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TEXAS HOMESTEAD AND PROBATE LAW

Jonathan D. Baughman
McGinnis Lochridge
Houston, Texas

Why Homestead Matters

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Background/Basics

Texas Homestead Law



Homestead

- The Texas Constitution (Article 16, Section 51).
- Texas Statutes:
 - Property Code
 - Probate Code
 - Family Code
 - Tax Code



Homestead Exemption

- If validly established, homestead (real property) is protected from forced sale by general creditors



Historical Purpose

- Preserve family
- Provide debtor with a home and means to support his or her family
- Prevent family from becoming a “public burden”



Claims Enforceable Against the Homestead

- Purchase money liens
- Liens for improvements
- Tax liens (ad valorem and federal)
- Home equity liens
- Reverse mortgages
- Previously recorded liens
- Lien secured by manufactured home



Presumptions

- **Liberally construed** to protect the homestead
- Once established, homestead is **presumed to continue**
- Burden of proof is on party asserting termination or abandonment



Homestead



- Homestead created by:
 - **Overt acts of usage** and
 - **Intent to claim real property as permanent residence**
- Must have right to possession
No requirement that the property be occupied by the party claiming the homestead
- Do not have to have ownership in fee

Establishing the Homestead— In General

- Use must be by the homestead claimant or a member of the family



Homestead Rights

- Can only have one homestead.
 - i.e. can only have a rural or an urban homestead.
Cannot have both
- Must have present right to possession
- Cannot be solely future interests



Property Interest

- Homestead cannot exist without interest in real property
 - Exception:
Spouse can claim Homestead rights in Separate property of Other Spouse

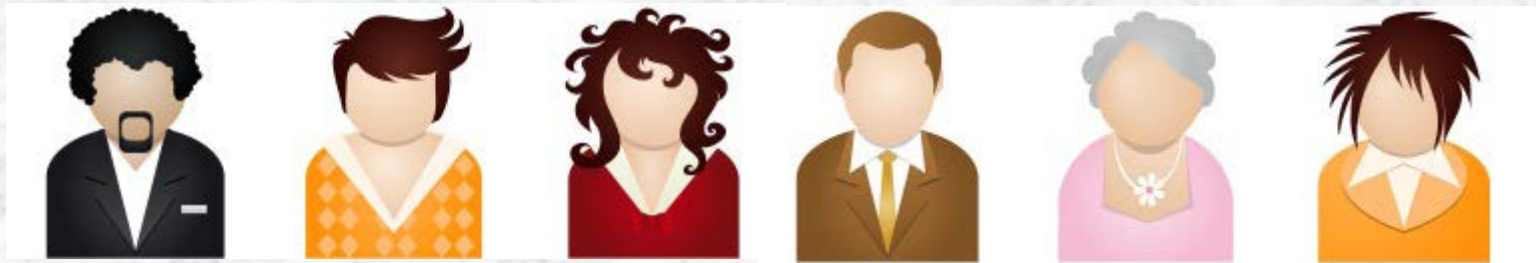


Homestead

WHO CAN POSSESS HOMESTEAD RIGHT?

Possessor of Homestead

- Family Homestead
- “Single Adult” Homestead
- Surviving Spouse Homestead
- Surviving Minor Children



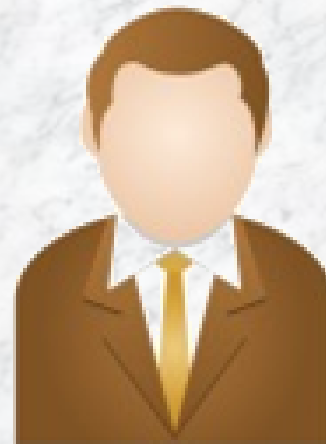
Family Homestead

- The “Family” Homestead
 - Definition of “Family.”
 - Social Status of Family
 - Duty to Support
 - State of Dependence
 - Effect of Death/Divorce/Marriage



“Single Adult” Homestead

- Established in 1973 by the Texas Constitution
- Limited to 10 acres for Urban Homestead and 100 acres for Rural Homestead
- Does not apply if separated but not divorced



Surviving Spouse Homestead

- Probate Code:
 - Homestead property shall “descend and vest in like manner as other real property of the deceased”
 - Surviving spouse entitled to retain a survivor’s homestead right for life or for so long as survivor elects to use homestead
 - May not be defeated by either spouse in will



Surviving Spouse Homestead

- Sometimes referred to as a “**stealth life estate**”
 - Legal life estate created by operation of law
 - Right vests immediately upon death
 - The right can last for the life of the surviving spouse



Surviving Spouse Homestead

- Surviving spouse **OR** guardian of a minor child can continue to occupy
- Permanent abandonment will terminate the homestead right



Surviving Minor **Children**--Homestead

- Surviving Minor entitled to constitutional survivor's homestead
- Parents cannot defeat homestead rights of minor children through testamentary devise
 - However, parents can convey homestead while alive.



Surviving Minor **Children** Homestead

- Surviving adult children are not among the class of persons who may claim homestead
- Fee ownership passes under terms of will but homestead remains superior right



Marriage and Divorce

- One Homestead Per Family
- Single Man and Single Woman
 - Each have separate homestead
 - If get married, only have one homestead
- If married couple get divorced
 - Each have separate homestead



Homestead

TYPES OF HOMESTEADS

Two Types: Rural and Urban Homestead

- Established by the Texas Constitution:
 - Rural Homestead
 - Urban Homestead



- Question of fact whether Rural or Urban

Rural Homestead

- Rural Homestead:
 - Limited to 200 acres
 - **Not** in city, town or village
 - Used for home



Establishing the **Rural** Homestead

- Claimant must reside on part of the property
- Claimant must use remaining property for support of the family
- Use must be permanent



Urban Homestead

- Urban Homestead
 - Not more than 10 acres
 - In a city, town, or village
 - Used for a home



Urban Homestead

- Property Code defines urban homestead:
 - Not more than 10 acres (contiguous); and
 - Located within a municipality or its extraterritorial jurisdiction or a platted subdivision; and
 - Served by Police and Fire protection and:
 - **At least 3 of the following:**
 - Electric
 - Natural gas
 - Sewer
 - Storm sewer; and
 - water



Characteristics of **Urban** Homestead

Family

- One or more contiguous lots not exceeding 10 acres
- In a city, town or village
- Used for purposes of urban home and place of business
- Includes improvements
- Municipal services



Single Adult

- One or more contiguous lots not exceeding 10 acres
- In a city, town or village
- Used for purposes of urban home and place of business
- Includes improvements
- Municipal services



Characteristics of **Rural** Homestead

Family

- **200** Acres
- NOT in a city, town or village
- Used for purposes of a home
- Includes improvements



Single Adult

- **100** Acres
- NOT in a city, town or village
- Used for purposes of a home
- Includes improvements



Homestead

***In Re Hill*, 972 F.2d 116 (5th Cir. 1992)**

Oil & Gas



Homestead—Mineral Rights

- Constitutional & historical basis for mineral rights being included in homestead

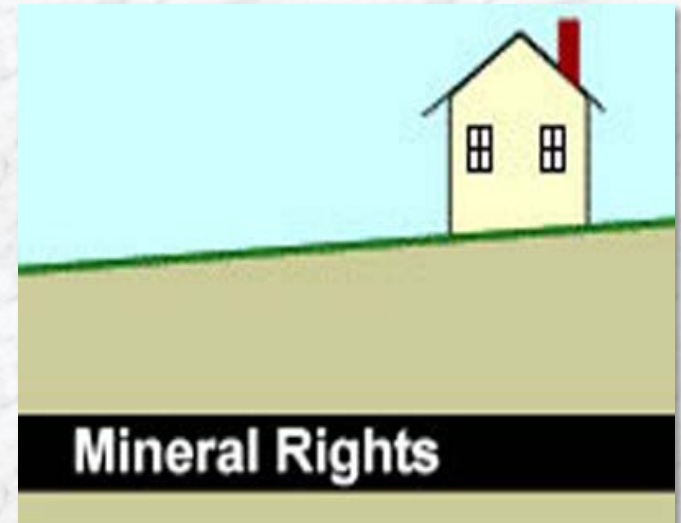


Homestead—Mineral Rights

Southern Oil Co. v. Colquitt,
69 SW 169 (Tex. Civ. App. 1902)

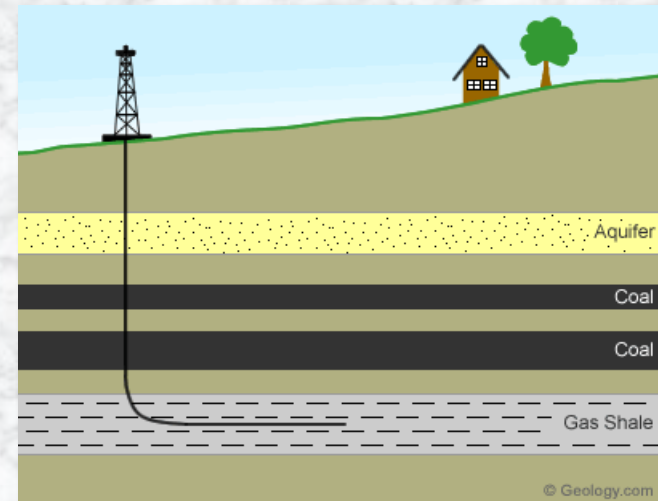
Oil & Gas

- Mineral Rights:
 - Homestead extends to un-severed minerals under surface of land
 - Same result if homestead claimant executes oil and gas lease
 - Occupation and possession of surface impresses leased mineral estate with homestead (homestead claimant owns a reversionary interest)



Oil & Gas

- Severed minerals:
 - No homestead in severed minerals if surface estate is not owned by mineral owner



Oil & Gas

In Re Poer, 76 B.R. 98 (N. D. TX 1987)

Oil & Gas

- Open Mines Doctrine
 - General rule:
 - Life tenant only entitled to interest on mineral royalties and bonuses
 - Exception:
 - Life Tenant entitled to all royalties and bonuses from homestead property if production was in existence when the life estate came into existence



Homestead—Mineral Rights

Riley v. Riley,
972 S.W.2d 149 (Tex. Civ.--Texarkana 1998)

Homestead

Homestead Rights In Separate Property of Other Spouse

Homestead Rights In Separate Property Owned by Other Spouse

- Texas Constitution:
 - “An owner or claimant of the property claimed as homestead may not sell or abandon the homestead **without the consent** of each owner **and the spouse** of each owner, given in such manner as may be prescribed by law.”



Homestead Rights In Separate Property Owned by Other Spouse

- Family Code:
 - “Whether the homestead is the separate property of either spouse or community property, neither spouse may sell, convey, or encumber the homestead **without the joinder of the other spouse** except as provided in this chapter or by other rules of law”



Homestead Rights In Separate Property Owned by Other Spouse

- Property Code:
 - “If a homestead claimant is married, a homestead cannot be abandoned **without the consent of the claimant’s spouse.**”



Homestead—Mineral Rights

Evans v. Mills,
67 F.2d 840 (5th Cir. 1934)

Homestead—Mineral Rights

Grissom v. Anderson,
79 S.W. 2d 619 (Tex. 1935)

Special Issues Involving Prior Attempted Conveyance of the Homestead



Termination by Abandonment

- Discontinuance of use by overt acts
 - Examples:
 - Acquiring new homestead
 - Permanent or continuous rental of homestead to others
 - Sale of homestead
- Intent to permanently abandon the homestead



Homestead

- No abandonment when:
 - Temporary absence –
 - No Requirement to Remain on Homestead at All Times
 - Rental of property–
 - No Abandonment if the Claimant Does Not Acquire Another Homestead and the Claimant Intends to Resume Possession After the Rental Term



Reservation of Homestead Rights

- Homestead can be reserved
- Reservation preserves the homestead in the grantor of the instrument
- Any subsequent conveyance (or lease) requires joinder of grantor (or ratification or proof of abandonment)



Homestead

PRACTICE POINTERS

Texas Title Examination Standard

14.90 Homestead

If the property conveyed is or may be the homestead of married persons, whether community property or separate property, **an examiner must require the joinder of both spouses, unless it is conclusively shown that the property is not, or is no longer, homestead.**

Comment:

A tract's homestead character, however, does not make a conveyance of the land (other than a mortgage or a deed of trust) by one spouse alone void. If the record title is in the name of the executing spouse, such a deed is merely inoperative while the property remains the non-signing spouse's homestead. Obviously, factors such as the passage of time should be taken into consideration in assessing whether it is necessary that inquiry be made into whether a tract of land conveyed by one spouse alone was homestead.

Unlike a deed, **a mortgage or deed of trust** granting a lien on homestead property is **absolutely void** unless joined by both spouses. This is because the Texas Constitution provides that no mortgage, trust deed, or other lien "shall ever be valid" except as authorized thereby. Joinder by both spouses is only one of many strict requirements and limitations the constitution places on the mortgaging of homestead.) Thus, the failure of one of the spouses to join in a deed of trust or other mortgage is not cured even though the property ceases to be homestead.

Homestead

- If mineral owner also owns the surface (even if separate property), presume it is homestead property and get **both** spouses to sign
- If mineral owner dies (even if separate property) and leaves surviving spouse open mines doctrine may apply





Homestead Practice Pointers

- If property involved is potentially homestead, address in **“Comment and Requirement” to Title Opinion:**
 - “You should determine whether the abovementioned spouse claimed the subject property as homestead property on the date the lease was executed. If you determine that the property was claimed as homestead property on said date, you should obtain a ratification of the lease, effective as of the original date of the lease, executed with words of present grant by both spouses and file said ratification in Karnes County, Texas with a recorded copy furnished to this office for review and comment.”



Homestead Practice Pointers

- Waivers of homestead rights are void, illegal and unenforceable
- If doubt exists, get an affidavit of the owners designating other property as homestead and stating that property being conveyed is not homestead

Texas Probate Law



Probate Law

- Intestate
 - Community Property
 - Separate Property
 - Adopted Children
 - Anti-Lapse Statute



Probate Law

- Wills
 - Holographic Wills
 - Attested Wills
 - Self-Proving Affidavit
 - Codicil



Probate Law

- Revocation of Will
- No Revival Rule



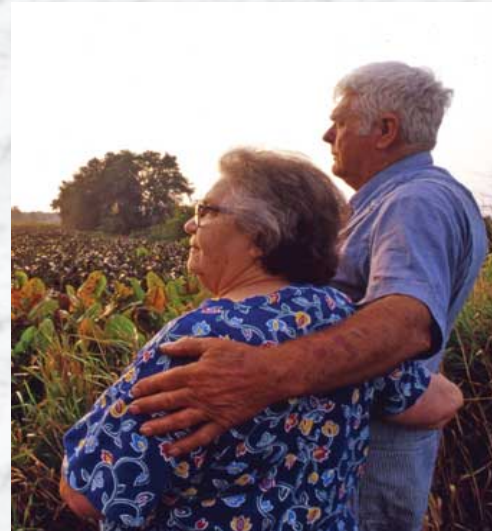
Basic Will Provisions

- Exordium Clause
- Identification
- Specific Bequests
- Residuary Clause
- Survival Period
- Fiduciary Appointments
- Fiduciary Powers and Duties
- Disclaimers



Trusts

- Living Trusts
- Testamentary Trusts
 - Spendthrift Protection
 - Rule Against Perpetuities Savings Clause
 - Powers of Appointment
- Life Estates



Overview of Probate Process

- Formal Probate
- Executor versus Administrator
- Administration
 - Dependent Administration
 - Independent Administration



Sale of Real Property & Mineral Transactions

- Personal representative's authority to sell real property
- Independent executor's and independent administrator's authority to execute oil and gas leases
- Closing the estate



Alternative Probate & Non-Probate Procedures

- Community administration
- Muniment of title
- Small estate affidavit
- Affidavit of heirship
- Recording foreign will in official public deed records



Contact Information

Jonathan D. Baughman

McGinnis Lochridge

711 Louisiana Street, Suite 1600

Houston, Texas 77002

(713) 615-8540

jbaughman@mcginnislaw.com

