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LEGISLATIVE NOTE: 1963 AMENDMENTS AFFECTING MARRIED WOMEN'S RIGHTS IN TEXAS

by

Eugene L. Smith*

FOR the second time in six years¹ the Texas legislature has substantially changed the legal rights of married women.² Presented with two³ schemes designed to emancipate further the wives of this state, the ordinarily perverse legislators chose the more reasonable; by so doing, they removed a multitude of complexities that have plagued lawyers for many years and created fewer, but equally complex, problems for future preoccupation.

House Bills 403⁴ and 404⁵ effected principal changes in marital

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¹ The 55th Legislature amended articles 4614, 4616, 4617, and 4623, Tex. Gen. & Spec. Laws 1957, ch. 407, at 1233. The 1957 legislation is discussed in Blevins, *Recent Statutory Changes in the Wife's Managerial Powers*, 38 Texas L. Rev. 55 (1959), and Comment, 13 Sw. L.J. 84 (1959). There were subsequent minor amendments to article 4614, Tex. Gen. & Spec. Laws 1961, ch. 472, at 1188, and article 4622, Tex. Gen. & Spec. Laws 1962, ch. 156, at 161.

² This Article will not deal generally with married women's rights. For discussions, see Huie, *Community Property Law of Texas*, Commentary, 13 Tex. Rev. Civ. Stat. Ann. 1 (1960); Blevins, *supra* note 1; Comment, 13 Sw. L.J. 84 (1959).

³ The unadopted scheme, Tex. S.J. Res. 2 (passed by the Senate), was a proposed constitutional amendment which provided: "Equality under the law shall not be denied or abridged because of sex . . ." For divergent views, compare Tobolowsky, *For Equal Rights Amendment*, 26 Texas B.J. 1004 (1963), with Amsler, *Against Equal Rights Amendment*, 26 Texas B.J. 1005 (1963). The State Bar of Texas recently conducted a referendum among its members and asked for their vote on the advisability of a resolution opposing enactment of the amendment. 26 Texas B.J. 995 (1963).

⁴ H.B. 403, Vernon's Tex. Sess. Law Serv. ch. 472, at 1188 (1963), repealed article 4623, Tex. Gen. & Spec. Laws 1962, ch. 156, at 161, and carried into effect August 23, 1963, the following amended statutes, 13 Tex. Rev. Civ. Stat. Ann. (Supp. 1963):

Article 4614. Wife's separate property

All property of the wife, both real and personal, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands thus acquired, shall be her separate property. The separate property of the wife shall not be subject to the debts contracted by the husband before or after marriage nor for the torts of the husband. During marriage the wife shall have the sole management, control, and disposition of her separate property, both real and personal.

Article 4618. Sale of homestead

The homestead, whether the separate property of the husband or of the wife, or the community property of both, shall not be disposed of except by the joint conveyance of both the husband and the wife, except where the husband or wife is insane or has permanently abandoned the other, in which instances the husband or wife may sell and make title to any such homestead, if his or her separate property, in the manner provided in article 1288, Revised Civil Statutes of Texas, 1925.

Article 4621. Community property not liable

The community property of the husband and wife, other than the personal earnings of the wife and the revenues from her separate property, shall not

property law: (1) the wife was given general contractual powers, *i.e.*, as a feme sole, with special community property available for the satisfaction of a greater range of debts⁶ and (2) the wife was given sole management of her separate estate, without the necessity of qualifying in any manner.

The gross result of the legislation is clear: it returns to the wife a measure of control over her affairs which has not existed since 1925.⁷ More subject to speculation is the question of the intangible, subtle effect of the changed status of the wife on the courts' approach to related problems. As a result of the statutory changes that expressly

be liable for debts or damages resulting from contracts of the wife, except for necessities furnished herself and children, unless the husband joins in the execution of the contract; provided that her rights with reference to the community property on permanent abandonment by the husband shall not be affected by this provision.

Article 4624. Judgment and execution

Upon the trial of any suit based upon a contract of the wife, the court shall decree that judgment may be levied upon her separate property, upon revenues from her separate property, or upon her personal earnings, and if the husband be joined in any suit based upon a contract of the wife for necessities for herself and their common child or children and the court finds that such contract was for such necessities and that the debts so contracted or expenses incurred were reasonable and proper, the court shall also decree that execution may be levied upon the common property or upon the separate property of the husband.

Article 4626. Female emancipated by marriage

A married woman shall have the same powers and capacity as if she were a feme sole, in her own name, to contract and be contracted with, sue and be sued, and all her separate property, her personal earnings and the revenues from her separate estate which is not exempt from execution under the laws of Texas shall thereafter be subject to her debts and be liable therefor, and her contracts and obligations shall be binding on her.

⁵ H.B. 404, Vernon's Tex. Sess. Law Serv. ch. 473, at 1189 (1963), repealed article 1299, Tex. Gen. & Spec. Laws 1897, ch. 40, at 41, which required the husband's joinder with the wife and her privity acknowledgment in a conveyance of the wife's separate lands.

⁶ Under the constitutional definition, all property acquired during coverture is community property except that acquired by "gift, devise, or descent." Tex. Const. art. 16, § 15; Tex. Rev. Civ. Stat. Ann. art. 4619 (1960); *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925).

Each spouse's separate property consists of the property owned before marriage, that acquired during marriage by gift, devise, or descent, and the increase of separate lands. Tex. Const. art. 16, § 15; Tex. Rev. Civ. Stat. Ann. art. 4613 (1960) (husband's separate property); Tex. Rev. Civ. Stat. Ann. art. 4614 (Supp. 1963) (wife's separate property), see note 4 *supra*; *Arnold v. Leonard*, *supra*.

The "special community" property consists of the wife's earnings and the revenue from her separate property. Designation of these types of community property, which are exempted from liability for the husband's debts by Tex. Rev. Civ. Stat. Ann. art. 4616 (1960), as the wife's "special community" apparently has been accepted by the Texas Supreme Court. See *Moss v. Gibbs*, — Tex. —, 370 S.W.2d 452 (1963). This term "special community" apparently was used first in *Bobbitt, Is There More Than One Class of Community Property in Texas?*, 4 Texas L. Rev. 154 (1925). This "class" of community property is treated separately in the statutes in two principal respects: it is exempt from the claim of the husband's creditors and it is available to the wife's creditors under the 1963 statutes. See text accompanying note 59 *infra*.

⁷ Discussions of the history of statutes affecting rights of married women in Texas may be found in *Huie, supra* note 2, at 38-42; *Comment*, 13 Sw. L.J. 84-87 (1959).

or impliedly remove the "subordination of the wife to the husband,"⁸ courts may now re-examine the foundations of early landmark cases. This effect should be particularly felt in that area of the law in which the corollary of the legal subjugation of married women was a preferment of the wife in the form of sheltering rules.⁹ If the married woman is now *sui juris*, not only has she gained a measure of independence, she has lost a measure of protection. No longer can it be said with assurance that a resulting trust in favor of the wife will arise if her separate money is used to take title to land in her husband's name,¹⁰ or that "mere intention of the husband and wife cannot convert property purchased with [a community obligation] . . . into the separate estate of either spouse,"¹¹ or that a wife cannot convey her separate property directly to her husband,¹² or even that the husband's joinder is required in tort suits.¹³ The real point of the new laws is that a woman is to be treated no differently after marriage as far as her capacity to contract is concerned. It is a partial substitution of the aggregate theory of marital partnership for the entity theory.

I. THE WIFE'S POWER TO MANAGE, CONTROL, AND DISPOSE OF HER SEPARATE PROPERTY

Article 4614¹⁴ now grants to a married woman the *sole* management, control, and disposition of her separate property. Perhaps the least controversial of the 1963 amendments, this provision should be as welcome to men as to women. Its language, except for substitution of "wife" for "husband," duplicates that of article 4613,¹⁵ which confers upon husbands the same power over their separate property. Presumably, the duplicative language gives wives the same power as husbands in this respect. Article 4614 construed with article 4626¹⁶ restores to the wife the powers over her separate property that existed from 1913 to 1917 and were lost in the unconstitutional legislation at-

⁸ *Le Gierse & Co. v. Moore*, 59 Tex. 470, 472 (1883).

⁹ For an extreme example of such a rule, see *Humble Oil & Ref. Co. v. Downey*, 143 Tex. 181, 153 S.W.2d 426 (1944), which permitted a businesswoman to avoid a conveyance which had not been privily acknowledged.

¹⁰ *Matador Land & Cattle Co. v. Cooper*, 87 S.W. 235 (Tex. Civ. App. 1905).

¹¹ *Gleich v. Bongio*, 128 Tex. 606, 612, 99 S.W.2d 881, 884 (1937).

¹² *Graham v. Struwe*, 76 Tex. 532, 13 S.W. 381 (1890).

¹³ *Northern Texas Traction Co. v. Hill*, 297 S.W. 778 (Tex. Civ. App. 1927) *error ref.*

¹⁴ Tex. Rev. Civ. Stat. Ann. art. 4614 (Supp. 1963). For the text of the statute, see note 4 *supra*.

¹⁵ Tex. Rev. Civ. Stat. Ann. art. 4613 (1960).

¹⁶ Tex. Rev. Civ. Stat. Ann. art. 4626 (Supp. 1963). For the text of the statute, see note 4 *supra*.

tempting to make separate property of the special community.¹⁷ More importantly, it replaces the obscure provisions of the 1957 version of article 4614¹⁸ which required the wife's filing of an acknowledged statement of election to manage her separate property.¹⁹

A. *Wife's Power To Dispose Of Separate Property*²⁰

It is no longer necessary to secure the husband's joinder in the conveyance of the wife's separate estate. The repeal of previous joinder provisions²¹ and the repeal of article 1299,²² which required the husband's joinder and the wife's privy acknowledgment in her conveyances, make reasonably plain that a married woman may convey her separate property in the same fashion as a married man. However, the difficulties of determining the nature of property, *i.e.*, whether it is community or separate, remain and create additional problems.²³ No change, even inferentially, has been made in the husband's power to manage the "general" community.²⁴ Residual management powers in the husband, combined with the general problems of determining the nature of the property, should cause transferees to be cautious in accepting conveyances from a married woman, even of property in which title is in her name.

For instance, if community funds are used by the wife for the purchase of land in her name without the consent of the husband, the husband has a community interest in the land.²⁵ A purchaser from the wife may take subject to the husband's equities because it is presumed that all property acquired during marriage is community.²⁶ Furthermore, the parol evidence rule will not bar the establishment of the community interest even in the face of a deed recital that the

¹⁷ *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925). See note 7 *supra*.

¹⁸ Tex. Gen. & Spec. Laws 1961, ch. 472, at 1188.

¹⁹ No one was certain of the wife's powers in connection with her separate property absent a filing of the statement of election. See Blevins, *supra* note 1, at 65-69; Comment, 13 Sw. L.J. 84, 106-11 (1959).

²⁰ See also Amsler, *The New Married Women's Statutes: Meaning and Effect*, 15 Baylor L. Rev. 145 (1963). Professors Amsler and McSwain of Baylor University School of Law drafted the new legislation.

²¹ Tex. Rev. Civ. Stat. Ann. art. 4614 (Supp. 1963) omitted provisions that in prior statutes required the husband's joinder in conveyances of separate property and transfers of separate stocks and bonds. Tex. Gen. & Spec. Laws 1961, ch. 472, at 1188.

²² Tex. Gen. & Spec. Laws 1897, ch. 40, at 41.

²³ For an analysis of problems involved in determining ownership, see Huie, *supra* note 2, at 4-27.

²⁴ Tex. Rev. Civ. Stat. Ann. art. 4619 (1960) defines community property and provides that only the husband has power to dispose of it.

²⁵ *Hodge v. Ellis*, 154 Tex. 341, 277 S.W.2d 900 (1955); *Lindsay v. Clayman*, 151 Tex. 593, 254 S.W.2d 777 (1952). For a compendium of cases, see Fritz, *Marital Property—Effects of Recitals and Credit Purchases*, 41 Texas L. Rev. 1 (1962).

²⁶ Tex. Rev. Civ. Stat. Ann. art. 4619 (1960); *Smith v. Buss*, 135 Tex. 566, 144 S.W.2d 529 (1940); *McCutchen v. Purinton*, 84 Tex. 603, 19 S.W. 710 (1892).

property belongs in the wife's separate estate.²⁷ There is serious question in such a case whether the buyer would be a bona fide purchaser even if the record title indicates that the property is owned by the wife.²⁸ Obviously, a better result would be a holding that if apparent title is in the wife, the purchaser for value cuts off any equities of the husband. Confusion of title intramurally cannot with justification affect the rights of purchasers relying on the appearance of title.

There exists another problem in conveyances of the wife's separate lands. House Bill 405²⁹ repealed article 1299, which required the joinder of the husband and wife in the conveyance of the wife's separate land and provided that the conveyance was ineffective until she had been examined "privily and apart" by the notary public or other person authorized to take her acknowledgment. Unfortunately, article 6605 was not repealed. This latter provision governs the taking of married women's acknowledgments and is by its terms mandatory; it provides:

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 he 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.³⁰

Painful though it may be to a married woman, a prudent grantee should refuse to accept a deed from her unless the mandate of article 6605 is met, although in all likelihood the courts will hold that it is not required. The specter of *Downey v. Humble Oil & Ref. Co.*³¹ and of similar cases³² that void a married woman's conveyances if not properly acknowledged by her is sufficient to put any attorney on guard. Until article 6605 is repealed, it is advisable to require the privy acknowledgment.

Further, with the difficulties of establishing the nature of the property and the uncertainty surrounding bona fide purchasers' rights *vis-à-vis* the husband, caution also requires that a grantee insist on

²⁷ *Hodge v. Ellis*, 154 Tex. 341, 277 S.W.2d 900 (1955).

²⁸ *Cf. Jackson v. Hernandez*, 155 Tex. 249, 285 S.W.2d 184 (1955).

²⁹ *Vernon's Tex. Sess. Law Serv.* ch. 472, at 1188 (1963).

³⁰ *Tex. Rev. Civ. Stat. Ann.* art. 6605 (1960).

³¹ 143 Tex. 181, 153 S.W.2d 426 (1944). The *Downey* case emphasizes that articles 6605 and 6608 (see note 30 *supra*) contain the requirements of acknowledgment.

³² See particularly *Wheelock v. Cavitt*, 91 Tex. 679, 45 S.W. 796 (1898), which held an unacknowledged deed of a married woman to a purchaser for value void even with a certificate of acknowledgment on the deed. See also *Thompson v. Crimm*, 132 Tex. 586, 126 S.W.2d 18 (1939).

the husband's joinder in deeds of property purportedly belonging to the wife's separate estate. Exceptions would exist if the recited consideration is contractual in nature or if facts exist that will estop the husband from asserting his community interest.³³

The legislature made no changes in the requirement that the husband join in the conveyance of the wife's separate lands if such lands constitute the homestead³⁴ except in cases in which the husband is insane or has abandoned the wife.³⁵ However, article 4618,³⁶ regulating the sale of the homestead, was amended to authorize the husband to sell his separate property homestead upon abandonment by or insanity of the wife. No effort was made to amend the statutes in a manner that would make it impossible for de facto insanity (as opposed to adjudicated insanity) to give the surviving spouse additional powers.³⁷ Thus, insanity of either spouse will make it possible for the survivor to convey the homestead regardless of its nature as separate property or community property. The same rule holds true for permanent abandonment. All this is so despite provisions for adjudication of insanity,³⁸ appointment of guardians,³⁹ and community administration.⁴⁰

In connection with land conveyances, one of the more important effects of the 1963 legislation is the provision of article 4626 giving the wife general contractual powers. Since by article 4614 she is now endowed with sole control of her separate property, it is obvious that the cases denying her the power to make a valid executory contract

³³ *Lindsay v. Clayman*, 151 Tex. 593, 254 S.W.2d 777 (1952). See Huie, *supra* note 2, at 8-11.

³⁴ Tex. Rev. Civ. Stat. Ann. art. 1300 (1962).

³⁵ Tex. Rev. Civ. Stat. Ann. art. 4618 (Supp. 1963) (see note 4 *supra*) permits sale by the wife of her separate property homestead if she has been abandoned permanently or if the husband is insane. If the wife is abandoned by the husband, there is provision for a court-approved power to manage, control, and dispose of the community property. Tex. Rev. Civ. Stat. Ann. art. 4819 (1960). In the case of the husband's adjudicated insanity, she is empowered to deal with the community. Tex. Prob. Code Ann. § 157 (1956). Even without qualifying as community survivor under an appropriate statute, either husband or wife apparently may manage, control, and dispose of either community property or the survivor's separate property, including homestead, in order to discharge liens or pay for necessities. See *Reynolds Mortgage Co. v. Gambill*, 115 Tex. 531, 280 S.W. 531 (1926); *Magnolia Petroleum Co. v. Still*, 162 S.W.2d 268 (Tex. Civ. App. 1942) *error ref.* For a discussion of the permissive nature of such statutes, see *Ross v. Tide Water Oil Co.*, 136 Tex. 66, 145 S.W.2d 1089 (1941), which treats them as cumulative only. The effect of these cases is to confuse titles generally by conferring upon wives and husbands unrecorded powers of conveyancing and management.

³⁶ Tex. Rev. Civ. Stat. Ann. art. 4618 (Supp. 1963).

³⁷ See note 35 *supra* for discussion.

³⁸ Tex. Rev. Civ. Stat. Ann. art. 5547 (1958).

³⁹ Tex. Prob. Code Ann. ch. 5, pt. 3 (1956). A guardian is necessary if the incompetent spouse has separate property to be administered. Tex. Prob. Code Ann. § 157 (1956).

⁴⁰ Tex. Prob. Code Ann. §§ 155-77 (1956).

to convey her separate realty⁴¹ are no longer good law. Such a contract is enforceable by suit for specific performance *if* the courts hold that her separate acknowledgment is no longer the catalyst to the conveyance.⁴² There is no question that breach of such a contract would render her liable for money damages payable out of her separate property or her special community.⁴³ The wife should also be bound by contractual covenants and warranties in her deeds; this should give purchasers her after-acquired title because the apparent basis of the previous holdings to the contrary was that the wife was not *sui juris*.⁴⁴ Furthermore, a married woman's invalid deed of her separate realty will now be valid as a contract upon which specific performance may be had (as with the husband) so long as it is property which she might otherwise convey.⁴⁵

Removing the requirements of joinder by the husband should now make it possible for a married woman to convey her separate lands directly to the husband, either by deed of gift or in consideration of the husband's separate property in exchange.⁴⁶ If this result is possible, it follows that the wife can transfer her separate personalty directly to the husband without the device of an intervening trustee or straw man.⁴⁷

The 1963 legislation abolished all requirements of the husband's joinder in the transfer of the wife's separate personalty. Thus, it is no longer necessary to secure a joint conveyance of stocks and bonds belonging to the wife, although it may still be advisable. In this connection transferees are faced with the same problems that grantees of land encounter, *i.e.*, is the property in the married woman's name her separate property or community property, and if the name in

⁴¹ *E.g.*, *Blakely v. Kanaman*, 107 Tex. 206, 175 S.W. 674 (1915); *Jones v. Goff*, 63 Tex. 248 (1885).

⁴² See notes 21-23 *supra* and accompanying text.

⁴³ See *Scarborough v. Payne*, 198 S.W.2d 917 (Tex. Civ. App. 1946) *error ref.*, which held a wife liable for the broker's commission on a valid contract even though specific performance was not available.

⁴⁴ *Panhandle Constr. Co. v. Lindsay*, 123 Tex. 613, 72 S.W.2d 1068 (1934), and *Wadkins v. Watson*, 86 Tex. 194, 24 S.W. 385 (1893), are the leading cases holding the wife not liable on covenants and warranties of title. The *Wadkins* case refused to apply after-acquired title rules to a married woman's conveyance. Tex. Rev. Civ. Stat. Ann. art. 1292 (1962) provides that the implied covenants should now apply.

⁴⁵ Tex. Rev. Civ. Stat. Ann. art. 1301 (1945) transforms an invalid conveyance into a contract upon which specific performance may be had.

⁴⁶ It was formerly held that a married woman could not convey her property directly to her husband (*Graham v. Struwe*, 76 Tex. 532, 13 S.W. 381 (1890)) but assumed that the husband could convey directly to the wife. (*Kellett v. Trice*, 95 Tex. 160, 66 S.W. 51 (1902) (*dicta*)). *Cf.* *Huie*, *supra* note 2, at 28. Since the wife is given powers over her separate property equal to her husband's powers over his separate property, they should now have the same powers *inter se*. However, agreements to change the nature of property would still be prohibited under *Kellett v. Trice*, *supra*.

⁴⁷ *Cf.* *Stratton v. Robinson*, 67 S.W. 539 (Tex. Civ. App. 1902) *error ref.*

which the property is held is not indicative of the property's status, is the transferee on notice of the husband's interest or equities?⁴⁸ Since all property acquired during marriage is presumptively community,⁴⁹ a purchaser is well advised to require the husband's joinder in transfers of personalty as well as transfers of real estate.

In sum, purchasers from married women of allegedly separate property are in better positions if controversies arise. However, the cautious transferee should assume that the 1963 amendments made no substantial change in the laws.

B. Wife's Power To Control And Manage Separate Property

With the new statutes, a married woman's capacity to contract in connection with her separate property is removed as a factor in the law. Article 4626,⁵⁰ giving general contractual powers to married women, eliminates the uncertainty of a wife's liability on contracts made in connection with her separate property.⁵¹ This provision and article 4614 now give the wife sole management and control of her separate property. Because the amended statutes render both her separate property and her special community liable for her contractual debts,⁵² questions of liability of specific assets are obviated. Cases dealing with this problem before the amendments turned on the validity of the wife's contract from which the debt arose. Thus, if the wife executed a contract benefiting her separate property (or perhaps just in connection with her separate property) a court first had to determine the validity of the contract.⁵³ If the contract were found valid, execution upon this contractual debt could be levied on either the separate property or the special community property of the wife.⁵⁴

Needless to say, the legislature took a giant step forward when it emancipated married women as far as their contractual capacity is

⁴⁸ See text accompanying notes 26-28 *supra*. The problem with respect to personalty is the same as that of realty, but is perhaps more acute because of the absence of record title. There is no particular differentiation in the cases between real and personal property. See *Hawkins v. Britton State Bank*, 122 Tex. 69, 52 S.W.2d 243 (1932) (farm implements); *Sorenson v. City Nat'l Bank*, 121 Tex. 478, 49 S.W.2d 718 (1932) (bank account).

⁴⁹ Tex. Rev. Civ. Stat. Ann. art. 4619 (1960).

⁵⁰ Tex. Rev. Civ. Stat. Ann. art. 4626 (Supp. 1963). For the text of the statute, see note 4 *supra*.

⁵¹ The supreme court indicated that a power to make a contract binding the wife's separate property was necessary to the effectuation of her powers of management, control, and disposition. *Taylor v. Hollingsworth*, 142 Tex. 158, 176 S.W.2d 733 (1942); *Cauble v. Beaver Electra Ref. Co.*, 115 Tex. 1, 274 S.W. 120 (1925); *cf. Bearden v. Knight*, 149 Tex. 108, 228 S.W.2d 837 (1950). See generally Comment, 13 Sw. L.J. 84, 88-89 (1959).

⁵² Tex. Rev. Civ. Stat. Ann. arts. 4621, 4624, 4626 (Supp. 1963). For the text of articles 4624, 4626, see note 4 *supra*.

⁵³ See, e.g., *Levin v. Jeffers*, 122 Tex. 83, 52 S.W.2d 81 (1932).

⁵⁴ *Bearden v. Knight*, 149 Tex. 108, 228 S.W.2d 837 (1950).

concerned. Coverture is no longer a defense. When contracting with a woman now, the contract will be binding if it would bind a single woman. One may secure the contractual debt with a lien on her separate property.⁵⁵ Moreover, one may look to the wife's special community or separate property for satisfaction of the debt if it is reduced to judgment. Wives will now pledge their credit when they execute contracts of surety⁵⁶ or indemnity,⁵⁷ notes, or contracts of purchase (land or personalty) whether or not such contracts are "in connection with" the management, control, and disposition of their separate property.⁵⁸ Contractors may in any of these instances require that separate property be pledged as security for the performance of the obligation.

The combination of powers in articles 4614 and 4626, though of great benefit to married women and persons dealing with married women, is of principal benefit if separate property is involved. The more common situation, that in which the wife has no separate property, substantiates this conclusion.

II. CONTRACTUAL CAPACITY AND SATISFACTION OF THE WIFE'S DEBTS

A. *Contractual Capacity*

Article 4626 confers upon married women the capacity of a feme sole. Thus, wives are allowed to contract and be contracted with in their own name, and *thereafter* their separate property and special community property are liable for their debts.⁵⁹ One conclusion seems evident about the effect of this provision: article 4626 confers a general contractual capacity only. Except for the grant of powers over separate property in article 4614,⁶⁰ there are no powers granted to the wife over either the community property or the special community property. Consequently, contracts purporting to pledge as security property other than separate property are beyond the capacity of the wife. The elements of control and management over the special or general community property are omitted although the

⁵⁵ The power to convey includes the lesser power to execute a lien upon realty. *Red River Nat'l Bank v. Ferguson*, 109 Tex. 287, 206 S.W. 923 (1918); *Kellett v. Trice*, 95 Tex. 160, 66 S.W. 51 (1902).

⁵⁶ The husband's joinder was required in surety contracts before 1957. *Red River Nat'l Bank v. Ferguson*, *supra* note 55.

⁵⁷ The wife previously had no such power. *Tolbert v. Standard Acc. Ins. Co.*, 148 Tex. 235, 223 S.W.2d 617 (1949).

⁵⁸ Former art. 4614, Tex. Gen. & Spec. Laws 1961, ch. 219, at 446, used the phrase "in connection with" in delimiting the wife's power to contract.

⁵⁹ In addition, Tex. Rev. Civ. Stat. Ann. art. 4624 (Supp. 1963) provides that execution may be levied by the court upon either the wife's separate estate or her special community.

⁶⁰ See text accompanying notes 50-58 *supra*.

special community (including the wife's earnings and revenues from her separate property) property is made available for satisfaction of the contractual debt through execution.

The foregoing conclusion is harsh, but it logically follows from the omission in the 1963 legislation of a provision giving married women authority to manage, control, and dispose of any portion of the community property, including the special community.⁶¹ Article 4619 gives the husband exclusive power to dispose of the community property. Provisions are available for transfer of these powers to the wife under certain circumstances, *i.e.*, permanent abandonment or insanity of the husband.⁶² Absent abandonment, insanity, or a statutory grant of power to the wife, it sadly follows that her capacity with regard to the community property is unchanged.⁶³

This omission of capacity puts a contractor in an untenable position as a practical matter. He may contract with the wife and, upon obtaining a judgment, may levy execution on the special community property for satisfaction of the debt. However, there is no way to insure that the special community property upon which the creditor is relying, *e.g.*, the wife's earnings, will be available to satisfy the debt or that the wife will satisfy the debt from this property. As an illustration of the contractor-creditor's dilemma under the amended statute, suppose that husband (*H*) and wife (*W*) are each receiving salaries of 100 dollars per month and that each receives 100 dollars per month income from respective separate properties. *W* wishes to borrow money from a third party (*T*), who must decide on the best means of protecting himself. By virtue of article 4626, *W* clearly can obligate herself to repay the loan, but cannot incur a community obligation because *H* is manager of that portion.⁶⁴ If *T*'s loan is to be secured, his only recourse is to fix a lien

⁶¹ See Amsler, *supra* note 20, at 149-50.

⁶² Tex. Rev. Civ. Stat. Ann. art. 4619 (1960) (abandonment); Tex. Prob. Code Ann. § 157 (insanity).

⁶³ This conclusion follows from those cases holding that absent a grant of capacity to a married woman she will be unable to contract. *Tolbert v. Standard Acc. Ins. Co.*, 148 Tex. 235, 223 S.W.2d 617 (1949), held a married woman without capacity to be an indemnitor because the statute authorizing her to be a surety when joined by her husband should be narrowly construed. *Pottorff v. J.D. Adams Co.*, 70 S.W.2d 745 (Tex. Civ. App. 1934) *error ref.*, likewise limited the powers of the wife to those given by "Constitution or statute, expressly or by implication." The court's reasoning was that married women had no contractual power at common law and that exceptions are strictly construed. *Id.* at 746. If this reasoning is followed, it will be necessary for the Texas courts to imply powers of management of the special community from a combination of the contractual powers given the wife and the exemption of the special community from the husband's debts.

⁶⁴ Tex. Rev. Civ. Stat. Ann. art. 4621 (Supp. 1963) (see note 4 *supra*) provides that the community (other than the special community) is not liable for the wife's contractual debts unless the husband joined in the execution of the contract or the contract is for necessities. No change was made in the liability of the community for necessities. For discussion, see State Bar of Texas, *Creditors' Rights in Texas* 340-42 (1963).

on W's separate property even though W's special community is liable for and subject to her debt.

Aggravating the creditor's problem is *Moss v. Gibbs*,⁶⁵ decided by the Supreme Court of Texas in 1963. There the question was whether the special community property of the wife (that property exempt from the husband's debts) remained exempt from the claims of the husband's creditors after it had undergone a mutation or change in form. In the *Moss* case, the husband's creditors attempted to satisfy a judgment against the husband through execution on three lots purchased with special community property funds. Article 4616 exempts the wife's earnings and revenues from her separate property from liability for debts "contracted by [the] husband." The court held that special community property that has undergone a mutation, *i.e.*, been converted into a form different from that in which it was received, loses its exemption under article 4616 and thus becomes subject to execution in satisfaction of the husband's debts. The court refused to permit tracing of the exempt funds into other property and thereby adopted the often criticized doctrine of *Strickland v. Wester*,⁶⁶ which recognized that such property becomes general community property.

From the standpoint of the wife's power to manage the special community, *Moss v. Gibbs* clearly indicates that no such power existed other than the minor right of control in order to preserve the special community property intact and thus protect the exemption.⁶⁷ However, any act of management or disposition, as opposed to protective control, will cause loss of the exemption and subject the mutated property to the claims of the husband's creditors. From the majority opinion's unenthusiastic distinguishing of *Hawkins v. Britton State Bank*,⁶⁸ we can surmise that the husband will not be permitted to exercise either managerial or dispositive powers over special community and thereby make it available to his creditors. However, even if the husband is prohibited from exercising powers over the special

⁶⁵ ___ Tex. ___, 370 S.W.2d 452 (1963), noted in 15 Baylor L. Rev. 193 (1963).

⁶⁶ 131 Tex. 23, 112 S.W.2d 1047 (1938). For a criticism of this case, see Huie, *supra* note 2, at 43-44.

⁶⁷ In the statutes dealing with the spouses' separate property, the elements of ownership are "management, control, and disposition." Tex. Rev. Civ. Stat. Ann. art. 4613 (Supp. 1963). It seems to be assumed, *sub silentio*, in both *Strickland* and *Moss* that the minor mutation of depositing special community in the form of cash in a checking account will not cause the exemption to be lost. Query: Will the purchase of savings bonds, annuity contracts, or other promises to pay be a mutation exposing the new property to the claims of the husband's creditors?

⁶⁸ 122 Tex. 69, 52 S.W.2d 243 (1932). In *Hawkins*, the court held that farm machinery purchased with revenues from the wife's separate farm was exempt from the husband's creditors. But there the claim of the creditor was based on an attempted incumbrance of the equipment by the husband.

community, the supreme court evidenced little interest in holding in *Moss* that the wife has these powers over the special community.⁶⁹ Thus, it appears that her powers are not equivalent to the powers that she has over her separate property except to the extent of excluding management or disposition by the husband if revenues of separate property, even mutated, are used in connection with the separate property from which they are derived.

If the *Hawkins* case is followed to the extent indicated above and if article 4626 bestows no manipulative powers on a married woman, the special community is left in limbo. The wife, as well as the husband, is without power to manage or dispose of it. But the wife's contracts may be enforced by creditors' levies on the special community even though she may not contract with specific reference to it under article 4626. A married woman has capacity to effect mutations of the property which will result in the property's becoming part of the general community insofar as the husband's creditors are concerned; however, she is without power to "manage" the special community unless she does so in connection with her separate property as in the *Hawkins* case.

In *Moss*, refusal to allow tracing of the special community by the wife in a contest with the husband's creditors should not prevent tracing by *her* creditors either in a dispute with the husband or his creditors. It would be fair to allow her creditors to make use of the doctrine since they reasonably have relied on the availability of special community property for satisfaction of any liability arising from their contracts with the wife. Further, removal of this property from their claims by mutation would open the door to fraud by the wife and nullify the obvious intent of the framers of article 4624. The latter article furnishes scant help to a creditor since it establishes no priorities for conflicting claims against special community property.⁷⁰

Removal of the wife's disability to enter into contracts changes the area of conflict from capacity to satisfaction of debts. The vestigial capacity questions are those of management, control, and disposition of the special community, not the broader questions of contractual capacity. Since she may contract freely, cases holding her without authority to contract as a surety, partner, or borrower are no longer applicable.

⁶⁹ See *Pottorff v. J.D. Adams Co.*, 70 S.W.2d 745 (Tex. Civ. App. 1934) *error ref.*

⁷⁰ On the preference of property to satisfy the claims of the wife's creditors, the court may decree that her separate property must be exhausted before there is recourse to the special community, in which the husband has an interest. See *Zeliff v. Jennings*, 61 Tex. 458 (1884), which indicates that this principle should apply when liability for the wife's deliberate tort was at issue. See also *State Bar of Texas, Creditors' Rights in Texas* 351-53, 356-58 (1963).

Article 4626, as amended, has also caused a profound change in its repeal of those provisions governing the right of married women to engage in mercantile and trading enterprises.⁷¹ Her disabilities to contract are removed for all purposes by the new statute, and it is no longer necessary to seek removal by application to the district court. However, the power to contract generally does not answer the question of the availability of the special community earned in her business to her creditors. This problem is analogous to the problem encountered in the *Hawkins* case. Since profits of the business are special community if derived from her separate property, to what extent can they be controlled by her free of the claim of the husband's creditors? If *Moss v. Gibbs* controls, the mutation of profits into assets will make the assets available to the husband's creditors. If *Hawkins* controls, the same mutation will not cause the exemption to be lost. Under either theory, her creditors will have greater protection because the special community is made liable for her debts.⁷²

III. CONCLUSIONS

One general criticism of the legal profession (which includes here lawyers, judges, and professors) seems justified in this area. We are prone to be haphazard in our generalizations. Too often there is no distinction drawn between the effect of the spouses' transactions and resulting rights *inter se* and *inter alios*. The rights of third parties should not necessarily depend upon the result which would be reached in an adjustment of rights between the spouses upon divorce or death.

The problems which remain unsolved with respect to the special community seem insoluble at this juncture. Recent cases decided by the Supreme Court show a strong inclination to give overriding effect to a "unitary" concept of the community which acts to the exclusion of competing considerations. *Hilley v. Hilley*⁷³ and allied cases⁷⁴ hold that joint tenancies in community property can not be given effect, apparently because of the wife's incapacity to create the estate. In *Brown v. Lee*,⁷⁵ the court stated in dictum that the proceeds of life insurance purchased with community funds are community property; again the court emphasized the wife's lack of power. The focal point has shifted from a consideration of the husband's power to the

⁷¹ Article 4626, Tex. Gen. & Spec. Laws 1937, ch. 499, at 1343.

⁷² There was serious question before whether the special community was liable. Comment, 13 Sw. L.J. 84, 100-102 (1959).

⁷³ 161 Tex. 569, 342 S.W.2d 565 (1961).

⁷⁴ *Davis v. East Tex. Savings & Loan Ass'n*, 163 Tex. 361, 354 S.W.2d 926 (1962); *Bland v. Free*, 162 Tex. 65, 344 S.W.2d 435 (1961), *rev'd*, 369 U.S. 663 (1962).

⁷⁵ — Tex. —, 371 S.W.2d 694 (1963), noted in 18 Sw. L.J. 133 (1964).

wife's lack of power, with a consequent shifting of the foundation of dominion over marital property. The new legislation has not helped materially because the power to contract does not clearly include the power to conduct transactions involving community property.

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