

# THE REAL ESTATE MENT

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## HOMESTEAD RIGHTS in Texas

# HOMESTEAD RIGHTS IN TEXAS

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When a couple acquires a homestead, certain legal rights automatically arise. A basic purpose of these "homestead rights" is to protect the family homestead from both secured and unsecured creditors. Because homestead rights are a part of real property law, it is important that persons in the real estate industry be familiar with them.

## What are Homestead Rights?

There are two distinctly different types of homestead rights. These sets of rights may be referred to as a "lifetime homestead" and a "probate homestead." Thus, it is important to identify which type of homestead is being discussed.

Basically, probate homestead rules give a surviving widow or widower the right to occupy the family homestead for the remainder of her or his life, *regardless* of who inherits title to the property upon the death of the first spouse. Probate homestead occupancy rights also extend to minor children. The right of life occupancy continues as long as the person(s) asserting the right continues actual occupancy.

Lifetime homestead rights protect the family homestead from the claims of both secured and unsecured creditors during marriage, except in three specific circumstances. These rights also extend to a widow, after the death of her husband. Further, they extend both to minor children and to unmarried daughters living with the decedent at the time of death.

As mentioned earlier, unless a creditor falls within one of three categories, he cannot force the homestead to be sold to collect debts owed him. The homestead cannot even be mortgaged unless it falls within one of three circumstances as follows:

1. to acquire initial purchase money to finance the purchase of the homestead;
2. to acquire money to pay ad valorem (property) taxes due on the homestead; or
3. to finance permanent and valuable improvements to the homestead (i.e., a mechanic's lien situation).

While homestead property can be refinanced at a later date if, for example, interest rates become more favorable, the "burden" (amount of outstanding loan) on the homestead cannot be increased unless such increase is to cover the cost of permanent and valuable improvements or property taxes (and, though not specified by state law, a federal income tax lien). Legally, conveying the

homestead to a third party (sometimes called a straw party) and then back to the original owner is ineffective, if the substance of the transactions is to create a mortgage of the homestead for the purpose forbidden by law.

For creditors to have a valid lien against the property when permanent and valuable improvements are being added to it, the Texas Constitution requires contracts for the labor and materials be in writing and signed by both spouses in the same manner which would be required if they were conveying title to the property. For a mechanic's lien so created to be effective it must, of course, be recorded in the county in which the property is located.

Homestead rights also insure that one spouse cannot sell the homestead without the other's consent. Thus, both spouses must sign a deed to convey the homestead.

As a general rule, once a homestead is created it continues until such time as another homestead is acquired. It does not necessarily terminate just because the family temporarily lives at another location.

If a spouse dies, the homestead cannot be partitioned (physically divided) among his or her heirs so long as the other spouse survives, or so long as the guardian of any minor children is permitted by court order to live on the homestead. This right against partition does not extend to unmarried daughters living at home who have reached the age of majority. In either case the homestead may be partitioned among the heirs if the surviving spouse sells his or her interest in or elects to move from the homestead.

If a surviving spouse remarries, the homestead right continues so long as he or she continues to occupy or use the homestead.

Finally, if the homestead is sold for cash, the money received retains its homestead character for a period of six months. If one homestead is exchanged for another, creditors likewise cannot reach the new homestead. One must, of course, be able to trace the funds from the sale of one homestead to the purchase of the subsequent one.

As a general rule, a lender cannot rely upon an owner's statement that a given tract of land is not his homestead. However, if his statement is consistent with observable physical factors, the owner will likely be prevented from denying that this tract is not his homestead.

### **How are Homestead Rights Acquired?**

Traditionally, homestead rights have been established when a family acquired a possessory interest in real estate. In most cases this possessory interest has involved ownership of land, with the family occupying a home on it.

Until recently homestead rights could arise only for "families". Legally, a "family" exists any time two or more people live together under circumstances giving rise to a moral or legal obligation of support. Conversely, the family members depend upon the head of the family for support. Under this definition it is possible for homestead rights to exist even where a couple is living together but unmarried.

Under another recent change in the law it is now possible for a single person (i.e., an unmarried person not a constituent of a family) to establish a lifetime (but not a probate) homestead.

### **Urban vs. Rural Homesteads**

Obviously, an important question is, "How much of a family's real property is subject to homestead rights?" Here the answer varies, depending upon whether rural or urban property is involved. As a general rule a family can have either a rural or an urban homestead, but not both. The test to determine whether the rural or urban rules apply is whether or not the homestead is located in a "built-up area".

A rural homestead may consist of not more than 200 acres (100 acres for a single unmarried person who is not a part of a family). Homestead rules permit creditors to reach acreage in excess of this amount. The homestead may consist of more than one tract, although it must contain the family home. Noncontiguous tracts need not be located in the same area, but to qualify as part of the homestead they must be used for family purposes. *Homestead rights attach to both the land and all permanent improvements thereon*, thereby effectively insulating a sizeable value of property in many cases.

For an urban homestead, the limiting factor is the

value, at the time of acquisition, of the raw land involved (rather than physical quantity). The urban homestead can consist of contiguous or noncontiguous tracts, one of which ordinarily will contain the family residence, so long as the initial value of all raw land does not exceed \$10,000. Once more this allows a sizeable value of property to be protected under homestead rights, because again *the protection extends to all buildings and other fixtures permanently attached to the land*. Thus, for example, if one purchased a home and lot for \$100,000 in which the lot was valued at \$10,000 and the house at \$90,000, the entire \$100,000 would be protected from all creditors except those fitting within the three classifications previously set out.

An urban homestead can also consist wholly or partially of business property. If partially, the business must be located in the same "built-up area" as the residence. A business homestead can be a part of the urban homestead *only* if it is the place where the head of the family pursues his or her principal business.

### **The Homestead and Property Tax**

Although not directly related to the lifetime and probate homestead rights, another benefit of owning a homestead is that the state and/or county property tax burden may be lessened. To do so, one must file annually for the homestead tax exemption. This entitles the residential homestead owner(s) to a \$3,000 decrease in assessed valuation for state property tax purposes. If the homestead owner(s) are over 65, they may also receive a \$3,000 decrease in assessed valuation for property tax purposes in a political subdivision (e.g., city, county) if such decrease has been authorized by the appropriate political subdivision.

### **Concluding Comments**

Homestead rights are a part of Texas real property law. Their understanding is particularly important to those involved in real estate because of the restrictions they place upon mortgaging the homestead to finance other business investments.



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