



12-1-1974

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Recommended Citation

J. Brian Sokolik, *The Interests of a Wife in Joint Management Community Property Are Not Affected by an Action to Which She Is Not a Named Party*, 6 ST. MARY'S L.J. (1974).

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**COMMUNITY PROPERTY—Management Rights Of Spouses—
The Interests Of A Wife In Joint Management Community
Property Are Not Affected By An Action To
Which She Is Not A Named Party**

Cooper v. Texas Gulf Industries, Inc., 513 S.W.2d 200 (Tex. 1974).

Dr. Griffin Cooper and his wife were named grantees in a deed to joint community real estate which they purchased from Texas Gulf Industries, Inc. The Coopers brought suit to rescind and cancel that sale. The defendant contended that the action was barred as *res judicata* on the basis of a prior unsuccessful suit involving the same joint community realty in which Dr. Cooper was the sole plaintiff. The defense asserted that Dr. Cooper had acted in his capacity as a representative of the community in the first suit, and therefore both he and his wife were bound by the previous dismissal and neither could maintain this action.¹ The trial court granted the defendant's motion for summary judgment, and the decision was affirmed by the court of civil appeals.² Held—*Reversed and remanded*. The Texas Family Code³ has abolished the doctrine of virtual representation whereby the husband was the legal representative of his wife in all actions involving their joint management community property.⁴ Therefore, the rights of the wife, like the rights of the husband and the rights of any other joint owner, may be affected only by a suit in which the wife is a named party.⁵

Whether an item is community property is ultimately determined according to Article XVI of the Texas Constitution.⁶ This constitutional provision is substantially incorporated in the current statutory definition of community

1. Brief for Respondents at 13, *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200 (Tex. 1974).

2. *Cooper v. Texas Gulf Indus., Inc.*, 495 S.W.2d 273 (Tex. Civ. App.—Waco 1973), *rev'd*, 513 S.W.2d 200 (Tex. 1974).

3. TEX. FAMILY CODE ANN. § 5.22 (1973).

4. *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200, 202 (Tex. 1974).

5. *Id.* at 202.

6. TEX. CONST. art. XVI, § 15; *see Taylor v. Hollingsworth*, 142 Tex. 158, 162, 176 S.W.2d 733, 735 (1943); *Arnold v. Leonard*, 114 Tex. 535, 540, 273 S.W. 799, 802 (1925). Texas community property laws were derived from the ganancial system which existed in Mexico before Texas became part of the United States. W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* § 11.1, at 24-25, § 15, at 33 (2d ed. 1971). "*Bienes gananciales* in Spanish law is that property held in community by husband and wife, having been acquired or gained by them during the marriage." *Id.* at § 1, at 1 n.2. For an excellent history and analysis of the ganancial system see W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* (2d ed. 1971); McKnight, *Texas Community Property Law—Its Course of Development and Reform*, 8 CALIF. WEST. L. REV. 117 (1971); Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20 (1967).

property contained in the Family Code.⁷

The rights of marital property management depend on the respective statutory classification of particular property as separate, special community, or joint community.⁸ Community property is either sole management (special community property) or joint management community property.⁹ Sole management community property is that which a spouse would have owned if single and includes personal earnings, revenue from separate property, recoveries for personal injuries, and increases, mutations, and revenue from property subject to the spouse's sole management.¹⁰ Since joint management community property has not yet been legislatively or judicially defined, it must be described merely as all property not subject to sole management.¹¹

Originally, the husband was the sole manager of the entire marital estate including the separate property of his wife.¹² Thus, the wife retained her

7. Compare TEX. CONST. art. XVI, § 15 with TEX. FAMILY CODE ANN. § 5.01 (1973). The only significant variance between the code and the constitution is that the code describes community property in terms of both spouses whereas the constitutional definition is framed in terms of the wife's separate property. McKnight, *Texas Community Property Law—Its Course of Development and Reform*, 8 CALIF. WEST. L. REV. 117, 133 (1971).

8. TEX. FAMILY CODE ANN. §§ 5.21, 5.22 (1973). The term special community is not found in section 5.22; it has been used by the courts repeatedly, however, when referring to the type of property now treated in section 5.22(a). See, e.g., *Moss v. Gibbs*, 370 S.W.2d 452, 455 (Tex. 1963).

Separate property includes property acquired by a spouse before marriage, property acquired during marriage by gift [e.g., *Fisk v. Flores*, 43 Tex. 340 (1875); *Codwell v. Dobney*, 208 S.W.2d 127 (Tex. Civ. App.—Austin 1948, writ ref'd n.r.e.)], devise [*Henry v. Reinle*, 245 S.W.2d 743 (Tex. Civ. App.—Waco 1952, writ ref'd n.r.e.); *McClelland v. McClelland*, 37 S.W. 350 (Tex. Civ. App. 1896, writ ref'd)], or descent [e.g., *Hays v. Marble*, 213 S.W.2d 329 (Tex. Civ. App.—Amarillo 1948, writ dism'd); *Cotton v. Friedman*, 158 S.W. 780 (Tex. Civ. App.—Galveston 1913, no writ)], and separate property created by a partition agreement [TEX. CONST. art. XVI, § 15; TEX. FAMILY CODE ANN. § 5.42(a) (1973)]. The recovery for personal injuries by a spouse, excluding loss of earning capacity, is also separate property according to Section 5.01 of the Code. TEX. FAMILY CODE ANN. § 5.01(a)(3) (1973). All other property is community property. TEX. FAMILY CODE ANN. § 5.01(b) (1973).

9. TEX. FAMILY CODE ANN. § 5.22 (1973). For an account of the controversy which followed from the creation of the category special community property see *Babbitt, Is There More Than One Class of Community Property in Texas?*, 4 TEXAS L. REV. 154 (1926).

10. TEX. FAMILY CODE ANN. § 5.22(a) (1973).

11. This criterion is similar to the "implied exclusion test" which has been generally applied in determining community property. Under this "test" all property which is not separate property is community property. *Graham v. Franco*, 488 S.W.2d 390, 392 (Tex. 1972); *Arnold v. Leonard*, 114 Tex. 535, 540, 273 S.W. 799, 802 (1925). Another test, the "onerous title" test, classifies property acquired by the work, efforts or labor of the spouses or income from their separate property as community property. *Graham v. Franco*, 488 S.W.2d 390, 392 (Tex. 1972); *Norris v. Vaughn*, 152 Tex. 491, 497-98, 260 S.W.2d 676, 680 (1953); W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* § 62, at 127 (2d ed. 1971). Joint management community property is owned by the community or both spouses, and both have the right to manage that property concurrently. See TEX. FAMILY CODE ANN. § 5.21 (1973).

12. W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* § 113, at

right to ownership but had no control over the disposition of her separate or community property.¹³

The first milestone in the abolition of the husband's exclusive right of management occurred in 1913 when the legislature granted a wife power to manage both her special community property and her separate property subject to certain limitations.¹⁴ These rights were confirmed by the 1967 legislative amendment which also provides that any joint management community property is to be administered by both spouses.¹⁵

The doctrine of virtual representation developed as a legal consequence of the rule which endowed the husband with the sole right to manage.¹⁶ According to that doctrine, a husband was the representative of his wife's interest in the community so that not only was he entitled to perform the ministerial acts of the community, such as buying or selling, but he also represented the wife's interests in any litigation involving the community estate.¹⁷ This rule was based on the privity which exists between spouses, so that both spouses were bound by the actions of the husband alone.¹⁸

As representative of the community the husband was authorized to conduct litigation in any manner he desired providing he did not act in bad faith regarding his wife's interest.¹⁹ A wife was not an indispensable party to such

276 (2d ed. 1971); 1 E. OAKES, *SPEER'S MARITAL RIGHTS IN TEXAS* § 171, at 284, § 173, at 285, § 365, at 526 (4th ed. 1961); Huie, *Commentary on the Community Property Laws of Texas*, 13 TEX. REV. CIV. STAT. ANN. § 11, at 39 (1969); Comment, *Section 5.22 of the Texas Family Code: Control and Management of the Marital Estate*, 27 SW. L.J. 837 (1973). In a state abiding by common law principles, however, the husband, by marriage, acquired absolute control and ownership of the wife's personal property. H. PLATT, *THE LAW AS TO THE PROPERTY RIGHTS OF MARRIED WOMEN* § 1, at 1, 2 (1885); 1 E. OAKES, *SPEER'S MARITAL RIGHTS IN TEXAS* § 89, at 116, 117 (4th ed. 1961).

13. 1 E. OAKES, *SPEER'S MARITAL RIGHTS IN TEXAS* § 90, at 118 (4th ed. 1961).

14. Tex. Laws 1913, ch. 32, at 61; 1 E. OAKES, *SPEER'S MARITAL RIGHTS IN TEXAS* § 331, at 487 (4th ed. 1961); McKnight, *Texas Community Property Law—Its Course of Development and Reform*, 8 CALIF. WEST. L. REV. 117, 124-25 (1971). A wife still had to be joined by her husband whenever conveying separate real estate, and the signatures of both were necessary to transfer stocks and bonds that were her separate property. *Arnold v. Leonard*, 114 Tex. 535, 544, 273 S.W. 799, 804 (1925).

15. Tex. Laws 1967, ch. 309, § 1, at 738; McKnight, *Texas Community Property Law—Its Course of Development and Reform*, 8 CALIF. WEST. L. REV. 117, 130-31 (1971). Although the objective of the reform movement was to amend the state constitution to provide equal rights for both sexes, the legislature believed it could achieve the same result by statutory enactment of the provisions which are contained in the current Texas Family Code. McKnight, *Recodification of Matrimonial Property Law*, 29 TEX. B.J. 1000, 1001 (1966). The constitution was amended in 1972 to provide equality for both sexes. TEX. CONST. art. I, § 3(a).

16. *Thompson v. Jones*, 16 Tex. 255, 256 (1889).

17. *Hall v. Aloco Oil Co.*, 164 S.W.2d 861, 862-63 (Tex. Civ. App.—Amarillo 1942, writ ref'd). See also Annot., 58 A.L.R.2d 701 (1958); 34 TEX. JUR. 2d *Judgments* § 409 (1962); 30 TEX. JUR. 2d *Husband and Wife* § 167 (1962).

18. *Ray v. Chisum*, 260 S.W.2d 118, 124 (Tex. Civ. App.—Texarkana 1953, writ ref'd n.r.e.); Annot., 58 A.L.R.2d 701, 706 (1958).

19. 2 E. OAKES, *SPEER'S MARITAL RIGHTS IN TEXAS* § 689, at 489 (4th ed. 1961).

litigation²⁰ although she was bound by the judgment in any suit on behalf of the community to which her husband was a party.²¹

Generally, a suit involving the homestead was an exception to the doctrine of virtual representation:²²

If there was any defense that could have been urged growing out of her homestead rights which would have defeated the action, then she was a necessary defendant in the cause.²³

Thus, the wife could not be bound by a judgment in a suit concerning the homestead, so long as the homestead defense was applicable in the particular action.²⁴ With the exception of the valid homestead defense, the doctrine of

He could compromise the suit, remit part of a recovery, and even release a cause of action for damages. *Id.* § 689, at 489.

20. *Starr v. Schoellkopf Co.*, 131 Tex. 263, 265, 113 S.W.2d 1227, 1228 (1938); *Gabb v. Boston*, 109 Tex. 26, 28, 193 S.W. 137, 138 (1917); *Jergens v. Schiele*, 61 Tex. 255, 258 (1884); *Chumchal v. Moore*, 43 S.W.2d 956, 957 (Tex. Civ. App.—San Antonio 1931, writ *dism'd*); *Central Coal & Coke Co. v. Henry*, 47 S.W. 281, 282 (Tex. Civ. App. 1898, writ *ref'd*).

21. *Hollis v. Hollis*, 226 S.W.2d 129, 133 (Tex. Civ. App.—Amarillo 1949, writ *dism'd*); *Hall v. Aloco Oil Co.*, 164 S.W.2d 861, 862-63 (Tex. Civ. App.—Amarillo 1942, writ *ref'd*); *Treadwell v. Walker County Lumber Co.*, 161 S.W. 397, 399 (Tex. Civ. App.—Texarkana 1913, no writ). *Contra*, *Civils v. First Nat'l Bank*, 241 P. 1023, 1024 (Idaho 1925) (community property state); *Gustin v. Crockett*, 87 P. 839, 841 (Wash. 1906) (community property state).

The consequences of this rule were more prejudicial to the wife's interests in the community estate than anything which developed from the husband's sole right to administer the assets of the community. For example, if the husband decided to sell community property, the consideration received from that sale would remain community in nature, and the wife would still own an undivided one-half interest in the proceeds. If the consideration was equal to or greater than the value of the property, then the wife would incur no financial loss. Even if the compensation was less than the value of the property sold, the wife would own a one-half interest in the proceeds. In contrast, in the situation where the husband defended and lost a suit to try title involving the community estate, the wife lost all of her interest in the property. *See Treadwell v. Walker County Lumber Co.*, 161 S.W. 397, 399 (Tex. Civ. App.—Texarkana 1913, no writ).

In *Howell v. Fidelity Lumber Co.*, 228 S.W. 181, 183 (Tex. Comm'n App. 1921, opinion adopted), the husband was insane at the time a default judgment was rendered against him in an action of trespass to try title to land constituting part of the community estate. His wife was bound by the decree although not named in the action. Even an abandoned wife was bound by a judgment rendered against her husband, foreclosing an attachment lien on land constituting the community estate. *See Hall v. Aloco Oil Co.*, 164 S.W.2d 861 (Tex. Civ. App.—Amarillo 1942, writ *ref'd*). It has even been held that a judgment against the husband concerning the community estate cannot be collaterally voided by the wife even on grounds of fraud and collusion. *Gann v. Montgomery*, 210 S.W.2d 255 (Tex. Civ. App.—Fort Worth 1948, writ *ref'd n.r.e.*); *Willard v. Phillips*, 43 S.W.2d 170, 172 (Tex. Civ. App.—Amarillo 1931, no writ).

22. Annot., 58 A.L.R.2d 701, 761-63, 766-70 (1958); 34 TEX. JUR. 2d *Judgments* § 409, at 454-56 (1962).

23. *Jergens v. Schiele*, 61 Tex. 255, 258 (1884).

24. *See McIntire v. Sawicki*, 353 S.W.2d 952 (Tex. Civ. App.—Eastland 1962, writ *ref'd n.r.e.*) (homestead was valid defense because record title was in both spouses and property was homestead); *Travelers Insurance Co. v. Nauert*, 200 S.W.2d 661, 664 (Tex. Civ. App.—El Paso 1941, no writ) (wife held to be a necessary party when decree will effectively partition homestead). The homestead defense was invalid in a suit to fore-

virtual representation compounded the inequity which existed between the spouses regarding the right to manage community property. This situation has now been rectified, however, by Section 5.22 of the Texas Family Code which has effectively eliminated that doctrine.

In *Cooper v. Texas Gulf Industries, Inc.*²⁵ the supreme court was confronted for the first time with the question of whether a wife's interests are affected by a judgment against her husband in an action concerning the spouses' joint management community property. The court first determined the nature of the property to be community property subject to the joint management of both spouses.²⁶ The court then concluded that the new Family Code had abolished the doctrine of virtual representation; consequently a judgment against the husband in a suit involving joint management community property will not affect the wife's interests unless she is a named party.²⁷

Resolution of the management issue in *Cooper* required a judicial construction of Section 5.22 of the Family Code, and in this regard the case is one of first impression.²⁸ Prior to *Cooper*, no formula existed for determining joint management community property under section 5.22. In *Cooper* the Texas Supreme Court presumably created a method by which joint management community property may now be identified.²⁹ The property in issue was not held in the name of a sole spouse; both *Coopers* were grantees on the deed.³⁰ This fact, supplemented by the presumption of community property,³¹ led the court to state that the realty was joint management community property.³² This "test" is similar to the "implied exclusion method" whereby property which is not the separate property of either spouse is

close a purchase money lien on the community land since no homestead right could exist as against the purchase money. See *Kubena v. Hatch*, 144 Tex. 627, 193 S.W.2d 175 (1946) (homestead defense was invalid where the suit was to foreclose a tax lien); *Johnson v. Bradshaw*, 67 S.W. 438, 439 (Tex. Civ. App. 1902, no writ).

25. 513 S.W.2d 200 (Tex. 1974).

26. *Id.* at 201, 202.

27. *Id.* at 202.

28. Although *Williams v. Portland State Bank*, 514 S.W.2d 124 (Tex. Civ. App.—Beaumont 1974, writ filed) involved management issues which necessitated the construction of Sections 5.22 and 5.24 of the Family Code, *Cooper* was decided 2 months earlier and is thus the first case to interpret Section 5.22 of the Family Code.

29. *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200, 202 (Tex. 1974). The court quoted section 5.24(a) which provides that property is presumed to be subject to the sole management of a spouse if it is held in his or her name. *Id.* at 202. Therefore all property not held in the sole name of one spouse is joint management community property.

30. *Id.* at 201.

31. TEX. FAMILY CODE ANN. § 5.02 (1973): "Property possessed by either spouse during or on dissolution of marriage is presumed to be community property." The court in *Cooper* decided that the presumption was not overcome by the record. *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200, 202 (Tex. 1974).

32. *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200, 202 (Tex. 1974).

therefore the community property of both spouses.³³

In addition to classification of the property, solution of the issue in *Cooper* also entailed a reexamination of the doctrine of virtual representation.³⁴ The court observed that since the basis for that doctrine was the husband's sole power of management of the entire community, and since Section 5.22 of the Family Code deprived him of sole management, the doctrine of virtual representation had also been abolished by the Code.³⁵ It reasonably follows that "[t]he wife is her husband's equal with respect to management . . . [and] neither spouse may virtually represent the other."³⁶ The court's construction of section 5.22 likened the spousal relationship to that of a tenancy in common; that is, both spouses own an undivided one-half interest, and neither can affect the other's interest without consent: "The rights of the wife, like the rights of the husband and the rights of any other joint owner, may be affected only by a suit in which the wife is called to answer."³⁷

The holding in *Cooper* was made even clearer and more precise by the court's decision on the same day of a companion case, *Dulak v. Dulak*.³⁸ In that case the Austin Court of Civil Appeals had construed Section 5.22 of the Family Code to mean that *either* spouse may represent the other in a suit involving community property.³⁹ In overruling *Dulak* the supreme court cited *Cooper*, explaining that the basis for that decision was their understanding of the legislative intent behind Section 5.22(c) of the Family Code which requires a spouse to execute a power of attorney or other written agreement when altering joint management rights.⁴⁰ It was therefore obvious to the court that the legislature did not intend *either* spouse to represent the other without such an agreement; thus, the doctrine of virtual representation was necessarily abolished.⁴¹ The Code was construed as precluding the alterna-

33. Cases cited note 20 *supra*.

34. *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200, 201 (Tex. 1974).

35. *Id.* at 202.

36. *Id.* at 202.

37. *Id.* at 202.

38. 513 S.W.2d 205 (Tex. 1974).

39. *Dulak v. Dulak*, 496 S.W.2d 776, 782 (Tex. Civ. App.—Austin 1973), *rev'd*, 513 S.W.2d 205 (Tex. 1974). In effect, the court in *Dulak* interpreted these sections to imply that the matrimonial relationship was analogous to a partnership wherein either spouse may act as an agent for the community without consulting the other spouse.

40. *Dulak v. Dulak*, 513 S.W.2d 205, 207 (Tex. 1974). The Texas Supreme Court in *Cooper* stated that both an agreement and power of attorney had to be in writing under the Family Code as amended in 1971. *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200, 202 (Tex. 1974). However, Section 5.22 of the current Family Code states that only the power of attorney must be written and does not require the spouses to execute an agreement in writing. TEX. FAMILY CODE ANN. § 5.22(b), (c) (1973). Section 5.22 was amended by Tex. Laws 1973, ch. 577, § 26, at 1606. The Austin Court of Civil Appeals has subsequently held that "other agreements" are no longer required to be in writing. *Evans v. Muller*, 510 S.W.2d 651, 654 (Tex. Civ. App.—Austin), *rev'd*, 516 S.W.2d 923 (Tex. 1974).

41. *Dulak v. Dulak*, 513 S.W.2d 205, 207 (Tex. 1974).

tive interpretation given by the civil appeals court in *Dulak*, which would have preserved the doctrine of virtual representation, merely altering it to allow either spouse to represent the other.⁴²

The supreme court's construction of section 5.22 in *Cooper* appears to have established not only that a wife is an indispensable party as to her interest in a suit involving joint management community property, but also that the wife is *not* an indispensable party as to her husband's community interest.⁴³

Traditionally, if Mrs. Cooper was an indispensable party as to the entire joint community, as the Coopers alleged, the judgment rendered in the first suit would have been invalid and would not bar a subsequent suit by both the Coopers.⁴⁴ To obviate such a result and maintain the jurisdictional power of the trial court to grant relief to those parties already named, the court resorted to the reasoning behind Rule 39 or the Texas Rules of Civil Procedure which contains the rules for joinder of parties.⁴⁵ The court determined that Rule 39 was not so concerned with the right of a court to proceed; rather, the primary emphasis was whether, in equity, the court *ought* to proceed.⁴⁶ Consequently, although the wife is indispensable in an adjudication of her interests, it is within the discretion of the trial court to determine whether it will hear those parties already before the court in an action concerning joint management community property.⁴⁷

In an apparent attempt to reconcile the confusion resulting from the two holdings—that the judgment in the prior suit was to be *res judicata* as to Dr. Cooper but not as to his wife—the court went on to state that the prior dismissal was conclusive as to Dr. Cooper except to the extent it might have to be disregarded in giving Mrs. Cooper all the relief to which she may show

42. The court of civil appeals in *Cooper* did not reach the same conclusion, purporting to adhere to the doctrine of virtual representation. The court relied partially on cases decided prior to the enactment of the Family Code and stated, "A wife is not a necessary party to actions involving community property, and judgment against the husband will conclude her even if she is not a party." *Cooper v. Texas Gulf Indus., Inc.*, 495 S.W.2d 273, 275 (Tex. Civ. App.—Waco 1973), *rev'd*, 513 S.W.2d 200 (Tex. 1974). Compounding this error, the court added that even if the property had been Mrs. Cooper's separate property, she would not have been a necessary party. This statement is clearly contrary to Section 5.21 of the Family Code: "[e]ach spouse has the sole management, control and disposition of his or her separate property." For an explanation of the purpose behind the Family Code see McKnight, *Recodification of Matrimonial Property Law*, 29 TEX. B.J. 1000 (1966).

43. *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200, 202, 205 (Tex. 1974).

44. *Id.* at 203.

45. Rule 39 incorporated the greatest part of Rule 19 of the Federal Rules of Civil Procedure; therefore the court reviewed sources which explained the legislative intent behind Rule 19. *Id.* at 204.

46. *Id.* at 204. The court's interpretation of the rule was that

[u]nder the provisions of our present Rule 39 it would be rare indeed if there were a person whose presence was so indispensable in the sense that his absence deprives the court of jurisdiction to adjudicate between the parties already joined.

Id. at 204.

47. *Id.* at 204.

herself entitled.⁴⁸ It is difficult to comprehend what the court meant by this statement; therefore the *Cooper* decision leaves open the possible future violation of some basic community property principles. If Mrs. Cooper prevails on remand and is permitted to rescind the purchase of her undivided half interest in the real estate, the court in effect will be sanctioning a partition of community property during marriage without a written agreement of the parties,⁴⁹ thus creating separate property from a community estate.⁵⁰ There is no provision within the Texas Constitution which allows for the creation of separate property in this manner. Since both the courts and the legislature must adhere to the provisions of the constitution, neither may create separate property in any manner not specifically provided there.⁵¹

The constitution was amended in 1948 to allow a husband and wife to partition community property by mutual agreement in writing, thereby converting it into separate property.⁵² No other amendments have occurred since 1948 which would allow for the creation of separate property in the manner which might result if Mrs. Cooper prevails on remand.

In the re-trial of Mrs. Cooper's suit there are three possible results which could follow the holding in *Cooper*. The simplest would be for her to lose on the merits, thus avoiding the question of how to treat the property if she is allowed to rescind her part of the purchase. If Mrs. Cooper prevails, she either might be granted rescission only for her interest in the property, or she might be granted total rescission by means of the court's joining her husband in the new judgment. An examination of these three alternatives reveals that only two are viable under the Texas constitution.

If Mrs. Cooper receives a take nothing judgment in the court below, then both Coopers will, under the doctrine of res judicata, be prohibited from ever again bringing suit against Texas Gulf Industries on this same issue. Dr. and Mrs. Cooper will continue to own the realty as their joint community property, and in accordance with Section 5.22(c) of the Family Code and the opinion in the instant case they will manage it jointly. On the other hand, if Mrs. Cooper prevails in the trial court and rescission is decreed only

48. *Id.* at 204, 205.

49. The only manner of partition allowed by the constitution and the Family Code is by written instrument executed by the spouses. TEX. CONST. art. XVI, § 15; TEX. FAMILY CODE ANN. § 5.42(a) (1973).

50. TEX. FAMILY CODE ANN. § 5.42(b) (1973) provides that when community property is partitioned during marriage the property transferred to a spouse becomes the separate property of that spouse.

51. In the landmark case of *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925), the court held that the legislature could alter the rights of management and liability of community property but could not change the basic constitutional definition. *Id.* at 547, 273 S.W. at 805. In the recent case of *Williams v. McKnight*, 402 S.W.2d 505 (Tex. 1966), the court noted that constitutional limitations bind the judiciary as well as the legislature. *Id.* at 508.

52. TEX. CONST. art. XVI, § 15.

as to her interest, this will amount to a sale by a tenant in common of a one-half undivided interest in the community property. Consequently, Texas Gulf Industries would become a tenant in common with Dr. Cooper. The possibility of this occurrence is abhorrent to community property principles, and the resulting partition of Dr. and Mrs. Cooper's joint community property would be unconstitutional.⁵³

When the court stated that the judgment of dismissal as to Dr. Cooper might have to be disregarded in granting Mrs. Cooper all the relief to which she might show herself entitled, it recognized this perplexing constitutional issue but should have explained further the necessity for the lower courts' future decisions to conform with the constitution.⁵⁴ The third alternative is the only manner in which the lower court can render a judgment which would be constitutionally valid if Mrs. Cooper prevails. If the trial court grants rescission, Mrs. Cooper may obtain full relief only in one manner according to the constitution.⁵⁵ Rescission involving joint management community property can be accomplished only by disregarding the judgment against Dr. Cooper in the previous case and requiring him to be joined in the rescission. Rescinding the sale in this manner will conform to the constitution by not partitioning the joint community real estate of the Coopers. Thus, the entire community estate would be the victor because the entire sale would be rescinded and the ownership rights would remain the same. Both Coopers would then own the refunded purchase money as joint management community property.

Since the court in *Cooper* relied on Section 5.22 of the Texas Family Code as amended in 1971, it should be noted that a different decision might have been rendered if the case had arisen under the newly amended code.⁵⁶ The legislature deleted "in writing" from the requisite that the spouses must execute an "agreement in writing" whenever either spouse desires the other to act as sole manager of any of the joint management community property.⁵⁷ In *Evans v. Muller*⁵⁸ this legislative omission was noted, and the court held in effect that such an agreement could even be implied.⁵⁹

53. *Id.*; TEX. FAMILY CODE ANN. § 5.42(a) (1973).

54. TEX. CONST. art. XVI, § 15.

55. TEX. CONST. art. XVI, § 15 does not provide a method for partitioning joint community property during marriage other than by a written agreement between the spouses. Therefore Dr. Cooper must be joined in the rescission in order for it to be constitutionally valid.

56. TEX. FAMILY CODE ANN. § 5.22 (1973).

57. *Id.*

58. 510 S.W.2d 651 (Tex. Civ. App.—Austin), *rev'd*, 516 S.W.2d 923 (Tex. 1974). The court of civil appeals was reversed because at the time the case was originally tried Section 5.22(c) of the Family Code required such an agreement to be by power of attorney or other agreement in writing. The deletion of "in writing" by amendment did not become effective until January 1, 1974, approximately 1 year after the original action commenced.

59. *Id.* at 654-55.