Property—Community Property—Community Property Subject to the Joint Management of Both Spouses Cannot be Encumbered by One Spouse Acting Without the Other's Consent. *Williams v. Portland State Bank,* 514 S.W.2d 124 (Tex. Civ. App.—Beaumont 1974, writ dism'd by agr.)

Rosa Lee Chivers and Thurman Lee Williams were married in 1954.[1] In April, 1963, they purchased 77.44 acres of land as community property. The deed named both Rosa Lee and Thurman as grantees. In December, 1963, a 100-acre tract was also purchased as community property, but the deed to this tract named Thurman as sole grantee. In 1971, Thurman negotiated with the Portland State Bank for a loan. Consequently, a 25,000-dollar note and deed of trust covering both tracts of land, dated June 23, 1971, were prepared by the bank to be executed by both Rosa Lee and Thurman. Rosa Lee, however, refused to sign the papers, and Thurman so informed the president of the bank. The bank then prepared a new note and deed of trust to be executed by Thurman alone.

Rosa Lee filed an action for divorce on June 30, 1971. The date of the completion of the loan transaction is not reported, but the bank filed the deed of trust of record on July 27, 1971. The divorce subsequently was granted on November 17, 1971, and Rosa Lee was awarded title to both tracts of land. In July, 1972, when Thurman did not pay the first annual installment on the note, the bank wrote Rosa Lee and informed her of its intention to foreclose on the deed of trust and sell the land. Shortly thereafter, Rosa Lee filed this action against the bank. The bank filed a cross claim against both Rosa Lee and Thurman to recover on the note and foreclose the deed of trust. The trial court granted judgment for the bank for 25,000 dollars plus interest and attorney's fees against Thurman, and ordered foreclosure of the deed of trust on both tracts of land with respect to both Rosa Lee and Thurman's interest. The Texas Court of Civil Appeals in Beaumont affirmed in part and reversed and rendered in part. The court held that when community property is subject to joint management, control, and disposition, one spouse does not have the authority to encumber the other spouse's interest without his or her consent.[2]

The court in *Williams v. Portland State Bank* recognized that

1. Williams v. Portland State Bank, 514 S.W.2d 124 (Tex. Civ. App.—Beaumont 1974, writ dism'd by agr.).
2. *Id.* at 127.

resolution of the two issues in the case involved the interpretation of sections 5.22 and 5.24 of the Texas Family Code.[3] The court noted first that with respect to the 77.44-acre tract that was held in the names of both Rosa Lee and Thurman, section 5.22(c) governed. This section provides that, with some exceptions that are not applicable, "community property is subject to the joint management, control, and disposition of the husband and wife, unless the spouses provide otherwise by power of attorney in writing or by other agreement."[4] Because the 77.44-acre tract was subject to the joint management, control, and disposition of both spouses, Thurman had no authority to encumber Rosa Lee's interest in the land.[5]

---

3. Sections 5.22 and 5.24 are reprinted below:

§ 5.22. Community Property: General Rules

(a) During marriage, each spouse has the sole management, control, and disposition of the community property that he or she would have owned if single, including but not limited to:

(1) personal earnings;

(2) revenue from separate property;

(3) recoveries for personal injuries; and

(4) the increase and mutations of, and the revenue from, all property subject to his or her sole management, control, and disposition.

(b) If community property subject to the sole management, control, and disposition of one spouse is mixed or combined with community property subject to the sole management, control, and disposition of the other spouse, then the mixed or combined community property is subject to the joint management, control, and disposition of the spouses, unless the spouses provide otherwise by power of attorney in writing or other agreement.

(c) Except as provided in Subsection (a) of this section, the community property is subject to the joint management, control, and disposition of the husband and wife, unless the spouses provide otherwise by power of attorney in writing or other agreement.

§ 5.24. Protection of Third Persons

(a) During marriage, property is presumed to be subject to the sole management, control, and disposition of a spouse if it is held in his or her name, as shown by muniment, contract, deposit of funds, or other evidence of ownership or if it is in his or her possession and is not subject to such evidence of ownership.

(b) A third person dealing with a spouse is entitled to rely (as against the other spouse or anyone claiming from that spouse) on that spouse's authority to deal with the property if:

(1) the property is presumed to be subject to the sole management, control, and disposition of the spouse; and

(2) the person dealing with the spouse:

(A) is not a party to a fraud upon the other spouse or another person; and

(B) does not have actual or constructive notice of the spouse's lack of authority.

TEX. FAM. CODE ANN. §§5.22, 5.24 (1975).

4. TEX. FAM. CODE ANN. § 5.22 (1975).

5. Williams v. Portland State Bank, 514 S.W.2d 124, 126 (Tex. Civ. App.—Beaumont 1974, writ dism'd by agr.).

Second, regarding the 100-acre tract, section 5.24(a) establishes a presumption that property is "subject to the sole management, control, and disposition of a spouse if it is held in his or her name."[6] The court held that the presumption was not available to protect the bank in this case, however, for the bank had actual knowledge that Rosa Lee had refused to sign the first note and deed of trust. This actual knowledge was sufficient to put the bank on notice of the need to make a further investigation into whether Thurman had authority to encumber Rosa Lee's interest.[7]

The resolution of the issues in the *Williams* case reflects a consideration of recent changes in the community property laws of Texas. Prior to 1967, Texas law allowed the husband to act as sole manager of the community estate.[8] This peculiarity was characteristic of the Spanish property system, from which the Texas system developed.[9] One early court's statement of the sole-management rule was particularly clear as to the husband's power: "[The husband] has the sole management [of community property] during the life of his wife . . . . His control of it during her life is absolute. Barring any disposition made with intent to defraud her, he may sell, barter, or give it away."[10] This authority also specifically in-

6. TEX. FAM. CODE ANN. § 5.24(a) (1975).

7. Williams v. Portland State Bank, 514 S.W.2d 124, 126 (Tex. Civ. App.—Beaumont 1974, writ dism'd by agr.).

8. O. SPEER, SPEER'S MARITAL RIGHTS IN TEXAS §365 (4th ed. 1961). A comprehensive review of Texas community property law is far beyond the scope of this casenote. The purpose of this note is to examine the court's treatment of two issues—joint management of community property and notice to third parties dealing with the property—as they relate to the Texas Family Code. Cases cited as authority for prior law in these areas are merely representative and by no means exhaustive.

An abundance of authoritative commentary is available regarding the history, development, and recent changes in Texas marital property law. For a basic overview of the Texas community property system, see Huie, *Commentary on the Community Property Law of Texas*, 13 TEX. REV. CIV. STAT. ANN. 1 (1960). For a review of the changes made by the Matrimonial Property Act of 1967, see Hudspeth, *The Matrimonial Property Act of 1967—Six Areas of Change*, 31 TEX. B.J. 477 (1968); McKnight, *Matrimonial Property*, 23 SW. L.J. 44 (1969); McKnight, *Recodification of Matrimonial Property Law*, 29 TEX. B.J. 1000 (1966). For a history of the marital property provisions of the Texas Family Code, see McKnight, *Commentary to Title 1, Texas Family Code*, 5 TEX. TECH L. REV. 281 (1974). Later works on the Texas Family Code property provisions include Huie, *Divided Management of Community Property in Texas*, 5 TEX. TECH L. REV. 623 (1974); McKnight, *Family Law*, 28 SW. L.J. 66 (1974); Comment, *The Family Code—Has It Substantially Changed Marital Property Rights in Texas?*, 9 HOUS. L. REV. 120 (1971); Comment, *Section 5.22 of the Texas Family Code: Control and Management of the Marital Estate*, 27 SW. L.J. 837 (1973).

9. Comment, *Section 5.22 of the Texas Family Code: Control and Management of the Marital Estate*, 27 SW. L.J. 837, 838 (1973).

10. Moody v. Smoot, 78 Tex. 119, 14 S.W. 285 (1890); *accord*, Teas v. Republic Nat'l

cluded the power to mortgage the property,[11] as well as the power to encumber the property by deed of trust.[12] Thus, foreclosure on a deed of trust in which the wife did not join had been held to be an effective encumbrance of her undivided one-half interest.[13]

The enactment of section 5.22(c) is a recodification of the 1967 provisions for joint management, control, and disposition of community property.[14] The only exceptions to joint management are those listed in section 5.22(a).[15] The *Williams* court correctly concluded that the 77.44-acre tract held in both names was subject to the joint management, control, and disposition of both spouses.[16] There were no circumstances present that would qualify as an exception to the general rule of section 5.22(c).[17]

This classification by the *Williams* court should be contrasted with the classification by the court in *Cockerham v. Cockerham.*[18] In *Cockerham* the Texas Court of Civil Appeals in Waco held that property could be subject to the sole management of one of the spouses wihout meeting one of the specific exceptions in section 5.22(a).[19] The property under consideration in the *Cockerham* case was an undivided one-half interest in 320 acres of land,[20] certain dairy and farming equipment, and cattle. The property was community property, for it had been purchased by the husband and wife during marriage. The husband was the actual "manager" of the dairy operations, while the wife had entered into the retail clothing business. After the couple's divorce, the wife's trustee in bankruptcy attempted to reach the dairy farm property and equipment to satisfy the wife's creditors. The court, relying on section 5.61(b) of the Texas Family Code,[21] held that the property was subject to the

Bank, 460 S.W.2d 233, 242 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.).

11. Mason v. Green, 226 S.W. 829 (Tex. Civ. App.—Texarkana 1920, no writ).

12. Boehm v. Beutler, 41 S.W. 658 (Tex. Civ. App.—1897, writ ref'd).

13. Bound v. Dillard, 140 S.W.2d 520 (Tex. Civ. App.—Dallas 1940, no writ).

14. McKnight, *Commentary to Title 1, Texas Family Code,* 5 TEX. TECH L. REV. 281, 358 (1974).

15. TEX. FAM. CODE ANN. § 5.22(a) (1975).

16. Williams v. Portland State Bank, 514 S.W.2d 124, 126 (Tex. Civ. App.—Beaumont 1974, writ dism'd by agr.).

17. *Id.*

18. 514 S.W.2d 150 (Tex. Civ. App.—Waco 1974, writ granted).

19. *Id.* at 159.

20. One-half of the 320 acres was the husband's separate property; the other undivided one-half interest was community property. Cockerham v. Cockerham, 514 S.W.2d 150, 154 (Tex. Civ. App.—Waco 1974, writ granted).

21. Section 5.61(b) reads as follows:

husband's sole management, control, and disposition, and disallowed the trustee's claim. The *Cockerham* court's classification of the property as subject to the husband's sole management, however, is clearly erroneous. Because the property was acquired during marriage, and none of the exceptions to 5.22(a) were present, it was subject to the joint management of both spouses. The court apparently relied on factual distinctions to reach its conclusion.[22] Apparently swayed by the wife's erring ways and convinced that equity should rescue the husband, the court ignored the legal consequences of classification under section 5.22(a) to reach the erroneous conclusion. The holding of the *Williams* court is the correct interpretation of the joint management provisions, and this view should be adopted by the Texas Supreme Court.[23]

The second issue that the *Williams* court faced involved the 100-acre tract, which was deeded solely to Thurman. It is a long-standing rule that property acquired during marriage in the husband's name is presumed to be community property.[24] Under the Texas Family Code, however, community property held in the name of one spouse is also presumed to be subject to that spouse's sole management, control, and disposition.[25] Thus, under the sole-management exception, a spouse can alienate or encumber certain community property without joinder of the other spouse. The problem that arises from this situation is that third parties who deal with

---

(b) Unless both spouses are liable by other rules of law, the community property subject to a spouse's sole management, control, and disposition is not subject to:

(1) any liabilities that the other spouse incurred before marriage; or

(2) any nontortious liabilities that the other spouse incurs during marriage.

TEX. FAM. CODE ANN. § 5.61(b) (1975).

22. The court stated:

> The dairy operation was located on the 320-acre tract which was nearby but not contiguous to the 198 acre homestead tract. It was in the possession and control of the husband. The wife took no part in operating the dairy, particularly since the year 1969 when she entered the dress shop business . . . . [S]he was not home except at nights and on Sundays, and as time went on she spent even less time with her husband and children.

Cockerham v. Cockerham, 514 S.W.2d 150, 158-59 (Tex. Civ. App.—Waco 1974, writ granted).

23. In granting the writ of error in *Cockerham*, the supreme court limited the appeal to five points of error, four of which directly relate to the classification of the property as being subject to sole management. Cockerham v. Cockerham, 18 Tex. Sup. Ct. J. 181 (Jan. 25, 1975).

24. Edrington v. Mayfield, 5 Tex. 363 (1849); *accord*, Cooper v. Texas Gulf Indus., Inc., 495 S.W.2d 273, 275 (Tex. Civ. App.—Waco 1973), *rev'd on other grounds*, 513 S.W.2d 200 (Tex. 1974).

25. TEX. FAM. CODE ANN. § 5.24(a) (1975).

the property are placed in a vulnerable position, because property that appears to be subject to sole management actually could be subject to joint management. This would require joinder of both spouses to create an effective conveyance or encumbrance. The legislature provided a solution for this problem in section 5.24(b) of the Texas Family Code. Third parties, under 5.24(b), are entitled to rely on the apparent authority of one spouse to act as sole manager unless they have "actual or constructive notice of the spouse's lack of authority."[26]

The drafters of the Family Code intentionally used the terms actual and constructive notice, rather than knowledge.[27] The terms are not synonymous, because a person may be held to have notice of something about which he has no actual knowledge.[28] Additionally, the concept of actual notice implies not only actual knowledge of certain facts, but also includes knowledge of facts that a reasonable inquiry would have disclosed.[29] The main difference between actual and constructive notice is that actual notice is derived from matters that are of personal information or knowledge, whereas constructive notice is established from facts found in recorded instruments.[30] Also, actual notice is primarily a jury question, while constructive notice arises from a legal presumption that cannot be controverted.[31] The use of both concepts in section 5.24 provides ample protection for owners of property subject to joint management.

The language used by the *Williams* court in discussing the issue of the bank's notice is somewhat imprecise. From the court's discussion, however, it is clear that the bank had actual notice of Rosa Lee's refusal to join in the deed of trust. The court stated that the bank's "actual knowledge that [Rosa Lee] had refused to sign the first note . . . was sufficient as a matter of law to put the bank on 'notice' to make further inquiry" into Thurman's authority to en-

26. TEX. FAM. CODE ANN. § 5.24(b) (1975).

27. Williams v. Portland State Bank, 514 S.W.2d 124, 126 (Tex. Civ. App.—Beaumont 1974, writ dism'd by agr.).

28. Flack v. First Nat'l Bank, 226 S.W.2d 628 (Tex. 1950).

29. Hexter v. Pratt, 10 S.W.2d 692 (Tex. Comm'n App. 1928, jdgmt adopted).

30. University State Bank v. Gifford Hill Concrete Co., 431 S.W.2d 561, 570 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.). Examples of constructive notice that might be applicable in community property situations are recorded schedules of separate property, marriage contracts, partitions, and court orders. McKnight, *Commentary to Title 1, Texas Family Code*, 5 TEX. TECH L. REV. 281, 366 (1974).

31. University State Bank v. Gifford Hill Concrete Co., 431 S.W.2d 561, 571 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.).

cumber the land.[32] The fact that Thurman had informed the bank president of his wife's failure to join in the encumbrance of the property thus defeated any claim of protection the bank might have had under section 5.24(b).

The provisions of sections 5.22 and 5.24 are clear. In order for community property to be subject to the sole management of one spouse, the provisions of 5.22(a) must be satisfied. The *Williams* court correctly applied this section to the 77.44-acre tract, though the opinion could have been more thorough. The *Cockerham* decision ignores the requirements of 5.22(a). The dissenting opinion in the *Cockerham* case[33] correctly classifies the property, and this view should be adopted by the Supreme Court of Texas. Additionally, the significance of the use of the term notice rather than knowledge, as pointed out by the *Williams* court,[34] should not be overlooked. Because the meaning of "actual notice" implies a duty to make a reasonable investigation, third parties relying on apparent authority of sole management will not be able to remain intentionally ignorant of another spouse's interest, but are charged with the duty of making a reasonable investigation into the rights of the spouses in order to claim the protection of section 5.24(b).

H. Michael Bartley

32. Williams v. Portland State Bank, 514 S.W.2d 124, 126 (Tex. Civ. App.—Beaumont 1974, writ dism'd by agr.).

33. Cockerham v. Cockerham, 514 S.W.2d 150, 159 (Tex. Civ. App.—Waco 1974, writ granted) (Hall, J., dissenting).

34. Williams v. Portland State Bank, 514 S.W.2d 124, 126 (Tex. Civ. App.—Beaumont 1974, writ dism'd by agr.).