



1950

## The Wife's Emergency Powers

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### Recommended Citation

Marvin Skelton, Note, *The Wife's Emergency Powers*, 4 Sw L.J. 112 (1950)  
<https://scholar.smu.edu/smulr/vol4/iss1/8>

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the relation of a surety and any action by the parties which would release a surety will release her property.<sup>28</sup> Thus if the time of payment is extended without her consent her property is released.<sup>29</sup> It is settled, however, that a surety who contracts so as to alter the general rules of suretyship must abide by such contract. So while an extension of time of payment between the creditor and principal debtor operates as a release of the surety,<sup>30</sup> this right may be waived by such surety, either in advance or afterwards.<sup>31</sup>

Thus the wife, when joined by her husband, can become personal surety for another but not for her husband, and by complying with Article 1299 she may mortgage her realty to secure another's debt or obligation, even that of her husband, but no personal liability is created by such mortgage.

There is merit in the restriction as to the wife's becoming a personal surety for her husband. If the law were otherwise it would afford an opportunity for the coercive and needy husband to work his will and to deplete the wife's separate estate, and yet an obvious counter argument presents itself. A wife can mortgage her separate property as a surety even for her husband's debts; practically, then, it is doubtful whether the present restriction prevents coercive husbands from gaining their ends.

*John K. Bowlin.*

## THE WIFE'S EMERGENCY POWERS

**W**HERE emergencies, such as abandonment or insanity, arise, the Texas statutes expressly provide an increase in the wife's power to convey. The statutes make no express provision for an increase in the wife's power to contract in similar situations.

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<sup>28</sup> *Wofford v. Unger*, 55 Tex. 480 (1881).

<sup>29</sup> *Borden et. ux. v. Arnold et al.*, 94 S. W. (2d) 216, Tex. Civ. App. 1936) *writ of error refused*.

<sup>30</sup> *Benson v. Phipps*, 87 Tex. 578, 29 S. W. 1066 (1895).

<sup>31</sup> *Nat. Bank of Commerce v. Kenny, et al.*, 98 Tex. 293, 83 S. W. 368 (1904).

As a result, when emergencies arise, the wife's power to convey is based on express statutes, while her power to contract is based on a construction of all the statutes in light of the circumstances.

### THE EMERGENCY POWER TO CONTRACT

#### *Insanity*

Before the emergency, the wife possesses various statutory powers, most of them implied. When she uses these powers, her agreements bind her personally.<sup>1</sup> She may contract without the husband's joinder for necessities for herself and children<sup>2</sup> and for expenses incidental to the management and control of her separate property<sup>3</sup> and probably of such community property as the statutes commit to her charge.<sup>4</sup> With the joinder of her husband, she may contract as joint maker of a note or as a surety.<sup>5</sup> In addition, she may contract in excess of her implied powers and waive her defense of coverture, as such a contract is voidable, not void,<sup>6</sup> and binds her unless she timely interposes such defense.<sup>7</sup> Insanity of the husband does not deprive her of these powers. The question is whether such emergency adds to them.

In *Lee v. Hall Music Co.*<sup>8</sup> the wife was sued on certain promissory notes, executed by her without joinder of her insane husband. The plaintiff's sole basis for recovery was that the husband's insanity allowed the wife to contract freely and bind herself, despite her plea of coverture. Recovery was denied as the pleadings failed to allege that the notes were executed by the wife for a purpose authorized by law and the wife had established her defense of coverture. Recognizing it was faced with the question whether the bare fact that the husband was insane relieved the wife of her disabili-

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<sup>1</sup> 23 TEX. JUR. 199 (1932).

<sup>2</sup> *Trammell v. Neiman-Marcus Co.*, 179 S. W. 271 (Tex. Civ. App. 1915).

<sup>3</sup> *Cauble v. Beaver-Electra Refining Co.*, 115 Tex. 1, 274 S. W. 120 (1925).

<sup>4</sup> *Hawkins v. Britton State Bank*, 122 Tex. 69, 52 S. W. (2d) 243 (1932).

<sup>5</sup> TEX. REV. CIV. STAT. (Vernon, 1948), Art. 4623.

<sup>6</sup> *Leake v. Saunders*, 84 S. W. (2d) 993 (Tex. Com. App. 1935).

<sup>7</sup> 23 TEX. JUR. 232 (1932).

<sup>8</sup> *Lee v. Hall Music Co.*, 119 Tex. 547, 35 S. W. (2d) 685 (1931).

ties, the Supreme Court said the only effect was to impliedly enlarge her previous contractual powers.

Where the insane husband has no separate property and there are no children, the wife is authorized to manage, control and dispose of the community without qualifying as community survivor.<sup>9</sup> Where there are children she is allowed to convey community property if there are existing community debts qualifying as community survivor.<sup>10</sup> As she is allowed such control over the community property, she would seem to have the necessarily implied power to contract incidental thereto. For example, she apparently could contract to extend a community note. These appear to be the only *direct* results of the husband's insanity in enlarging the wife's contractual powers. In other words, she continues to possess her previous powers to contract incidental to the control allowed her over her separate property and now receives power to contract incidental to such control as is allowed her over the community property.

Where there are children, but no existing community debts, it is necessary she qualify as community survivor by filing application and posting bond to exercise control over the community property. Where the husband has separate property it is necessary that the wife be appointed guardian of such property in order to exercise control of it.<sup>11</sup> Where the wife does qualify in these two situations, it appears she may contract incidental to the control allowed her. In such case, her enlarged contractual powers result from her qualifying as survivor or guardian, not from her husband's insanity. Of course, her power to contract for necessities may be given a wider application by the courts in the situation, as the definition given to necessities depends on the circumstances.<sup>12</sup>

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<sup>9</sup> TEX. REV. CIV. STAT. (Vernon, 1948), Art. 3662. The reference to separate property seems inappropriate as the chapter deals with community administration.

<sup>10</sup> *Magnolia Petroleum Co. v. Still*, 163 S. W. (2d) 268 (Tex. Civ. App. 1942) *writ of error refused*.

<sup>11</sup> TEX. REV. CIV. STAT. (Vernon, 1948) Art. 4121.

<sup>12</sup> 23 TEX. JUR. 200 (1932).

The community administration statutes make no mention of the emergency where the husband permanently abandons the wife.

Although the husband's insanity does not relieve the wife of her disabilities, the courts will not allow her to use such defense to the injury of third parties relying on her representations as a *feme sole*. In *Wilson v. Beck*<sup>13</sup> the wife entered into a partition agreement, while her husband was insane, representing herself as a *feme sole* and saying her husband was dead. The court refused to allow her defense of coverture, saying that while the law affords a married woman ample protection, when she either mistakenly or purposely assumes the status of a *feme sole* and parties contract with her with reference to that status, she will not thereafter be permitted to repudiate such contracts, to the injury and damage of persons misled.

In summary: the wife of an insane husband continues to possess her statutory powers to contract. Apparently the only enlargement in her contractual powers is the implied power incidental to the control allowed her over the community property. To exercise such control, she must qualify as community survivor unless the husband has no separate property and there are no children or there are children but existing community debts. Contracts executed in excess of the foregoing powers are voidable and may be rendered void by her timely defense of coverture, unless she is estopped to deny them.

### *Abandonment*

When the wife is thrown on her own resources by her husband's permanent abandonment, the courts feel she would be defenseless against the many demands and responsibilities inevitably facing her, unless accorded the freedom of contract. The decisions appear to give a liberal definition of this emergency. For example, they have considered the wife permanently abandoned when she was forced to leave her husband due to his threats. When the husband

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<sup>13</sup> *Wilson v. Beck*, 286 S. W. 315 (Tex. Civ. App. 1926) *writ of error refused*.

has left the wife, the courts have considered her permanently abandoned when placed on her own resources, whether the husband's actions were intentional or unintentional, as where he was confined in a penitentiary. Thus, the husband's return, while showing the abandonment was not "permanent," apparently will not affect her interim contracts. In *Wright v. Hays*,<sup>14</sup> an early leading case involving such emergency, the Supreme Court said:

"The default of the husband and the necessity of the wife's situation require and the law authorizes her to assume his position for the care of herself, her family and property, and vest her with the capacity of a *feme sole*."

Whether the courts consider the wife a *feme sole* for all purposes or merely to the extent of the necessity is not clear. During the emergency, she has been allowed to contract for necessaries and mortgage her separate property or the community property as security.<sup>15</sup> She has been permitted to contract to extend community debts and liens and to contract concerning repair of property she has rented.<sup>16</sup> Where she contracted for necessaries and non-necessaries, she and the husband have been held liable for the necessaries and the wife alone for the non-necessaries.<sup>17</sup> The basis of her liability for the non-necessaries was her implied contractual powers incidental to control over her separate property.

It appears the wife could have executed the foregoing contracts under her prior implied powers. Most of the cases involved necessaries. When the wife finds herself abandoned, the scope of her necessaries obviously increases, and the courts may exercise wide discretion in enlarging her implied powers, as the term *necessaries* is determined by the circumstances. In such case, the wife

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<sup>14</sup> *Wright v. Hays*, 10 Tex. 130, 135 (1853).

<sup>15</sup> *Bradley v. Gilliam*, 260 S. W. 289 (Tex. Civ. App. 1924); *Williams v. Farmer's National Bank of Stephenville*, 201 S. W. 1083 (Tex. Civ. App. 1918) *writ of error refused*; *Fermier v. Brannan*, 21 Tex. Civ. App. 543, 53 S. W. 699 (1899).

<sup>16</sup> See *Ulmer v. John Hancock Mutual Life Ins. Co.*, 161 S. W. (2d) 862, 865 (Tex. Civ. App. 1942) *writ of error refused want of merit*; *Crowder v. McLeod*, 151 S. W. 1166 (Tex. Civ. App. 1912) *writ of error dismissed*; *Heagy v. Kastner*, 138 S. W. 708 (Tex. Civ. App. 1911).

<sup>17</sup> *Falmer v. Coghlan*, 55 S. W. 1122 (Tex. Civ. App. 1900).

does not gain a new power; she merely has a prior power enlarged. Whether or not her contracts for necessities bind her personally will depend on the agreement with the creditor as to whether he will look to her, her husband or both of them for payment. As a result, her creditors may find themselves in a difficult situation. If they continue contracting with the wife after the abandonment they may be faced with the necessity of reaching the husband, as his liability is not relieved by the abandonment of his wife.<sup>18</sup> It is clear, however, if the wife contracts with parties relying on her representations that she is abandoned, she will be estopped to deny liability on such contracts.<sup>19</sup>

The wife continues to possess powers incidental to her control over her separate property and such community property as the statutes commit to her charge.<sup>20</sup> When abandoned, she is allowed complete control over her separate realty<sup>21</sup> and the community realty to the extent of the necessity.<sup>22</sup> As a result, her contractual powers incidental to such control would appear enlarged. Effect of the emergency on control allowed her over the so-called *special* community property is beyond the scope of this comment.<sup>23</sup> It is sufficient to say that any increase in control allowed her would seem to increase her contractual powers.

If the courts intend the wife to be a *feme sole* for all purposes, a logical result would be that she has unlimited power to contract. Yet she has been allowed to escape liability by pleading coverture to a note endorsed by her without joinder of her husband, as required by statute.<sup>24</sup> The court recognized a permanent abandoned wife may make obligations binding on her separate property and the community property under certain conditions. However, it

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<sup>18</sup> Black v. Bryan, 18 Tex. 453 (1857).

<sup>19</sup> See Wilson v. Beck, *supra*, note 13, at 319.

<sup>20</sup> See notes 3 and 4, *supra*.

<sup>21</sup> Harris v. Hamilton, 221 S. W. 273 (Tex. Com. App. 1920).

<sup>22</sup> Keys v. Tarrant Co. Bldg. and Loan Association, 286 S. W. 593 (Tex. Civ. App. 1926).

<sup>23</sup> See comment on special community property in this symposium.

<sup>24</sup> TEX. REV. CIV. STAT. (Vernon, 1948) Art. 4623.

added that the statute was too clear in specifying that the wife must be joined by her husband in order to make a note or be a surety to allow any other construction.<sup>25</sup> Since the decisions are not clear as to the extent that the wife is considered a *feme sole*, the courts would seem faced with the question only when necessary to allow her to contract in excess of her prior powers, enlarged by the emergency.

To repeat briefly: although the courts refer to a permanently abandoned wife as a *feme sole*, she has been limited to powers she possessed prior to the emergency or received as an incident to the control allowed her over her separate property and the community property due to the emergency. The decisions have not allowed her the complete freedom accorded an actual *feme sole*, although it seems clear that her prior powers are enlarged. The extent to which the courts will consider the wife a *feme sole* would seem to depend on the necessity of the situation.

#### THE EMERGENCY POWER TO CONVEY

##### *Insanity*

Statutory requirements that the wife be joined by her husband in conveying her separate property, whether lands<sup>26</sup> or homestead,<sup>27</sup> are relaxed when the husband becomes insane. In *Ross v. Tide Water Oil Co.*<sup>28</sup> the wife, without joinder of her insane husband, conveyed her separate property, which was their homestead. The Supreme Court allowed the conveyance, saying the insanity invested the wife with authority to convey her separate property, whether homestead or not, without his joinder, and it was not necessary that she apply to the district court for permission. Referring to Articles 4617 and 4618,<sup>29</sup> the court said that they allow the wife to convey her separate property, homestead or not, without joinder

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<sup>25</sup> *First National Bank of Mt. Calm v. Roller*, 299 S. W. 917 (Tex. Civ. App. 1927); affirmed on point discussed in 14 S. W. (2d) 834 (Tex. Com. App. 1929).

<sup>26</sup> TEX. REV. CIV. STAT. (Vernon, 1948) Art. 4614.

<sup>27</sup> TEX. REV. CIV. STAT. (Vernon, 1948) Art. 4618.

<sup>28</sup> *Ross v. Tide Water Oil Co.*, 136 Tex. 66, 145 S. W. (2d) 1089 (1941).

<sup>29</sup> TEX. REV. CIV. STAT. (Vernon, 1948) Art. 4617, Art. 4618.



of her husband, when he is insane or has permanently abandoned her, and these articles are permissive rather than mandatory when directing that the wife *may* apply to the district court for permission. These statutes make no mention of children so it appears that their presence is immaterial. Apparently the word *may* used in each article indicates a legislative intent to provide the wife an additional method, which may be made a matter of record, for conveying her separate property in such emergencies.

Where community property is involved, the rights of the wife depend on the community administration statutes or the existence of community debts.<sup>30</sup> It is obvious that the husband's full control over the community must be delegated. If there are no children and no separate property of the husband, the community passes to the wife, charged with community debts.<sup>31</sup> The wife does not receive any addition to her undivided half-title, as she normally does at her husband's death. She merely receives the power to manage, control and sell the community property to pay debts or, in the absence of community debts, to dispose of it in a manner permitted to the husband during the normal marital relation.<sup>32</sup> She receives such a qualified passing of title for the purpose of an informal administration of the community, and loses such control if and when her husband regains his sanity.<sup>33</sup>

Where there are children and no community debts, the wife must qualify as community survivor<sup>34</sup> to exercise control. She must satisfy the rules governing a husband when his wife becomes insane, including the posting of the required bond.<sup>35</sup> On qualifying, she exercises the same rights as would the husband in the con-

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<sup>30</sup> See notes 9 and 10, *supra*.

<sup>31</sup> TEX. REV. CIV. STAT. (Vernon, 1948) Art. 3662.

<sup>32</sup> *Lee v. Hall Music Co.*, *supra*, note 8; *Schwarz v. West*, 37 Tex. Civ. App. 136, 84 S. W. 282 (1904); 23 TEX. JUR. 144 (1932).

<sup>33</sup> 23 TEX. JUR. 252 (1932).

<sup>34</sup> *Survivor* as used in community administration indicates a sane person representing an insane person, as well as a living person representing a deceased person. TEX. REV. CIV. STAT. (Vernon, 1948) Art. 3679.

<sup>35</sup> TEX. REV. CIV. STAT. (Vernon, 1948) Art. 3667.

verse situation to control, manage and dispose of the community.<sup>36</sup> Her control continues until she remarries in event of her husband's death.<sup>37</sup> Where there are children and existing community debts, the requirement that she qualify as community survivor is relaxed. In *Magnolia Petroleum Co. v. Still*<sup>38</sup> the wife executed an oil and gas lease, joined by her insane husband. The court said the wife of an insane husband, where there are children, has power to convey mineral interests in the community homestead to pay existing community debts, without qualifying under the community administration statutes. It should be remembered that this case applies only when there are existing community debts.

To summarize: the wife of an insane husband may convey her separate property, whether lands or homestead, without her husband's joinder and without receiving permission of the district court. Where there are no children and no separate property of the husband, she is the informal administratrix of the community, with power to convey, without qualifying as community survivor, whether community debts exist or not. Where there are children and no community debts, she exercises full control and disposal of the community property after qualifying as community survivor. Where there are children and community debts, she may convey community property without so qualifying.

### *Abandonment*

It appears settled that a permanently abandoned wife may convey her separate property, whether homestead or not, without joinder of her husband.<sup>39</sup> In *Harris v. Hamilton* the court said:

"The basis of these decisions is that, while the married relation has not been legally severed, a status is created in the wife, in so far as her

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<sup>36</sup> *Howell v. Fidelity Lumber Co.*, 228 S. W. 181 (Tex. Com. App. 1921).

<sup>37</sup> TEX. REV. CIV. STAT. (Vernon, 1948) Art. 3678.

<sup>38</sup> *Magnolia Petroleum Co. v. Still*, *supra*, note 10.

<sup>39</sup> *Hector v. Knox*, 63 Tex. 613 (1885); *Service Parts Co. v. Bizzell*, 120 S. W. (2d) 919 (Tex. Civ. App. 1938); *Mabry v. Citizen's Lumber Co.*, 47 Tex. Civ. App. 443, 105 S. W. 1156 (1907) *writ of error refused*.

property rights are concerned, identical with that of a feme sole, giving her full power over her property the same as if the marital relation did not exist."<sup>40</sup>

Articles 4617 and 4618<sup>41</sup> make express provision for such emergency conveyances. The Supreme Court's decision that these statutes are permissive rather than mandatory when providing that the wife *may* apply to the district court for permission has been discussed previously.<sup>42</sup> By analogy it would seem possible for her to convey her separate stocks and bonds without the husband's joinder.

Where the land is community, it seems settled the permanently abandoned wife may convey without her husband's joinder. However, it appears that her conveyances are allowed only where necessary to protect the community interest or support the family.<sup>43</sup> Under the statutes prior to 1927 the courts allowed the wife such an emergency increase in power. In that year, Article 4619<sup>44</sup> was amended so as to provide the wife express relief where her husband disappears and his whereabouts remains unknown to her more than twelve months. By satisfying the article's requirements, she is allowed full control, management and disposition of the community, with the same power conferred by law upon the husband, and her acts shall be as those of a *feme sole*. Such control continues until the husband returns and such fact is filed for record in the appropriate county. As the legislature used the mandatory word *shall* in directing how the wife should petition the district court to receive the article's benefit, it would seem necessary

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<sup>40</sup> Harris v. Hamilton, 221 S. W. 273, 275 (Tex. Com. App. 1920).

<sup>41</sup> TEX. REV. CIV. STAT. (Vernon, 1948) Art. 4617, Art. 4618.

<sup>42</sup> See note 29, *supra*.

<sup>43</sup> See Clements v. Ewing, 71 Tex. 370, 372, 9 S. W. 312, 313 (1888); Slator v. Neal, 64 Tex. 222 (1885) which says confinement of husband in penitentiary is an abandonment; Heidenheimer v. Thomas, 63 Tex. 287 (1885); Anna Berta Lodge v. Leverton, 42 Tex. 18 (1875); Keys v. Tarrant Co. Bldg. and Loan Association, *supra*, note 22; Royall v. Webster, 279 S. W. 895 (Tex. Civ. App. 1926); Newman v. Gill, 243 S. W. 697 (Tex. Civ. App. 1922).

<sup>44</sup> TEX. REV. CIV. STAT. (Vernon, 1948) Art. 4619.

that such permission be received before she exercise control of the community.

As Article 4619 specifies the sole emergency where "the husband shall have disappeared and his whereabouts shall have been and remain unknown to the wife continuously for more than twelve months," what effect does it have on the formerly recognized rights of a permanently abandoned wife whose plight does not fit this specific emergency?

In *Masterson v. Bouldin*<sup>45</sup> the court was faced with the issue of whether a permanently abandoned wife must apply to a district court for permission to convey the community property. The court said the law was well settled before Article 4619 was amended that a deserted wife could make such a conveyance when necessary. When the legislature amended Article 4619, the caption of the amending act specified that the only change intended was dependent upon the fact that the husband shall have disappeared and his whereabouts have been and remain unknown to the wife more than twelve months. As the legislature impliedly negated any intention to change the prior effect of the statute, the court reasoned that Article 4619 does not affect the power of a wife permanently separated from her husband to convey community property as established by prior decisions.

To restate briefly: a permanently abandoned wife may convey her separate lands, including the homestead, and such community property as is necessary to protect the community interest or support the family, without her husband's joinder and without receiving permission of the district court. Apparently she may be allowed to transfer her separate stocks and bonds in the same manner. Where her husband disappears and his whereabouts remains unknown more than twelve months and she receives permission of the district court, she may exercise complete control and disposition of the community property, subject to his return.

*Marvin Skelton.*

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<sup>45</sup> *Masterson v. Bouldin*, 151 S. W. (2d) 301 (Tex. Civ. App. 1941) *writ of error refused*.