

MARITAL PROPERTY ISSUES: Effects on
Land Titles and Curative Implications --

A Panel Discussion on the
Characterization of Non-Homestead
Marital Property, the Power of Each
Spouse to Dispose of Non-Homestead
Marital Property and the Protection of
Third Parties Dealing with
Non-Homestead Marital Property

CURING TEXAS LAND TITLES II
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I. Introduction: Herein of the Comparison of the Scope of Real Property Title Examination and the Scope of Marital Property Law:

A. Scope of Real Property Title Examination-

1. every matter connected with or affecting each purchaser's estate and which appears by recital, reference or otherwise upon the face of any instrument forming an essential link in the chain of title through which each purchaser deraigns title.
2. record title and all matters affecting record title which appears upon or is referenced in the instruments reviewed which comprise the relevant chain of title.

B. Scope of Marital Property Law: Three Foci-

1. Characterization of Property-

- a. property is either separate property or community property.
- b. characterization looks to the status of the property as either separate or community based upon the time and circumstances of acquisition of an interest and not the manner in which title is taken.
- c. in contrast, a record title analysis looks to the manner in which title is taken thereby the characterization of property entails a different approach and different considerations.
- d. despite the different approach and considerations, property characterization is an essential element of title examination because characterization helps determine legal and equitable interests acquired by a husband or wife which might otherwise be ignored.
- e. also, characterization relies upon a series of presumptions which may be established or rebutted based upon the facts which appear upon or are referenced in the chain of title instruments.

2. Disposition of Marital Property-

- a. once property is characterized as either separate or community, then marital property law specifies each spouses' abilities and inabilities to dispose of that property.

- b. this area of marital property law prescribes and proscribes the elements of a proper conveyance of each type of property.
- 3. Protection of Third Parties-
 - a. Marital Property Law provides certain rules to protect innocent third parties who purchase interests in good faith and for value.
 - b. these rules potentially provide a title examiner with an important legal umbrella to determine the effect of conveyances occurring in the examined chain of title.
- C. This Outline is intended to provide the reader with an overview of the applicable marital property law which should be mastered so that a complete title examination can be completed. This Outline is not intended to cover every aspect of marital property law or other implicated law.

II. Marital Property Law-Title Examination Checklist:

A. Characterization-

- 1. Was property possessed during marriage?
 - a. if yes, then property presumed to be community property.
 - b. if no, then property is separate property[proceed to II-B].

NOTE: POSSESSION during marriage is the key and not whether the conveyance was made in one or both spouses' names.

- 2. if property is presumed to be community property, can such a presumption be rebutted by facts contained in the examined record?
 - a. if property "acquired" or a "claimed or owned" before marriage, then separate property.

NOTE 1: "ACQUIRED" means the inception or origin of title not the finalization or maturation of title.

NOTE 2: the inception of title can be a farmout agreement, earnest money contract, bond for a patent or other similar instrument and the actual instrument of conveyance may only be the final step to mature title.

- b. if property is acquired by gift at any time, then separate property.
 - i. normal inter-vivos gifts.
 - ii. presumption of gift if parent delivers possession, conveys title or purchases property in name of child.
 - iii. presumption of gift of separate property in inter-spousal transactions.
- NOTE: this presumption originally framed in favor of wife.
- iv. presumption of gift between spouses if separate property of one used as consideration in conveyance involving other spouse as grantee.
- c. if property is acquired by descent or devise at any time, then separate property.
 - d. if property contains significant recitals, then presumed separate property.

NOTE 1: SIGNIFICANT RECITALS include language such as, "to wife as her separate property for her exclusive use" or "to wife to be paid out of her separate property."

NOTE 2: if instrument contains significant recitals, then the normal community property presumption replaced by a presumption of separate property.

NOTE 3: the Texas cases reviewing the significant recitals presumption have, to date, been concerned with conveyances to the wife and not with conveyances to the husband. As such, the caselaw is framed in terms of a presumption of separate property obtaining only in favor of the wife and not the husband. However, since 1967 and the legislative attempts to equalize the rights of husbands and wives, the presumption should obtain for either spouse.

B. Disposition: Non-Homestead Property-

- 1. Husband's separate property-full power to dispose.
- 2. Wife's separate property
 - a. 1841-1963: The Disabilities of the Wife-

NOTE 1: husband's joinder and wife's privy acknowledgment were essential and positive elements of a conveyance.

NOTE 2: if either element missing, the conveyance was void.

NOTE 3: if privy acknowledgment was present but defective, the conveyance was inoperative and acknowledgment could be cured by ratification with proper acknowledgment or by Court action.

NOTE 4: the privy acknowledgment and not the wife's signature made a conveyance effective.

NOTE 5: wife could only make a present conveyance and thus wife not bound by after-acquired title doctrine, the title warranties in an instrument, estoppel by deed [in certain instances] and could not enter into a contract to convey which did not pass present title.

NOTE 6: husband's joinder not required if:

- i. husband insane;
- ii. husband permanently abandons wife; or
- iii. husband refuses to join conveyance.

NOTE 7: statute provided for the above three exceptions only with Court action, however, co-equal with the statutory rights was a common law right to obviate joinder without Court action in the case of i and ii above.

b. 1957-1963: wife's election to dispose without husband's joinder.

NOTE: this election did not remove the positive requirement of the privy acknowledgment for a conveyance.

c. 1963-1967: Removal of Disabilities-Phase One-

NOTE 1: husband's joinder and the privy acknowledgment were no longer positive elements of a conveyance.

NOTE 2: the privy acknowledgment form was still the required form for notice and recordation purposes, and the absence of the privy acknowledgment did not void the conveyance but only deprived that conveyance of recordation and notice status.

NOTE 3: married women given full capacity to contract and full dispositive powers over her separate property.

d. 1967-1985: Removal of Disabilities Completed-

NOTE 1: privy acknowledgment form eliminated.

NOTE 2: wife has full dispositive powers over separate property.

3. Community Property-

a. 1841-1967-husband's exclusive right to convey-

NOTE 1: since wife's joinder not required, then any defect in wife's joinder in conveyance of community property (such as missing privy acknowledgment) did not affect the conveyance.

NOTE 2: any attempted conveyance by the wife of community property was void unless wife was authorized by husband to make the conveyance or husband otherwise consented to conveyance.

NOTE 3: wife's inability to convey obtained even if property in her name alone so long as it was community property.

NOTE 4: wife's disability removed if husband abandoned wife or husband was insane.

b. 1967-1985-joint management, control and disposition-

NOTE 1: both spouses necessary for a conveyance.

NOTE 2: absence of one spouse means conveyance ineffective as to non-joining spouse but effective as to signatory spouse.

NOTE 3: community property presumed to be subject to joint dispositive powers unless provided otherwise by agreement, power of attorney or otherwise [which would include the provisions of former Article 4622 and Family Code §5.24 - discussed below].

C. Protection of Third Parties:

1. 1841-1967-

- a. community property presumption obtains and continues unless rebutted by facts contained in the record.
- b. with community property presumption goes husband's exclusive right to convey.
- c. wife's interest in such property is equitable in nature.
- d. unless record reveals otherwise, an innocent third party purchaser for value can rely upon community property presumption and husband's exclusive power to convey and take a conveyance from husband which cuts off the wife's interest.

NOTE: the above legal logic obtains so long as the community presumption obtains and an innocent third party can rely upon the record that the community presumption still in effect.

2. 1967-1985-

- a. under former Article 4622 (1967-1969) and Family Code §5.24 (1969-1985) there is a presumption that property in the name or possession of one spouse is subject to that spouse's sole disposition.
- b. these statutory provisions protect the innocent third party purchaser for value.

III. Substantive Discussion of Each Item in the Foregoing Checklist:

A. Characterization:

1. The Community Property Presumption-

- a. Family Code §5.02 and its predecessor statutes state in pertinent part:

Property possessed by either spouse during...marriage is presumed to be community property.

- b. the above presumption is a rebuttable presumption.

See, McKinley v. McKinley, 496 S.W.2d 540 (Tex. 1973).
Wilson v. Wilson, 145 Tex. 607, 201 S.W.2d 226 (1947).

- c. presumption obtains even if title taken in only one spouse's name so long as it is possessed by either spouse during marriage.

See, Maples v. Minitz, 615 S.W.2d 690, 691 (Tex. 1981).
Harrington v. Harrington, 451 S.W.2d 797, 799 (Tex. Civ. App.-Houston [1st Dist.] 1970, no writ).
McGee v. McGee, 537 S.W.2d 94, 96 (Tex. Civ. App.-Amarillo 1976, no writ).

- d. presumption obtains if property acquired in both spouses' names.

See, In Re: Marriage of York, 613 S.W.2d 764, 767 (Tex. Civ. App.-Amarillo 1981, no writ).

- e. several cases hold that when property is taken in both spouses' names, there arises the additional presumption that the spouses agreed that the property would be community property.

See, Gonzalez v. Guajardo de Gonzalez, 541 S.W.2d 865 (Tex. Civ. App.-Waco 1976, no writ).
Robbins v. Robbins, 519 S.W.2d 507 (Tex. Civ. App.-Ft. Worth 1975, no writ).

2. Rebutting the Community Property Presumption: General Comments-

- a. to overcome the community property presumption, one must trace and clearly identify property claimed to be separate property.

See, Tarver v. Tarver, 394 S.W.2d 780 (Tex. 1965).
McKinley v. McKinley, 496 S.W.2d 540.

- b. the character of property as either separate or community is established at the time of acquisition and by the circumstances of acquisition.

See, Bradley v. Bradley, 540 S.W.2d 504, 512 (Tex. Civ. App.-Ft. Worth 1976, no writ). Smith v. Buss, 135 Tex. 566, 144 S.W.2d 529, 532 (1940).

- c. the Texas Constitution and the Family Code and its statutory antecedents, dating back to 1840, have specifically defined separate property as that property claimed or owned before marriage and that property acquired during marriage by gift, devise or descent.

See, Texas Constitution Art. XVI, Section 15 and Family Code §5.01.

- d. in fact, the Constitutional definition of separate property is the exclusive definition of separate property.

See, Eggemeyer v. Eggemeyer, 554 S.W.2d 137 (Tex. 1977).
Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799 (1925).

- e. community property is defined in terms of the above exclusive definition of separate property and is that property, other than separate property, acquired during marriage.

See, Family Code §5.01(b) and prior statutory enactments.

- f. thus, rebutting the community property presumption requires the demonstration that the subject estate fits one of the exclusively prescribed types of separate property.

3. Rebutting the Community Presumption: Claimed or Owned Before Marriage [The Inception of Title Rule]-

- a. character of an estate as either separate or community derives from when the right to the interest accrued and not when the title to the interest was finalized, i.e. it is the origin of the title that is the significant focus and not the subsequent steps necessary for the fruition of title.

See, Jensen v. Jensen, 665 S.W.2d 107 (Tex. 1984). Welder v. Lambert, 91 Tex. 510, 44 S.W. 281, 287 (1898). Craemer v. Briscoe, 101 Tex. 490, 109 S.W. 911 (1908).

b. the inception of title rule as stated above can best be understood through examples:

<u>Case</u>	<u>Origin of Title</u>	<u>Maturation of Title</u>	<u>Character</u>
1. <u>Welder v. Lambert</u> , 44 S.W. 281.	1. contract to receive patent upon compliance with certain terms 2. <u>contract entered-into before marriage</u>	1. issue of patent during marriage	1. separate
2. <u>Craemer v. Briscoe</u> , 109 S.W. 911.	1. right to homestead donation upon settling and occupancy for three years 2. <u>first settled during marriage</u>	1. three years occupancy finished after wife died	1. community
3. <u>Peterson v. Peterson</u> , 595 S.W.2d 889, 890-1 (1980).	1. Earnest money contract entered-into <u>before marriage</u>	1. deed to home during marriage	1. separate
4. <u>Roach v. Roach</u> , 672 S.W.2d 524, 530-31 (1984).	1. deed executed but held in escrow and not delivered [<u>before marriage</u>]	1. deed delivered during marriage	1. separate

c. the above caselaw turn on when the property right or claim accrued.

d. whether such a right or claim exists which is sufficient to have the character of the examined estate relate back to such right or claim is a function of the specific statute or type of conveyance involved.

See, Roach v. Roach, 672 S.W.2d 524, 530-31 (Tex. App.-1984, no writ) (a deed which fails because of the absence of an element of a deed can still be effective as a contract to convey [see, Property Code §5.002 and antecedent Art. 1301]). But see, discussion at III B 2 d xvii (Page 24). Wierzchula v. Wierzchula, 623 S.W.2d 730, 731 (Tex. Civ. App.-Houston [1st Dist.] 1981, no writ) (re: Veteran's Administration loan commitments). Mendoza v. Mendoza, 255 S.W.2d 251, 252 (Tex. Civ. App.-San Antonio 1953, no writ)

(two deeds between the same two parties covering the exact same interest). Stiles v. Hawkins, 207 S.W. 89 (Tex. 1918), Richardson v. Temple Lumber Co., 46 S.W.2d 737 (Tex. Civ. App.-Beaumont 1932, writ dism'd). Welder v. Lambert, 44 S.W. 281 (the three prior cases deal with the inception of title rule and grants from the Sovereign).

e. inception of title and limitation title-

i. if start period of adverse possession under claim of right [including equitable right through ineffective deed] then limitation title relates back to time of first possession and if started adverse possession when single then maturation of limitation title during marriage will not change separate character of property.

See, Strong v. Garrett, 148 Tex. 265, 224 S.W.2d 471 (1949).

ii. if one is a naked trespasser then limitation title will not relate back to time of first possession and character of property based upon whether person is married when limitation title matures.

See, Brown v. Foster Lumber Co., 178 S.W. 787, 788-9 (Tex. Civ. App.-Galveston 1915, writ ref'd).

4. Rebutting the Community Property Presumption: Gifts-

a. "A 'gift' is a voluntary transfer of property to another made gratuitously and without consideration."

See, Bradley v. Bradley, 540 S.W.2d at 511. Hilley v. Hilley, 161 Tex. 569, 342 S.W.2d 565 (1961).

b. elements of a gift-

i. voluntary transfer without consideration.

See, Woodworth v. Cortez, 660 S.W.2d 451, 563-4 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Kunkel v. Kunkel, 515 S.W.2d 941 (Tex. Civ. App.-Amarillo 1974, writ ref'd n.r.e.).

---- consideration of "love and affection" raises rebuttable presumption of gift.

See, Lowe v. Ragland, 156 Tex. 504, 297 S.W.2d 236, 237 (Tex. Civ.App.-Austin 1942, writ ref'd w.o.m.).

---- donee's agreement to support donor for donor's lifetime does not invalidate gift.

See, John Hancock Mutual Life Insurance Co. v. Bennett, 128 S.W.2d 791, 797-8 (Tex. 1939).

---- recitation of "\$10 consideration" or "other valuable consideration" when found in connection with either of the above two considerations does not necessarily defeat a gift.

See, Hall v. Barrett, 126 S.W.2d 1045, 1047 (Tex. Civ. App.-Ft. Worth 1939, no writ).
Lowe v. Ragland, 297 S.W.2d at 673-4.

ii. delivery of the subject matter of gift to donee.

See, Grimsley v. Grimsley, 632 S.W.2d 174, 177 (Tex. App.-Corpus Christi 1982, no writ). Woodworth v. Cortez, 660 S.W.2d at 563.

iii. present intent to vest in donee, unconditionally and immediately, ownership of the property delivered.

See, Armington v. Gilcrease Oil Co., 190 S.W.2d 587, 595 (Tex. Civ. App.-San Antonio 1945, no writ). Woodworth v. Cortez, 660 S.W.2d at 563.

iv. a gift of real property must comply with all the elements of a regular conveyance of land, save consideration.

See, Woodworth v. Cortez, 660 S.W.2d at 564.

c. burden of proving gift on person claiming through donee.

See, Diaz v. Cantu, 586 S.W.2d 576, 580 (Tex. Civ. App.-Corpus Christi 1979, writ ref'd n.r.e.).

d. special gift situations-

ii. parent-child-

---- there is a presumption of gift if the parent delivers possession, conveys title or purchases property in the name of the child.

See, Woodworth v. Cortez, 660 S.W.2d at 564.
Burk v. Turner, 79 Tex. 276, 15 S.W. 256, 256-7 (1891). Reeves v. Simpson, 144 S.W. 361, 362 (Tex. Civ. App.-Ft. Worth 1912, no writ).

---- the above cases should be limited to situations, such as the ones described in each of the cases, where a parent consummates a transaction with a third party for the benefit of the child, and if a parent wants to make a direct inter-vivos gift to a child the normal gift elements should be followed.

ii. inter-spousal-

---- presumption obtains that one spouse intends to make a gift of separate property to the other spouse if there is an inter-spousal conveyance complete with delivery of a deed.

See, Dalton v. Pruett, 483 S.W.2d 926, 929 (Tex. Civ. App.-Texarkana 1972, no writ).

---- this presumption originally framed in favor of wife inasmuch as it would traditionally be the husband taking a conveyance in wife's name or in both names.

iii. third party to one or both spouses-

---- where one spouse furnishes the consideration from their separate estate and takes title to the property in the name of the other spouse or jointly in both spouses, the presumption is that spouse providing the consideration intended the other spouse's interest to be a gift.

See, Cockerham v. Cockerham, 527 S.W.2d 162, 168 (Tex. 1975). Purser v. Purser, 604 S.W.2d 411, 414 (Tex. Civ. App.-Texarkana 1980, no writ).

5. Rebutting the Community Presumption: Descent or Devise-

- a. property acquired during marriage by descent or devise is separate property.

See, Henry v. Reinle, 245 S.W.2d 743, 744 (Tex. Civ. App.-Waco 1952, writ ref'd. n.r.e.).

- b. subsequent partition of property acquired by either descent or devise does not change character of property.

See, Odstrcil v. Odstrcil, 384 S.W.2d 403, 406-7 (Tex. Civ. App.-Houston, 1964, writ dism'd.). Westhoff v. Reitz, 554 S.W.2d 1, 3 (Tex. Civ. App.-Ft. Worth, 1977, writ ref'd. n.r.e.).

6. Rebutting the Community Property Presumption: Significant Recitals-

a. if there are significant recitals contained in an instrument of conveyance, then the community property presumption is replaced by a presumption that the interest conveyed is separate property.

See, Henry S. Miller Company v. Evans, 452 S.W.2d 426, 430-1 (Tex. 1970). Messer v. Johnson, 422 S.W.2d 908, 910-12 (Tex. 1968).

b. Examples of Significant Recitals:

i. "as wife's separate property;"

ii. "as wife's separate property and for wife's sole use and benefit;" and

iii. "consideration to be paid out of the wife's separate funds."

c. if an instrument of conveyance does not contain significant recitals then the normal community property presumption obtains.

See, Brick & Tile, Inc., v. Parker, 143 Tex. 383, 186 S.W.2d 66, 67 (1945).

d. the significant recital separate property presumption is a rebuttable presumption, unless the significant recital is challenged by a person who was a party to the instrument of conveyance or one who is in privity with one who was a party to the instrument of conveyance.

See, Messer v. Johnson, 422 S.W.2d at 910-11.

e. the rationale for this irrebuttable nature of the significant recital separate property presumption is based on the traditional rule that one who is a party to contractual recitals (which are more than statements of fact but which show the character of the right to be conveyed) cannot later attack such recitals save for fraud, accident or mistake.

See, Henry S. Miller Company v. Evans, 452 S.W.2d and 431. Kahn v. Kahn, 94 Tex. 114, 58 S.W. 825 (1900). McKivett v. McKivett, 123 Tex. 298, 70 S.W.2d 694 (1934).

f. the following are examples of when a person is considered a party to the deed so that that person or that person's privies cannot attack the significant recitals contained in the instrument of conveyance except for fraud, accident or mistake:

i. if the person is the grantor in the instrument of conveyance.

See, McKivett v. McKivett, 70 S.W.2d 694.

ii. if the person joins in the conveyance.

See, Messer v. Johnson, 422 S.W.2d 908.

iii. when the husband is a participant in a transaction whereby the wife received a deed with significant recitals and thereafter the husband joined in a series of conveyances of the interest acquired through such deed with significant recitals, not as a grantor, but as a joining husband so as to fulfill the requirement that the husband join the wife in any conveyance of her separate property.

See, Little v. Linder, 651 S.W.2d 895, 898-900 (Tex. App.-Tyler 1983 writ ref'd n.r.e.).

iv. party to an executory contract even if not party to deed.

See, Lobe v. Wilhite, 224 S.W.2d 343 (Tex. Civ. App.-Dallas 1949, writ ref'd n.r.e.).

v. if the person signs the promissory note or deed of trust concerning the property to be acquired by one spouse or the other.

See, Hodge v. Ellis, 154 Tex. 341, 277 S.W.2d 900 (1955).

vi. if the person is present at the transaction.

See, Long v. Knox, 155 Tex. 581, 291 S.W.2d 292 (1956) (Oil, Gas and Mineral Lease involved).

vii. husband, as independent executor for another, conveys to wife.

See, Contreras v. Contreras, 590 S.W.2d 218, 222 (Tex. Civ. App.-Tyler 1979, no writ).

- g. the Texas cases reviewing the significant recital presumption have, to date, been concerned with conveyances to the wife and not with conveyances to the husband. As such, the caselaw is framed in terms of the presumption of separate property obtaining only in favor of the wife and not the husband. However, since 1967 with the Legislative attempts to equalize the rights of husbands and wives, this presumption should obtain for either spouse.

B. Disposition: Non-Homestead Property-

- 1. Husband's separate property - husband has always had and continues to have complete and full power of disposition over his own separate property.

- 2. Wife's separate property-

- a. 1841-1963: Disabilities of the Wife-

- i. prior to 1841 no privy separate married woman's acknowledgment necessary for conveyance of wife's separate property, and only husband's consent (even oral) necessary for an effective conveyance. In fact, husband's consent inferrable from husband's failure to object to any conveyance for a long period of time.

See, Wm. Cameron & Company, Inc., v. Cuffie, 144 S.W. 1024, 1028-9 (Tex. Civ. App.-Galveston, 1912 no writ). Groesbeck v. Bodman, 73 Tex. 287, 11 S.W. 322, 324 (1889).

- ii. beginning with the Act of February 3, 1841, and continuing through Article 1299 (repealed 1963), the wife was considered to have the same disposition rights in her own separate property as a feme sole did in her own property save that a married woman could not convey her separate property unless she was joined by her husband and unless she executed a married woman's acknowledgment.

See, Groesbeck v. Bodman, 11 S.W. at 324. Barre v. Daggett, 105 Tex. 572, 153 S.W. 120, 121 (1913).

- iii. in addition to the traditional deed elements, both the husband's joinder and a properly executed married woman's acknowledgment were positive elements of any conveyance of a woman's separate property and any conveyance which did not contain both requirements was void.

See, Kellett v. Trice, 95 Tex. 160, 66 S.W. 51, 53 (1902).
Humble Oil & Refining Co. v. Downey, 143 Tex. 171, 183
S.W.2d 426, 430 (1944).

iv. in fact, it was the married woman's acknowledgment and not the woman's signature on an instrument of conveyance which made such an instrument of conveyance effective.

See, Humble Oil & Refining Co. v. Downey, 183 S.W.2d at 430. United Savings Bank of Detroit v. Frazier, 116 S.W.2d 933, 940 (Tex. Civ. App.-Dallas 1938, writ dismissed).

b. 1841-1963: Disabilities of the Wife - Special Issues-

i. conveyances where joinder and privity acknowledgment required-

(a) any conveyance of equitable or legal title.

See, Cauble v. Worsham, 96 Tex. 86, 70 S.W. 737, 738-9 (1902).

(b) any conveyance such as disclaimer of an interest by a wife or any related action such that the wife's former interest is presently conveyed to another.

See, Weatherred v. Kiker, 357 S.W.2d 182, 184 (Tex. Civ. App.-Amarillo 1962, writ refused n.r.e.).

(ii) since the husband had to join, pro forma as a grantor, then the wife generally could not convey to the husband for that would mean that the husband would be conveying to himself.

See, Gilbert v. Lobley, 231 S.W.2d 969, 971-2 (Tex. Civ. App.-Ft. Worth 1950) aff'd, 149 Tex. 493, 236 S.W.2d 121 (1951).

(iii) Power-of-attorney-

(a) a married woman could not execute a power-of-attorney concerning her separate property unless the husband joined in the power-of-attorney and the power-of-attorney contained a married woman's acknowledgment, or unless the power-of-attorney contained a married woman's acknowledgment and the person designated in the power-of-attorney conveyed the wife's separate property in connection with or in conjunction with the

husband, or unless the husband and wife executed a joint power-of-attorney which contained a proper marital woman's acknowledgment.

See, Nolan v. Moore, 96 Tex. 341, 72 S.W. 583-4, (1903).

(b) the wife could not generally give husband a power-of-attorney.

See, Gilbert v. Lobley, 231 S.W.2d 969, 971-2 (Tex. Civ. App.-Ft. Worth 1950) aff'd, 149 Tex. 493, 236 S.W.2d 121 (1951).

iv. After acquired title, estoppel by deed and breach of warranty of title-

(a) the doctrines of after acquired title, estoppel by deed and breach of warranty of title have no application to a married woman because:

(1) a married woman had no general capacity to contract;

(2) a married woman could make no conveyance except of her present interest; and

(3) all three doctrines require general contract capacity and the right to convey future interests.

See, Pascoe v. Keuhnast, 642 S.W.2d 37, 40 (Tex. App.-Waco 1982) cert den'd, 103 S. Ct. 3528. Wadkins v. Watson, 86 Tex. 194, 24 S.W. 385, 386-7 (1893). Kellett v. Trice, 66 S.W. at 53.

v. Contracts to convey-

(a) a married woman was unable to execute a contract to convey unless the contract to convey was such that it constituted a present conveyance of her existing interest.

See, Kellett v. Trice, 66 S.W. at 53. Blakely v. Kanaman, 107 Tex. 206, 175 S.W. 674, 675 (1915). Estapa v. Saldona, 200 S.W.2d 722, 723 (Tex. Civ. App.-San Antonio 1945, no writ).

(b) the above rule obtains because under Article 1299 and its antecedent statutory enactments, a married woman could only make a conveyance of her present interest and because a married woman had no general capacity to contract regarding property except as provided by statute and whereas a contract to convey is usually not a present conveyance and also requires general contract capacity.

vi. Pooling-

(a) since pooling of interests results in a cross-conveyance of the interests pooled, any exercise of pooling authority involving a married woman's separate property should implicate some of the above stated rules.

(b) for instance, a married woman's authorization to pool her separate estate or her execution of an instrument effecting pooling should require normal requirements of a married woman's conveyance.

(c) a potential problem is raised if a woman's separate property is pooled with any property in which husband has an interest since a wife generally could not make a conveyance to husband. See, Lange, Texas Practice Series, Land Titles §566, p. 545 (1962).

c. 1841-1963: Disabilities of the Wife-Special Issues concerning Joinder-

i. when the husband's joinder is not required-

(a) permanent abandonment by husband.

(b) insanity of husband.

(c) husband's refusal to join in a conveyance.

ii. Texas Statutory Law allowed the non-joinder of a husband in the above three situations if the wife obtained Court permission. Independent of the Texas Statutory Law, Texas Common Law allowed the wife to execute an instrument without the joinder of the husband if the husband permanently abandoned the wife or if the husband was insane and thereby lacked capacity to contract. What is significant about the Texas Common Law is that no leave of Court or other Court action was required.

See, Ross v. Tidewater Oil Co., 145 S.W.2d 1089, 1091-3 (Tex. 1941). Masterson v. Bouldin, 151 S.W.2d 301, 305 (Tex. Civ. App.-Eastland 1941, writ ref'd). Arlin Properties, Inc., v. Utz, 465 S.W.2d 231, 233 (Tex. Civ. App.-Ft. Worth, 1971 no writ).

iii. Article 4614 was amended in 1957 to provide a married woman with the opportunity to make conveyances of her separate property without the joinder of her husband by filing of record notice of her election in the County of her residence, and arguably the election was not effective if filed of record only in the County where the land is situated. Article 4614 was amended in 1961 to allow filing of the election notice in County records where the land is situated to make the election effective.

the 1957 and 1961 amendments to Article 4614 allowed the woman to elect for her husband not to join in any conveyance, but did not eliminate the positive requirement of a privy married woman's acknowledgment.

See, Click v. Seale, 519 S.W.2d 913, 916-21 (Tex. Civ. App.-Austin 1975) writ ref'd n.r.e. 556 S.W.2d 95. Mata v. Rangel, 432 S.W.2d 146, 148-151 (Tex. Civ. App.-Houston, [1st Dist.] writ ref'd n.r.e.).

d. 1841-1963: Disabilities of the Wife-The Married Woman's Acknowledgment-

i. as stated above, the married woman's acknowledgment was a positive element of the conveyance and, in fact, it was the acknowledgment and not the woman's signature which made an instrument of conveyance effective.

See, Humble Oil & Refining Co. v. Downey, 183 S.W.2d at 430.

ii. if an instrument of conveyance did not contain a married woman's acknowledgment, then the same was void, even as to innocent third party purchasers for value.

See, Humble Oil & Refining Co. v. Downey, 183 S.W.2d at 428-30.

- iii. an attempted conveyance of a married woman's separate property is void even if it contains a completed married woman's affidavit if it can be shown that the woman never did actually appear in person before the Notary Public.

See, Humble Oil & Refining Co. v. Downey, 183 S.W.2d at 428-30.

- iv. However, if the married woman appears before a Notary Public and the Notary fails to comply with his duties and make a certificate in full compliance with the law, such certificate, however, is conclusive in favor of an innocent third party purchaser for value without notice of the fact that the officer failed to do his duty.

See, Humble Oil & Refining Co. v. Downey, 183 S.W.2d at 430. Gulf Production Company v. Continental Oil Company, 139, 183, 164 S.W.2d 488, 493 (1942). (Here fact of interest of Notary in property to be conveyed not invalidate deed to party with no notice of such interest).

- v. the requirements of a proper married woman's acknowledgment include that the married woman must appear in person before a Notary so that the married woman can be examined separately and apart from the husband, have the instrument explained to her, have the instrument shown to her, given the opportunity to retract any signature, and to state that the signature given was made willingly and as her own deed and act.

See, Charleton v. Richard Gill Company, 285 S.W.2d 801, 802-3 (Tex. Civ. App.-San Antonio 1955, no writ).

- vi. generally, a married woman's affidavit must comply with general rules of acknowledgment law. See, Adams, Texas Acknowledgment Law, 47 Tex. B. J. 1347 (1984).

For instance, the same people who can take a regular acknowledgment can take a married woman's acknowledgment.

- vii. the requirement that the married woman be examined "apart from her husband" means examination not in separate rooms but only outside the husband's hearing distance or not in such close proximity so as that the husband would be able, with the wife's knowledge, to overhear her

explanations and responses or in such proximity that the husband could influence the married woman.

See, Wright v. Nunn, 45 S.W.2d 307, 308 (Tex. Civ. App.-Austin 1931, no writ). Richmond v. Hogg Creek Oil Company, 229 S.W. 563, 567 (Tex. Civ. App.-Ft. Worth, 1921) writ dism'd 236 S.W. 904 (1922).

viii. a married woman has the deed "fully explained to her" if the officer explains to her the tenor and effect of the instrument, and the existence of any fraud the officer knows is being practiced upon her. Essentially, the "tenor and effect" requirement means that the officer has to tell the married woman that the instrument is passing title and other facts contained on the face of the instrument, but the officer does not have to undergo a full investigation of all facts, including locating the property so that he can verify that the wife is actually conveying the interest she purports to convey.

See, Rinehart v. Tomerlin, 227 S.W.2d 876, 878-9 (Tex. Civ. App.-Ft. Worth 1950, writ ref'd).

- ix. the certificate of the officer taking acknowledgment must specify:
- (a) the officer acted within his jurisdiction;
 - (b) that the wife appeared before him;
 - (c) that the wife was known or made known to the officer;
 - (d) that the wife was examined privily and apart from the husband;
 - (e) that she had the instrument fully explained to her;
 - (f) she thereupon acknowledged such instrument to be her act and deed and she willingly signed the instrument for purposes and consideration therein expressed;
 - (g) the wife did not wish to retract act; and
 - (h) the officer signed and sealed such certificate.

x. no particular language is necessary for any given certificate, just that it substantially complies with the above eight criteria. Substantial compliance is obtained if the language used possesses the same meaning and represents the same facts. No particular words are necessary so long as the essential prerequisites are complied with.

See, Hill v. Foster, 143 Tex. 482, 186 S.W.2d 343, 345 (1945).

xi. failure to substantially comply renders an instrument a nullity.

See, Humble Oil & Refining Co. v. Downey, 183 S.W.2d at 428.

xii. if the certificate fails to substantially comply with the requirements of a proper certificate, but the wife and officer actually completed all of the elements and the officer used an incorrect certificate form, then the deed is inoperative but not void and can be made operative by:

(a) by suit to show acknowledgment acts were properly completed;

See, Hayden v. Moffat, 74 Tex. 647, 12 S.W. 820, 821 (1889); or

(b) by correction of certificate by ratification deed or similar instrument recognizing validity of prior instruments, and which contains a proper acknowledgment form.

See, Hill v. Foster, 143 Tex. 482, 186 S.W.2d 343, 345 (1945).

xiii. the above two cases indicate that if the incorrect form is used that the defective acknowledgment can be cured, however, proper initial compliance is preferable because an inoperative deed is not notice to an innocent third party purchaser for value and a subsequent ratification will not cut off such an intervening third party purchaser for value.

xiv. unless the married woman's acknowledgment was fatally defective, there is a rule of conclusiveness of the certificate such that an innocent third party purchaser for value may rely upon the fact that the statement and recitations in a married woman's acknowledgment actually did occur as so indicated therein.

xv. impact of a bad married woman's acknowledgment and limitation title.

(a) a conveyance not containing a married woman's acknowledgment required by law passes no title, either equitable or legal, and does not constitute "title or color of title" to support limitation title under the three year statute of limitation.

See, Silcock v. Baker, 61 S.W. 939, 940 (Tex. Civ. App. 1901, no writ).

(b) a conveyance not containing a married woman's acknowledgment required by law passes no title, either equitable or legal, and does not constitute "a duly registered deed" for purposes of limitation title under the five year statute of limitation.

See, Merriman v. Blalack, 121 S.W. 552, 559 (Tex. Civ. App. 1909 writ ref'd).

(c) but if the husband and wife both execute a deed which is ineffective as to the wife because of an ineffective married woman's acknowledgment, then that deed is "a duly registered deed" for purposes of the five year statute of limitation.

See, Dupey v. Dicks, 218 S.W. 49, 51-2 (Tex. Civ. App.-Galveston 1920, writ ref'd).

(d) an ineffective deed because of a fatal married woman's acknowledgment is a sufficient "memorandum of title" for purposes of the ten year statute of limitation.

See, Williams v. Bradley, 67 S.W. 170, 170-1 (Tex. Civ. App. 1902, writ ref'd).

xvi. the so-called curative statutes are not effective to validate an ineffective deed due to an improper married woman's acknowledgment.

See, Holland v. Votaw, 103 Tex. 534, 131 S.W. 406 (1910).

xvii. Article 1301 (now Property Code §5.002) which gave effect to a failed conveyance as a contract to convey has no application to an instrument which is defective because of an improper married woman's

acknowledgment, or if the husband fails to join a conveyance of the woman's separate property.

See, Tompkins v. American Republic's Corp., 248 S.W.2d 1001, 1006 (Tex. Civ. App.-Beaumont 1952, no writ).

e. 1963-1967: Removal of Disabilities-Phase One-

- i. husband's joinder in married woman's privy acknowledgment were no longer positive elements of conveyance.

the married woman's privy acknowledgment form was still the prescribed form of acknowledgment for a married woman and an instrument of conveyance involving a married woman's separate property could not be filed of record or if filed of record would not be notice to any third party purchaser for value if the traditional married woman's privy acknowledgment form was not substantially complied with.

See, Diamond v. Borestein, 414 S.W.2d 454 (Tex. 1967).

- ii. the wife now has full capacity to contract. Article 4625 (repealed 1969).

f. 1967-1985: Removal of Disabilities Completed-

- i. the privy acknowledgment form eliminated and the same acknowledgment form to be used by either an individual male or individual female.
- ii. the wife now has full dispositive powers over separate property. See, Family Code Section 5.21 which says each spouse has the sole management, control and disposition of his or her separate property.
- iii. the wife now has full capacity to contract. ~~Family Code §4.03~~ Cockerham v. Cockerham, 527 S.W.2d 162, 171 (Tex. 1975).
- iv. when the Legislature abolished the married woman's privy acknowledgment, it stated that all married woman acknowledgments executed from 1963 to 1967 which were not in substantial compliance as of that date were deemed to be cured unless a suit involving record title was filed by January 1, 1968.

3. Community Property-

a. 1841-1967: Husband's Exclusive Right to Convey-

- i. husband, as sole manager of the community property, had the exclusive right to convey community property except where the husband abandoned the wife, became insane or lacked legal capacity.

See, Pascoe v. Keuhnast, 642 S.W.2d at 139-40.
Lockhart v. Garner, 156 Tex. 580, 298 S.W.2d 108 (1957).

- ii. the defective joinder by the wife in any conveyance of community property, either by a faulty married woman's acknowledgment or otherwise was insignificant and only the husband's execution was necessary for a proper conveyance.

See, Garner v. Lockhart, 285 S.W.2d 393 (Tex. Civ. App.-Ft. Worth, 1955) affm'd 156 Tex. 580, 298 S.W.2d 108 (1957).

- iii. a wife could convey the community property if the husband so consented, and oral consent was all that was necessary.

See, Lockhart v. Garner, 298 S.W.2d at 108.

- iv. the husband's exclusive right to convey the community property extended even over that community property which was taken only in the wife's name.

See, Martinez v. De Barroso, 189 S.W. 740, 741 (Tex. Civ. App.-San Antonio 1916, writ ref'd).

b. 1841-1967: Unusual circumstances in which the wife could convey community property without joinder of husband.

- i. if the husband abandoned the wife which meant that the husband either deserted her, was permanently separated from her or was confined to the penitentiary.

See, Reed v. Beheler, 198 S.W.2d 625, 626-9 (Tex. Civ. App.-Ft. Worth 1946, no writ).

- ii. upon abandonment, the wife obtained powers as a feme sole for purposes of disposition of the community estate, but the disposition powers were

qualified and non-exclusive inasmuch as the husband still retained the concurrent power of full disposition, and was qualified by the fact that the woman can only act and convey the property for necessities only.

See, King v. King, 91 S.W. 633, 635-6 (Tex. Civ. App. 1906, no writ).

iii. basically, the woman had the right to act without Court intervention or action if it involved a conveyance for necessities, but any other type of conveyance required some Court action.

See, Ross v. Tidewater Oil Company, 145 S.W.2d at 1089-90. Masterson v. Bouldin, 151 S.W.2d at 305-7.

iv. insanity of the husband.

v. the provisions concerning the wife's ability to convey the community estate without the joinder of the husband upon the insanity of the husband involves a complex statutory scheme with a common thread which can be stated generally, to-wit:

unless the woman attempted to make a conveyance for necessities, there is some type of Court action which must be taken by the married woman before she can make any such action. Accordingly, unless the conveyance is for necessities, the record may demonstrate a Court record which can be reviewed to determine if the conveyance was proper.

vi. in common law the insanity of the husband did not vest the wife with full dispositive powers over the community estate and, in fact, denied wife's right to contract even for necessities if the husband was insane.

See, Lee v. Hall Music Co., 35 S.W.2d 685, 687 (Tex. Comm'n. App.-adopted 1931).

vii. early Texas statute allowed the wife to contract or convey for necessities only.

See, Lee v. Hall Music Co., 35 S.W.2d at 687.

viii. then there existed a broad patchwork of statutory provisions which is beyond the scope of this review;

(a) these statutes were cumulative of the power to convey for necessities and not in abrogation of such right.

See, Masterson v. Bouldin, 151 S.W.2d at 306.

(b) the applicable probate, community administration or guardianship statutory provisions have had varying degrees of applicability in this area.

See, Magnolia Petroleum Co. v. Still, 163 S.W.2d 268, 269-272 (Tex. Civ. App.-Texarkana 1942, writ ref'd). Houston Bank & Trust Company v. Lee, 345 S.W.2d 320, 322-5 (Tex. Civ. App.-Houston 1961, no writ).

ix. certain selective other statutory provisions in this area are:

x. 1879-1893: Wife must have to qualify as the husband's guardian.

See, Heidenhamer v. Thomas, 63 Tex. 287.

xi. 1893-1925: Wife has unlimited powers only if there are no children, no separate property of the husband and the husband is judicially declared insane.

See, Donaldson v. Meyer, 261 S.W. 369, 370-1 (Tex. Comm'n. App.-adopted 1924).

xii. 1925-1955: Wife has unlimited dispositive powers only if there are no children, no separate property of the husband and the husband is judicially declared incompetent.

See, Lee v. Hall Music Co., 35 S.W.2d 686-7. Magnolia Petroleum Co. v. Still, 163 S.W.2d at 272.

xiii. 1955-1957: Wife and husband had to post inventory, bond and appraisal and still undergo Court supervision.

See, Houston Bank & Trust Company v. Lee, 345 S.W.2d at 322-5.

xiv. Until 1956: Wife's insanity did not abate or otherwise effect the husband's dispositive powers over the community estate.

See, Pierce v. Gibson, 108 Tex. 62, 184 S.W. 502, 524-5 (1916).

c. 1967-1985: Joint Management, Control and Disposition-

- i. one spouse cannot alone convey or encumber joint management community property unless the spouses have otherwise agreed and conveyances by one spouse of joint management community property is effective only as to the signatory spouse's one-half (1/2) interest.

See, Valone v. Miller, 663 S.W.2d 97, 98-9 (Tex. Civ. App.-Houston [14th Dist.] 1983, writ ref'd n.r.e.).

- ii. Under Family Code §5.22(d) which replaced Article 4621 (repealed 1969) during marriage, community property is presumed to be subject to joint management unless provided by power-of-attorney, agreement or otherwise [such as the provision that during marriage property in which title is taken in one spouse's name only is presumed to be subject to that spouse's sole disposition. Family Code 5.24 replacing Article 4622 in 1969].

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

d. 1956-To Present: Unusual Circumstances-

- i. Probate Code §157 - when either spouse is judicially declared to be incompetent the other spouse acquires full dispositive powers over the community estate, and guardianship proceedings are not necessary unless the incompetent spouse owned separate property and then the guardianship applies only to incompetent spouse's separate property.
- ii. the present Family Code and its predecessor statutes provide for conveyance by one spouse in the case of disappearance of the other spouse without knowledge of the disappeared spouse's whereabouts, permanent abandonment, permanent separation or when one spouse is unable to manage the community estate under their sole or joint control. The Family Code requires Court intervention and the Court may provide the competent spouse with whatever just or equitable disposition powers are necessary.

C. Protection of Third Parties: Herein of Record Title Considerations Including Innocent Purchasers of Value Who Cut Off Equitable Interests-

1. 1841-1967-

- a. if status of title raises presumption of community property and purchaser has no notice of facts rebutting such presumption.
- b. concomitant with community property presumption is husband's exclusive disposition power over community property.
- c. married woman's interest in presumed community property is equitable in nature.
 - i. even if conveyance taken in married woman's name alone or even if estate, presumed community, could be shown by extrinsic facts not of record to be her separate property; or
 - ii. even if conveyance taken only in husband's name.
- d. innocent purchaser for value can rely upon community property presumption and husband's exclusive disposition power and take record title which cuts off the married woman's interest.

See, Roswurm v. Sinclair Prairie Oil Co., 181 S.W.2d 736, 740-4 (Tex. Civ. App.-Ft. Worth 1944, writ ref'd w.o.m.).
Buckalew v. Butcher-Arthur, Inc., 214 S.W.2d 184, 192-200 (Tex. Civ. App.-Beaumont, 1948, writ ref'd n.r.e.).

2. 1967-1985- Article 4622 and Family Code §5.24-

- a. Article 4622 (1967-69) codified as Family Code §5.24 creates presumption that if muniment of title or other index of title shows title taken in one spouse's name alone, then presumed that the spouse, in whose name title is taken, has sole power of disposition.
- b. above presumption also obtains if record title does not indicate sole ownership, as above, but possession of property in one spouse alone.
- c. presumption obtains only if there is no other evidence of ownership.

d. presumption overcome-

- i. for Article 4622-if there is evidence of fraud on other spouse or purchaser has notice of shared ownership or control or named spouse's lack of authority.
- ii. for Family Code 5.24 same two disqualifying features except §5.24 may require both to be present to defeat presumption.

e. certain instruments which may be of record and if so recorded could provide facts to either support or defeat the §5.24 presumption.

- i. Family Code §5.03- recordation of separate property schedules;
- ii. Family Code §§5.25(h) and 5.26(g)- Court orders in unusual circumstance cases;
- iii. Family Code §5.46- marital agreements, including partition or exchange agreements.

f. the notice threshold of Family Code §5.24 is the general notice requirement of traditional notice law.

See, Williams v. Portland State Bank, 514 S.W.2d 124, 126-7 (Tex. Civ. App.-Beaumont 1974, writ ref'd).

For traditional notice law, see, Westland Oil Development Corporation v. Gulf Oil Corporation, 637 S.W.2d 903 (Tex. 1983). Flack v. First National Bank of Dalhart, 148 Tex. 495, 226 S.W.2d 628 (1950). Loomis v. Cobb, 159 S.W. 305, 307 (Tex. Civ. App.-El Paso 1913, writ ref'd).

g. the Outline has now come full circle as it begins and ends with the scope of notice required in title examination.

APPENDIX "A"

County	Clerk
Marriage License	A/2 Marr. Rec 6/3/1836 6/4/1836
Jane Roe	John Doe

Republic of Texas	
Patent	A/123 7/1/1836
160 ac.	7/20/1836
John Doe	
GWD	[not joined by wife]
160 ac.	C/213
\$10.00	8/21/1846
OGV	8/22/1846

County Court	
Land Script Certificate	A/1 DR 6/1/1836 6/2/1836
[for service in the war]	
160 ac.	
John Doe	
	[as a single man]

Sam and Susan Smith [husband and wife]	
GWD	[not joined by wife]
160 ac.	F/14
\$10.00	9/10/1865
OGV	9/11/1865

Bill and Betty Smith
[husband and wife]

died intestate
[8/15/1880]

Gift Deed 22/517
"Love and Affection"
12/24/1902
12/26/1902

- A. Bill Smith, Jr. (son)
- B. Betty Smith (dau.)
- C. Eliza Smith (dau.)

Betty Smith Jones (my daughter)
Eliza Smith Green (my daughter)

[joined
by hus.]

[not joined
by hus.]
23/24
1/1/1903
1/1/1903

GWD
\$10.00
OGV

Bill Smith and Wife

Mrs. Bill Smith
[my husband having abandoned me]

OGL 24/24
10 yrs. 2/2/1905
1/8 roy. 2/2/1905

Big Oil Company

