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## Problems Concerning Administration of Community Property

Eldon R. Vaughan

A. W. Davis

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the community property so as to make them the separate property of her husband. In either case the procedure is the same, *i.e.*, it requires two deeds—the first from the husband and the wife to a trustee; the second from the trustee to the husband as his separate property. The conveyance can be as a gift, or for a consideration from the husband's separate estate.

Husband and wife cannot change the status of marital property by mere agreement; there must be a conveyance recognized by law. The courts are quick to declare void an effort to change separate property to community property by agreement through the guise of deeds. If a deed of one spouses's separate property to a trustee and then a deed from the trustee back to the husband and wife, declare that their purpose is to convert separate property into community property, the whole transaction will be void, but if there are no such express recitals, the transaction makes the spouses co-tenants. There cannot be a gift of separate property to the community. And finally, there is a possibility that separate property can be changed to community property by a conveyance to the community in exchange for a consideration from community funds.

*Howard Coghlan.*

## PROBLEMS CONCERNING ADMINISTRATION OF COMMUNITY PROPERTY

### INTRODUCTION

**O**F course community property ceases to be such when either spouse dies. In case of intestacy and no children, all such property belongs to the survivor; if there are children, they inherit the decedent's half, and a co-tenancy with the survivor results.<sup>1</sup> In case of a will, the beneficiaries therein get the decedent's half

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<sup>1</sup> TEX. REV. CIV. STAT. (Vernon's, 1948), Art. 2578. "Children" is used in the text as meaning also one child only, or grandchildren if the child who is their parent is dead.

(even though they are outsiders—subject only to homestead rights, if any, in the survivor and children), and a co-tenancy with the survivor results. In all these situations, such property of course remains subject to the community debts and therefore subject to administration to pay such debts.

What are “community debts”? They are debts that are collectible from non-exempt community property. They therefore apparently include any debt contracted by the husband, before or after marriage, and any debt similarly contracted by the wife which she does not avoid, and any tort liability of either spouse, before or after marriage. That is, as to the wife, all premarital debts are included; all postnuptial debts which are authorized by statute are included; unauthorized debts after marriage—which are voidable—seem to be included if she elects not to avoid them. The above debts of the husband are collectible from all the community property except four items produced by the wife or her property; the above debts of the wife (except necessities, which are ordinarily more broadly collectible) are collectible from those four items of community property, only. (Of course, the debts of each spouse are collectible also from the separate property of such spouse.) The above tort liability of each spouse is collectible as debts are, or in some situations collectible from the entire community property.<sup>2</sup>

If there are no children and also no community debts, no community administration is possible. If there are children and community debts, there are three or more possibilities: community administration by the survivor without qualifying in court; or community administration by the survivor by so qualifying; or an ordinary administration, by the decedent's executor or administrator, alone or coexisting with one of the preceding. If there are children but no community debts, the only possible type of com-

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<sup>2</sup> As to the preceding paragraph, see comment in this issue *The Liability of Marital Property for the Contracts and Torts of Husband and Wife*. See also Art. 4620 and Art. 3661; also the 1848 Statute (4 Gammel 469), the meaning of which is apparently unchanged by Art. 4620.

munity administration would be by the survivor's qualifying in court.

Where either spouse is adjudged insane, the other spouse may control community property (which continues to be such) much as in the case of death;<sup>3</sup> but that entire topic is omitted from discussion here.

The problems of community administration are numerous and difficult. Some of the major ones will be discussed, under the two headings of the non-qualifying community survivor and the community survivor who qualifies in the probate court under the statutes.

### 1. THE NON-QUALIFYING COMMUNITY SURVIVOR

#### *What Powers Does Either Community Survivor Have Without Court Action?*

##### *Nature and Elements*

It is well recognized that, for the purpose of paying community debts and settling community obligations, the survivor, husband or wife, can convey the former community property without any court action whatsoever.<sup>4</sup>

It is the existence of community obligations which generates the power, and, somewhat on the analogy of a surviving partner, the courts regularly have conceded the surviving spouse's right to sell and convey for the purpose of settling those debts,<sup>5</sup> or, what

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<sup>3</sup> TEX. REV. CIV. STAT. (Vernon's, 1948), Art. 3662.

<sup>4</sup> Shell Oil Co., Inc. v. Howth, 138 Tex. 357, 159 S. W. (2d) 483 (1942); Grebe v. First State Bank of Bishop, 136 Tex. 226, 150 S. W. (2d) 64 (1941); Stone v. Jackson, 109 Tex. 385, 210 S. W. 953 (1919); Davis v. Magnolia Petroleum Co., 134 Tex. 201, 134 S. W. (2d) 1042 (Tex. Com. App. 1946); Griffin v. Stanolind Oil & Gas Co., 133 Tex. 45, 125 S. W. (2d) 545 (Tex. Com. App. 1939); "The right and power of the survivor of the community estate to sell same without administration to pay a community debt has been so long and so oftentimes recognized that it has become a rule of property in Texas no longer open to question," Kinard v. Sims, 53 S. W. (2d) 803, 804 (Tex. Civ. App. 1932). *Writ of error refused.*

<sup>5</sup> Shell Oil Co., Inc. v. Howth, Davis v. Magnolia Petroleum Co., Griffin v. Stanolind Oil & Gas Co., *supra*, note 4; Clemmons v. McDowell, 5 S. W. (2d) 224 (Tex. Civ. App. 1928), *affirmed*, 12 S. W. (2d) 995 (Tex. Com. App. 1929); Southern Underwriters v. Lewis, 150 S. W. (2d) 162 (Tex. Civ. App. 1941); Williams v. Davis,

is related, performing other contractual obligations which bind the former community.<sup>6</sup> The survivor's action in so doing, if within a reasonable time, is binding upon the children, who, with the survivor, retain their proportionate interest in any residue left. The conveyance must be for the purpose of paying community debts,<sup>7</sup> or at least, community debts must exist; and it cannot be in fraud of the children.<sup>8</sup> If such debts exist, the buyer takes good title free thereof, though the proceeds are not used to pay the debts; the same result follows, under the same facts, with an independent executor. The amount of the debt and the value of the property conveyed are immaterial except for their influence on the question of fraud.<sup>9</sup> That the debt was not yet due, that enough personality existed with which the debt might have been paid, that errors of judgment were committed do not impair the right of the survivor to sell.<sup>10</sup> There is, however, no authority in the survivor to give away former community property or exchange it unless

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133 S. W. (2d) 275 (Tex. Civ. App. 1939); *First National Bank of Bowie v. Phillips*, 101 S. W. (2d) 319 (Tex. Civ. App. 1936) *writ of error dismissed*.

<sup>6</sup> *Garnett v. Jobe*, 70 Tex. 696, 8 S. W. 505 (1888); *Long v. Walker*, 47 Tex. 173 (1877); *Prim v. Barton*, 18 Tex. 206 (1856); *Stramler v. Coe*, 15 Tex. 211 (1855); *McCombs v. Abrams*, 28 S. W. (2d) 584 (Tex. Civ. App. 1930), *aff'd* 48 S. W. (2d) 612 (Tex. Com. App. 1932); *Carey v. Texas Pacific Coal & Oil Co.*, 237 S. W. 309 (Tex. Civ. App. 1921), where lease was binding obligation on community, wife, as survivor, had power to accept delay rentals and continue lease in force.

<sup>7</sup> No community debt where conveyance made in consideration of defense of adult son against murder charge three years after husband's death, *Shell Oil Co., Inc. v. Howth*, *supra*, note 4; no power where assets all cash and no debts existed, *Grebe v. First State Bank of Bishop*, *supra*, note 4; or, where it was agreed the community owed no debts, *White v. Baker*, 118 S. W. (2d) 319 (Tex. Civ. App. 1938); see *Burnham v. Hardy Oil Co.*, 108 Tex. 555, 195 S. W. 1139 (1917).

<sup>8</sup> *Griffin v. Stanolind Oil & Gas Co.*, *supra*, note 4; *Walston v. Gibson*, 141 S. W. (2d) 997 (Tex. Civ. App. 1940) *writ of error refused*; *Williams v. Davis*, *supra*, note 5. *Cf. Lipsitz v. Rice*, 233 S. W. 594 (Tex. Civ. App. 1921) where jury found fraud.

<sup>9</sup> *Griffin v. Stanolind Oil & Gas Co.*, *supra*, note 4, debt of \$10.32 due for taxes when oil and gas lease executed by the survivor; no showing of value of lease other than cash down payment of \$10.00. Nor does the fact that the sale was made not solely for debts invalidate it, *Cage v. Tucker's Heirs*, 29 Tex. Civ. App. 586, 69 S. W. 425 (1902), and *Clemmons v. McDowell*, 12 S. W. (2d) 955 (Tex. Com. App. 1929), at 956: "... it having been shown at the time the survivor conveyed the land it was encumbered by a community obligation which was assumed and paid by the purchaser, the conveyance, as a matter of law, regardless of the motive the survivor may have had in making the deed, was to pay a community debt."

<sup>10</sup> *Kinard v. Sims*, *supra*, note 4.

such exchange is for the purpose of settling or paying debts;<sup>11</sup> and there seems to be no authority in the survivor to sell it for necessities.<sup>12</sup>

The survivor may renew, revive or secure community debts,<sup>13</sup> and the fact that limitations have run against a debt does not vitiate the power of the survivor to sell and convey for the purpose of paying the barred debt.<sup>14</sup> The power in the community survivor is a general power, and it is not necessary that reference to the power be made in instruments executed by the survivor under this authority;<sup>15</sup> better practice would seem to include a reference, however. The parties may purposely stipulate that, even though debts do exist, the individual capacity is to govern, *e. g.*, where a widow and child convey as "sole heirs;"<sup>16</sup> where the grantee undertakes to purchase from the husband as owner and insists the heirs be joined as such;<sup>17</sup> or, where the surviving husband and five children join in a deed naming the grantors as individuals, the interest of a sixth child is not conveyed.<sup>18</sup>

### *Are the Rights of a Surviving Wife Equal To Those of a Surviving Husband?*

As a general rule, either the surviving husband or the surviving wife can exercise the power, without court action, to sell to pay

<sup>11</sup> *Bordages v. Stanolind Oil & Gas Co.*, 129 S. W. (2d) 786 (Tex. Civ. App. 1938) *writ of error dismissed, judgment correct.*

<sup>12</sup> *Littleton v. Giddings*, 47 Tex. 109 (1877); *Brown v. Elmendorf*, 25 S. W. 145 (Tex. Civ. App. 1894), *aff'd* 87 Tex. 56, 26 S. W. 1043 (1894); *Booth v. Clark*, 34 Tex. Civ. App. 315, 78 S. W. 392 (1904).

<sup>13</sup> *First Nat'l Bank of Bowie v. Phillips*, 101 S. W. (2d) 319 (Tex. Civ. App. 1936) *writ of error dismissed*; *Bell v. Pirtle*, 69 S. W. (2d) 476 (Tex. Civ. App. 1934).

<sup>14</sup> *Stone v. Jackson*, *supra*, note 4; *Stramler v. Coe*, *supra*, note 6; *Walston v. Gibson*, *supra*, note 8; *Kauffman v. Hahn*, 59 S. W. (2d) 435 (Texas Civ. App. 1933); *Allredge v. Wilson*, 268 S. W. 1045 (Tex. Civ. App. 1925) *Cf. First Natl. Bank of Bowie v. Phillips*, *supra*, note 13; *Cf. revival of barred debt by an executor or administrator, which is said to be a prima facie fraud and not binding upon the heirs.*

<sup>15</sup> *Davis v. Magnolia Petroleum Co.*, *supra*, note 4; *Humble Oil & Refining Co. v. Lloyd*, 108 S. W. (2d) 213 (Tex. Civ. App. 1937) *writ of error refused*; *Bell v. Pirtle*, *supra*, note 13.

<sup>16</sup> *Mariposa Land & Cattle Co. v. Sullivan*, 87 Tex. 142, 26 S. W. 978 (1894).

<sup>17</sup> *Willacy Co. Water Control & Improvement Dist. No. 1 v. Hofer*, 149 S. W. (2d) 1114 (Tex. Civ. App. 1941).

<sup>18</sup> *Meyers v. Crenshaw*, 116 S. W. (2d) 1125 (Tex. Civ. App. 1938), *aff'd*. 134 Tex. 500, 137 S. W. (2d) 7 (Tex. Com. App. 1940).

community debts; but a distinction has been established because of the differing individual liabilities of the spouses for community obligations. The husband being personally liable for more of the community debts, ordinarily, than the wife is,<sup>19</sup> his right to exercise the powers of the community survivor is superior to the right of the administrator of the wife's estate,<sup>20</sup> although where the husband makes no effort to exercise the power his having the mere superior right does not prevent another from doing so.<sup>21</sup>

The husband's liability for community debts being ordinarily more extensive than the wife's, the administrator of his estate requires, and is given, a superior right to manage and control the assets of the former community to the exclusion of the surviving wife whose power is suspended during such administration;<sup>22</sup> she cannot sell even to pay debts, but her power is restored when the administration of the deceased husband's estate is closed. Where the wife is administrator of her husband's estate her power *as community* survivor is likewise suspended,<sup>23</sup> and she should be dealt with as administratrix and not as the survivor of the community.

When the wife has qualified under the statutes and is subsequently remarried, her control ceases and the estate becomes subject to regular administration.<sup>24</sup> By analogy, her powers as non-qualifying community survivor are similarly suspended during

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<sup>19</sup> See comment in this issue, *The Liability of Marital Property for the Contracts and Torts of Husband and Wife*.

<sup>20</sup> *Stone v. Jackson*, *supra*, note 4; *Carleton v. Goebler*, 94 Tex. 93, 58 S. W. 829 (1900); *Moody v. Smoot*, 78 Tex. 119, 14 S. W. 285 (1890); *Good v. Coombs*, 28 Tex. 35 (1866); *Primm v. Barton*, 18 Tex. 206 (1856); *Chanowsky v. Friedman*, 205 S. W. (2d) 641 (Tex. Civ. App. 1947), *writ of error refused*, *n.r.e. Levy v. W. L. Moody & Co.*, 87 S. W. 205 (Tex. Civ. App. 1905) *writ of error refused*.

<sup>21</sup> *Chanowsky v. Friedman*, 219 S. W. (2d) 501 (Tex. Civ. App. 1949).

<sup>22</sup> *Matula v. Freytag*, 101 Tex. 357, 107 S. W. 536 (1908); *Corzinne v. Williams*, 85 Tex. 499, 22 S. W. 399 (1893); *Hollingsworth v. Davis*, 62 Tex. 438 (1884); *Moke v. Brackett*, 28 Tex. 443 (1866); *Tucker v. Brackett*, 28 Tex. 337 (1866); *Knight v. Tannehill Bros.*, 140 S. W. (2d) 552 (Tex. Civ. App. 1940) *writ of error dismissed, judgment correct*; *Latham v. Dawson*, 40 Tex. Civ. App. 219, 89 S. W. 315 (1905) *no writ*.

<sup>23</sup> *Wingfield v. Hackney*, 95 Tex. 490, 68 S. W. 262 (1902).

<sup>24</sup> TEX. REV. CIV. STAT. (Vernon's 1948) art. 3680.

the continuation of the second marriage,<sup>25</sup> but are restored upon its dissolution.<sup>26</sup>

### *Relation of Non-Qualifying Survivor to Creditors and Heirs*

The rights of a survivor and the heirs are fixed at the time of the death of the other spouse, and all subsequent transactions must be undertaken subject to those rights as well as to the liabilities of the estate. The liabilities of the survivor arise on his own account and not because of the death of the other spouse. As noted, a surviving husband is usually personally liable for many more community debts than is a surviving wife.<sup>27</sup> Subsequent acts may give rise to a personal liability which did not exist prior to the termination of the marriage, *e. g.*, to the extent that a survivor appropriates to his own use either separate property of the deceased or former community property which would otherwise be liable to creditors, equity will impose a personal obligation for the debt.<sup>28</sup> However, since the estate vests immediately on death and the survivor and heirs are entitled to possession, subject to the debts of the decedent, the use or disposition by them must be found to be inconsistent with the superior rights of creditors and to defeat the latter's right to reach and apply the property to the debt.<sup>29</sup>

Where the survivor discharges community obligations from his own separate property, he is entitled to reimbursement from the

<sup>25</sup> *Summerville v. King*, 98 Tex. 332, 83 S. W. 680 (1904); *Auerbach v. Wylie*, 84 Tex. 618, 19 S. W. 856 (1892), (Fisher, J. dissenting, 20 S. W. 776); *Davis v. McCarty*, 64 Tex. 584 (S. Ct. 1885); *Knight v. Tannehill Bros.*, *supra*, note 17.

<sup>26</sup> *Summerville v. King*, *Id.*; *Knight v. Tannehill Bros.*, *supra*, note 22.

<sup>27</sup> *Stone v. Jackson*, *supra*, note 4; *Clemmons v. McDowell*, *supra*, note 5.

<sup>28</sup> *Solomon v. Skinner*, 82 Tex. 345, 18 S. W. 698 (1891); *Low v. Felton*, 84 Tex. 378, 19 S. W. 693 (1892); *Schmidtke v. Miller*, 71 Tex. 103, 8 S. W. 638 (1892); *Mayes v. Jones*, 62 Tex. 365 (1884); *Webster v. Willis*, 56 Tex. 468 (1882); *McCampbell v. Henderson*, 50 Tex. 601 (1879); *Patterson v. Allen*, 50 Tex. 23 (1878); *Ingram v. Dowling*, 11 S. W. (2d) 325 (Tex. Civ. App. 1928); *Rex Supply Co. v. Shepherd*, 293 S. W. 342 (Tex. Civ. App. 1927) *writ of error refused*; *Hurst v. Crawford*, 216 S. W. 284 (Tex. Civ. App. 1919).

<sup>29</sup> *Blinn v. McDonald*, 92 Tex. 604, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931 (1899); *Kauffman v. Wooters*, 79 Tex. 205, 13 S. W. 549 (1890); *Embree-McLean Carriage Co. v. Johnson*, 85 S. W. 1021 (Tex. Civ. App. 1905); *Middleton v. Pipkin*, 56 S. W. 240 (Tex. Civ. App. 1900).

assets of the former community estate, provided it is done fairly and not to the detriment of the remainder of the estate.<sup>30</sup>

The heirs and the surviving spouse stand as tenants in common of the former community estate, subject to claims against the estate and to the survivor's power to dispose of it to settle those claims. Absent facts giving rise to such power, the survivor has no superior rights in the estate. As a tenant in common, he is entitled to the use and possession of the property<sup>31</sup> where his use is reasonable and proper and there is no excluding the heirs. The position of the survivor is often spoken of as that of a trustee, when he has exceeded his authority. If he continues in possession and management where the debts have been settled and the administration, if any, has been closed, he cannot use the former community assets for private gains, and any profits or increases accruing therefrom must be shared with the heirs.<sup>32</sup>

Too, the survivor may convey his own undivided interest in his individual capacity. If he or she purports to convey full title to a specific portion of the former community estate, the conveyance is valid if the children may secure their just share from the remainder. This amounts to an "equitable partition," and rules of equity govern.<sup>33</sup> Of course, the parties may partition by agreement or suit, but in any event, the rights of creditors must be preserved.

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<sup>30</sup> *Davis v. Magnolia Petroleum Co.*, *supra*, note 4; *Leatherwood v. Arnold*, 66 Tex. 414, 1 S. W. 173 (1886); *Williford v. Simpson*, 217 S. W. 191 (Tex. Civ. App. 1920); *Kerens Nat'l. Bank v. Stockton*, 281 S. W. 580 (Tex. Civ. App. 1926), *rev'd on other grounds*, 120 Tex. 546, 40 S. W. (2d) 7 (1931); *Suggs v. Singly*, 167 S. W. 241 (Tex. Civ. App. 1914); *Jennings v. Barton*, 98 S. W. 445 (Tex. Civ. App. 1906) *writ of error refused*; *Davis v. Harmon*, 9 Tex. Civ. App. 356, 29 S. W. 492 (Tex. Civ. App. 1895).

<sup>31</sup> *Akin v. Jefferson*, 65 Tex. 137 (1885) (Survivor leasing land or hiring stock out to others is accountable to heirs, but not for his own reasonable use); *Lumpkin v. Murrell*, 46 Tex. 51 (1876); *Spencer v. Pettit*, 2 S. W. (2d) 422 (Tex. Com. App. 1928) (Survivor's use and occupation approved, but disposition disapproved even absent fraudulent intent; held as "constructive trustee" for proceeds.); *Citizens Savings Bank & Trust Co. v. Spencer*, 105 S. W. (2d) 671 (Tex. Civ. App. 1937) *writ of error dismissed*, 110 S. W. (2d) 1151; *Whitham & Co. v. Donovan*, 11 S. W. (2d) 197 (Tex. Civ. App. 1928).

<sup>32</sup> *Grebe v. First State Bank of Bishop*, *supra*, note 4; *First Nat'l. Bank v. Phillips*, 101 S. W. (2d) 319 (Tex. Civ. App. 1937) *writ of error dismissed*; *Garcia v. Garcia*, 4 S. W. (2d) 257 (Tex. Civ. App. 1928) *writ of error dismissed*.

<sup>33</sup> *Heller v. Heller*, 114 Tex. 401, 269 S. W. 771 (1925); *Peak v. Swindle*, 68 Tex. 242, 4 S. W. 478 (1887); *Arnold v. Cauble*, 49 Tex. 527 (1878); *Clements v. Maury*,

### *Rights of Purchasers From a Non-Qualifying Survivor*

When a purchaser is called upon to defend a conveyance to him from the non-qualifying survivor, the actualities of the situation under which the conveyance was made will vary the burden imposed upon the parties involved. The property might have been community property and considered as such; it might have been community property but legal title might have been in the surviving spouse; or, it might have been the separate property of the deceased spouse which was presumed to be community. In the first and last instances, where the property is disposed of as community, the conveyance must be for the purpose of paying community debts, or at least such debts must exist; while in the second instance, where the legal title stands in the survivor, it will be seen that the existence of debts may be immaterial.

When the property was community and is conveyed for the purpose of paying community debts, the purchaser has the burden of establishing the facts authorizing the disposition when attacked by the heirs.<sup>34</sup> He need not show that the proceeds were used for paying debts, but he must have no notice of any intention of the survivor to misapply the proceeds and must not be a party to any fraud or collusion with the survivor. If community debts exist, if the property was community, and the seller is the community survivor, the disposition will be sustained unless bad faith or fraud is shown by the attacking heirs.<sup>35</sup> Where the lapse of time between the conveyance and the suit attacking the conveyance is so great as to make direct proof of the existence of the power improbable, a presumption will be indulged that the conveyance was for the purpose of paying community debts.<sup>36</sup>

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50 Tex. Civ. App. 158, 110 S. W. 185 (1908) *writ of error refused*; Williams v. Emberson, 22 Tex. Civ. App. 522, 55 S. W. 595 (1900).

<sup>34</sup> Proetzel v. Schroeder, 83 Tex. 684, 19 S. W. 292 (1892); Moody v. Butler, 63 Tex. 210 (1885); Johnson v. Harrison, 48 Tex. 257 (1887); Bordages v. Stanolind, *supra*, note 11; Stone v. Light, 228 S. W. 1108 (Tex. Civ. App. 1920); Iiams v. Mager, 216 S. W. 422 (Tex. Civ. App. 1919); Eastham v. Sims, 11 Tex. Civ. App. 133, 32 S. W. 359 (1895).

<sup>35</sup> Clemmons v. McDowell, 5 S. W. (2d) 224 (Tex. Civ. App. 1928) *aff'd*, 12 S. W. (2d) 955 (Tex. Com. App. 1929).

<sup>36</sup> Hensel v. Kegans, 79 Tex. 347, 15 S. W. 275 (1891); Clemmons v. McDowell,

As pointed out, a conveyance by the survivor where no power exists can be sustained as a conveyance of the survivor's interest, and the purchaser will be protected as far as the equities will admit. It has been held that such a conveyance from the survivor may be ratified by the heirs;<sup>37</sup> that the survivor may settle with the heirs either from the former community estate<sup>38</sup> or from the survivor's separate property;<sup>39</sup> and that a settlement with the heirs by the survivor will inure to the benefit of the purchaser.<sup>40</sup>

Where the disputed property was, at the time of the conveyance, actually former community property but legal title thereto stood in the survivor, a bona fide purchaser from the survivor without notice of the community character of the property takes good title as against the heirs, and under these circumstances the existence of community debts is immaterial.<sup>41</sup> This is but another example of a bona fide purchaser without notice prevailing over hidden equities and is not peculiar to the unqualified survivor's powers. Of course, where the purchaser (or mortgagee) has notice of the community character of the property his protection is diminished and he will take only the interest of the survivor.<sup>42</sup> But the burden

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*supra*, note 33; *Caddell v. Lufkin Land & Lumber Co.*, 255 S. W. 397 (Tex. Com. App. 1923); *Bordages v. Stanolind Oil & Gas*, *supra*, note 11. As to what period must elapse to give rise to the presumption, it has been said that the period is the same as where a deed would be admitted into evidence as an ancient instrument without proof of execution, *Brown v. Elmendorf*, 25 S. W. 145 (Tex. Civ. App. 1894); twenty to thirty years seem to be sufficient. It is to be noted that the period elapsing between the death of a spouse and the conveyance by the survivor, as distinguished from that between the conveyance and the suit attacking it, would appear to have the opposite effect. See *Taylor v. Taylor*, 26 S. W. 889 (Tex. Civ. App. 1894), *aff'd in part*, 88 Tex. 47, 29 S. W. 1057 (1895).

<sup>37</sup> *Barkley v. Stone*, 195 S. W. 925 (Tex. Civ. App. 1917) *writ of error refused*.

<sup>38</sup> *Brown v. Elmendorf*, *supra*, note. 36.

<sup>39</sup> *Long v. Moore*, 48 S. W. 43 (Tex. Civ. App. 1898) *writ of error refused*.

<sup>40</sup> *Randolph v. Junker*, 1 Tex. Civ. App. 517, 21 S. W. 551 (1892).

<sup>41</sup> *Patty v. Middleton*, 82 Tex. 586 (1891); *Hand v. Errington*, 242 S. W. 722 (Tex. Com. App. 1922); *Downing v. Jeffrey*, 173 S. W. (2d) 241 (Tex. Civ. App. 1943) *writ of error refused, w. m.*; *Ashcroft v. Fleming*, 168 S. W. (2d) 304 (Tex. Civ. App. 1942), *aff'd* 142 Tex. 41, 175 S. W. (2d) 401 (1943).

<sup>42</sup> *Gough v. H. O. L. C.*, 135 S. W. 771 (Tex. Civ. App. 1939) *writ of error dismissed, judgment correct*; *White v. Baker*, *supra*, note 7; *Lipsitz v. Rice*, *supra*, note 8; *American Freehold Land Mtg. Co. v. Dulock*, 67 S. W. 172 (Tex. Civ. App. 1902) *writ of error refused*.

is upon the heirs or the grantees of their equitable interests to establish notice of the purchaser as to the community nature of the property.<sup>43</sup>

The most far-reaching effect given to a survivor's conveyance is where the property is actually the separate property of the deceased spouse but falls within the presumptions that all property acquired during the marriage, and also all property possessed by the spouses at dissolution of the marriage, is community property. If debts exist which would authorize the survivor to dispose of the former community property and there is nothing to give notice to a bona fide purchaser as to the realities, such purchaser is entitled to rely upon the presumption of community property and to purchase from the survivor.<sup>44</sup> Here again the disposition must be for the purpose of paying community debts or at least such debts must exist, but there is some authority to the effect that where no such debts exist, the conveyance by the survivor will pass one-half of the property, which is what the survivor apparently had title to under the presumption that the property was community. What constitutes notice under this and the above circumstances is generally in accord with the requirements for notice in any other situation and offers nothing unique.<sup>45</sup>

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<sup>43</sup> *Marshburn v. Stewart*, 113 Tex. 507, 254 S. W. 942 (Tex. Com. App. 1924); *Elliott v. Wallace*, 59 S. W. (2d) 109 (Tex. Com. App. 1933); *Buckalew v. Butcher-Arthur, Inc.*, 214 S. W. (2d) 184 (Tex. Civ. App. 1948) *writ of error refused, n.r.e.*

<sup>44</sup> *Word v. Box*, 66 Tex. 596, 3 S. W. 93 (1886); *Marshburn v. Stewart*, *supra*, note 41; *Roswurm v. Sinclair Prairie Oil Co.*, 181 S. W. (2d) 736 (Tex. Civ. App. 1944) *writ of error refused, w.m.*; *Mayor v. Breeding*, 24 S. W. (2d) 542 (Tex. Civ. App. 1930) *writ of error refused*; *Sanburn v. Schuler*, 22 S. W. 119 (Tex. Civ. App. 1893) *writ of error denied, with opinion*, 86 Tex. 116, 23 S. W. 641 (1893).

<sup>45</sup> Generally speaking, see *Buckalew v. Butcher-Arthur, Inc.*, *supra*, note 43, at page 194; that purchaser bound only "... (1) to investigate the records of instruments affecting the title... (2) to determine whether the land was in possession, and... what rights were claimed by the possessor, and (3)... to pursue the inquiry suggested by any fact known to him which 'would have prompted a prudent man, desirous to protect himself and willing to act fairly with others', to make a further investigation of the title and which if followed up would have led to the knowledge of the equitable right of [the heirs]."

## II. THE QUALIFIED COMMUNITY SURVIVOR

### *The Mechanics of Qualifying*

Either spouse, within four years after the death of the other, makes application to the county court for appointment.<sup>46</sup> The application must show that there is a child or children and that there is a community estate.<sup>47</sup> The county court appoints appraisers,<sup>48</sup> who make an inventory listing all property, debts and claims;<sup>49</sup> and the survivor files a bond equal to the value of the whole community estate.<sup>50</sup> The court then enters an order authorizing the survivor to control, manage and dispose of the community estate.<sup>51</sup>

### *What Are the Comparative Rights of the Surviving Husband and Wife to Administer The Former Community Estate?*

A statute<sup>52</sup> defines the rights of a surviving wife as being equal to those of a surviving husband, where both qualify under the statutes. However, their rights differ materially in a few instances, *e. g.*, where each remarries (discussed *infra*) and where the deceased husband has left a will. While a surviving husband has an absolute right to administer the former community property, a surviving wife possesses this right only in case the deceased husband does not leave a will.<sup>53</sup>

If he leaves a will, the Supreme Court held in *Carlton v. Goebler*,<sup>54</sup> that his executor is entitled to administer the former community estate. This seems to definitely preclude qualification by the surviving wife while such administration is pending.<sup>55</sup> In

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<sup>46</sup> TEX. REV. CIV. STAT. (Vernon, 1948) Art. 3664.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Id.*, art. 3665.

<sup>49</sup> *Id.*, art. 3666.

<sup>50</sup> *Id.*, art. 3667.

<sup>51</sup> *Id.*, art. 3668.

<sup>52</sup> *Id.*, art. 3678.

<sup>53</sup> *Matula v. Freytag*, 101 Tex. 357, 107 S. W. 536 (1908).

<sup>54</sup> 94 Tex. 93; 58 S. W. 829 (1900).

<sup>55</sup> *Nations v. Neighbors*, 201 S. W. 691 (Tex. Civ. App., 1918), *writ of error refused*.

*Lovejoy v. Cockrell*<sup>56</sup> the deceased husband left a will, the independent executor qualified and conveyed former community property. The surviving wife brought suit to recover the property, alleging that the executor had no right to sell it, since it was formerly community property. The Commission of Appeals, in denying her claim, said that since the former community property is chargeable with the husband's debts, it is considered as part of his estate when there is an administration of such estate.

On the other hand, though a deceased wife left a will and an executor qualifies thereunder, the surviving husband has the absolute right to administer the former community property without interference.<sup>57</sup>

At least a partial justification for this difference in the rights of the surviving husband and wife lies in the fact that the husband is for the most part the community manager, and ordinarily creates more community debts than does the wife.

#### *Are Debts Necessary for Conveyance by Qualified Community Survivors?*

The statutes<sup>58</sup> state that the qualified survivor shall have the right of absolute control and disposition of the former community property.

This provision seems very clear, but a considerable amount of litigation has arisen as to whether community debts are necessary to enable such a qualified survivor to convey the former community property. In *Brunson v. Yount-Lee Oil Co.*<sup>59</sup> the Supreme Court held that the existence of such debts is not prerequisite, and that this right to convey includes the homestead.

This broad right seems to be balanced by the requirement that

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<sup>56</sup> 44 S. W. (2d) 1040 (Tex. Civ. App., 1931); *affirmed* in 63 S. W. (2d) 1009, (Tex. Comm. App. 1933).

<sup>57</sup> *Moody v. Smoot*, 78 Tex. 119, 14 S. W. 285 (1890); *Cullers v. May*, 81 Tex. 110, 16 S. W. 813 (1891); *Levy v. W. L. Moody & Co.*, 87 S. W. 205 (Tex. Civ. App., 1905), *writ of error refused*.

<sup>58</sup> TEX. REV. CIV. STAT. (Vernon's, 1948), art. 3669.

<sup>59</sup> 56 S. W. (2d) 1073 (1933), *affirming* 32 S. W. (2d) 893 (Tex. Civ. App., 1930).

the surviving spouse must post a bond, equal to the value of the former community property in order to qualify.<sup>60</sup> By this provision the creditors and heirs are protected in case the property is improperly disposed of. It should be noted that this bond is somewhat similar to that required of executors who are not independent and of administrators.<sup>61</sup>

*Must the Qualified Survivor Refer to His Power When He Conveys?*

The statutes<sup>62</sup> provide that a certified copy of the court order authorizing the administration will be evidence of the right of the qualified community survivor. Must a reference be made to such order in a deed, to make the latter valid?

The Texas rule seems to be fully and clearly stated in *Conrad v. Hill*,<sup>63</sup> although this is not a case involving conveyance by a community survivor. The Supreme Court said that a trustee or donee of a power may execute it by an instrument which does not refer to said power, but in order to make the execution valid, it must appear (from the instrument or the circumstances) that the donee did act in pursuance of this power, and that it was his intention to dispose of the property in accordance with its terms. The court further said if from the circumstances or the instrument the intention of the trustee or donee is doubtful, it will not be held that by such conveyance the power was exercised. The case of *McGraw v. Merchants and Planters National Bank*<sup>64</sup> adopted the rule of the *Conrad* case, again emphasizing that the instrument or surrounding circumstances must show the intention of the survivor to exercise the power granted by the probate court. The qualified survivor there executed deeds of trust that contained no express reference to the community administration, yet as the lan-

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<sup>60</sup> TEX. REV. CIV. STAT. (Vernon's, 1948), art. 3667.

<sup>61</sup> *Id.*, art. 3386.

<sup>62</sup> *Id.*, art. 3669.

<sup>63</sup> 91 Tex. 341, 43 S. W. 789 (1897).

<sup>64</sup> 34 S. W. (2d) 633 (Tex. Civ. App., 1930) *writ of error refused*.

guage used was general, without any reservation, the court said it reasonably appeared that the survivor intended to impose a lien on the children's half of the tract, as well as on his own half. *Todd v. Shell Petroleum Co.*<sup>65</sup> is in accord with the case just discussed. Quite possibly a conveyance in general language without reference to the survivor's power would be an exercise thereof, even though there actually was no intent to exercise it.

*What Is the Effect of Remarriage by Widow Who Has Qualified as Community Administrator?*

The surviving widow, by virtue of Article 3678,<sup>66</sup> has the same right to administer the former community estate upon qualifying as has the surviving husband. However, Article 3680<sup>67</sup> provides that upon her remarriage this right will be forfeited and "the estate shall be subject to administration as in other cases of deceased persons' estates." This article has been the source of much litigation, but the decisions for the most part seem to be uniform in enforcing the forfeiture.

The case of *Llano Development and Furnace Co. v. Cross*<sup>68</sup> involved a widow who had qualified as the community administratrix but had since remarried. The court held that by virtue of the marriage, she had lost her right to sue in her representative capacity on a note given to her in part payment for land which had belonged to the community even though the sale and execution of the note was before her subsequent remarriage. This problem arose again in the case of *Van Ness v. Cross*,<sup>69</sup> where a widow who had qualified under the statute had attempted to convey former community property for the payment of community debts after her remarriage. The court concluded that even though the widow had gained absolute control by qualifying, the control was

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<sup>65</sup> 85 S. W. (2d) 1049 (Tex. Civ. App., 1935), *writ of error refused*.

<sup>66</sup> TEX. REV. CIV. STAT. (Vernon, 1948), art. 3678.

<sup>67</sup> *Id.*, art. 3680.

<sup>68</sup> 24 S. W. 77 (Tex. Civ. App., 1893).

<sup>69</sup> 215 S. W. 272 (Tex. Civ. App., 1919).

lost by the remarriage, and this included even the right to sell for the purpose of paying community debts.

Another important aspect of this problem is, what is the effect of the dissolution of the second marriage of a widow who had previously qualified? The Supreme Court held in *Summerville v. King*<sup>70</sup> that this marriage had terminated the administration of the widow, but that the dissolution of this marriage had the effect of fully restoring the widow to her previous representative capacity.

By contrast, the surviving husband's remarriage after he has qualified does not affect his powers as community administrator.<sup>71</sup>

### *The Problem of Partition and Distribution*

On the death of either the husband or the wife, community property ceases and immediately vests, if there are children, in them and the surviving spouse as tenants in common.<sup>72</sup>

Tenants in common may have partition as a matter of right,<sup>73</sup> but in the case of property that was formerly community, this right is conditional where the survivor has qualified, due to the latitude given to such survivor in administering the property because of his bond.<sup>74</sup>

The statute<sup>75</sup> clearly states that partition may be had by those entitled thereto only after the lapse of twelve months from the time of qualification of the survivor. It seems there is no way in which this period may be shortened. This period of waiting is similar to that required in the case of ordinary executors and administrators<sup>76</sup> and also independent executors.<sup>77</sup>

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<sup>70</sup> 98 Tex. 332, 83 S. W. 680 (1904).

<sup>71</sup> *Drought v. Story* 143 S. W. 361 (Tex. Civ. App., 1912), *writ of error refused*.

<sup>72</sup> *Caldwell v. Farrier, et al.*, 248 S. W. 425 (Tex. Civ. App., 1923) (co-tenants).

<sup>73</sup> 11 TEX. JUR., *co-tenancy*, § 47.

<sup>74</sup> *McFarland v. Beaton*, 126 S. W. (2d) 719, (Tex. Civ. App. 1939) *affirmed*; 134 Tex. 652 134 S. W. (2d) 1058 (1940).

<sup>75</sup> TEX. REV. CIV. STAT. (Vernon's, 1948), art. 3681.

<sup>76</sup> TEX. REV. CIV. STAT. (Vernon's, 1948), art. 3602.

<sup>77</sup> *Alexander v. Berkman*, 3 S. W. (2d) 8647 (Tex. Civ. App. 1928), *writ of error refused*.

A method that has been used by the heirs to realize more quickly on their inheritance is to sell to a third party. The question then arises whether this grantee is entitled to partition. This problem is answered in *Miller v. Miller*,<sup>78</sup> where the grantee sought partition before the statutory period of twelve months had passed. The court, in refusing partition, said that the qualified survivor's right of absolute control for twelve months could not be subordinated to the sale by the heir; and that the grantee has only the same right to partition as did the heir.

It should be noticed that there is nothing to prevent the interest of such a grantee in the specific property from being wiped out by a sale by the qualified survivor; the grantee, of course, has a right to his proportionate share of the proceeds of the sale (unless, of course, community debts are paid therewith).

Another aspect of the problem of partition is that the statute does not demand that the partition be granted even though the twelve months have lapsed. The case of *Cox v. Gaines*<sup>79</sup> was an example of the application being refused even though the statutory period had passed. The estate being insolvent, the court held the heir was not entitled to partition.

#### *A Problem as to When the Community Administration Is Closed*

Article 3669<sup>80</sup> provides that after qualification, the survivor shall have absolute control and disposition of the property that was formerly community without further action by the court. This statute, which incidentally creates another similarity between the qualified community survivor and the independent executor,<sup>81</sup> has the effect of setting the administration in motion, but there is no corresponding statute that provides for stopping it. The only things required by the statutes are that the survivor shall pay the

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<sup>78</sup> 227 S. W. 737 (Tex. Civ. App. 1921).

<sup>79</sup> 75 S. W. (2d) 172 (Tex. Civ. App., 1934).

<sup>80</sup> TEX. REV. CIV. STAT. (Vernon's, 1948), art. 3669.

<sup>81</sup> *Id.*, art. 3436.

debts of the community,<sup>82</sup> keep an account of all transactions,<sup>83</sup> act for the best interests of the community,<sup>84</sup> and upon partition, hand over one-half of the remaining property to the heirs of the deceased spouse.<sup>85</sup> The statutes,<sup>86</sup> as in the case of the independent executor, do not require the survivor to report to the court where he qualified that the administration has served its purpose and that partition has been effectuated, and do not provide for withdrawal of the bond—which ordinarily remains on file, though frequently uncollectible. Ordinary administrators must close within one year, approximately.<sup>87</sup>

There is no statute providing a definite duration for community administrations. Two statutes provide that an administration may be closed at any time, apparently, after one year, (1) by the heirs' demanding partition and distribution,<sup>88</sup> or (2) by court order following proceedings by an unpaid creditor if (and only if) there is no property left.<sup>89</sup> Apparently, also, the administration would be closed by partition initiated by the survivor.<sup>90</sup> Unless there is such action by heirs or such a court order or such voluntary partition, the qualified survivor continues indefinitely to have the power to convey the former community property. *Drought v. Story*<sup>91</sup> involved this exact problem; the husband, who had qualified as the community administrator in 1868, conveyed the former community property 32 years later, in 1900. The court, pointing to the fact that the heirs had not sought partition or distribution, held that the husband had the power to convey good title to

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<sup>82</sup> *Id.*, art. 3672.

<sup>83</sup> *Id.*, art. 3670.

<sup>84</sup> *Id.*, art. 3669.

<sup>85</sup> *Id.*, art. 3670.

<sup>86</sup> *Id.*, art. 3669.

<sup>87</sup> *Id.*, art. 3643.

<sup>88</sup> *Id.*, art. 3681.

<sup>89</sup> *Id.*, art. 3674.

<sup>90</sup> *Drought v. Story*, *supra*, note 71.

<sup>91</sup> 143 S. W. 361 (Tex. Civ. App., 1912), *writ of error refused*. This case was decided under a slightly different statute, but not different as to this question.

the property. *Tholl v. Speer*<sup>92</sup> and *Todd v. Shell Petroleum Co.*,<sup>93</sup> involving conveyances 17 years and 18 years later, respectively, are in accord.

The lack of a definite time limit for closing community administrations is a source of trouble and uncertainty where one takes from a former community administrator when the administration has been closed and partition and distribution have taken place. It is important that a purchaser take all possible precautions in his dealings with the survivor—such as obtaining joinder of all the heirs in the survivor's conveyance, and making an inspection to ascertain who is in possession of the land and under whom he is holding.

It would seem desirable for the legislature to set some time limit for closing community administrations, or at least to require the filing of a simple notice of such closing.

*Eldon R. Vaughan*  
*A. W. Davis*

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<sup>92</sup> 230 S. W. 453 (Tex. Civ. App., 1921).

<sup>93</sup> 85 S. W. (2d) 1049 (Tex. Civ. App., 1935), writ of error refused.