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CONTROL AND DISPOSITION OF SPECIAL COMMUNITY PROPERTY

INTRODUCTION

THE phrase "special community property" is not used in the Texas statutes. It is an expression used by the bar to designate that portion of the community estate, (*i.e.*, rents from the wife's separate lands, interest from her bonds and notes, dividends from her stock, and her personal earnings) which Article 4616¹ of the Texas Statutes exempts from the debts and torts of the husband, which Article 4623² makes subject to the debts of the wife, and which under the cases receives special treatment hereinafter discussed.³

In Texas, the law in regard to the control and disposition of this special community property is in a confused and unsettled state. To present the subject in as clear a form as possible, a resort to subtopics will be necessary. The title suggests that the topic should be divided into control on the one hand and disposition on the other. Upon review of the authorities, however, it becomes apparent that they do not emphasize this distinction, logical though it is. Both the cases and the writers use the entire phrase "control and disposition" without drawing much, if any, distinction between the two.

One classification suggested by both the authorities and Article 4616 is the one to be used herein: *i.e.*, (1) rents and revenues from the wife's separate realty; (2) income from the wife's separate securities; and (3) the wife's personal earnings. It is felt

¹ TEX. REV. CIV. STAT. (Vernon, 1925) Art. 4616.

² *Id.*, Art. 4623.

³ It is the policy of the courts to strictly construe Article 4616 in that they refuse to extend it to cover revenues from other types of separate property owned by the wife. *Simmons v. Sikes*, 56 S. W. (2d) 193 (Tex. Civ. App. 1932) *writ of error refused* (royalty from a product patent).

that under this classification the varying rules as to each type of special community property are more easily dealt with and more easily understood.

LEGISLATIVE HISTORY

Under the Texas Civil Statutes of 1911,⁴ and prior thereto, the special community property received no special treatment. It was, like ordinary community property, subject to the exclusive control and disposition of the husband. Furthermore the husband had full control of the *separate* property of the wife. In 1913 the Texas Legislature gave the *wife* the exclusive right of control and disposition of her separate property and exempted all the items of special community from the husband's debts.⁵ It also gave the wife exclusive control of the items of special community and the right of disposition thereof (subject to an ambiguous requirement of the husband's joinder).⁶ The special significance of this statute will be noted later in this comment. The next important change was made in 1917, when what is now Article 4614 was amended to make the "rents and revenues" from the wife's separate realty part of her *separate estate*. The act of 1921 (exempting the husband's separate property from the wife's torts) left this substantially unchanged. This provision, however, was declared unconstitutional in the landmark case of *Arnold v. Leonard*,⁷ as being in conflict with the definition of the wife's separate property contained in the Texas Constitution.⁸ The 1925 revision, nevertheless, defined the wife's separate property as including both the rents and revenues from her separate realty and the income from her securities.⁹ In Article 4616 of the same revision, the legislature exempted these same items (except revenues from the wife's land) plus the wife's earnings and her separate property from the debts and torts of the hus-

⁴ TEX. REV. CIV. STAT. (1911) Art. 4621.

⁵ Gen. Laws Reg. Sess., 33rd Leg., 1913, c. 32, p. 61.

⁶ *Ibid.*

⁷ 114 Tex. 535, 273 S. W. 799 (1925).

⁸ TEX. CONST., Art. 16, § 15.

⁹ TEX. REV. CIV. STAT. (Vernon, 1925) Art. 4614.

band. It is noteworthy that in this article the legislature used language which suggested that none of these items of special community property were the wife's separate property:

"... 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 payment of debts contracted by the husband nor of torts of the husband." (Italics supplied.)

It is difficult to understand why the italicized portion should have been included, unless the legislature itself was doubtful whether its inclusion of these items as the wife's separate property in Article 4614 was constitutional. In 1929 the legislature amended Article 4614 by omitting after the words "thus acquired" the words "and the rents and revenues derived therefrom, the interest on bonds and notes belonging to her and dividends on stock owned by her." This, in effect, removed these items from the category of her separate estate, but under Article 4616, special community property remains exempt from the husband's debts and torts.

RENTS AND REVENUES FROM THE WIFE'S SEPARATE REALTY

The law on this topic as it stands today is molded by the leading case of *Hawkins v. Britton State Bank*.¹⁰ The facts of that case were essentially these: plaintiff, a married woman, sued for the value of certain farm machinery purchased with rents from her separate estate. Without her knowledge or consent, her husband had conveyed the machinery to defendant bank in payment of a community debt contracted by the husband. It was held that the rents from the wife's separate estate were community property, but were under the exclusive control of the wife, and were not subject to debts contracted by the husband.

Nowhere in the *Hawkins* case does the court expressly say that the *mutuated forms* of these rents (*i.e., merchandise bought with such rents*) are subject to the rule which it lays down in respect

¹⁰ 122 Tex. 69, 52 S. W. (2d) 243 (Tex. Com. App. 1932) *opinion adopted*.

to the rents themselves, nor does the court expressly hold that these rents are to be *disposed of* by the wife exclusively. However, the court implies strongly that the rule as to rents applies to the mutations thereof in that the certified questions sent up by the court of civil appeals dealt purely with the mutated form, and the opinion deals only with the rents in its reasoning and applies the *results* to the *machinery* bought therewith. Judge Critz in the *Hawkins* case quotes with approval the following language of Judge Greenwood in the case of *Arnold v. Leonard*:¹¹

"The legislature . . . could lawfully deprive the husband of the power . . . to manage and control the wife's separate property and portions of the community property which were derived from the 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."¹² (Italics supplied.)

Judge Critz must have recognized that the statute making the language of Judge Greenwood just quoted applicable was no longer in force; therefore, he apparently felt that the law with respect to rents *without* the aid of a special statute was that the wife has the control and disposition thereof. This conclusion is further corroborated by the fact that another portion of the *Hawkins* opinion states unequivocally that the rents from the wife's separate lands "are under the exclusive management and control of the wife, and cannot be subjected to the payment of debts contracted by the husband, either by execution or *otherwise* without the wife's consent."¹³ (Italics supplied.) The overall effect of the statements just quoted from the two opinions leads us to the conclusion that Judge Critz intended to hold that the wife has the sole right of control *and disposition* of the rents and revenues from her separate realty, and probably of the goods bought therewith. (The holding might possibly be limited to forbidding the husband to convey the mutated product to his creditors, while otherwise allowing him

¹¹ *Arnold v. Leonard*, 114 Tex. 535, 273 S. W. 799 (1925).

¹² *Hawkins v. Britton State Bank*, 122 Tex. 69, 75 S. W. (2d) 243, 246 (1932).

¹³ *Ibid.*

control and disposition thereof; but such a distinction seems unlikely.) The court said that such control and disposition of rents by the wife were necessary in order that the rights conferred upon her by Article 4614—viz., the sole control and disposition of her *separate* property be not hollow and empty.¹⁴ It seems that the wife should control and dispose of the goods bought with rents for another reason also: rents are either cash or crops; the only uses for cash are depositing it (which involves a conveyance of the cash to the bank, in exchange for a chose in action, the bank balance) or spending it; the principal use for crop rents is selling the crops. Thus, almost invariably, rents undergo prompt mutation. Allowing the wife to control and dispose of only the rents is indeed a relatively insubstantial right.

Another case that seems to be in point on this part of the topic is *Chandler v. Alamo Mfg. Co.*¹⁵ It clearly holds that the rents and revenues from the wife's separate realty are subject to the control of the husband as is the rest of the community estate. Therefore the holding in the *Chandler* case is squarely in conflict with the holding in the *Hawkins* case. The court did not even mention the *Hawkins* case, but relied instead upon the case of *Pottorf v. J. D. Adams Co., Inc.*,¹⁶ which deals only with the wife's personal earnings. It is doubtful that in relying upon the *Pottorf* case the court followed the proper authority, because first, that case dealt with another portion of the special community having distinctive features, and secondly, the *Hawkins* case was squarely in point. Furthermore, the *Chandler* case has no writ of error history and is therefore greatly overshadowed by the authority of the *Hawkins* case.¹⁷

The case of *Marshall v. Smith*,¹⁸ is the only other case bearing directly upon this point. It holds that the mutated form of the rents

¹⁴ This case is noted in 11 TEX. L. REV. 391 (1933).

¹⁵ 140 S. W. 918 (Tex. Civ. App. 1940).

¹⁶ 70 S. W. (2d) 745 (Tex. Civ. App. 1934) *writ of error refused*.

¹⁷ The *Chandler* case is noted in 19 TEX. L. REV. 204 (1941).

¹⁸ 199 S. W. (2d) 555 (Tex. Civ. App. 1946).

from the wife's separate realty is subject to the exclusive control of the husband. The court cites no cases in support of this proposition; furthermore, like the *Chandler* case it has no writ of error history and therefore stands no higher than a bare civil appeals opinion.

A case which might be construed to apply to the question of who controls and disposes of the *property bought with the rents* is that of *Strickland v. Wester*.¹⁹ In that case the husband's creditors attempted to seize land which the wife had bought with her personal earnings. The court declared that when the wife's *personal earnings* are converted into other property, that property is subject to the debts of the husband. Thus the court refused to allow that particular item of special community to retain its characteristics of special community, when converted into other property. Instead, it then takes the nature of ordinary community property, to the extent that it is subject to the debts of the husband. What did the court mean by saying that this property is *subject to* the debts of the husband? Did it mean that the husband could *voluntarily* convey it to his creditors to satisfy his debts, or did it mean only that the creditors could *seize* the property to satisfy such debts? Since the court used the words, "the same as any other community property," it probably meant that it is subject to *both* voluntary conveyance by the husband to his creditors and seizure by such creditors.

It could be argued that this same holding should apply not only to the wife's personal earnings, but also to the other items of special community, because they are all members of the same class. If it does apply, it overrules the *Hawkins* case as to mutations of rents, for it is a more recent case.

It is doubtful, however, whether this holding applies to the mutations of the other item (rents, interest, and dividends). First, it should not apply unless there is a close analogy between them, and there is no such analogy. There is a basic difference between

¹⁹ 112 S. W. (2d) 1047 (Tex. Com. App. 1938) *opinion adopted*.

rents, interest and dividends from the wife's separate property, on the one hand, and the wife's personal earnings on the other. As to the former group, there is a corpus, separately owned, controlled and disposed of by the wife, from which income is derived. As to the wife's personal earnings, there is no such corpus. Further, the legislative history of earnings is considerably different from that of the rents, interest and dividends. Secondly, the two cases (*Hawkins* and *Strickland*) should be reconciled, if reasonably possible; and it can be accomplished very simply by limiting the *Strickland* case to the subject matter with which it dealt, *viz.*, property bought with the wife's *personal earnings*.

It might be argued that since there are only three basic types of property in Texas: (husband's separate property, wife's separate property, and community property), mutations should apply only to these basic types; therefore, that special community property, when converted into other property, should lose its identity as such and become mere ordinary community property, thus fully liable for the husband's debts and subject to the husband's control and disposition. The argument is strengthened by Articles 4620 and 3661, which provide apparently that all community property is liable for both the husband's and the wife's debts, except where other statutes provide otherwise; whence it seems that Article 4616 should be construed strictly, to exempt only the four items it mentions (rents, interest, dividends and earnings). Thus the property purchased with such items should be subject to seizure for the husband's debts (a result exactly consonant with the *Strickland* case); and since voluntary conveyance usually parallels involuntary conveyance by creditors, such purchased property would probably be subject to the husband's control and disposition. The *Hawkins* case's holding as to rents, that the husband could not convey the mutated product thereof to his creditor, might possibly be based on failure to distinguish sharply between rents and property bought therewith; just as the Supreme Court in *Cauble v. Brown*.

*Electra Refining Co.*²⁰ inexactly stated, as to oil well rigs and machinery, that "they were personal earnings of" the wife.

While the preceding argument is a strong one in regard to the wife's personal earnings, it has less force in regard to her rents, because the *Hawkins* case, by holding that the wife has exclusive control and disposition of such rents, apparently made this item a very definite type of property, with characteristics of such great importance that it seems they should be preserved and carried over to the property bought therewith. Furthermore, the reasoning of the *Hawkins* case (that the statutory right of the wife to have control and disposition of her separate property would be an empty one, unless she also be given the right to control and dispose of the rents therefrom) applies with substantially equal force to the property which she buys with such rents.

Admittedly, this question of who controls and disposes of the property bought with rents from the wife's separate property is one on which the state of the law is not at all clear. But due to the basic difference between such rents and earnings, their differing legislative histories, and the desire that the courts will probably have to reconcile these cases, it is likely that the *Strickland* case will be limited to its facts, and the *Hawkins* case will prevail as the major authority concerning the property bought with rents.

Therefore, it appears that the *Hawkins* case is the strongest authority in respect to the rents and revenues²¹ from the wife's separate lands, and that case holds in effect that the rents and revenues from her separate realty and probably the mutated forms thereof are subject to the sole control and disposition of the wife.

INCOME FROM SECURITIES (STOCKS, BONDS, AND NOTES)

A thorough search of the cases fails to reveal a single authority dealing with the dividends from the wife's separate stock or the interest from her bonds and notes. Therefore we are committed to

²⁰ 115 Tex. 1, 274 S. W. 120 (1925).

²¹ See note 26, *infra*.

analogous cases and the statutes as a basis for arriving at a conclusion as to their control and disposition.

A close analogy can be found between this portion of the special community property and rents and revenues from the wife's separate realty. Both of the types consists of income from a corpus which is owned and managed exclusively by the wife as her separate property and which may be disposed of by her. The sole qualification upon such conveyance by the wife is that the husband must join as to stocks and bonds, only. This qualification upon her disposition is not too stringent, in that if the husband refuses to join she may obtain a court order allowing her to proceed alone. Because of this strong analogy, the reasoning of the *Hawkins* case is particularly applicable to these items; *i.e.*, the wife's statutory right to control and dispose of her separate securities would be an empty one were she not also given the right to control and dispose of the income therefrom.

Turning to the statutes, one is faced with the problem of statutory construction. Looking at them as they are today without taking into consideration the legislative history behind them, one might be forced to the conclusion that the income from her securities as a part of the community estate is subject to the sole control and disposition of the husband. However, a survey of the history of these statutes seems to cast doubt upon this conclusion. (This history has been reviewed earlier in this comment, but the significance thereof has been reserved for discussion at this point.) At first the *husband* had control of the special community items. Then with the increase of women's rights generally in the United States, the legislature in 1913 gave the wife the reins. Apparently having been pleased with what they must have felt was a step in the right direction, in 1925 they went the second mile and made all of these items, except the wife's personal earnings, part of the wife's *separate* estate. There was no longer any need for the special statute of 1913 giving the wife control and disposition of these items, for she already had full rights over her separate property. So this spe-

cial statute was dropped in the revision of that year. Clearly the legislature had remained within the bounds of the constitution heretofore, but now it had exceeded them, and the court said so in the case of *Arnold v. Leonard*. Even so it was not until four years later in 1929 that a new legislature repealed the portion of Article 4614 being discussed. By such repeal there is no doubt that the legislature intended to remove rents, interest and dividends from the category of the wife's separate property, *but* there is considerable doubt that it intended to remove it from the *control* of the wife. Is it reasonable to assume that upon being forced to abandon the second step of this progressive experiment, the legislature intended also to abandon the first step with which it had apparently been so well pleased? We think not. Of course, the authors realize that this interpretation calls for the assumption that the new legislature overlooked the possibility that the wife's control of this property might revert to the husband, as a result of its repeal of that portion of the statute which made these items her separate property and its failure to re-insert the 1913 statute giving her *control* of these items.

As shown above, there is a compelling analogy between interest and dividends and rents, so that the results reached in the *Hawkins* case as to rents should be applied to interest and dividends. However, because there are no cases *directly* on the point and further because a *literal* reading of the statutes (Articles 4614, 4616, 4619, and 4620) as they exist today gives the control and disposition to the husband, one can only conclude that the question is unsettled. The most one can reasonably say is that the courts will *probably* hold the same way in regard to interest and dividends and their mutated products as it held in the *Hawkins* case in regard to rents and their mutated products.

THE WIFE'S PERSONAL EARNINGS

There is less confusion in the law dealing with this segment of special community property than exists in regard to the preceding two. Neither the reasoning predicated upon the legislative history

of the topic nor the analogy to rents from her separate lands applies with force to the wife's earnings; so the *Hawkins* case is inapplicable. From 1913 to 1925, the legislature did confide the *control* of her personal earnings to the wife by special statute, but at no time did it place them in the category of her *separate* property as it did the other items of special community property. Thus, because the legislature failed to include in its 1925 revision the special statute of 1913 which gave the wife the control of these earnings, it is very likely that it fully intended to, and did, return this control to the *husband*. Further, the established principle that the labor of either spouse is community labor and the fruits therefrom are community property, supports this result. The analogy to rents from land is inapplicable in that there is no corpus owned separately by the wife from which the income stems.

The few cases upon this point substantiates this conclusion by saying that the husband has control of the wife's earnings, subject to their exemption from his debts and torts.²² As is pointed out in *Speer's Law of Marital Rights in Texas*²³ this results in the anomalous situation that the husband may voluntarily convey the wife's earnings to his creditors in satisfaction of his debts, but the creditors may not seize them.

It would appear that the products bought with the wife's personal earnings do not receive the protection which Article 4616 extends to the earnings themselves. Thus, it was held in the case of *Stickland v. Wester*²⁴ that "when such earnings are converted into other property, that property is subject to debts contracted by the husband the same as any other community property."²⁵

To summarize, the only thing special about the wife's personal earnings is that they are not subject to seizure by the husband's creditors to satisfy his debts. In all other respects they are treated as ordinary community property.

²² *Pottorf v. J. D. Adams Co.*, *supra*, note 16.

²³ SPEER, *LAW OF MARITAL RIGHTS IN TEXAS*, § 358 (3rd ed. 1929).

²⁴ *Strickland v. Wester*, *supra*, note 19.

²⁵ *Id.* at 1048.

CONCLUSION

As to the rents and revenues from the wife's separate land, the following rules seem to be established by the authorities: (1) they are subject to the control and disposition of the wife alone; (2) the wife probably has the sole right of control and disposition of property into which such rents and revenues are converted; (3) neither the rents and revenues²⁶ nor the mutated forms thereof are subject to the debts or torts of the husband through levy by creditors or conveyance by the husband.²⁷ As to the control and disposition of the income from the wife's separate securities, the law is unsettled. Because, however, of the close analogy to rents, and the identical legislative history behind the statutes dealing with the two, it seems likely that the law as to rents will be applied to the income from the wife's separate securities.²⁸

It seems clear that the wife's personal earnings receive no special consideration other than that accorded them in Article 4616, *i.e.*, they may not be seized to satisfy the husband's debts or torts.

²⁶ There is some doubt as to whether this rule applies to "revenues" from the wife's lands. "Rents" and "revenues" are distinct categories, though obviously the latter could include the former. Article 4616, exempting the special community property from the husband's debts and torts, lists "rents" but not "revenues"—and it should probably be strictly construed to exempt only what it says. However, the attempt in 1917 to broaden the wife's separate estate (discussed *supra*) included "rents and revenues." The *Hawkins* case (discussed *supra*), certainly by its rationale and probably by its language, treats rents and revenues on the same footing. Therefore the rule stated is probably accurate, but there is much doubt as to levy by the husband's creditors on "revenues" (other than rent) and the mutated forms thereof.

²⁷ On this point, other community property states differ as follows: 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, §§ 71, 115, 2 de Funiak 526-616 (1943).

Arizona—Increase, rents, issues and profits of wife's separate property are wife's separate property.

California—Rents, issue and profits of wife's separate property are wife's separate property. Wife may, without consent of husband, convey same.

Idaho—Rents and profits from wife's separate property are community property, unless the instrument conveying the property to wife provides that they be applied to her sole and separate use. In that case she alone may dispose of them and they are not subject to the debts of husband. Whether or not the instrument so provides, wife has control and management thereof.

Louisiana—Rents, issues and profits of wife's separate property, however administered, are community property unless the wife by written instrument duly notarized and witnessed declares and reserves it as her separate property.

Michigan—All property originally derived from wife's separate property is wife's separate property. Wife has sole right to manage, control and dispose of it.

²⁸ For the differences in other community property states, *ibid.*