Chapman v. Allen*, 15 Tex. 278 (1855); *Cleveland v. Cole*, 65 Tex. 402 (1886); *San Antonio & A.P. Ry. Co. v. Flato*, 13 Tex. Civ. App. 214, 35 S.W. 859 (1896).

Under this line of authorities, able scholars have reasoned that the body of the wife brought into the marriage was peculiarly her own; and that if any "property" was involved in a personal injury to the wife, it was peculiarly hers. If her house, her separate property, were set afire and destroyed by a third person, the recovery should be her separate property. If an automobile were owned by the wife before marriage and was injured or destroyed, the recovery should go to repay the loss or damage to her separate property. So, the reasoning continues, if the arm of the wife is cut off, the recovery for the loss because of disfigurement and for the attendant pain and suffering should go to the wife. The reasoning is that the recovery is a replacement, in so far as practicable, and not the "acquisition" of an asset by the community estate. See Huie, *Definition of Wife's Separate Property*, 35 TEXAS LAW REVIEW 1054 at 1061 (1957); McKnight, *Personal Injury as Separate Property*, 3 TRIAL LAWYERS FORUM 7 (1968); McKnight, *Matrimonial Property*, 26 SOUTHWESTERN LAW JOURNAL 31 at 36 (1972); McSwain, *The New Marital Property Statutes*, 2 FAMILY LAW NEWSLETTER (STATE BAR OF TEXAS), number 3 (1968).

Other noted writers outside of Texas agree with Dean Green that the *Ezell* dictum and cases following it are incorrectly decided. Green, *The Texas Death Act*, 26 TEXAS LAW REVIEW 461 at 466 et seq.; MOYNIHAN, 2 AMERICAN LAW OF PROPERTY (1952) § 7.16; MCKAY, LAW OF COMMUNITY PROPERTY §§ 182, 184, and 378. In Section 398, MCKAY concludes,

But neither at common law or by the law of community does he [the husband] hold the wife's right to personal security and should not be permitted to recover for the violation of this right. It does not belong to him nor to the community. The wife's physical pain and suffering are not his loss nor the loss of the community.

In the light of the foregoing, it is our conclusion that, in adopting the provisions of Section 15 of Article 16 of our constitution, the people did not intend to change the common law or the Spanish law

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under which Texas operated so as to make a cause of action for injuries to the wife an asset of the community. A personal injury, and the chose in action created, was not “property” at common law as then understood, and it was not property “acquired” by any community effort. If it was “property” under the common law, the Spanish law, or the Texas law, its character was separate, or personal, to the wife. In using the word “property,” the framers of the constitution apparently had in mind property which could be given, bought and sold, and passed by will or by inheritance. A chose in action, or cause of action, arising out of injury to the wife was none of these. So, as stated, the dictum of *Ezell v. Dodson* was in error, and it still is. Granted our great reluctance to disapprove or overrule decisions in the field of property, or in the field of contracts upon which people deliberately rely, we consider it our particular duty to follow the constitution and to right the wrongs especially where the Legislature has felt strongly enough about it to take the action it has. This Court has, in the past, corrected the dictum of its previous decisions when the dictum was wrong. *Valmont Plantations v. State of Texas*, 163 Tex. 381, 355 S.W.2d 502 (1962). We have also overruled opinions where we regard them as erroneous. *Watkins v. Southcrest Baptist Church*, 399 S.W.2d 530 at 535 (Tex. 1966), and *Howle v. Camp Amon Carter*, 470 S.W.2d 629 at 630 (Tex. 1971). The dictum of *Ezell v. Dodson* is therefore overruled.

Most of the opinions of this Court dealing with injuries to the wife after *Ezell* were, like *Ezell*, concerned with procedural matters, mainly the question of who could or should, or should not, bring the suit. The merits of the question of the character of the recovery, whether separate or community, apparently were not re-examined. *Texas Central Ry. Co. v. Burnett*, 61 Tex. 638 (1884); *G.C. & S.F. Ry. v. Greenlee*, 62 Tex. 344 (1884); *Missouri Pacific Ry. Co. v. White*, 80 Tex. 202, 15 S.W. 808 (1891). These and other opinions are likewise overruled to the extent that they conflict with this opinion.

The Legislature in 1915 attempted to change the rule by a statute which was too broad. That statute was carried forward in the Revised Statutes of Texas of 1925 as Article 4615. It provided, in effect, that *all* recovery by the wife for personal injuries, except medical expenses, should be her separate property. This included loss of earnings which under common law and community property concepts at the time of the adoption of our constitution were community. The earnings of the spouses were funds acquired by the efforts of a spouse which have been considered part of the community of the spouses. That statute and the drafting of its successor are analyzed by Joseph W. McKnight in his article, *Personal Injury as Separate Property*, 3 TRIAL LAWYERS FORUM 7 (1968).

A court of civil appeals held that the above statute was unconstitutional. *Northern Texas Traction Co. v. Hill*, 297 S.W. 778 (Tex. Civ. App. 1927, writ refused). Because the statute classified all recovery, including personal earnings, to be separate, it was a correct decision as above indicated. But the court in the *Hill* case wrote too broadly and cited only the dictum of *Ezell v. Dodson* for its broad language. To the extent that the holding of the Northern Texas Traction Co. case conflicts with this opinion, it is overruled.

Our holding is that, independent of the statute involved, recovery for personal injuries to the body of the wife, including disfigurement and physical pain and suffering, past and future, is separate property of the wife. And, of course, a statute which provides that such recovery shall be the separate property of the wife is constitutional.

Recovery for Medical Expenses and Loss of Earning Capacity

Though there is room for a difference of opinion, our research indicates that the recovery for medical and related expenses is for the community. The reasoning has been that it is the burden of the community to pay these expenses. MOYNIHAN in 2 AMERICAN LAW OF COMMUNITY PROPERTY (1952) says at page 160:

Although it would on principle seem the sounder view that damages recovered for pain, suffering and bodily disfigurement are the separate property of the injured spouse, it does not follow that all elements of damage for personal injury are properly classified as separate property. Damages for impairment of earning capacity and consequential damages in the nature of medical, hospital and nursing expenses are properly recoverable for the community.

DE FUNIAK writes in Section 82 of PRINCIPLES OF COMMUNITY PROPERTY, that while recovery for injuries to the spouse should be separate, the rule is different for other elements of recovery:

But on the other hand, if injury deprives the marital community of the earnings or services of the spouse, that is an injury to the marital community; likewise there is loss to the community where the community funds are expended for hospital and medical expenses. . . .¹ If the wife is contributing earnings to the marital community, any injury interrupting or lowering those earnings is equally, as in the case of the husband, an injury to the community. . . .

He also states that:

The earning capacity, as such, would presumably be translated into earnings during the marriage, which would be community property.

To the extent that the marital partnership has incurred medical or other expenses and has lost wages, both spouses have been damaged by the injury to the spouse; and both spouses have a claim against the wrongdoer. The recovery, therefore, is community in character. This Court has held, however, that the wife could bring suit alone for medical services. *Few v. Charter Oak Fire Ins. Co.*, 463 S.W.2d 424 (1971).

Contributory Negligence of Husband

The Texas cases which have denied the wife a recovery for her personal injuries have for their basis the reasoning that, following *Ezell*, the recovery would be community property. Since the husband was negligent, he should not be permitted to recover for his own wrong; and since the husband shares in a recovery for the community property, there should be no recovery. Dean Page Keeton, in analyzing the holdings in the early cases, writes that, "it might be said that contributory negligence is a bar, not because it is unjust to hold the defendant but because it is unjust for the negligent plaintiff [the husband] to benefit from his own wrong." And "it is for this reason that the Texas courts . . . will not allow an injured spouse to recover for personal injuries, where the other spouse contributes to produce the injuries by negligent conduct." Keeton, *Imputed Contributory Negligence*, 13 TEXAS LAW REVIEW 161 at 177 and 179 (1935). This reasoning is spelled out in *Northern Texas Traction Co. v. Hill*, 297 S.W. 778 (Tex. Civ. App. 1927, writ refused) where the court pointed out that the husband had a "half interest" in the cause of action. Hence his contributory negligence would be a defense, "for to hold otherwise would be to allow him to recover regardless of his own negligence." 297 S.W. at 780.

In other situations, our decisions have not denied a wife to recover where the husband has been guilty of wrongdoing. Thus in *Nickerson v. Nickerson*, 65 Tex. 281 (1886), the husband and a third party had the wife wrongfully imprisoned. It was argued that she should not be permitted to recover from the third person because the recovery would be community, and hence the husband would profit from his own wrong. Before the case came to trial, there was a divorce. Contrary to the dictum of *Ezell* and in line with the other authorities cited above, this Court held:

¹ We do not have before us, and express no opinion upon a situation which might show that the medical expenses were paid from the separate funds of the injured spouse.

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... like other choses in action (for injuries to the person) not reduced to possession during the coverture, the sum recovered would be her separate estate. 65 Tex. at 283.

In any event, the reason for the rule that the negligence of the husband should be imputed to the wife (that he would profit from his own wrong) falls where the recovery for her injuries is her separate property. We have held that such recovery is her separate property, and the recovery will not be to him or the community. Therefore, the contributory negligence of the husband does not bar the recovery by the wife. Cases which have followed the dictum of *Ezell* and have used the community property defense (“imputed negligence”) are therefore wrong and should be overruled. Accordingly, the language in *Missouri Pacific Ry. Co. v. White*, 80 Tex. 202, 15 S.W. 808 (an adopted opinion by the Commission of Appeals, 1891), and the holding of *Dallas Railway & Terminal Company v. High*, 129 Tex. 219, 103 S.W.2d 735 (1937), and cases following them such as *Northern Texas Traction Co.* referred to above, are overruled in so far as they conflict with this opinion. In the case at bar, the only acts of contributory negligence pleaded, submitted, and found were those of Mr. Franco. Mrs. Franco is therefore not barred from those items for which she may recover, set out above.

Where, as in the case of medical expenses and lost earnings, the recovery would be community, the contributory negligence of the husband must be attributed to the marital community so far as affects any right of action on behalf of the marital community. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY (1971) § 83.

Other points are brought forward which include questions dealing with the admissibility of evidence dealing with contributory negligence, or not, of the husband in stopping his car upon the highway without proper lights burning. We have examined all the points, and we are in substantial agreement with their handling by the Court of Civil Appeals. They are overruled.

The opinion and judgment of the Court of Civil Appeals was that the part of the judgment of the trial court which denied a recovery to the husband was affirmed; but as to the wife, that court reversed the judgment of the trial court and remanded the cause for a new trial. The effect of the judgment of the Court of Civil Appeals was to sever the cause of action of the wife for such damages as she may be entitled to recover, but its judgment did not so provide. We order such a severance. Accordingly, the judgment of the Court of Civil Appeals is reformed to provide for a severance; and as reformed, it is affirmed.

Notes, Comments & Questions

1. Did *Graham v. Franco* change the law regarding characterization of personal injury damages?
2. Does *Graham v. Franco* skirt implied exclusion?
3. Note the discussion in *Graham v. Franco* of the respective doctrines of implied exclusion and of onerous title. How does the court limit the doctrine of implied exclusion? Consider these doctrines when reading the cases that follow such as *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977) and *Williams v. Williams*, 569 S.W.2d 867 (Tex. 1978), *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982), *infra*, and *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984), *infra*; all appear to be influenced by the doctrine of onerous title.
4. *Graham v. Franco* was followed in *Southwestern Bell Telephone Co. v. Thomas*, 554 S.W.2d 672 (Tex. 1977), where the trial court had rendered judgment for the plaintiffs, Mr. and Mrs. Thomas, for damages sustained when a car driven by Mr. Thomas in which Mrs. Thomas was a passenger had been struck from the rear by a truck owned by Southwestern Bell. The Court of Civil Appeals had

affirmed, but the Supreme Court reversed and remanded the case as to personal injuries of Mr. Thomas and as to past and future medical expenses of Mr. and Mrs. Thomas, because of the failure of the trial court to submit the issue of contributory negligence, and said:

Mrs. Thomas' recovery of damages for personal injuries is not barred by contributory negligence on Mr. Thomas's part. *Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972). Her claim for personal injuries is severed, and the judgments below are in that regard affirmed.

5. In *Schwing v. Bluebonnet Express, Inc.*, 489 S.W.2d 279 (Tex. 1973), the court held that in a wrongful death action for the death of a wife, contributory negligence of the husband would be imputed to bar the husband's cause of action, but that it would not serve as a bar to the cause of action of the children. Although the accident occurred in 1964, prior to enactment of the Matrimonial Property Act of 1967 and prior to the decision in *Graham v. Franco*, the court pointed out that the decision in *Franco* did not turn on provisions of the statute but rested on constitutional grounds.

6. The case of *Graham v. Franco* opened the door for personal injury actions and recoveries to be considered marital property, giving rise to a need to characterize as separate or community property. Other characterization of personal injury cases will be considered within Chapter 2.

7. In *Graham v. Franco*, were medical expenses characterized?

8. Identify other damages which might be recovered in a personal injury case. How might those damages be characterized?

WILLIAMS

v.

WILLIAMS

569 S.W.2d 867

(Tex. 1978)

McGEE, JUSTICE.

The question presented by this cause is whether a premarital agreement to waive the constitutional and statutory rights of a surviving spouse to a homestead and other exempt property is valid. The trial court held such an agreement to be valid. The court of civil appeals reversed the judgment. 548 S.W.2d 492. We reverse the judgment of the court of civil appeals and affirm that of the trial court.

William Wesley Williams, Sr., and Mildred Disch Lawrence were married on September 9, 1973. Both parties had children by previous marriages and both brought substantial property into this marriage. Four days before their marriage, the parties executed a premarital agreement. The basic agreement containing the provisions relative to the waiver of the homestead right and right to have exempt property set aside to the survivor provided:

"Whereas the parties desire that all property now owned or hereafter acquired by each of them shall, for testamentary disposition, be free from any claim of the other that may arise by reason of their contemplated marriage, "It is therefore agreed:

"1. Property to be separately owned. After the solemnization of the marriage between the parties, each of them shall separately retain all rights in his or her own property, whether now owned or hereafter acquired, and each of them shall have the absolute and unrestricted right to dispose of such separate property, free from any claim that may be made by the other by

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reason of their marriage, and with the same effect as if no marriage had been consummated between them.”

A supplemental agreement was simultaneously executed and incorporated into the basic agreement. It disclosed the properties that each spouse would bring into the marriage, set forth certain guidelines concerning living and other incidental expenses to be incurred during the marriage, and further provided:

“5. All income from the separate estate of each party, including dividends, interest, rents and salaries, and any increases, sales proceeds, reinvestments or changes in said separate estate, shall remain under control of the party receiving the same and shall be deposited in such party’s separate account. It is the intent of the parties that such income, except for the personal living expenses hereinabove set forth, shall remain the separate property of each party.”

The marriage lasted but 141 days. Shortly after the parties were married, Mr. Williams became ill and died on January 29, 1974. He died testate and his sole devisees were his children, William Wesley Williams, Jr. and Geneva W. Canion, who are the petitioners in this cause. Approximately one year after the death of their father, and relying on the executed premarital agreement, they requested possession of the residence, the household furnishings therein, and a 1971 Chrysler automobile. It is undisputed that the property sought had been the separate property of the deceased and had been devised to the petitioners. Mildred Williams refused to abide by the premarital agreement, choosing instead to claim her rights as a surviving spouse. TEX. CONST. art. XVI, § 52; TEX. PROB. CODE ANN. §§ 271, 272, 284 (1956).

As a result of Mrs. Williams’ refusal to vacate the property, the children filed this suit for declaratory judgment. The case was withdrawn from the jury and the trial court rendered judgment in favor of the children. The trial court held that the portion of the premarital agreement by which Mrs. Williams relinquished her constitutional and statutory rights to the homestead was valid and binding on her. The court then ruled that the agreement was void to the extent that it provided that income or other property acquired during marriage should be the separate property of the party who earned or whose property produced such income or acquisition. But the trial court held that the valid and void provisions of the agreement were severable and ordered that the children recover possession of the residence, all personal property belonging to their father at the time of his death, and the Chrysler automobile.

Article XVI, section 52 of the Texas Constitution provides that the homestead shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead.¹ This is sometimes referred to as the probate homestead. O. SPEER, TEXAS FAMILY LAW § 36:62, at 208 (5th ed. 1977). This homestead right of the survivor has been held to be one in the nature of a legal life estate or life estate created by operation of law. See *Sparks v. Robertson*, 203 S.W.2d 622 (Tex. Civ. App.—Austin 1947, writ ref’d); *White v. Blackman*, 168 S.W.2d 531 (Tex. Civ. App.—Texarkana 1942, writ ref’d w.o.m.); *Petrus v. Cage Bros.*, 128 S.W.2d 537 (Tex. Civ. App.—San Antonio 1939, writ ref’d); Comment, *The Widow’s Exemption in Texas*, 25 BAYLOR L. REV. 346, 347 (1973). The Probate Code

¹ TEX. CONST. art. XVI, § 52 reads as follows:

“On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same.”

requires that the probate homestead and certain exempt personal property² be set aside to the surviving spouse. TEX. PROB. CODE ANN. §§ 271, 272, 283, 284 (1956). These rights are provided by law for the protection of the family and to secure a home for the surviving spouse. Therefore, we must decide whether these rights may be waived by a premarital agreement.

The statutory authorization for premarital agreements in Texas is section 5.41 of the Family Code.³ This statute should be construed as broadly as possible in order to allow the parties as much flexibility to contract with respect to property or other rights incident to the marriage, provided the constitutional and statutory definitions of separate and community property or the requirements of public policy are not violated. *See generally* O. SPEER, TEXAS FAMILY LAW § 16:5, at 192 (5th ed. 1976); McKnight, *Commentary to the Texas Family Code*, Title 1, 5 TEX. TECH. L. REV. 281, 374-76 (1974).

Mrs. Williams argues that the policy of the law favoring the security of the widow by preventing an improvident relinquishment of the homestead, or other similar rights, is paramount to the policy of the law favoring flexibility in premarital agreements. Decisions from Kansas and North Dakota support this view. . . . The weight of authority and the better rule, however, allows the premarital waiver of these rights. . . . (cites omitted)

Furthermore, the premarital agreement in question does not violate the public policy of this state. The parties to the agreement were mature individuals. There was no suggestion of fraud, overreaching, or a lack of understanding. Full disclosure was made of the nature and extent of the property interests involved. Both parties had substantial separate property which they desired to preserve for themselves. There were no interests of any minor children to protect. Viewing this agreement in light of these facts and circumstances, as well as the underlying purpose of the transaction, we are of the opinion that neither party would be adversely affected by the premarital agreement.

Mrs. Williams also contends that article XVI, section 52 of the Texas Constitution, in effect, prohibits the premarital agreement now before us. This contention, however, is based on an incorrect interpretation of section 52. While a “surviving” spouse is granted the right to occupy the homestead by section 52, such language is not to be construed as a constitutional prohibition to a waiver of that right by prospective spouses. Therefore, we hold that Mrs. Williams waived her rights to the probate homestead and exempt property by the premarital agreement in question.

The trial court correctly concluded that the agreement was void to the extent that income or other property acquired during marriage should be the separate property of the party who earned or whose property produced such income or acquisition. Such provisions were no more than a mere agreement between the parties to establish the character of the property prior to its acquisition during marriage in violation of both the Texas Constitution and the Family Code, TEX. CONST. art. XVI, § 15; TEX. FAMILY CODE ANN. § 5.01 (1975); *see Gorman v. Gause*, 56 S.W.2d 855 (Tex. Comm’n App. 1933, jdmt. adopted); *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925); *Hilley v. Hilley*, 161 Tex. 569, 342 S.W.2d 565 (1961). Mrs. Williams contends that the entire agreement is vitiated by these void provisions. On the assumption that the provisions in question constituted part of the consideration for the agreement, she asserts that when a contract is based upon several considerations, one or

² TEX. REV. CIV. STAT. ANN. art. 3836 (Supp. 1976-77).

³ TEX. FAMILY CODE ANN. § 5.41 (1975) provides in pertinent part:

“(a) Before marriage, persons intending to marry may enter into a marital property agreement as they may desire.

“(b) The agreement must be in writing and subscribed by all the parties.”

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more of which is illegal, then the entire contract is void. *Edwards County v. Jennings*, 89 Tex. 618, 35 S.W. 1053 (1806); *Patrizi v. McAninch*, 153 Tex. 389, 269 S.W.2d 343 (1954). We disagree.

We are of the opinion that the agreement here is controlled instead by the rule that where the consideration for the agreement is valid, an agreement containing more than one promise is not necessarily rendered invalid by the illegality of one of the promises. In such a case, the invalid provisions may be severed and the valid portions of the agreement upheld provided the invalid provision does not constitute the main or essential purpose of the agreement. See *Wicks v. Comves*, 110 Tex. 532, 221 S.W. 938 (1920); *C.C. Slaughter Cattle Co. v. Potter County*, 235 S.W. 295 (Tex. Civ. App.—Amarillo 1921), *aff'd*, 254 S.W. 775 (Tex. Comm'n App.1923, jdmt. adopted); *cf. Smith v. Morton Independent School District*, 85 S.W.2d 853 (Tex. Civ. App.—Amarillo 1935, writ *dism'd*). See also 6A A. CORBIN, CONTRACTS § 1521 (1962); J. CALAMARI & J. PERILLO, CONTRACTS § 22-4 (2d ed. 1977); 17 AM. JUR. 2D, *Contracts* § 230 (1964). Mutual promises to marry, subsequently performed, provide valid consideration for the premarital agreement in question. The invalid provisions of the agreement are only a part of the many reciprocal promises in the agreement concerning the rights of the parties to the marriage. Moreover, they did not constitute the main or essential purpose of the agreement. Therefore, we hold that the trial court was correct in severing the invalid provisions from the premarital agreement and enforcing the valid provisions regarding Mrs. Williams' waiver of her rights as a surviving spouse to the homestead and other exempt property.

Accordingly, we reverse the judgment of the court of civil appeals and affirm that of the trial court.

CHADICK, JUSTICE, dissenting.

I respectfully dissent. I would affirm the judgment of the court of civil appeals.

On September 5, 1973, Mildred Disch Lawrence and William Wesley Williams, Sr. executed an antenuptial agreement. Four days later they were married. The antenuptial agreement was evidenced by two separately executed documents which the trial court correctly treated as a single contract. One agreement contained these provisions:

Whereas the parties desire that all property now owned or hereafter acquired by each of them shall, for testamentary disposition, be free from any claim of the other that may arise by reason of their contemplated marriage, It is therefore agreed:

1. Property to be separately owned. After the solemnization of the marriage between the parties, each of them shall separately retain all rights in his or her own property, whether now owned or hereafter acquired, and each of them shall have the absolute and unrestricted right to dispose of such separate property, free from any claim that may be made by the other by reason of their marriage, and with the same effect as if no marriage had been consummated between them.

The supplemental agreement listed the properties that each spouse would bring into the marriage and then provided:

5. All income from the separate estate of each party, including dividends, interest, rents and salaries, and any increases, sales proceeds, reinvestments or changes in said separate estate, shall remain under control of the party receiving the same and shall be deposited in such party's separate account. It is the intent of the parties that such income, except for the personal living expenses hereinabove set forth, shall remain the separate property of each party.

The trial court withdrew the case from the jury and rendered judgment. It declared, as recited in the judgment, that the contract was void insofar as it provided "that income or other property acquired

during marriage . . . should be the separate property of the party who earned or whose property produced such income or acquisition.” That, of course, was a correct decision, since the contractual provision violated section 15 of article XVI¹ of the Texas Constitution, as well as section 5.01 of the Texas Family Code.² *Hilley v. Hilley*, 161 Tex. 569, 342 S.W.2d 565 (1961); *Gorman v. Gause*, 56 S.W.2d 855 (Tex. Comm’n App.1933, jdmt. adopted); *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925).

The trial court ruled, however, that the part of the agreement which relinquished the constitutional and statutory right to the homestead was valid. It then concluded that the void and valid parts of the single contract were severable and that Mrs. Williams had relinquished her rights to the homestead.

I.

* * *

II.

The protection of a widow from creditors following her husband’s death finds its origins in the Spanish law. *Green v. Crow*, 17 Tex. 180, 184 (1856). The Third Congress of the Republic enacted the Exemption Act of 1839,³ 2 H. GAMMEL, LAWS OF TEXAS 125 (1898); HARTLEY’S DIGEST OF THE LAWS OF TEXAS, art. 1270, at 405-06 (1850), and the Seventh Congress in 1843 amended the probate law by requiring the judge of the probate court to set apart the exempt real and personal property in the husband’s estate “for the sole use and benefit of the widow and children of the deceased.” 2 H. GAMMEL, LAWS OF TEXAS 834 (1898). When the Republic joined the United States, Texas became the first state to incorporate into its fundamental law a provision protecting the homestead rights of the

¹ § 15. Separate and Community Property of Husband and Wife

All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of the wife; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband. . . .

² Section 5.01. Marital Property Characterized

(a) A spouse’s separate property consists of:

- (1) the property owned or claimed by the spouse before marriage;
- (2) the property acquired by the spouse during marriage by gift, devise, or descent; and
- (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.

(b) Community property consists of the property, other than separate property, acquired by either spouse during marriage.

³ AN ACT Entitled an act to exempt certain property therein named from execution.

Sec. 1. Be it enacted by the Senate and House of Representatives of the Republic of Texas in Congress assembled, That from and after the passage of this act, there shall be reserved to every citizen or head of a family in this Republic, free and independent of the power of a writ of fire facias, or other execution issuing from any court of competent jurisdiction whatever, fifty acres of land or one town lot, including his or her homestead, and improvements not exceeding five hundred dollars in value, all house hold and kitchen furniture, (provided it does not exceed in value two hundred dollars, all implements of husbandry,) (provided they shall not exceed fifty dollars in value,) all tools, apparatus and books belonging to the trade or profession of any citizen, five milk cows, one yoke of work oxen or one horse, twenty hogs, and one year’s provisions; and that all laws and parts of laws contravening or opposing the provisions of this act, be and the same are hereby repealed: Provided, The passage of this act shall not interfere with contracts between parties heretofore made. JOHN M. HANSFORD, Speaker of the House of Representatives. DAVID G. BURNET, President of the Senate. Approved, January 26, 1839. MIRABEAU B. LAMAR.

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family. W. NUNN, TEXAS HOMESTEAD AND OTHER EXEMPTIONS, § 3 (1931); Cole, *The Homestead Law in Texas*, 3 TEXAS L. REV. 217, 233 n. 74 (1925).

The first constitution of the State of Texas defined the homestead, freed it from forced sale, and then said “nor shall the owner, if a married man, be at liberty to alienate the same, unless by the consent of the wife, in such manner as the legislature may hereafter point out.”⁴ . . .

* * *

The homestead laws are designed to protect the stability and welfare of the state. *Andrews v. Security Nat'l Bank*, 121 Tex. 409, 50 S.W.2d 253, 256 (1932); *Black v. Rockmore*, 50 Tex. 88, 96 (1878); 2 G. THOMPSON, REAL PROPERTY, § 970 (2d ed. 1939). By protecting citizens against being driven from their homes, there is some measure of protection against their becoming dependent on the state for housing. Moreover, the protection of the home is intended to encourage citizens to contribute as productive members of society. TEX. CONST. ANN. art. XVI, § 50, comment (Vernon 1955); W. NUNN, TEXAS HOMESTEAD AND OTHER EXEMPTIONS, § 2 (1931); 2 G. THOMPSON, REAL PROPERTY, § 1970 (2d ed. 1939). The Constitution's protection of the family has been expanded by a judicial history of liberal construction which effectuates the homestead law's beneficial purpose, “in accord with the humane principles and wise governmental policy upon which all homestead laws rest.” *Woods v. Alvarado State Bank*, 118 Tex. 586, 19 S.W.2d 35, 38 (1929). The homestead law “is entitled to the most liberal construction for the accomplishment of its objects.” *Trawick v. Harris*, 8 Tex. 312, 316 (1852). See also *Andrews v. Security Nat'l Bank*, 121 Tex. 409, 50 S.W.2d 253, 256 (1932); *Hall v. Fields*, 81 Tex. 553, 17 S.W. 82 (1891); *Blum v. Gaines*, 57 Tex. 119, 121 (1882); *Black v. Rockmore*, 50 Tex. 88, 96 (1878); *Allison v. Brookshire*, 38 Tex. 199, 201 (1873); *Reconstruction Finance Corp. v. Burgess*, 155 S.W.2d 977, 980 (Tex. Civ. App.—Waco 1941, writ ref'd); *Panhandle Constr. Co. v. Head*, 134 S.W.2d 779, 781 (Tex. Civ. App.—Amarillo 1939, writ ref'd).

The answer to our problem, while found in the history and the purposes of the homestead, is apparent in the Constitution itself. Article XVI, section 52, of the Texas Constitution states that upon the death of the husband or wife, or both, the homestead descends and vests as other real property, but then adds a positive prohibition about partitioning under the circumstances of this case. These are the words of the Constitution, which control our decision:

but it (the homestead) shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same.

It may be argued that, there being no children born of this marriage, effect should be given the antenuptial agreement. In fact, some jurisdictions make the distinction and permit an antenuptial agreement to forego homestead if there are no children. See, e.g., *Zachman v. Zachman*, 201 Ill. 380, 66 N.E. 256 (1903). Those cases do not arise under a direct constitutional prohibition as we have in Texas. The Texas Constitution directly addresses both the situation in which there are children and the situation in which there are none. It treats the two identically, and specifically prohibits a partition in each instance. To permit the relinquishment in this instance should logically compel the same result when the survivor has children at home. It is the clarity of the constitutional provision, no doubt, which explains why this problem has not previously been presented to a Texas court.

⁴ TEX. CONST. art. VII, § 22 (1845).

Some states have considered whether a premarital agreement may operate to defeat a homestead, and there is a conflict between their decisions. The agreements have been held void in Arkansas, Kansas, North Dakota and Vermont. . . .

Other jurisdictions, including Arizona, Illinois, Iowa, Minnesota, and Oregon, have given effect to the antenuptial agreements.

When the Texas Constitution addresses a problem, as it has in the case of survivor's right to a homestead, precedents from other jurisdictions become immaterial and unpersuasive. But of the jurisdictions considering the question of validity, apparently only the Kansas courts contended with a similar constitutional homestead provision. KAN. CONST. art. XV, § 9. It has been held in Kansas that the probate homestead rights provided by the Kansas Constitution, KAN. CONST. art. XV, § 9, and statute, KAN. PROB. CODE ANN. § 59-401, are for the protection of the family. Those rights cannot be varied or avoided by an antenuptial contract which provides that, should the wife survive the husband, she is to have no part in his estate. *In re Neis' Estate*, 170 Kan. 254, 225 P.2d 110, 117-18 (1950); *In re Garden's Estate*, 158 Kan. 554, 148 P.2d 745, 753-54 (1944); *Boulls v. Boulls*, 137 Kan. 880, 22 P.2d 465, 467 (1933). The policy considered by the Kansas courts in holding void any antenuptial agreements to waive the probate homestead is consistent with the approach that Texas has taken on the protection of homestead rights. The constitutional basis for voiding such agreements is stronger in Texas because the probate homestead provision, TEX. CONST. art. XVI, § 52, specifically defines the right.

III.

Despite the constitutional protection that Texas has historically given the probate homestead, the majority holds that the right may be waived by antenuptial agreement. Even if that is true, nowhere in the present antenuptial agreement is the homestead right expressly mentioned or specifically waived. The agreement contains only the general language that each spouse's separate property shall be "free from any claim" by the other spouse that may arise as a result of the marriage. It must be in this general language, if at all, that the majority finds waiver of the homestead right.

It has been held that "contracts of the wife in restraint of her right to the homestead, made either in contemplation of marriage or after marriage, should be closely scrutinized." *McCormick v. McNeel*, 53 Tex. 15, 20 (1880).⁵ Because of the importance of the homestead right and the public policy that creates its agreements to abridge the right, if upheld, should be done so only if, after close examination, it is determined that the waiver is clear and explicit. "The right to a widow's . . . probate homestead cannot be waived by an ante-nuptial agreement not clear and explicit as to what rights were being waived." *Smith v. Tang*, 100 Ariz. 196, 412 P.2d 697, 704 (1966). The constitutionally protected home of a widow should not be taken away because of a generally worded antenuptial waiver. Moreover, contrary to the recitation in the majority opinion, there is nothing in this summary judgment record which shows that Mrs. Williams had full knowledge of the homestead right alleged to have been waived.

The antenuptial agreement in the present case fails to adequately identify the probate homestead or to clearly show that Mrs. Williams was waiving her right to it. Waiver should not be enforced against her.

I would affirm the judgment of the court of civil appeals.

⁵ In *McCormick* the widow elected to recover on a promissory note executed in consideration for an antenuptial deed relinquishing her homestead right and not to recover the homestead itself. The Court concluded that since the widow voluntarily elected to recover on the note at the trial, it would not interfere on her behalf to protect her homestead right.

STEAKLEY and POPE, JJ., join in this dissent.

Notes, Comments & Questions

1. After *Williams*, what appears to be the only provision which might be included in a premarital agreement?
2. What are the means by which spouses might change the character of property?
3. How about future spouses?
4. *Williams*, coupled with the desire of the general public, yielded an amendment to the Texas Constitution in 1980. Can you surmise what that amendment might be?
5. At the same time that the courts and the legislature were dealing with matters of marital property, the very atmosphere was changing with regard to the rights of women. The stage was set for some big changes, as evidenced by the passage of the Equal Rights Amendment.

The TEX. CONST. art. I, § 3a passed in 1972 provides as follows:

Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.

Although the Equal Rights Amendment does not deal specifically with the definition of separate property, its influence can be observed in the 1980 amendment to the Constitution in which separate property is no longer defined solely in terms of the wife; rather, it is defined in relation to both spouses.

The Equal Rights Amendment also influenced statutes. For example, TEX. FAM. CODE § 2.501 extended the duty to support to both spouses. *See also* TEX. FAM. CODE §§ 6.501, 6.502.

Case law has also embraced the Equal Rights Amendment beginning with dictum in *Felsenthal v. McMillan*, 493 S.W.2d 729 (Tex. 1973), indicates that if the question had been before the court in that case, the court would have recognized the existence of a cause of action by the wife for the tort of criminal conversation, corresponding to the husband's cause of action existing at common law. The tort of criminal conversation was abolished in Texas by legislation in 1975, when § 1.106 was added to the Family Code.

In *Vick v. Pioneer Oil Co.*, 569 S.W.2d 631 (Tex. Civ. App.—Amarillo 1978, no writ), the court held TEX. REV. CIV. STAT. ANN. art. 5172a § 4, providing overtime pay to women, to be unconstitutional under the Equal Rights Amendment. The court also found that the statute violated the Equal Employment Act, 42 U.S.C. § 2000e-2(a) because it favored one sex in employment practices.

Likewise, the Texas Equal Rights Amendment affected long held preferences that were based on gender in paternity and custody litigation. For example, In re *J.W.T.*, 872 S.W.2d 189 (Tex. 1994) established that a biological father has a constitutional right to establish paternity even though the mother and the presumed father—the husband—object. Also, the “tender years doctrine” which historically gave preference to a mother in custody litigation would be violative of the Equal Rights Amendment to the Texas Constitution. *See Dennis v. Smith*, 962 S.W.2d 67 (Tex. App.—Houston [1st Dist.] 1997, writ denied). *See also* the decisions recognizing the wife's derivative cause of action for loss of consortium, *Whittlesey v. Miller*, 572 S.W.2d 665 (Tex. 1978); *Reed Tool Co. v. Copelin*, 610 S.W.2d 736 (Tex. 1980); *Minyard Food Stores v. Newman*, 612 S.W.2d 198 (Tex. 1980).

In a related area of the law, the United States Supreme Court held in *Orr v. Orr*, 440 U.S. 268 (1979), that an Alabama statute which provided for the award of alimony to wives, but not to husbands, was unconstitutional. During that same year, the Texas Family Code was amended to authorize the award of temporary support during the pendency of divorce proceedings to husbands as well as wives.

It is clear that today's Supreme Court would hold unconstitutional, as a denial of equal protection, the Texas statutes as they existed prior to 1968, giving the husband sole management powers over the community property. See *Kirchberg v. Feenstra*, 450 U.S. 455 (1981). Presumably, the provisions of the present Family Code relating to management of community property would be held valid under the criteria applied in *Kirchberg*.

6. A review of the principles surrounding interspousal transfers is probably prudent at this point.

Either spouse may make a gift to the other spouse of his separate property or of his interest in community property. The property gifted becomes the separate property of the donee spouse. As to gifts of separate property, see *Bishop v. Bishop*, 359 S.W.2d 869 (Tex. 1962); *Dyer v. Dyer*, 616 S.W.2d 663 (Tex. Civ. App.—Corpus Christi 1981, writ dismissed). As to gifts of community property, see *Story v. Marshall*, 24 Tex. 306 (1859); *Parson v. United States*, 460 F.2d 228 (5th Cir. 1972); *Wyly v. Commissioner*, 610 F.2d 1282 (5th Cir. 1980). See also TEX. CONST. art. XVI § 15 as it exists today.

Whether a gift has been made is a question of fact to be answered by the fact finder, be it judge or jury. The facts must support that a gift has been made. See *Bishop v. Bishop*, 359 S.W.2d 869 (Tex. 1963); *Daubert v. United States*, 533 F. Supp. 66 (U.S.D.C., W.D. Tex. 1981); *Akin v. Akin*, 649 S.W.2d 700 (Tex. App.—Fort Worth 1983, writ refused n.r.e.).

Moreover, while property purchased by the community estate from the separate estate of a spouse for a valuable consideration is community property, it is not possible for a gift to be made to the community estate, because of the constitutional definition. *Kellett v. Trice*, 66 S.W. 51 (Tex. 1902); *Tittle v. Tittle*, 220 S.W.2d 637 (Tex. 1949); *McLemore v. McLemore*, 641 S.W.2d 395 (Tex. App.—Tyler 1982, no writ).

7. The issue of gifts led probate attorneys to be concerned about the 1948 version of TEX. CONST. art. XVI, § 15. Under the 1948 amendment, if a spouse gifted to the other spouse an income producing asset, the income produced was characterized as community property by operation of Texas law. Accordingly, the gifting spouse retained an interest in that community income, even though the underlying asset was now the other spouse's separate property.

The Commissioner of Internal Revenue, citing 26 U.S.C. § 2036 (a)(1) and abandoning 30 years of practice based on the dicta found in *Commissioner v. Estate of Hinds*, 180 F.2d 930 (5th Cir. 1950), took the position that the donor spouse had retained an interest in the gifted property and that half of the gifted asset and half of the income should be reported in the donor spouse's estate tax return. The Commissioner's position was tested in *Estate of Wyly v. Commissioner*, 610 F.2d 1282 (5th Cir. 1980). The Commissioner failed. The Fifth Circuit, Justice Garza writing for the majority, explained:

. . . it is our conclusion that § 2036(a)(1) does not sweep the value of these transfers into the donor's gross estate. To summarize our review of federal and state law, we have held that the donor's community property interest in the income produced by these transferred properties is so limited, contingent, and expectant that it does not amount to a "right to the income," within the Act as defined by *United States v. Byrum*, *supra*. The interest is neither "significant," or "substantial" as the Supreme Court and this Court have called for in *United States v. Estate of Grace* and *In Re Estate of Lumpkin*, *supra*, and is therefore not subject to estate tax under this

section. We have further held that the interest arises Only by operation of a mandatory definition contained in the Texas constitution which spouses may not circumvent, and that thus it is neither “retained” within the meaning of the Act, nor arisen “under” the transfers concerned.

8. The position that the Commissioner was taking in *Wyly* concerned probate attorneys who had planned numerous estates with the idea of eliminating assets from one spouse’s estate by gifting them to the other. The probate bar did not wait for *Wyly* to be decided. Rather, they supported a constitutional amendment, approved by the voters, and which is now found in the 1980 amendment. Can you identify that portion of the amendment in the current TEX. CONST. art. XVI, §15?

D. The Constitution as Amended in 1980, 1987 and 1999

1. The Current Constitutional Provision

The current version of TEX. CONST. art. XVI, § 15 is set forth below. The numbers within brackets are not found in the official version and have been added so each of the clauses may be easily referenced.

TEX. CONST. art. XVI, § 15. Separate and Community Property of Husband and Wife.

[1] All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; [2] and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property, provided that persons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any other community property then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse; [3] and the spouses may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned by one of them, or which thereafter might be acquired, shall be the separate property of that spouse; [4] and if one spouse makes a gift of property to the other that gift is presumed to include all the income or property which might arise from that gift of property; [5] and spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse; [6] and spouses may agree in writing that all or part of the separate property owned by either or both of them shall be the spouses’ community property.

Clauses 1-4, as amended Nov. 4, 1980, effective November 25, 1980. Clause 5 passed by voters on November 3, 1987, effective January 1, 1988. Clause 6 passed by voters of November 2, 1999, effective January 1, 2000.

Mastery of this constitutional provision, knowing how and when it is applied, is basic to understanding and successfully completing the study of Texas marital property law. For a deeper under-

standing of Texas Marital property law, this version of TEX. CONST. art. XVI, § 15 should be compared and contrasted to previous versions. The clauses are analyzed below.

Clause 1 - Separate Property Defined.

The first clause does nothing more than reiterate the definition of separate property that has been Texas law since before the Civil War. Today, however, the gender neutral term spouse, rather than wife, is used. As before, it is provided that all property owned or claimed before marriage or that acquired afterward by gift, devise or descent is the separate property of the owning or claiming spouse. Since 1866 the legislature has had the power to pass laws more clearly defining those rights - this would include rights of management and liability. *See Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925). The remaining clauses give to the spouses, and in some instances future spouses, the expanded power to change the character of property.

Clause 2 - Partition and Exchange Extended to Spouses & Future Spouses.

The second clause provides that spouses and future spouses may partition *or* exchange their property that is existing or that will be acquired in the future; the property partitioned or exchanged will become the separate property of the spouses. This second clause extends to future spouses and to property to be acquired in the future. Is this a change from the 1948 version that allowed partition or exchange of property? How so?

This clause allows for a partition and exchange to take place prior to the marriage. It is not enough that those about to marry, future spouses, merely agree that their property will be separate property, there must be an actual partition or exchange.

For example, if one spouse or future spouse has a separate property bank account that earns interest (community property) and the other has a separate property stock account that throws off dividends (community property), they may keep the rights in and to those accounts plus all interest or dividends separate *if* there is an exchange of such rights with the other spouse or future spouse. There is no requirement that the exchange be equal. However, if the future spouses had merely agreed (not exchanged) that all increases would be and remain the owning spouse's separate property, it is unlikely that such would withstand a constitutional challenge.

Spouses and future spouses may even exchange rights in and to their salaries so that their respective salaries become their separate property.

A partition is generally used when there is existing property or an identifiable account and the parties partition it into equal undivided interests or into specifically described portions.

This second clause of the constitution can only be utilized if there is no intent to defraud pre-existing creditors. If future spouses or spouses have pre-existing creditors and make an exchange or partition with the intent to defraud such creditors, the agreement will come into question and may be held ineffective. Is this a change from the 1948 version?

Clause 3 - Agreements are Limited to Spouses and Income Producing Property.

The third clause provides that *spouses* may from time to time, by written instrument, agree between themselves that the income from property from all or part of the separate property then owned or which thereafter might be acquired by one of them, shall be the separate property of the owning spouse.

This clause allows the spouses to merely agree; this clause does not allow future spouses to simply agree. Only spouses can agree and they can only agree that *property or income arising from their*

separate property might be and remain their separate property. For example, under this clause spouses can agree that rental income from a separate property rent house be and remain the owning spouse's separate property. Likewise, spouses can agree that dividends paid on separately owned stock will be and remain the owning spouse's separate property. Spouses cannot merely agree that their salary will be separate property, because such would not arise from separately owned property. Thus, if a spouse happens to be an attorney at a mega law firm, or a doctor employed by their own closely held corporation, the spouses cannot simply agree that their salary will be separate property. Why? Because salary is not income that arises from separate property.

In order to make separate property earned income separate, one must go back to the preceding clause 2 which requires a partition or an exchange. This is a very tricky and often overlooked limitation. Knowing what you know about the strict interpretation of the constitution, what would be the effect of a mere agreement that salary would be and remain a spouse's separate property?

To reiterate, future spouse's can only partition or exchange. This interpretation was accepted in *Fanning v. Fanning*, 828 S.W. 2d 135 (Tex. App.—Waco 1992), *aff'd. in part, rev'd. in part*, 846 S.W. 2d 225 (Tex. 1993). In *Fanning* the Waco court recognized that “the 1980 amendment did not authorize persons intending to marry to enter into agreements that the income from one spouse's separate property would thereafter be the owner's separate property. Therefore, we hold the trial court correctly concluded that paragraph 6.01 of the premarital agreement was unenforceable to the extent that the parties merely agreed that ‘as soon as legally possible all income from their respective separate estates shall be the separate property of the spouse from whose estate such income is derived.’” *Id.* at 141.

Because the Texas Constitution remains the ultimate authority on the character of marital property a premarital agreement entered into cannot violate the constitutional definition of separate and community property and any attempt to change the character of property must be done in accordance with the Texas Constitution. That is, partitions or exchanges must be used by future spouses to change the character of any property (i.e., income from separate property, salary) from community to separate. Spouses must also use partition or exchange to change the community character of property, other than that community income that arises from a spouse's separate property which can be converted from community to separate by mere agreement. Some courts have been quite liberal in their interpretations of agreements, concluding that parties about to be married may agree to exchange their community property interests and thereby maintain as separate property future income from separate property and earnings acquired during the marriage. *See, e.g., Dokmanovic v. Schwarz*, 880 S.W.2d 272, 273-76 (Tex. App.—Houston [14th Dist.] 1994, no writ); *Winger v. Pianka*, 831 S.W.2d 853, 858 (Tex. App.—Austin 1992, writ denied); *see also Calmes v. United States*, 926 F.Supp 582, 586-88 (N.D. Tex.)(applying Texas law). Accordingly, it appears that exchanges have, to some extent, been inferred.

Clause 4 - Income Follows a Gift Between Spouses.

Clause 4 provides that if one spouse makes a gift of property to the other, that gift is presumed to include all the income or property which might arise from that gifted property. This clause is often referred to as the *Wyly* Amendment. *See* discussion *supra* at page 52, note 7.

This reference arises from *Estate of Wyly v. Commissioner*, 610 F.2d 1282 (5th Cir. 1980). *Wyly* arose when the Commissioner of Internal Revenue reversed a position held for more than twenty-five years and attempted to levy taxes on income-producing property conveyed from one spouse to the other. Although such conveyance was a gift, by operation of Texas law the gifting spouse retained an interest in the income arising from that property; accordingly, the Commissioner wanted to tax the gifting spouse.

In order to avoid this result, the Texas Constitution was amended and Clause 4 was enacted. However, it should be noted, that the Fifth Circuit ultimately held that the act does not automatically render some portion of value of property gifted by a Texas spouse to the other included in the giving spouse's gross estate. The problem was solved by clause 4 and by the Fifth Circuit; today, income from a gift between spouses follows the gift. This applies only to gifts between spouses, not gifts from third parties.

Clause 5 - Spouses Can Establish Rights of Survivorship in Community Property.

Clause 5 provides that spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse. This clause was not effective until 1988, hopefully it did away with the many problems that arose when spouses attempted to establish a joint tenancy with a right of survivorship in property such as community bank accounts. It is assumed that this clause will eliminate the results of *Hilley v. Hilley*, 342 S.W.2d 565 (Tex. 1949); *Williams v. McKnight*, 402 S.W.2d 505 (Tex. 1966); *Jameson v. Bain*, 693 S.W.2d 676 (Tex. App.—San Antonio 1985, no writ). Joint tenancies with rights of survivorship had been regularly “shot down” because the parties failed to first partition the property into separate property. Now spouses can agree that the community property will be the separate property of the surviving spouse.

Clause 6 - Only Spouses Can Convert Separate Property to Community.

Clause 6, effective January 1, 2000, provides that spouses may agree in writing that all or part of the separate property owned by either or both of them shall be the spouses' community property.

This clause, a long time in coming, was pushed more by the probate bar than the family law bar; it is recognized as an excellent estate planning tool. For example, a monied spouse by very specific agreement, could transform their separate property into the couple's community property. Upon doing so, half of the monied spouse's estate would be removed from the estate's value upon the death of the monied spouse.

Although this clause aids in estate planning, it can yield big problems for the family law attorney. Once separate property is transformed into community property, a divorce court has the absolute right to make a just and right division. The spouse that had previously owned the separate property could, theoretically, be divested of the entirety of what had at one time been separate property. If the property had remained separate, a trial court would not be able to divest the owning spouse of their separate property. *Eggemeyer v. Eggemeyer*, 554 S.W. 2d 137 (Tex. 1997). While this is an incredible estate planning tool, divorce lawyers should be concerned that a meek property-owning spouse could be left to the mercy of a manipulative and stronger spouse, thereby giving the more powerful spouse the right to acquire the less powerful spouse's separate estate.

2. Statutes Control Enforcement of Pre- and Post-Marital Agreements

The Uniform Premarital Agreement Act which governs premarital agreements is found at TEX. FAM. CODE §§ 4.001-.010. The most important thing to remember is that the Texas Constitution, though not referenced in the statute, does reign supreme when it comes to the enforcement of premarital agreements. Marital property agreements, also called post-marital agreements, are governed by TEX. FAM. CODE §§ 4.101-.106. The enforcement provisions governing of pre and post-marital agreements are identical.

A premarital and post marital property agreement is not enforceable if the party against whom enforcement is sought proves that:

* * *

- (1) the party did not sign the agreement voluntarily; or
- (2) the agreement was unconscionable when it was signed and, before signing the agreement, that party:
 - (A) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
 - (B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other property beyond the disclosure provided; and
 - (C) did not have or reasonably could not have had adequate knowledge of the property or financial obligations of the other party.

* * *

These enforcement provisions found at TEX. FAM. CODE 4.006 and 4.105 do not encompass agreements which have as their purpose changing separate property into community property. However, all other marital property agreements are held to this standard.

One of the most important things to note is that the fair and reasonable disclosure regarding the property and liabilities of the parties must be given *before* the signing of the agreement. Accordingly, when any pre or post-marital agreement is drafted, a separate disclosure document should be drafted and a time of signing, which precedes the signing of the pre- or post-marital agreement, should be established. In addition, the statute specifies that unconscionability is to be decided by the court and the remedies and defenses provided in the statutes are exclusive. This exclusivity prohibits the use of common law defenses as was recognized, albeit prematurely, in *Daniel v. Daniel*, 779 S.W.2d 110 (Tex. App.—Houston [1st Dist.] 1989, no writ). Nonetheless, as we will see in *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686, (Tex. App.—Austin 2005, pet. denied), common law defenses are probably subsumed in the determination of whether a party signed an agreement voluntarily.

3. Enforcement of Agreements to Convert Separate Property to Community Property.

As with pre and post-marital agreements, the agreements to convert separate property into community property must be in writing and signed by the spouses. The property to be converted must be specifically identified and it must specify that the properties are being converted to the spouses' community property. The mere transfer of the spouse's separate property to the name of the other spouse or to the name of both spouses is not sufficient to convert the property to community property. TEX. FAM. CODE § 4.203.

The enforcement provisions for the agreements to convert are set forth in TEX. FAM. CODE § 4.205. As with pre and post-marital agreements, an agreement is not enforceable if the spouse against whom enforcement is sought proves that the spouse did not execute the agreement voluntarily. It is also unenforceable if proven that they did not receive a fair and reasonable disclosure of the legal effect of converting the property to community property.

The code does provide that an agreement which contains a statutorily provided statement or substantially similar words prominently displayed in bold face type, capital letters, or underlined, is rebuttably presumed to provide a fair and reasonable disclosure of the legal effect of converting property to community. The statute provides the language which will yield the rebuttable presumption, as follows:

“THIS INSTRUMENT CHANGES SEPARATE PROPERTY TO COMMUNITY PROPERTY. THIS MAY HAVE ADVERSE CONSEQUENCES DURING MARRIAGE

AND ON TERMINATION OF THE MARRIAGE BY DEATH OR DIVORCE. FOR EXAMPLE:

“EXPOSURE TO CREDITORS. IF YOU SIGN THIS AGREEMENT, ALL OR PART OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY PROPERTY MAY BECOME SUBJECT TO THE LIABILITIES OF YOUR SPOUSE. IF YOU DO NOT SIGN THIS AGREEMENT, YOUR SEPARATE PROPERTY IS GENERALLY NOT SUBJECT TO THE LIABILITIES OF YOUR SPOUSE UNLESS YOU ARE PERSONALLY LIABLE UNDER ANOTHER RULE OF LAW.

“LOSS OF MANAGEMENT RIGHTS. IF YOU SIGN THIS AGREEMENT, ALL OR PART OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY PROPERTY MAY BECOME SUBJECT TO EITHER THE JOINT MANAGEMENT, CONTROL, AND DISPOSITION OF YOU AND YOUR SPOUSE OR THE SOLE MANAGEMENT, CONTROL, AND DISPOSITION OF YOUR SPOUSE ALONE. IN THAT EVENT, YOU WILL LOSE YOUR MANAGEMENT RIGHTS OVER THE PROPERTY. IF YOU DO NOT SIGN THIS AGREEMENT, YOU WILL GENERALLY RETAIN THOSE RIGHTS.

“LOSS OF PROPERTY OWNERSHIP. IF YOU SIGN THIS AGREEMENT AND YOUR MARRIAGE IS SUBSEQUENTLY TERMINATED BY DEATH OF EITHER SPOUSE OR BY A DIVORCE, ALL OR PART OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY MAY BECOME THE SOLE PROPERTY OF YOUR SPOUSE OR YOUR SPOUSE’S HEIRS. IF YOU DO NOT SIGN THIS AGREEMENT, YOU GENERALLY CANNOT BE DEPRIVED OF OWNERSHIP OF YOUR SEPARATE PROPERTY ON TERMINATION OF YOUR MARRIAGE, WHETHER BY DEATH OR DIVORCE.”

TEX. FAM. CODE § 4.204(b).

This section of the Family Code also provides that if a proceeding regarding enforcement of an agreement which converts separate property to community property occurs after the death of the spouse against whom enforcement is sought, the proof required by subsection A, that being the rebuttable presumption to provide and fair and reasonable disclosure, may be established by an heir of the spouse or personal representative of the estate of that spouse.

4. Statutes and Decisions 1980 to Present

As you read the first five cases in this section, realize that these cases were decided prior to the recodification of the Texas Family Code. Make sure that you can identify, by number, the current, applicable statutes.

BRADLEY
v.
BRADLEY
725 S.W.2d 503
(Tex. App.—Corpus Christi 1987, no writ)

UTTER, JUSTICE.

This is an appeal from a decree of divorce in which the trial court held that “no community property other than personal effects has been accumulated by the parties.” We reverse the judgment of the trial court and remand for a new trial.

The parties were married on July 31, 1982 and were divorced on July 9, 1986. On July 26, 1982, prior to their marriage, appellant and appellee entered into a prenuptial agreement. During the marriage, appellant was not gainfully employed outside the home, and appellee’s income was derived from his medical practice.

In interpreting the prenuptial agreement, the trial court found that “the separate property of each of the parties as well as the revenues, increases, and income from such separate property, and from the respective personal efforts of each party belongs to that party.” The trial court obviously considered appellee’s income as being derived from appellee’s personal efforts and concluded that such income was appellee’s separate property.

By her second point of error, appellant contends that the trial court erred in determining that the prenuptial agreement operated to convert appellee’s income from personal earnings into his separate property.

Paragraph 2, entitled “Stipulations of Parties,” provides that “the general purpose and intent of the parties” is:

- (a) that VICTOR and MARGARET will each continue to own and to manage his or her separate property,
- (b) that all revenues, increases, and income from such separate property, and from their respective personal efforts will be subject to the sole management and control of the party whose separate property or personal efforts generated such revenues or income,
- (c) that the parties will do any and all things necessary in order to establish or preserve the separate character of all revenues, increases, and income from such separate property, and from their respective personal efforts,

Section (b) merely restates TEX. FAM. CODE ANN. § 5.22 (Vernon 1975). Section (c) sets out the parties’ intent to preserve the “separate property character” of “their respective personal efforts.” However, the “respective personal efforts” do not acquire separate property character until they have partitioned and exchanged their respective community property interests in the income from each other’s personal efforts.

Paragraph 7 of the agreement, entitled “Annual Partition and/or Exchange of the Community Estate, Pursuant to Section 5.42 of the Texas Family Code,” provides:

that on or before the 15th day of April of each year during the existence of this marriage, VICTOR and MARGARET will fairly and reasonably partition (and/or exchange) in writing