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Community Property and the Homestead Student Symposium - Texas Land Titles: Part II.

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COMMUNITY PROPERTY AND THE HOMESTEAD

The Texas Family Code gives each spouse the right to sole management, control, and disposition of his or her separate property.[700] The statute does not change the husband's power of management over his separate property, since he has possessed the right to manage, control, and dispose of the separate property since 1848.[701] The effect of this equalization process is to enable the wife to convey her separate real property without any statutory restraints of joinder or privy acknowledgment.

CHANGES IN COMMUNITY PROPERTY LAW

The various changes that have evolved in this area of law present some problems in researching land titles. For example, prior to 1913

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700. TEX. FAMILY CODE ANN. § 5.21 (1975). Sections 5.21 and 5.22 divide the marital estate into 1) separately owned property subject to the control of the owning spouse, 2) community property subject to the control of the spouse who would have owned it if he or she would have remained single and 3) mixed community property subject to the joint control and disposition of both spouses. *Id.* §§ 5.21, 5.22. A spouse's separate property consists of 1) the property owned or claimed by each spouse before marriage; 2) the property acquired by the spouse during marriage by gift, devise, or descent, and 3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage. *Id.* § 5.01(a).

The basic concept of the community property system is one of equality. Under this system, the wife's interest in the marital estate equals that of her husband. Rompel v. United States, 59 F. Supp. 483, 486 (W.D. Tex. 1945), *rev'd on other grounds*, 326 U.S. 367 (1945); Leyva v. Rodriguez, 195 S.W.2d 704, 707 (Tex. Civ. App.—San Antonio 1946, writ ref'd n.r.e.); Magnolia Petroleum Co. v. Still, 163 S.W.2d 268, 270 (Tex. Civ. App.—Texarkana 1942, writ ref'd). The status of equality between the spouses is based on the contribution that each spouse makes to the marriage. Each spouse owns a present, vested, undivided, one-half interest in all property acquired by onerous title during the marriage. *See* Commissioner v. Chase Manhattan Bank, 259 F.2d 231, 239 (5th Cir. 1958); Rompel v. United States, 59 F. Supp. 483, 486-87 (W.D. Tex.), *rev'd on other grounds*, 326 U.S. 367 (1945). With respect to the gains made and the losses suffered during the marriage relationship, the husband and wife become partners. *See* United States v. Stapf, 309 F.2d 592, 600 (5th Cir. 1962), *rev'd on other grounds*, 375 U.S. 118 (1963); Commissioner v. Chase Manhattan Bank, 259 F.2d 231, 239 (5th Cir. 1958); Rompel v. United States, 59 F. Supp. 483, 487 (W.D. Tex. 1945), *rev'd on other grounds*, 326 U.S. 367 (1945).

701. The husband was traditionally recognized as the sole authorized manager of all the community assets. United States v. Stapf, 309 F.2d 592, 600 (5th Cir. 1962), *rev'd on other grounds*, 375 U.S. 118 (1963); Commissioner v. Chase Manhattan Bank, 259 F.2d 231, 239 (5th Cir. 1958); *see* Kreuger v. Williams, 163 Tex. 545, 548, 359 S.W.2d 48, 50 (1962); Martin v. McAllister, 94 Tex. 567, 570, 63 S.W. 624, 625 (1901); Tex. Laws 1913, ch. 32, § 1, at 61; Tex. Laws 1848, ch. 79, § 2, at 77, 3 H. GAMMEL, LAWS OF TEXAS 77 (1898). The few restraints placed on the husband required that his dealings with the community estate be beneficial and not in fraud of the wife's interests.

the husband could convey his wife's separate real property, but he was required to obtain his wife's participation, as well as her privy acknowledgment, to prevent any implication of fraud on her interests.[702] The wife was required to be examined, apart from her husband, by a judge or notary public and to declare her willingness to sign the deed.[703] Therefore, any such deed executed prior to 1913 which did not fulfill these requirements creates a cloud on the subsequent titles in that chain.

Also in 1913 the Texas Legislature adopted a system of divided management of the community estate, giving the wife a measure of control over the community. The wife was authorized to manage her earnings, her separate estate, and the income from her separate property.[704] The husband's joinder was still required, however, in a conveyance by the wife of this property.[705] This formality could be avoided, however, if the wife applied for and was granted a court order granting her permission to convey the property without her husband's joinder.[706] Thus, any conveyance by a wife of her separate property made between the years 1914 to 1951 which does not reflect either the joinder of the husband or a court order dispensing with that requirement also creates a cloud in the chain.

In 1957 the Texas Legislature enacted a statute giving married women complete power to manage their separate property provided they complied with certain statutory provisions.[707] In order to convey her separate real property under this statute the wife had to be 21 years

Krueger v. Williams, 163 Tex. 545, 548, 359 S.W.2d 48, 50 (1962); Coss v. Coss, 207 S.W. 127, 128 (Tex. Civ. App.—San Antonio 1918, no writ).

702. Stone v. Sledge, 87 Tex. 49, 54, 26 S.W. 1068, 1070 (1894); Zimpleman v. Portwood, 107 S.W. 584, 585 (Tex. Civ. App. 1908, writ ref'd).

703. 2 PASCH. DIG. art. 1003, at 261 (1870). Stone v. Sledge, 87 Tex. 49, 26 S.W. 1068 (1894) reveals the problems that arose when this procedure was not followed properly. In a trespass to try title action, Mrs. Stone and her husband sought to recover a tract of land which was her separate property. The notary had attached a certificate to the deed which was materially defective and insufficient to convey the wife's title. The supreme court stated that "a deed in the name of the husband alone may purport to convey property which . . . belongs to the wife . . . but it purports to convey it as his own, and not as her property." *Id.* at 54, 26 S.W. at 1070 (1894).

704. Tex. Laws 1913, ch. 32, § 1, at 61, *codified in* TEX. FAMILY CODE ANN. § 5.21 (1975); *see, e.g.*, Farm & Home Sav. & Loan Ass'n v. Abernathy, 129 Tex. 379, 102 S.W.2d 410 (1937); Whitney Hardware Co. v. McMahan, 111 Tex. 242, 231 S.W. 694 (1921).

705. *See, e.g.*, Cauble v. Beaver-Electra Ref. Co., 115 Tex. 1, 274 S.W. 120 (1925); Gohlman, Lester, & Co. v. Whittle, 114 Tex. 548, 273 S.W. 808 (1925); Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799 (1925); Tex. Laws 1913, ch. 32, § 1, at 61-62, *codified in* TEX. FAMILY CODE ANN. § 5.21 (1975).

706. *See* Tex. Laws 1913, ch. 32, § 1, at 61-62, *codified in* TEX. FAMILY CODE ANN. § 5.21 (1975).

707. Tex. Laws 1957, ch. 407, § 1, at 1233 (article 4614).

of age and file a statement with the county clerk stating that she wished to have sole control of her separate property.[708]

Further legislative reform was effected in 1963 and resulted in several important changes in the law regarding conveyances by a married woman. For example, in *Diamond v. Borenstein*[709] the supreme court interpreted the new amendments as having expressly repealed the statutory requirement for the wife's separate acknowledgment and having granted her full power to contract and convey her separate property without the husband's joinder and without filing a statement of her election to do so.[710]

The Matrimonial Property Act of 1967 and its codification into the Family Code of 1970 represent the most sweeping of all recent reforms regarding the married woman's power to manage her own separate property. As a result of these revisions, the married woman has the right not only to full management and control of her separate property, but also to manage her special community property.[711]

Special Community Property

The status of the law regarding the wife's affirmative management powers over her special community remained uncertain until 1968.[712] As a result of the reform movements of 1967, however, the problems related to the wife's ability to convey her special community were solved. In 1968, the wife could validly convey her special community real property without her husband's joinder.[713] The Matrimonial Property Act of 1967 was subsequently codified into the Family Code of 1970, and today each spouse has the power to convey his or her special community property.[714]

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708. *Id.* Article 4614(d) stated: a married woman 21 years of age or over may file with the county clerk of the county of which she is a resident, a duly acknowledged statement that she thereby elects to have sole management, control, and disposition of her separate property.

709. 410 S.W.2d 457 (Tex. Civ. App.—El Paso 1966), *writ ref'd per curiam*, 414 S.W.2d 454 (Tex. 1967).

710. *Id.* at 460. Prior to the reform legislation of 1963, failure to adhere to the privy acknowledgment statute made the transaction a nullity. *See* Humble Oil & Ref. Co. v. Downey, 143 Tex. 191, 183 S.W.2d 426 (1944).

711. TEX. FAMILY CODE ANN. §§ 5.21-5.22 (1975).

712. Quilliam, *Gratuitous Transfers of Community Property to Third Persons*, 2 TEX. TECH. L. REV. 23, 24 (1970).

713. Tex. Laws 1967, ch. 309, § 1, at 738, *codified in* TEX. FAMILY CODE ANN. § 5.22 (1975). The term special community property was used in Moss v. Gibbs, 370 S.W.2d 452, 454-55 (Tex. 1963).

714. TEX. FAMILY CODE ANN. § 5.22 (1975). The most immediate result of section 5.22 is to reduce the husband's power over control, disposition, and management of the community property.

Before 1913, Texas statutes granted the husband the power of management and control over the community, as well as the wife's separate property.[715] In 1913 the Texas Legislature gave the wife the management of her special community property, consisting of her personal earnings and income from her separate property.[716] This control was rescinded in 1925, but the wife's ability to manage her special community was inferred by other statutory provisions. These provisions were Article 4616 of the Revised Civil Statutes[717] which exempted the wife's special community from liability for debts incurred by her husband, and article 4621[718] which implied that the special community was liable for the wife's contracts. Although these statutes impliedly granted the wife some control over her special community property, it was still unclear how this property could be conveyed. Article 4619 stated that "[d]uring coverture the common property of the husband and wife may be disposed of by the husband only."[719] Considering the special community as common property, the only logical solution would be to require the joinder of the husband in the conveyance of the wife's special community real property.

After 1963 a married woman had legal capacity to convey her separate property.[720] The problem still remained, however, whether the wife could solely convey her special community real property. If the wife sought to convey her special community real property to a third person, she would be best advised to seek her husband's joinder.

Prior to the 1967 reforms, the Texas courts had stated that the special community property was under the wife's exclusive control.[721] Most of the cases dealt, however, with a creditor of the husband attempting to levy on the wife's special community property for payment of his debt and no specific reference to the wife's affirmative management powers over her special community property was made.[722]

Joint Community Property

The reform amendments of 1967 provided that joint community

715. Huie, *Commentary on the Community Property Law of Texas*, 13 TEX. REV. CIV. STAT. ANN. 1, 39 (1960).
716. Tex. Laws 1913, ch. 32, § 1, at 61.
717. Tex. Laws 1957, ch. 407, § 2, at 1234.
718. TEX. REV. CIV. STAT. ANN. art. 4621 (1957).
719. Tex. Laws 1959, ch. 404, § 1, at 881.
720. Tex. Laws 1963, ch. 472, § 1, at 1188.
721. *See, e.g.*, Moss v. Gibbs, 370 S.W.2d 452, 455 (Tex. 1963).
722. *See, e.g.*, Bearden v. Knight, 149 Tex. 108, 112, 228 S.W.2d 837, 844 (1950); Hawkins v. Britton State Bank, 122 Tex. 69, 74, 52 S.W.2d 243, 245 (1932).

property would come under the joint management, control, and disposition of both spouses.[723] If community property subject to the sole management of one spouse is commingled with community property subject to the management of the other spouse, it becomes "mixed" community property, subject to joint management. Joint management of community property also includes the property produced by the joint efforts of the spouses in a common endeavor.[724]

Certain problems have arisen in construing the phrase "joint management, control, and disposition," especially in the context of the alienation of mixed community property. The controlling issue became whether both spouses were required to participate in the transfer of the mixed community, or whether a "joint manager" could transfer a part of the mixed community without the joinder of his co-manager. The possibility of considering the spouses tenants in common was examined:[725] one tenant in common may not convey the joint property without the authority of the other.[726] Another suggested analogy was to the law of partnership. Under this situation each marital partner would be considered the agent of the other with each partner having the power to convey. The supreme court considered these options in *Cooper v. Texas Gulf Industries, Inc.*[727] and held that the doctrine of virtual representation[728] had been abolished by the new Family Code: section 5.22 had taken away the husband's sole right to manage all of the community property.[729]

> When joint management community property is involved, the husband and wife are now *joint* managers. The wife is her husband's equal with respect to management; she stands in the same position as any other joint owner of property.[730]

723. TEX. REV. CIV. STAT. art. 4621 (1967), *codified in* TEX. FAMILY CODE ANN. § 5.22 (1975).

724. *See* Smith v. Strahan, 16 Tex. 314, 324 (1856); Logan v. Logan, 112 S.W.2d 515, 525 (Tex. Civ. App.—Amarillo 1937, writ dism'd).

725. *See* Rogan v. Williams & Co., 63 Tex. 123, 129 (1885); McClain v. Holder, 279 S.W.2d 105, 108 (Tex. Civ. App.—Galveston 1955, writ ref'd n.r.e.).

726. *See* McClain v. Holder, 279 S.W.2d 105, 109 (Tex. Civ. App.—Galveston 1955, writ ref'd n.r.e.).

727. 513 S.W.2d 200 (Tex. 1974).

728. The basis for virtual representation is the husband's power of sole management of the entire community. Under this doctrine, a suit naming only the husband as a party is nevertheless binding on the wife. Starr v. Schoellkopf Co., 131 Tex. 263, 265, 113 S.W.2d 1227, 1228 (1938); Gabb v. Boston, 109 Tex. 26, 30, 193 S.W. 137, 138 (1917); Jergens v. Schiele, 61 Tex. 255, 258 (1884); Cooley v. Miller, 228 S.W. 1085, 1086 (Tex. Comm'n App. 1921, jdgmt adopted).

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

730. *Id.* at 202.

Nevertheless, it is still undetermined whether both spouses must join in the conveyance of joint management community property.

Protection of Third Parties

The Family Code has created presumptions protecting third parties who deal with either spouse.[731] Section 5.24(a) provides that when a spouse takes a deed in his or her name alone, that property is presumed to be subject to that spouse's sole management and control.[732] A third party may rely on that presumption as long as he has no notice to the contrary, and he is not a party to a fraud on the other spouse.[733]

Despite the language in section 5.22 providing for joint control, this presumption could allow one spouse to dispose of mixed community or the special community property of the other spouse without the knowledge or joinder of the other. As long as a third party grantee has no knowledge that title is in the non-consenting spouse, he would be an innocent purchaser. If title to the joint community property is in both spouses, however, the question would then become whether the conveyance is void or is valid as to the one-half interest of the conveying spouse.

The Family Code of Texas represents an orderly and equitable legislative reform. Further classification is needed, however, in the area of joint control. Ambiguous circumstances involving the alienation of joint community property will result until more precise definitions of joint management and its functioning are forthcoming.

THE HOMESTEAD EXEMPTION

The purpose of the homestead exemption is to secure the family home.[734] The homestead is not an estate in land but is a personal right[735] established by constitutional and statutory provisions.[736] Since

731. TEX. FAMILY CODE ANN. § 5.24 (1975).

732. *Id.* § 5.24(a).

733. *Id.* § 5.24(b). In unilaterally disposing of joint community property or special community property of the other spouse, as between the spouses, there may be a presumption of fraud. *See* Krueger v. Williams, 163 Tex. 545, 548, 359 S.W.2d 48, 50 (1962).

Because of the husband's sole right to manage the community property prior to 1967, however, a bona fide purchaser could safely accept a deed from the husband alone. *See, e.g.*, Strong v. Strong, 128 Tex. 470, 473, 98 S.W.2d 346, 347 (1936).

734. *See* Cocke v. Conquest, 120 Tex. 43, 53, 35 S.W.2d 673, 678 (1931).

735. *See* Roberson v. Home Owners' Loan Corp., 147 S.W.2d 949, 953 (Tex. Civ. App.—Dallas 1941, writ dism'd jdgmt cor.); Middleton v. Johnston, 110 S.W. 789, 791

1845 all Texas constitutions have contained a provision forbidding a married man to alienate the homestead without his wife's consent.[737]

Specific Performance and the Wife's Contract to Convey the Homestead

Prior to the effective date of the Texas Family Code the wife could, by virtue of a statutory requirement of a privy acknowledgment by her to any conveyance of the homestead, retract or repudiate a contract for sale by refusing to sign the necessary deed.[738] Specific performance would not be granted to enforce a contract executed by both the husband and wife to convey the homestead property.[739] The general rule was that an executory contract to convey the homestead was not enforceable because it did not constitute a joint conveyance. Thus, even if the wife joined in the contract of sale, it was not enforceable unless she also executed the required privy acknowledgment of the deed.[740]

The original requirements for the conveyance of the homestead were profoundly affected by the wife's inability to contract. Article 1300 required the wife to join in the conveyance, sign the instrument and perform a separate acknowledgment.[741] The statutory procedure of the privy acknowledgment provided that the instrument of conveyance be shown and fully explained to the wife. She was required to be apart from her husband, and while signing, she was to state that she did not wish to retract her consent.[742] Prior to the privy acknowledgment and the wife's statement that she did not wish to retract, the wife could repudiate any executory contract for the conveyance of the homestead,[743] and the contract to convey was not sufficient as a basis for compelling the transfer of the property: "[t]he *sole* and *only* mode prescribed by statute is by 'conveyance,' in which she joins the husband, and . . . acknowledges privily and apart from him."[744]

In 1968 the legislature repealed the statutory requirements for the

(Tex. Civ. App. 1908, writ ref'd).

736. Gann v. Montgomery, 210 S.W.2d 255, 257-58 (Tex. Civ. App.—Fort Worth 1948, writ ref'd n.r.e.).

737. TEX. CONST. art. VII, § 22 (1845).

738. *See* Jones v. Goff, 63 Tex. 248 (1885).

739. *Id.* at 254-55.

740. *Id.* at 254-55.

741. Tex. Laws 1897, at 41, 10 H. GAMMEL, LAWS OF TEXAS 1095 (1897).

742. Tex. Laws 1846, at 156, 2 H. GAMMEL, LAWS OF TEXAS 1462 (1846). The form of the acknowledgment was set out in article 6608. *Id.*

743. Jones v. Goff, 63 Tex. 248, 254-55 (1885).

744. *Id.* at 255 (court's emphasis).

wife's privy acknowledgment.[745] The supreme court, in *Allen v. Monk*,[746] interpreted this as terminating the wife's statutory privilege to retract her consent as long as she had not given her separate acknowledgment. The court reasoned that there was "no longer any validity to the prohibition of specific performance of an executory contract to sell a homestead. . . ."[747] Further, the supreme court noted that a recent amendment to article 4618 had eliminated the requirement that the homestead be transferred only by joint *conveyance*, requiring merely "that both spouses join in any disposition of the homestead."[748] Although the supreme court failed to explain the difference between "joint conveyance" and "joint disposition," or "joinder," the opinion of the court of civil appeals in *Allen* suggests that the latter term means that the consent of the wife may be indicated merely by her signature.[749] Because Section 5.81 of the Family Code requires only "joinder," the separate acknowledgement of the wife is no longer necessary.[750] With the elimination of this requirement the wife may not retract her consent, and the executory contract to sell the homestead becomes binding.

Joinder In Conveyance

One of the most significant cases concerning the failure to comply with the new requirement of joinder in the conveyance of the homestead is *Marler v. Handy*.[751] The Marlers owned a community property homestead which Mr. Marler conveyed to Handy without his wife's consent or joinder. She had refused to sign the deed and continued to claim the property as her homestead. Mr. Marler subsequently purchased other property and moved with his wife and family to this new location. Mrs. Marler left the original property reluctantly, continued to claim it as her home, and intended to return. She tried to persuade her husband to bring suit to recover the property, but he refused. The supreme court upheld the conveyance, however, on the grounds that

> the husband, acting in good faith, may select the homestead of the family; and that when he has acquired a new home, and his wife

745. Tex. Laws 1967, ch. 309, § 6, at 735 (repealing articles 6605, 1300, 6608).
746. 505 S.W.2d 523, 525 (Tex. 1974).
747. *Id.* at 525.
748. *Id.* at 525.
749. Allen v. Monk, 498 S.W.2d 29 (Tex. Civ. App.—Austin 1973), *rev'd*, 505 S.W.2d 523 (Tex. 1974).
750. TEXAS FAMILY CODE ANN. § 5.81 (1975).
751. 88 Tex. 421, 31 S.W. 636 (1895).

> has removed with him to the newly-acquired homestead, a deed made by him without her concurrence, to the former homestead, becomes operative as to the husband as an estoppel against his right to recover the property.[752]

Thus, a conveyance by the husband of the family homestead without the wife's consent is not absolutely void; it is merely inoperative. It becomes operative if the wife fails to bring suit to set aside the deed and moves with her husband to a new homestead.[753]

This decision, although still the law, should be re-examined.[754] Conveyance of the homestead by the husband without his wife's consent should now be considered void. This would protect the wife "against the improvidence of the husband" and would better reflect the intent of the law.

In determining whether the husband may convey an abandoned family homestead, the nature of the property is the deciding factor. When the family homestead is joint community property and is abandoned as the homestead, the relevant question becomes whether the husband may convey it alone or whether he must obtain his wife's joinder. As in the conveyance of any other joint community property, if one spouse conveys without the joinder of the other, the transaction may be considered void. On the other hand, there is the possibility that the conveyance may be enforced as to the conveying spouse's community interest. Therefore, the non-joining spouse may thereby retain his or her joint community interest.

Abandonment of the Homestead

Generally there are only three ways in which the homestead status can be lost—by death, abandonment, or alienation.[755] In *Marler* the wife did not join in the conveyance of the homestead, nor did she actually abandon it. There are two elements of abandonment—a discontinuance of the use of the property plus the intention that the discontinued use be permanent.[756] Mrs. Marler did cease to use the original

752. *Id.* at 427, 31 S.W. at 639; *accord*, Julian v. Andrews, 491 S.W.2d 721, 726-27 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.).

753. Marler v. Handy, 88 Tex. 421, 427, 31 S.W. 636, 639 (1895).

754. Under circumstances similar to *Marler*, it could be argued that each spouse may claim a homestead. There is no reason why the wife, if she does not consent, should move with her husband and lose the original homestead right. The husband should thereby be allowed to claim the new property for homestead purposes.

755. Posey v. Commercial Nat'l Bank, 55 S.W.2d 515, 517 (Tex. Comm'n App. 1932, jdgmt adopted).

756. Archibald v. Jacobs, 69 Tex. 248, 251, 6 S.W. 177, 178 (1887).

homestead, but she had no intention of doing so permanently.[757] It appears then from this decision that a wife may lose her homestead merely by moving involuntarily from one homestad to another.[758]

It is also established that when a husband and wife move from one residence to another without selling the old residence, such removal does not necessarily constitute an abandonment of the old residence as their homestead.[759] The family may live at this new location for a number of years without losing their homestead rights in the original tract.[760] Whether the original residence remains the homestead has traditionally depended primarily on the husband's intention, since he was the head of the family.[761] Therefore, removal from the original property, combined with the husband's intention never to return and use it for homestead purposes, has usually constituted an abandonment of the old residence.[762]

In 1973 the Texas Constitution was amended to require that the abandonment of the homestead be done only with consent of both spouses.[763] Thus it would appear that in a fact situation similar to that in *Marler* the original homestead should retain that status. The logical solution in this type of situation is to make a husband who abandons and sells the family homestead without the joinder of his wife liable to the purchaser for damages on the void conveyance.

Encumbrances

An encumbrance may be placed on the homestead only by joinder of both spouses,[764] and unless the mortgage or encumbrance is for the purchase price, improvements, or ad valorem taxes, it is void.[765] Embodied within mortgage contracts are provisions which protect not only

757. Marler v. Handy, 88 Tex. 421, 424, 31 S.W. 636, 637 (1895).

758. *See also* Major v. Loy, 155 S.W.2d 617, 623 (Tex. Civ. App.—Eastland 1941, no writ) ("selling a home and moving from it is an abandonment as a matter of law.").

759. Smith v. Little, 217 S.W.2d 881, 882 (Tex. Civ. App.—Galveston 1949, writ ref'd n.r.e.).

760. Coyel v. Mortgage Bond Co., 124 S.W.2d 204, 206 (Tex. Civ. App.—Waco 1939, no writ).

761. *Id.* at 206.

762. Smith v. Uzzell, 61 Tex. 220, 221 (1884); Metts v. Waits, 8 S.W.2d 569, 571 (Tex. Civ. App.—Austin 1928, no writ).

763. TEX. CONST. art. XVI, § 50. For an illustration of the law prior to the constitutional amendment see Bishop v. Williams, 223 S.W. 512, 518 (Tex. Civ. App.—Austin 1920, writ ref'd).

764. TEX. FAMILY CODE ANN. § 5.81 (1975).

765. TEX. CONST. art. XVI, § 50 (1887); *see, e.g.* Hufstedler v. Glenn, 82 S.W.2d 733, 734 (Tex. Civ. App.—Austin 1935, no writ).

the interest of the homestead claimants but also those of the creditor mortgagee. These contracts usually contain a disclaimer of the homestead property and an indication by the mortgagor of which property is, in fact, homestead.[766]

There are three situations, however, in which it has been alleged that a debtor may be estopped from claiming the homestead exemption: (1) if the homestead claimants own only one piece of property which is being used as their homestead at the time it is mortgaged;[767] (2) if the homestead claimants own more than one piece of property at the time of the mortgage, but only one could be their homestead as a matter of law;[768] and (3) if the homestead claimants own more than one piece of property which has been occupied and used as a homestead.[769] The first situation is the least complicated. Under these circumstances, the Texas courts have consistently held that the husband and wife are not estopped from claiming the homestead exemption regardless of their contrary statements in the mortgage contract.[770] This is based on the rationale that the mortgagee should be charged with knowledge of the actual possession and use of the property as homestead by the family.[771] If the mortgaged property is the only property owned by the husband and wife at the time of the mortgage, it becomes their homestead as a matter of law.[772] The homestead claimants are bound by the constitution, their declarations to the contrary notwithstanding.[773]

The case of *Texas Land & Loan Co. v. Blalock*[774] illustrates the second situation. In that case, the husband and wife executed a deed of trust to their homestead property. The deed of trust included a declaration that the premises had never been used or occupied by the

766. *See* Comment, *Intentions, Mortgages and the Homestead Exemption: A Matter of Estoppel*, 24 BAYLOR L. REV. 187, 188 (1972).

767. *See, e.g.*, Lincoln v. Bennett, 138 Tex. 56, 156 S.W.2d 504 (1943); Nixon v. Hirschi, 134 Tex. 415, 136 S.W.2d 583 (1940); Ray v. Metzger, 165 S.W.2d 207 (Tex. Civ. App.—Fort Worth 1942), *aff'd*, 141 Tex. 372, 172 S.W.2d 480 (1943).

768. *See, e.g.*, Texas Land & Loan Co. v. Blalock, 76 Tex. 85, 13 S.W. 12 (1890).

769. *See, e.g.*, Hughes v. Wruble, 131 Tex. 444, 116 S.W.2d 368 (1938).

770. Lincoln v. Bennett, 138 Tex. 56, 61, 156 S.W.2d 504, 506 (1943); Nixon v. Hirschi, 134 Tex. 415, 418, 136 S.W.2d 583, 584 (1940); Ray v. Metzger, 165 S.W.2d 207, 209 (Tex. Civ. App.—Fort Worth 1942), *aff'd*, 141 Tex. 372, 172 S.W.2d 480 (1943).

771. *See, e.g.*, Nixon v. Hirschi, 134 Tex. 415, 136 S.W.2d 583 (1940); First Nat'l Bank v. Solis, 137 S.W.2d 142 (Tex. Civ. App.—Waco 1940, writ ref'd); Wooten v. Jones, 286 S.W. 680 (Tex. Civ. App.—Austin 1926, writ dism'd).

772. *See* Maryland Casualty Co. v. Davenport, 323 S.W.2d 615 (Tex. Civ. App.—Amarillo 1959, no writ).

773. *See, e.g.*, Texas Land & Loan Co. v. Blalock, 76 Tex. 85, 13 S.W. 12 (1890).

774. *Id.*

owners as their homestead, and that they resided on another lot which was their homestead. This lot was actually vacant and had never been used as homestead. The parties subsequently defaulted, and when the trustee sought to foreclose on the deed of trust, the husband and wife argued that the property was their homestead and that the deed of trust was void because it was not for purchase money or improvements.

The Texas Supreme Court, in denying that the homestead claimants were estopped by their statements, held that the creditor was charged with knowledge of the fact that the mortgaged property was the only property owned by the defendants which was adaptable to homestead purposes.[775] Thus, the mortgaged property was their homestead as a matter of law despite their declarations to the contrary.[776]

Illustrative of the third situation is *Hughes v. Wruble*.[777] In *Hughes* the husband and wife moved to Fort Worth and bought a home there for the purpose of living in Forth Worth and sending their children to school there, but they also continued to retain a lot in Graham with a home and improvements. They mortgaged their Fort Worth property, representing that they were only temporarily occupying that home and claiming the Graham property as their homestead. When the defendant attempted to foreclose on the Fort Worth property, however, the Hughes claimed it was their homestead and therefore exempt from forced sale. The supreme court held that the defendant was justified in relying on the Hughes' statements in mortgaging the Fort Worth property because these declarations were not inconsistent with the visible situation at the time of the encumbrance.[778] Thus, when the claimants own two pieces of property of which either could be considered homestead, designation by the claimants of one residence constitutes an abandonment of the other property as the homestead.

Unusual Circumstances

The Family Code refers to certain situations dealing with management of community property as "unusual."[779] These are generally situations in which the marriage is undergoing some form of break-

775. *Id.* at 89, 13 S.W. at 13.

776. The supreme court has held under similar circumstances that the same decision will be reached if it is only the husband who makes such disclaimers and declarations to the creditor. Lincoln v. Bennett, 138 Tex. 56, 62, 156 S.W.2d 504, 507 (1941).

777. 131 Tex. 444, 116 S.W.2d 368 (1938).

778. *Id.* at 449, 116 S.W.2d at 370.

779. TEX. FAMILY CODE ANN. § 5.25 (1975).

down.[780] As a result, one spouse may be allowed to manage that portion of the community property which would ordinarily be subject to the sole management and control of the other spouse. In order to obtain this control, the remaining spouse must petition the district court, stating his or her reasons.[781] After hearing the evidence the court will enter an order describing how this property should be managed.[782] It must be noted, however, that the court's jurisdiction over the matter is continuing, and it may amend or vacate the order if the circumstances change.[783]

The Family Code also provides for situations in which one spouse may petition to be allowed to convey either the separate homestead or community homestead without the joinder of the other spouse.[784] These unusual circumstances include insanity, disappearance, and abandonment.

As early as 1856, Texas courts had held that a wife could convey the community homestead without the joinder of her husband after he had abandoned her. In *Fullerton v. Doyle*[785] the husband abandoned his wife and gave nothing for her support. The homestead constituted their only community property, and in order to support her family, the wife contracted to sell it. After making the initial down payment, the buyer defaulted in his performance and tried to avoid the contract. His argument was that a married woman could not convey good title to the property. The court held, however, that the "assent of the partner who abandons the home and family and duties and powers of the marriage relation is not requisite to the sale of the homestead."[786]

780. For example in Ross v. Tidewater Oil Co., 136 Tex. 66, 145 S.W.2d 1089 (1941), a case decided when the husband was the sole manager of the community estate, Falvie Ross brought suit to cancel three deeds to various tracts of land. Charlie Ross, her husband, was insane at the time of these conveyances. Falvie Ross contended that a married woman, living with her insane husband, could not convey title to her separate estate. Affirming the decision of the court of civil appeals, the Texas Supreme Court held that Article 4617 of the Revised Civil Statutes authorized the wife to convey her separate property when the husband is insane or has permanently abandoned the wife. For examples of earlier case law see Zimpleman v. Robb, 53 Tex. 274 (1880) (power of abandoned wife to manage the community estate); Masterson v. Bouldin, 151 S.W.2d 301 (Tex. Civ. App.—Eastland 1941, writ ref'd) (power of wife to manage community estate when permanently separated from her husband).

781. TEX. FAMILY CODE ANN. § 5.25(a) (1974). From 1879 until 1893, absent family necessity, the wife, where the husband was insane, could not dispose of the community property unless she qualified as the husband's guardian. Heidenheimer v. Thomas, 63 Tex. 287 (1885).

782. TEX. FAMILY CODE ANN. § 5.25(f) (1974).

783. *Id.* § 5.25(g).

784. *Id.* §§ 5.82-5.85.

785. 18 Tex. 3 (1856).

786. *Id.* at 14.

CONCLUSION

Due to the many reform movements, culminating in the enactment of the Family Code the married woman in Texas has attained an equal status with her husband. Nevertheless, inequitable situations may still result in certain situations involving the homestead property. To remedy this matter, it should be established that the homestead exemption cannot be lost except by strict adherence with the law, that joinder of the spouses is required for the conveyance, abandonment, or encumbrance of the homestead property.