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TEXAS HOMESTEAD PROTECTIONS FOR INDIVIDUALS

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OVERVIEW:

This is an outline of the unique protections offered by what are commonly referred to as the “Texas homestead laws” contained in Art. XVI, Sec. 50 of the Texas Constitution (as amended) and in Texas Property Code Chapters 41 and 42.

The Texas Constitution provides the homestead of a family or single adult is protected from forced sale for purposes of paying debts and judgments except in cases of purchase money, *ad valorem* taxes, owelty of partition (divorce), home improvement loans, home equity loans, and reverse mortgages. Further, even a permitted lien must be in writing and signed by both spouses. This protection, combined with the prohibition against garnishment of wages contained in Sec. 28, has long made Texas a haven for debtors.

The Texas Property Code goes into more detail, specifically listing the amount and types of exempt property. It further provides in Sec. 41.001(5)(c) that “The homestead claimant’s proceeds of a sale of a homestead are not subject to seizure for a creditor’s claim for six months after the date of sale.” This expressly permits homestead protections to be rolled over from one homestead to the next, notwithstanding the preference on the part of title companies to collect judgments upon sale of the homestead. *Taylor v. Mosty Bros. Nursery, Inc.*, 777 S.W.2d 568, 570 (Tex.App. - San Antonio 1989, no writ).

Texas homestead laws are liberally construed by the courts. “Indeed, a court must uphold and enforce the Texas homestead laws even though in so doing the court might unwittingly assist a dishonest debtor in wrongfully defeating his creditor.” *Painewebber, Inc. V. Murray*, 260 B.R. 815, 822 (E.D.Tex.2001).

The Constitution and the Property Code provide an excellent opportunity for individuals (not corporations, LLC’s, or partnerships) to engage in asset protection.

Although there is a conceptual overlap, the homestead protection laws should not be confused with the homestead tax exemption as reflected on the rolls of an appraisal district, which is designed to lower *ad valorem* taxes on homeowner-occupied property.

DEFINITION OF HOMESTEAD:

Property Code Sec. 41.002 supplies the following definition:

(a) If used for the purposes of an urban home or as both an urban home and a place to exercise a calling or business, the homestead of a family or a single adult person not otherwise entitled to a homestead shall consist of not more than 10 acres of land which may be in one or more continuous lots, together with any improvements thereon.

(b) If used for the purposes of a rural home the homestead shall consist of:

(1) for a family, not more than 200 acres, which may be in one or more parcels, with the improvements thereon; or

(2) for a single, adult person, not otherwise entitled to a homestead, not more than 100 acres, which may be in one or more parcels, with the improvements thereon.

Note that this definition applies to realty and fixtures, not movable personal property (boats, travel trailers, and the like), although such personal property may be exempt under Chapter 42 (see below).

A person may claim an urban homestead or a rural homestead but not both. What constitutes “urban” versus “rural” has been the subject of much litigation. It is a fact issue that may differ from case to case. Once established, however, the initial characterization of the property as urban or rural continues even if the nature of the surrounding area changes. *U.S. v. Blakeman*, 997 F. 2d 1084.

A family may have only one homestead. Individual family members may not also claim separate homesteads.

DESIGNATION OF HOMESTEAD:

It may be useful, both for *ad valorem* tax purposes and for protection from creditors, to file an affidavit designating the homestead in the real property records of the county in which the property is located (Prop. Code Sec. 41.005). However, for creditor protection, this is not strictly necessary. If a person receives a homestead tax exemption then this designation is automatic. Case law further provides that “when a homestead claimant is in actual occupancy of his homestead, it will be deemed that a lender or encumbrancer acted with knowledge of the occupant’s right to invoke the rule of homestead.” *Sanchez v. Telles*, 960 S.W.2d 762, 770 (Tex. App. - El Paso 1997, pet. Denied).

Filing an affidavit designating homestead may meet the homestead claimant's initial burden of showing that property is homestead in character. Then, "Once property has been dedicated as homestead, it can only lose such designation by abandonment, alienation, or death. After the party has established the homestead character of the property, the burden shifts to the creditor . . . to disprove the continued existence of the homestead. In other words, a homestead is presumed to exist until its termination is proved." *Wilcox v. Marriott*, 103 S.W.3d 469, 472 (Tex App. - San Antonio 2003, pet. denied). Once obtained, homestead rights are not easily removed. A homestead claimant may even temporarily rent the property so long as another homestead is not acquired (Prop. Code Sec. 41.003).

Note that it is not necessary that a homestead claimant actually reside on the property at the time homestead is claimed. "A homestead exemption may be established upon unoccupied land if the owner presently intends to occupy and use the premises in a reasonable and definite time in the future, and has made such preparations toward actual occupancy and use that are of such character and have proceeded to such an extent as to manifest beyond doubt the intention to complete the improvements and reside upon the place as a home." *Farrington v. First Nat'l Bank*, 753 S.W.2d 248, 250-251 (Tex.App. - Houston [1st Dist.] 1988, write denied). Therefore, the key issues are *intent* and *preparation*. By these criteria, even a vacant lot can be homestead. So can a life estate or an executory interest (eg., a purchaser's equitable title under a contract for deed). Generally, however, to in order to make a valid homestead claim, a person must have a present and exclusive possessory interest in the property.

A person may also execute an affidavit disclaiming particular property as homestead (and, optionally, designating other property as homestead), and a lender is entitled to rely on such an affidavit in making a loan that will be secured by non-homestead property. This is typically referred to as a "non-homestead affidavit."

JUDGMENTS:

Texas courts have ruled that although a judgment lien may be unenforceable against a homestead, it may nonetheless constitute a cloud on title, even if it is invalid. *Tarrant Bank v. Mark B. Miller, et al.*, 833 S.W.2d 666 (Tex.App. - Eastland 1992). This generally results in title companies refusing to issue title insurance unless a seller/debtor's judgments are paid, notwithstanding the six-month rollover protection contained in Property Code Sec. 41.001(5)(c). The remedy is found in Property Code Sec. 52.0012 (new in 2007), which provides a statutory method for securing a release of a judgment lien against homestead property.

PERSONAL PROPERTY PROTECTIONS:

Certain personal property receives protection under Chapter 42 of the Texas Property Code. Specifically, personal property valued at \$60,000 for a family or \$30,000 for a single adult (exclusive of liens) is exempt from garnishment, attachment, execution or other seizure so

long as it is on the following list:

- (1) home furnishings, including family heirlooms;**
- (2) provisions for consumption;**
- (3) farming or ranching vehicles and implements;**
- (4) tools, equipment, books, and apparatus, including boats and motor vehicles used in a trade or profession;**
- (5) wearing apparel;**
- (6) jewelry not to exceed 25 percent of the aggregate limitations prescribed by Section 42.001(a);**
- (7) two firearms;**
- (8) athletic and sporting equipment, including bicycles;**
- (9) a two-wheeled, three-wheeled, or four-wheeled, motor vehicle for each member of a family or single adult who holds a driver's license or who does not hold a driver's license but who relies on another person to operate the vehicle for the benefit of the nonlicensed person;**
- (10) the following animals and forage on hand for their consumption:**
 - (A) Two horses, mules, or donkeys and a saddle, blanket, and bridle for each;**
 - (B) 12 head of cattle;**
 - (C) 60 head of other types of livestock; and**
 - (D) 120 fowl; and**
- (11) household pets.**

Retirement plans are exempted under Sec. 42.021.

Finally, Sec. 42.004 states that an exemption is lost if non-exempt assets are used to buy or pay down indebtedness on exempt assets "with the intent to defraud, delay, or hinder" a creditor. However, proving such intent can be difficult, particularly since the debtor is expressly permitted to raise an "ordinary course of business" defense.

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