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## The Basics of Texas Homestead Law

by

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If the home is one's castle then the homestead exemption is the moat around the castle preventing forceful entry by ruthless creditors. Homestead is generally defined as "[t]he house, outbuildings, and adjoining land owned and occupied by a person or family as a residence." BLACK'S LAW DICTIONARY 738 (7th ed. 1999). The Texas Constitution provides for homestead protection, exempting a person's homestead from forced sale except under limited circumstances. The primary purpose of the exemption is to preserve family integrity and provide the debtor and debtor's family a home and means of support, preventing the family from becoming public charges. 39 ALOYSIUS A. LEOPOLD, TEXAS PRACTICE: MARITAL PROPERTY AND HOMESTEADS § 26.2 (1993 & Gerry W. Beyer, Supp. 2002) [hereinafter LEOPOLD]. This month's article provides an overview of the fundamentals of Texas homestead law.

### I. Types of Homesteads—Property

Homesteads are classified by property type as either a rural homestead or an urban homestead, and the size of the exemption varies depending on this classification. Whether a homestead is rural or urban is a question of fact. *Kimmey v. Goodrum*, 346 S.W.2d 901 (Tex. Civ. App.—Waco 1961, writ ref'd n.r.e.). However, the Texas Property Code provides a definition of an urban homestead to assist in the classification. TEX. PROP. CODE ANN. § 41.002 (Vernon 2000 & Supp. 2003) [hereinafter PROP. CODE].

#### A. Urban

The Texas Property Code defines urban homestead as property which, at the time of its designation, is located within a municipality and is served by police and fire protection as well as three of the following municipality services: electric, gas, sewer, storm sewer, and water. Beginning in 1999, the urban homestead is limited to ten acres. More than one lot may be designated as a person's urban homestead provided that the lots are contiguous and all lots

making up the urban homestead do not exceed the ten acre limitation. PROP. CODE § 41.002.

Historically, the urban homestead exemption was limited by value, rather than acreage. For example, in 1860, the urban homestead could not exceed \$2,000 in value at the time of its designation. However, a constitutional amendment in 1983 eliminated the dollar value limitation and restricted the urban homestead on the basis of acreage. From 1983 through 1999, the urban homestead was limited to one acre. Towards the end of 1999, the Texas Constitution was further amended, increasing the size of the urban homestead to ten acres. See LEOPOLD at § 23.3.

## **B. Rural**

Under the Constitution, rural homesteads are limited to 200 acres. The Property Code, however, provides that although a family may have a rural homestead of up to 200 acres, a single adult is limited to 100 acres. PROP. CODE § 41.002(b). It is unclear whether the Property Code may cut back the number of acres for the single adult homestead.

The current version of the Property Code provides no definition of “rural” homestead. However, rural homestead is interpreted to mean homesteads that do not fall within the parameters of the urban homestead definition. *In re Rodriguez*, 282 B.R. 194, 199-200 (Bankr. N.D. Tex. 2002). This interpretation is consistent with previous versions of the Property Code, which provided “[a] homestead is considered to be rural if, at the time the designation is made, the property is not served by municipal utilities and fire and police protection.” See Act of Aug. 28, 1989, 71st Leg., 2d C.S., ch. 391, § 2 (amended 1999) (current version at PROP. CODE § 41.002(c) (replacing the definition of rural homestead with that of urban homestead)).

## **C. Business**

Texas no longer provides for a business homestead exclusively. Rather, the definition of urban homestead includes lots used for “both an urban home and a place to exercise a calling or business.” Thus, to claim a homestead exemption on land used for business purposes, the property must also be utilized as the urban home and fall within the parameters of the urban homestead definition, which limits the urban homestead to one or more contiguous lots no greater than ten acres. PROP. CODE § 41.002(a).

Prior to 1999, the Texas Constitution provided for a purely urban business homestead exemption. The exemption operated to exclude from forced sale up to one acre of urban land used as a place to exercise a calling or business of the homestead claimant. The business homestead could be claimed for multiple lots provided the lots were in the same “built-up” community. However, the combined total of homestead property claimed, whether it was residential, business, or combined residential and business, could not exceed the one acre limit. LEOPOLD at § 26.25. In 1999, a constitutional amendment eliminated the purely urban business homestead. TEX. CONST. art. XVI, § 51.

## **II. Types of Homesteads—Persons**

In addition to classifying the homestead by type of property (i.e., urban or rural), the homestead is also classified by the type of person(s) for whom the homestead operates. While the claimant is alive, the homestead may be classified as either a family homestead or a single

adult homestead. The size of the homestead exemption may vary in accordance with this classification as discussed in § I, above. Upon the death of the homestead claimant, the homestead exemption will continue to operate for the benefit of survivors of the claimant. However, the rights of these survivors vary depending on their status (i.e., spouse, minor child, or unmarried adult child living at home). TEX. PROB. CODE ANN. §§ 283-84 (Vernon 2003) [hereinafter PROB. CODE].

## A. Family

### 1. Property Included in the Family Homestead

Property claimed as a family homestead must “be used for the purposes of a home, or as both an urban home and a place to exercise a calling or business, of the homestead claimant.” TEX. CONST. art XVI, § 51. Thus, the family homestead centers on its use as a *home*. As discussed in § I, the Property Code further limits family homesteads to ten urban acres or 200 rural acres. Despite these limitations, families are not prevented from owning and using property as their home in excess of these limits. However, any land in excess of the acreage limitation will not qualify for the family homestead exemption, and the homestead claimant is entitled to designate which portion shall qualify. PROP. CODE § 41.005.

Included in the family homestead exemption are improvements made to the land, such as a house or fixtures attached to the land. Unmatured crops and minerals in the land are also treated as part of the homestead while they are attached to the land, and as such, are protected from forced sale. However, once the crops are harvested and minerals removed, they are no longer part of the realty but are personal property subject to levy. See *Coates v. Caldwell*, 8 S.W. 922 (Tex. 1888).

### 2. Family Defined

Family is defined as a relationship by blood or marriage in which two factors are present. First, the head of the family has a legal or moral obligation to support other members of the family. Second, the other members of the family are dependent on the head of the family for support. *NCNB Texas Nat'l Bank v. Carpenter*, 849 S.W.2d 875 (Tex. App.—Fort Worth 1993, no writ).

Family members can range from the typical family of mother, father, and child to the atypical family of an older brother caring for his orphaned sister or a grandmother caring for her grandson, provided the two factors, support and dependence, are present. Family may also include adult children in two ways: first, a mother caring for her adult child where the mother has an obligation of support (for example, if the child is a college student dependent on the mother) and second, an adult child caring for a dependant parent. Despite this broad definition of family, unmarried and unrelated persons living together do not qualify for the family homestead exemption. *Barker v. Lee*, 337 S.W.2d 637 (Tex. Civ. App.—Eastland 1960, no writ). However, a common law marriage is recognized as a family for purposes of the exemption. *Baker v. Mays & Mays*, 199 S.W.2d 279 (Tex. Civ. App.—Fort Worth 1946, writ dismissed).

## B. Single Adult

In 1973, the Texas Constitution was amended to include a single adult homestead. TEX. CONST. art. XVI, § 50. The single adult homestead is limited to 10 urban acres or 100 rural

acres. PROP. CODE § 42.001(a)-(b) (but note that TEX. CONST. art. XVI, § 51 provides for 200 acres for all rural homesteads). The only requirement is that the adult claimant be single at the time the single adult homestead is claimed. An individual separated but not divorced will not qualify for a single adult homestead, or for that matter a family homestead, on new property acquired. See *Tremaine v. Showalter*, 613 S.W.2d 35 (Tex. Civ. App.—Corpus Christi 1981, no writ). For example, if a husband and wife separate and husband acquires and occupies property with another woman, the single adult homestead cannot be claimed because the husband is legally married and the family homestead cannot be claimed on the new property because it is not the family home. LEOPOLD at § 24.13.

However, a single divorced parent may maintain a family homestead, rather than a single adult homestead, if the requisites of support and dependence, discussed in § II(A) above, are present. For example, a divorced father of three sons may maintain a family homestead if he provides support for (or perhaps merely has an obligation to support) his children as the head of household and the children in turn depend on their father for support. *Woods v. Alvarado State Bank*, 19 S.W. 35 (Tex. 1929). Furthermore, if both father and mother provide support for their children in a joint custody scenario, both may claim a family homestead. *Reynaldo v. Bank of San Antonio*, 630 S.W.2d 638, 639-40 (Tex. 1982). A widowed adult has continuing rights in the family homestead through the survivor's homestead right discussed below.

### C. Surviving Spouse

Upon the death of either the husband or wife (or both), the homestead property shall “descend and vest in like manner as other real property of the deceased.” PROB. CODE § 283. However, the surviving spouse is entitled to retain a constitutional survivor's homestead right for life or for so long as the survivor elects to use the homestead. *Id.* This right protects the homestead against forced sale and partition so long as the surviving spouse chooses to use and occupy the homestead. PROB. CODE § 284. The survivor's homestead is not conditioned on the survivor's status as head of the household. *Blum v. Gaines*, 57 Tex. 119 (1882). Occupancy rights of the surviving spouse are discussed in greater detail in § III(C), below.

The survivor's homestead right may not be defeated by either spouse through the devise of the homestead in either party's will. Rather, the laws of testamentary disposition are subject to the survivor's homestead right. *White v. Sparks*, 118 S.W.2d 649 (Tex. Civ. App.—Dallas 1938, writ dism'd). Rights and restrictions on the transfer and conveyance of homesteads are discussed in § IV(C), below.

### D. Surviving Minor Children

Upon the death of both parents, the homestead property will pass according to descent and distribution or under the deceased parent's will. However, much like the surviving spouse, the surviving minor children are entitled to a constitutional survivor's homestead. TEX. CONST. art. XVI, § 52. In asserting the surviving minor children's homestead entitlement, there is no requirement that the minor children resided with the deceased parent(s) prior to the parent's death. *National Union Fire Ins. Co. v. Olson*, 920 S.W.2d 458, 462 (Tex. App.—Austin 1996, no writ). The homestead right of surviving minor children is protected against forced sale as well as partition among heirs and will beneficiaries. PROB. CODE § 284. Occupancy rights of the surviving minor children are discussed in § III(C), below.

Parents are prevented from defeating the homestead rights of their minor children through a testamentary devise of the homestead property. However, the parents are not restricted from

conveying or encumbering the homestead property while they are alive. *Hall v. Fields*, 17 S.W. 82 (Tex. 1891).

## **E. Unmarried Adult Children Remaining With the Family**

The 2005 Texas Legislature amended Probate Code §§ 271 and 272 to make it clear that the homestead may be set aside and delivered only to the surviving spouse or minor children. Under the prior wording of the statute, the homestead could arguably be set aside for unmarried children remaining with the family of the decedent. These amendments finally bring the statutes into conformity with the 115 year old Texas Supreme Court case of *Zwernemann v. Von Rosenberg*, 13 S.W. 485 (Tex. 1890), which held similar language in a prior version of the statute to be contrary to the Texas constitution.

## **III. Benefits of Homestead**

### **A. Creditor Protection—While Alive**

Homesteads are generally not subject to attachment, execution, or forced sale by creditors. If the homestead is sold, the owner has six months to invest the proceeds into another homestead without the proceeds being subject to creditors' claims. However, there are nine exceptions to the homestead exemption. TEX. CONST. art. XVI, § 50, PROP. CODE § 41.001). Thus, Texas residents are entitled to the security of their home not being taken by creditors unless their creditor falls within one the nine exceptions to the homestead exemption listed below. If a creditor wrongfully levies against the homestead, both the creditor and the creditor's law firm may be liable. *Vacker v. Patterson, Boyd, Lowery, Anderholt & Peterson, P.C.*, 866 S.W.2d 817 (Tex. App.—Beaumont 1993, no writ).

#### **1. Purchase Money Liens**

A purchase money lien is a lien on the homestead securing the purchase price in favor of the seller or lending bank. Purchase money liens are not subject to the homestead exemption, thus permitting the homestead to be foreclosed upon default. TEX. CONST. art. XVI, § 50(a)(1); PROP. CODE § 41.001(b)(1).

#### **2. Ad Valorem Taxes**

A tax lien attaches automatically on the first of every year to all property on which property taxes are owed. TEX. TAX CODE ANN. § 32.01 (Vernon 2002). The homestead is not exempt from forced sale to pay delinquent taxes. TEX. CONST. art. XVI, § 50(a)(2); PROP. CODE § 41.001(b)(2).

#### **3. Mechanic's and Materialman's Liens**

Mechanic's and materialman's liens, liens incurred in connection with improvements made upon the homestead, are valid against the homestead if: (1) a written contract was executed prior to the commencement of improvements or delivery of supplies, (2) the contract is signed by both spouses, and (3) the contract is properly recorded. TEX. CONST. art. XVI, § 50(a)(5); PROP. CODE § 41.001(b)(3).

#### **4. Ouelty of Partition Lien**

Owerty of partition liens arise when there is an unequal division of co-tenancy property. For example, an unequal division of the homestead may arise in a divorce where the land on which the family home is situated is larger than the remaining portion of the land. Naturally, the house cannot be cut in half, so in such a scenario, the land may be partitioned unequally to keep the house in tact. Without the unequal partition in such a case, the entire land would need to be sold and the proceeds divided up equally. Upon an unequal division, the co-tenant with the lesser valued portion of property is entitled to a lien against the other co-tenant for the difference in value received. Homesteads are not exempt from owerty of partition liens. TEX. CONST. art. XVI, § 50(a)(3); PROP. CODE § 41.001(b)(4).

## **5. Refinancing**

The homestead may be encumbered by the refinancing of a valid lien against the homestead, including federal tax liens incurred from tax debt of either spouse. TEX. CONST. art. XVI, § 50(a)(4); PROP. CODE § 41.001(b)(5). For example, if bank has a purchase money lien against the homestead with an interest rate of 6% annum, the bank may offer homeowners to refinance the lien for an extra 5 years at 5% annum without risking the loss of its lien on the homestead.

## **6. Home Equity Loan**

A home equity loan arises when the homeowner uses an existing homestead as collateral for a loan based on the value of the property. Prior to 1998, a homeowner did not have the ability to use the homestead as collateral for a home equity loan. The recent amendment, permitting home equity loans, places no restrictions on the borrower's use of the money—it is not required that the loan proceeds be used on the homestead. LEOPOLD at § 27.10.3. Whatever the use of the proceeds, the homestead is not protected against a valid home equity loan. TEX. CONST. art. XVI, § 50(a)(6); PROP. CODE § 41.001(b)(6). However, in an effort to protect the homeowner, the Texas Constitution sets forth an extensive list of requirements which a creditor must satisfy before obtaining a valid lien against the homestead. See TEX. CONST. art. XVI, § 50(a)(6).

## **7. Reverse Mortgage**

A reverse mortgage is a home equity conversion strategy which uses the homestead as collateral for a loan in which the property owner receives a lump sum payment or regular periodic payments and in exchange the property owner gives up all or some of the home's equity. The mortgage is payable upon the death of the borrower or upon the abandonment of the homestead. TEX. CONST. art. XVI, § 50(k)-(p). Prior to 1997, the use of the homestead as collateral for a reverse mortgage was prohibited. Now, a homestead used as collateral for a valid reverse mortgage is not protected against forced sale while in the hands of the borrower or any survivors claiming a survivor's homestead. TEX. CONST. art. XVI, § 50(a)(7); PROP. CODE § 41.001(b)(7). However, the Texas Constitution provides an extensive list of requirements that must be satisfied prior to entering into a valid reverse mortgage. See TEX. CONST. art. XVI, § 50(k)-(p).

## **8. Manufactured Home Refinancing**

The homestead is subject to the conversion and refinancing of "a personal property lien secured by a manufactured home to a lien on real property, including the refinanc[ing] of the purchase price of the manufactured home, the cost of installing the manufactured home on the real property, and the refinanc[ing] of the purchase price of the real property." TEX. CONST.

art. XVI, § 50(a)(8).

## 9. Preexisting Lien

A lien which existed against the property prior to it becoming a homestead may have priority. *Stevenson v. Wilson*, 163 S.W.2d 1063 (Tex. Civ. App.—Waco 1942, no writ).

## B. Creditor Protection—After Death

The homestead exemption which the homeowner could claim while alive passes to the deceased homeowner's survivors. The homestead claimant's surviving spouse and minor children are entitled to a survivor's homestead. Creditors of the decedent are unable to reach the homestead property to satisfy the debts of the decedent, unless they fall within one of the nine exceptions listed above. PROB. CODE § 283. The survivor's homestead entitles the surviving spouse and minor children to special occupancy rights. PROB. CODE § 284.

## C. Special Occupancy Rights

### 1. Surviving Spouse

A survivor's homestead entitles the surviving spouse to occupy or use the homestead for life or for so long as the surviving spouse chooses to do so. PROB. CODE § 283. However, the homestead exemption lasts only as long as the spouse occupies or uses the homestead property. It is not required that the surviving spouse reside on the homestead property to be considered as using it. For example, the survivor could rent the land out to satisfy the use requirement. *Rancho Oil Co. v. Powell*, 175 S.W.2d 960 (1943). The homestead right protects the survivors homestead from forced sale by creditors and from partition among the heirs and beneficiaries of the homestead claimant. *Riley v. Riley*, 972 S.W.2d 149 (Tex. App.—Texarkana 1998, no pet.).

In addition to occupancy rights, the surviving spouse is entitled to all rents and revenues earned off the homestead. *Petrus v. Cage Brothers*, 128 S.W.2d 537 (Tex. Civ. App.—San Antonio 1939, writ ref'd n.r.e.). However, the survivor is required to maintain the homestead and make payments of all property taxes and mortgage interest without the right of reimbursement. *Williams v. Davis*, 133 S.W.2d 275, 278 (Tex. Civ. App.—Fort Worth 1939, no writ).

### 2. Minor Children

Upon the death of both parents, minor children may be entitled to a survivor's homestead. TEX. CONST. art. XVI, § 52. The court may authorize the guardian of the minor children to use and occupy the homestead for the purpose of providing support to the minor children. This special occupancy right protects the homestead against forced sale by creditors and partition among heirs and beneficiaries of the homestead claimant. PROB. CODE § 284. However, it lasts only so long as the children are minors. Unmarried adult children living at home are not entitled to this special occupancy right. *Id.*

While entitled to occupancy rights in the homestead, the minor children have the same rights and responsibilities as the surviving spouse regarding collection of rent and profits and the payment of mortgage interest and taxes. *Williams v. Davis*, 133 S.W.2d 275, 278 (Tex. Civ. App.—Fort Worth 1939, no writ).

## D. Tax Savings

Beyond the homestead exemption that protects homesteads from creditors, there are also beneficial tax exemptions for homestead owners. When determining property taxes, single adults and families are allowed a \$3,000 exemption of the assessed value of the residence homestead. TEX. TAX CODE ANN. § 11.13(a) (Vernon 2001). Additionally, an adult is entitled to a \$15,000 exemption of the assessed value of the residence homestead when assessing school taxes. This exemption is raised to \$25,000 for disabled adults or individuals over age 65. *Id.* § 11.13(b)-(c). Recently, these tax exemptions were extended to surviving spouses who have the absolute right to occupy and responsibility to pay taxes for the homestead property. *Copeland v. Tarrant Appraisal District*, 906 S.W.2d 148 (Tex. App.—Fort Worth 1995, writ denied).

## IV. Other Homestead Issues

### A. Designation

Texas does not require a formal designation of a person's property as homestead; instead, the protection arises when there is evidence of intent to use and occupy the land as the homestead. *Simank v. Alford*, 441 S.W.2d 234, 237 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.). PROP. CODE § 41.005. The homestead owner may voluntarily designate the homestead when there is excess acreage. *Id.* Excess not designated as being part of the homestead is subject to a forced sale. If the owner does not voluntarily designate the homestead, the court may appoint a commissioner to designate the homestead. PROP. CODE § 41.021.

There are two requirements for designation: (1) the description must sufficiently identify the property, and (2) the description must contain a statement by the person that executed the instrument indicating that the property is designated as a homestead. If the property being designated is rural, the statement mentioned above must also include the number of acres designated, and where there is more than one survey, the number of acres in each survey. The 1997 Legislature allowed for an automatic designation where the property owner has not designated or a designation will aid enforcement of a judgment debt. PROP. CODE § 41.005(e).

### B. Abandonment

A homestead interest is presumed to continue indefinitely absent proof of clear discontinued use and the intent to permanently abandon the homestead interest. Homestead protection is lost where the owner "abandons" the homestead by ceasing to use the property as a primary residence. *Rancho Oil Co. v. Powell*, S.W.2d 960, 963 (Tex. 1943). Temporary renting of the homestead does not change homestead character, unless the owner acquires another homestead property. PROP. CODE § 41.003.

To prove abandonment, one must show that the claimant discontinued use and intended to permanently abandon the homestead. When homestead rights have been established, such rights are presumed to continue unless a challenger satisfies the burden of proving abandonment through competent evidence. LEOPOLD at § 25.12. In 1997, the Texas Constitution was amended making proof of abandonment more difficult to show by requiring the consent of both the owner and owner's spouse. See TEX. CONST. art. XVI, § 50(b); see also PROP. CODE § 41.004.

## C. Transfer and Conveyance

Joinder of both spouses is required to sell, convey, or encumber the homestead. This applies regardless of whether the homestead is community property or the separate property of one spouse. TEX. FAM. CODE ANN. § 5.001 (Vernon 1998). However, if one of the spouses has been judicially declared incompetent, the other spouse is entitled to act on behalf of the incompetent spouse in regards to the homestead. *Id.* § 5.003.

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