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NOTES

The Constitutionality of Article 4615 — Personal Injury Recovery as Separate Property

In 1915 the Texas Legislature enacted article 4615, which characterized the personal injury recovery of a married woman as her separate property.¹ In 1927 the statute was declared unconstitutional.² In 1967 article 4615 was revised, again characterizing a spouse's recovery for personal injuries as separate property, but specifically excepting that portion of the recovery attributable to loss of earning capacity during marriage.³ The statute was re-enacted as section 5.01(a)(3) of the Family Code.⁴ This Note will examine the problem presented by this statute and analyze the most recent Texas cases dealing with its constitutionality.

I. SEPARATE PROPERTY IN TEXAS

In Texas separate property is defined by the Texas Constitution: "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 . . ."⁵ Community property is, therefore, defined by exclusion. That property which is not the separate property of either spouse is community.⁶ As early as 1925 the Texas Supreme Court held in *Arnold v. Leonard*⁷ that the legislature cannot alter the constitutional definition of separate property.⁸ In that case the constitutionality of a statute which characterized the rents and revenues from the wife's separate estate as her separate property was questioned. The court struck down the statute as violative of the constitutional definition of separate property. The constitutional definition was said to be the "sole measure" of the wife's separate estate.⁹ Therefore, the legislature was prohibited from saying that property acquired during marriage in any way other than by "gift, devise, or descent" may also become part of the wife's separate estate. It is upon this reasoning that Texas courts have traditionally held recoveries for personal injuries—a property right not mentioned in the constitutional definition—to be community property.¹⁰

¹ Act of Feb. 5, 1915, ch. 54, § 1, [1915] Tex. Laws 103.

² *Northern Texas Traction Co. v. Hill*, 297 S.W. 778 (Tex. Civ. App.—El Paso 1927), *error ref.*

³ Act of May 27, 1967, ch. 309, § 1, [1967] Tex. Laws 736, *re-enacted by* Act of May 14, 1970, ch. 888, § 6, [1970] Tex. Laws 2733; *see* TEX. FAM. CODE ANN. tit. 1, § 5.01(a)(3) (1970). Article 4615 was thus repealed because of its incorporation into the new Family Code which provides: "A spouse's separate property consists of: . . . (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage."

⁴ TEX. FAM. CODE ANN. tit. 1, § 5.01(a)(3) (1970).

⁵ TEX. CONST. art. XVI, § 15.

⁶ TEX. FAM. CODE ANN. tit. 1, § 5.01(b) (1970).

⁷ 114 Tex. 535, 273 S.W. 799 (1925).

⁸ *Id.*

⁹ *Id.* at 539, 273 S.W. at 801.

¹⁰ *See, e.g., Taylor v. Catalon*, 155 S.W.2d 965 (Tex. Civ. App.—Galveston 1941), *error ref.*; *Northern Texas Traction Co. v. Hill*, 297 S.W. 778 (Tex. Civ. App.—El Paso 1927), *error ref.*

II. JUDICIAL EXPANSION OF THE CONCEPT OF SEPARATE PROPERTY

With the enactment of article 4615 the Texas Legislature characterized personal injury recoveries as the separate property of the injured spouse. This early reform evidently was not tested in the appellate courts prior to the recodification of the statute in 1925. This statute provided that "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 other expenses incident to the collection of said compensation."¹¹ In 1927 the statute was held unconstitutional in *Northern Texas Traction Co. v. Hill*.¹² In *Hill* the husband had been driving the family automobile with the wife as passenger, and a collision with a negligent third party occurred. The wife argued that she should be able to recover from the third party since the new statute made personal injury recoveries separate property. Therefore, she argued, the husband's contributory negligence should not bar her recovery. The court disagreed, held the statute unconstitutional, and held that the husband's contributory negligence was a bar to the wife's recovery. The court cited *Arnold* as authority for its decision.

In several cases the Texas courts have permitted separate property recoveries for personal wrongs apparently in contradiction to the reasoning of *Arnold* and *Hill*. In *Nickerson v. Nickerson*¹³ the damages for personal injuries inflicted by the husband and a third party upon the wife were held to be the separate property of the wife. The injury occurred during the marriage, but the wife brought suit after a divorce. The court dismissed the wife's action against her husband, but as to the third party the wife was successful. The court reasoned that such property could not be community property since to hold otherwise would be to allow the guilty husband to benefit from his own wrong.¹⁴

In *Dickson v. Strickland*¹⁵ it was contended that "Ma" Ferguson was not eligible to hold office as Governor of Texas because her husband had been removed from that office by impeachment. One argument was that her salary as Governor would be the community property of her marriage in which her husband would share. Relying on *Nickerson*, the court curiously stated that if the husband had deprived himself of any right to share in the salary by his own wrong, the salary would necessarily be his wife's separate property. In further support of this line of reasoning are the alienation of affections cases. In *Norris v. Stoneham*¹⁶ the wife instituted an action for alienation of affections while she was still married, and not in contemplation of divorce. Her recovery was held to be her separate property. Similarly, in *Lisle v. Lynch*¹⁷ the husband brought an action for alienation of affections and for criminal conversation.

¹¹ An Act to Adopt and Establish the "Revised Civil Statutes of the State of Texas," § 1, tit. 75, ch. 3, art. 4615, [1925] Tex. Rev. Civ. Stat. 1266.

¹² 297 S.W. 778 (Tex. Civ. App.—El Paso 1927), *error ref.*

¹³ 65 Tex. 281 (1886).

¹⁴ *Id.* at 284-86.

¹⁵ 114 Tex. 176, 265 S.W. 1012 (1924).

¹⁶ 46 S.W.2d 363 (Tex. Civ. App.—Eastland 1932).

¹⁷ 318 S.W.2d 763 (Tex. Civ. App.—Fort Worth 1958), *error ref. n.r.e.*

Unlike the suit in *Norris*, the action was brought subsequent to the divorce of the plaintiff and his wife. The court held that the husband's recovery would be his separate property. The court cited *Nickerson* and *Norris* with approval.¹⁸ *Nickerson* was also relied on in *Wright v. Tipton*,¹⁹ in which a wife was permitted recovery in her own right on a liquor dealer's bond which obligated the dealer to refrain from selling liquor to a husband after receiving written notice from the wife through a peace officer.

As these cases illustrate, the Texas courts have designated some recoveries for personal injuries and similar wrongs as the separate property of the injured or wronged spouse. These holdings seem difficult to square with the strict construction of the Texas Constitution in *Arnold* and *Hill*.

III. THE ADVENT OF ARTICLE 4615

On January 1, 1968, an amended article 4615 became effective. The statute provided that "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."²⁰ This statute, on its face, appears strikingly similar to the one struck down in *Hill*. The same arguments used in *Hill* would appear to be equally applicable to the amended article. Thus, the constitutionality of article 4615 is questionable. However, differences between the two statutes exist that are of importance in any comparison for the purpose of determining constitutionality. The statute in *Hill* dealt only with the wife, while the new statute applies both to husbands and wives. Another difference is that the statute in *Hill* applied to *all* the elements of personal injury recovery, while the new statute applies only to that portion of the recovery for personal injuries which is not in satisfaction of loss of earning capacity during marriage.

One argument for the constitutionality of the new statute is based upon the long-recognized mutation theory. Whenever a chattel is brought into the marriage by either spouse it is his or her separate property.²¹ A money judgment for damages to that separate property constitutes a separate recovery, since the recovery is viewed as a mere mutation of that for which it is theoretically compensating.²² It may be cogently argued that each spouse enters the marriage relation with his or her physical body and mental well-being as his or her separate property. Therefore, any recovery from subsequent damage to these particulars would be a mutation of that loss for which the recovery compensates.

Since Texas courts have "expanded" the definition of separate property by more precisely delineating the characterization suggested by the constitution,²³ it is submitted that this tendency ought to continue so as to bring the recovery dealt with in article 4615 within the scope of separate property.²⁴ If the Texas

¹⁸ *Id.* at 765.

¹⁹ 92 Tex. 168, 46 S.W. 629 (1898).

²⁰ Ch. 309, § 1, [1967] Tex. Laws 736.

²¹ TEX. CONST. art. XVI, § 15.

²² *Farrow v. Farrow*, 238 S.W.2d 255 (Tex. Civ. App.—Austin 1951).

²³ See text accompanying notes 13-19 *supra*.

²⁴ In *Few v. Charter Oak Fire Ins. Co.*, 463 S.W.2d 424 (Tex. 1971), the court ob-

courts construe the statute as one which more clearly defines separate property as opposed to one which changes the definition of separate property, the mutation argument would appear to be the best line of reasoning on which the courts can rely to declare the statute constitutional.

IV. TWO RECENT TEXAS CASES UNDER ARTICLE 4615

In *Franco v. Graham*²⁵ the husband and wife were injured in an automobile accident in which the husband was contributorily negligent and the wife was free from fault. The Texas Court of Civil Appeals at Corpus Christi did not question the constitutionality of article 4615, and held that the husband's contributory negligence would not bar the wife's recovery from the negligent third party. In dealing with the argument posed by *Northern Texas Traction Co. v. Hill*,²⁶ the court first pointed out the differences in the two versions of the statute. The court found it important that the new statute excluded loss of earning capacity during marriage—an interest which has always been considered community in character. Countering the argument that the new statute changed the constitutional definition of community property, the court said that it "left undisturbed the definition of community property as set out in our Constitution, but more clearly defined a certain segment of property as being the separate property of the injured spouse."²⁷ Implicitly relying upon the mutation theory, the court said that there is no difference between the situation in which a spouse brings a chattel to the marriage, and the situation in which the spouse brings his or her body to the marriage.²⁸ Injuries to one or both should properly permit separate recovery. Thus, the court held that the recovery envisioned by article 4615 did not change the definitions of com-

served that arts. 4621 and 4626 as amended by the 60th Legislature did not disturb the definition of community property, but more clearly defined the management rights of each spouse.

Art. 4621. *Powers of management, control and disposition*

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. *Suits*

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.

These articles were enacted with art. 4615 and incorporated into the new Family Code. See TEX. FAM. CODE ANN. tit. 1, §§ 4.04, 5.22 (1970). Thus, the same reasoning might be applied to art. 4615 in that it leaves the definition of community property unchanged.

²⁵ 470 S.W.2d 429 (Tex. Civ. App.—Corpus Christi 1971).

²⁶ 297 S.W. 778 (Tex. Civ. App.—El Paso 1927), *error ref.*

²⁷ 470 S.W.2d at 437.

²⁸ *Id.* at 438.

munity or separate property. It logically follows that the statute merely clarifies a long-standing principle—*i.e.*, that such recovery has actually *always* been separate property—and does not change existing law. Apparently the only reason for not allowing separate property recovery in the past was that the submission of the question of damages to the jury had resulted in a comingling of two elements of recovery. Because loss of earning capacity and *personal* injury itself were not separated, the entire recovery was community in character by operation of law.²⁹ It is unfortunate that the court chose to say that “[p]rior to January 1, 1968, unquestionably it was the law in Texas that damages recovered for the wife’s personal injuries were community property.”³⁰ This statement indicated that somehow, because of article 4615, the law has now changed. The reasoning used by the court, however, points out that in fact the law has not changed, but has only been more carefully delineated.

In *Kirkpatrick v. Hurst*³¹ the plaintiff-wife was involved in an automobile accident with a negligent defendant on December 16, 1967. The wife was free from fault. There was some question of whether the statute of limitations had run on the wife’s claim since she had not filed suit until January 2, 1970.³² If the wife’s recovery was community in character, the statute would have run since the husband should have brought suit within the two-year period following the accident.³³ However, if the recovery was separate, the wife had two years from the day after January 1, 1968 (the date from which the wife was no longer under the disability of coverture) in which to bring suit.³⁴ Thus, the Texas Court of Civil Appeals at Texarkana faced the issue of whether the recovery for personal injuries was separate or community property. The court held that article 4615, as re-enacted in the Family Code, was constitutional, and thus the wife could recover. The court reasoned that the recovery envisioned by article 4615 was separate “because the recovery is not an acquisition of additional assets in the form of damages, but rather a replacement for the loss of a part of the individual spouse’s body *brought into the marriage*.”³⁵ After a review of *Arnold* the court found that article 4615 did not contravene its holding.³⁶ Consistent with its reasoning that separate property recovery was not a “new” rule of law, the court applied the statute retroactively to the pre-1968 cause of action.³⁷ The court said that had the special issue of the

²⁹ See, *e.g.*, *Rippy v. Rippy*, 49 S.W.2d 494 (Tex. Civ. App.—Austin 1932), *error ref.*

³⁰ 470 S.W.2d at 437.

³¹ No. 8026 (Tex. Civ. App.—Texarkana, Sept. 28, 1971).

³² TEX. REV. CIV. STAT. ANN. art. 5526 (1958).

³³ See *Chandler v. Alamo Mfg. Co.*, 140 S.W.2d 918, 921 (Tex. Civ. App.—Austin 1940).

³⁴ The stricture of the statute of limitations was softened for married women (as well as infants and incompetents) by art. 5535, which provided for the tolling of the limitations period for actions of the wife accruing during coverture. An Act to Adopt and Establish the “Revised Civil Statutes of the State of Texas,” § 1, tit. 91, ch. 2, art. 5535, [1925] Tex. Rev. Civ. Stat. 1560. Effective January 1, 1968, married women are no longer within the ambit of the statute. Act of May 27, 1967, ch. 309, § 3, [1967] Tex. Laws 740.

³⁵ No. 8026, at 10 (Tex. Civ. App.—Texarkana, Sept. 28, 1971).

³⁶ *Id.* at 9.

³⁷ Had the statute been declared constitutional *and* as changing the character of a portion of personal injury recovery (an admittedly inconsistent analysis) then the statute could not be applied retroactively. See discussion of this type of problem in *Scott v. Scott*, 170 S.W. 273 (Tex. Civ. App.—Fort Worth 1914). For a contrary result on the retroactive applica-