



## **The Texas Homestead**

### INTRODUCTION

Texas Homestead laws provide unique protections to an individual's residence and personal property. The homestead has always been sacred in Texas. The Texas Constitution (section 28) and Property Code section 42.001(b)(1) provide that 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, taxes (both ad valorem and federal tax liens against both spouses), owelty of partition (divorce), home improvement loans, home equity loans, reverse mortgages, liens predating the establishment of homestead, refinance loans, or the conversion or refinance of a lien on a mobile home that is attached to the homestead. Other liens are void. Further, even a permitted lien must be in writing and signed by both spouses to be valid. The protection of the homestead combined with the prohibition against garnishment of wages has long made Texas a destination for debtors.

Homestead laws are liberally construed by the courts.<sup>i</sup> "Indeed, a court must uphold and enforce the Texas homestead laws even though it may unwittingly assist a dishonest debtor in wrongfully defeating his creditor."<sup>ii</sup> Unless a judgment debtor owns investment real estate, cash or cash-equivalent on deposit, or a business with attachable inventory—or engages in detectable fraud in concealment of assets—a Texas judgment against an individual may be uncollectable. Homestead protections are available only to individuals—not corporations, partnerships, or LLCs and they do not include investment or business assets. Business interests are non-exempt personal property.

### A HOMESTEAD DEFINED

Although a person's homestead is primarily a question of intent, it must be based in a real property interest. For example, neither a mobile home nor a boat qualify. A vacant lot, however, can be homestead if the owner has reasonable expectations of building a home on it; a leasehold estate (rental property) can be homestead; a life estate may also qualify; and even a beneficial interest in a trust that holds real estate can be homestead.

Property Code section 41.002 provides the following size limitations:

(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.

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The statutory definition applies to realty and fixtures, not movable personal property. Movable, non-affixed items are not considered part of the homestead and are not exempt from execution unless included in the list of exempt personal property under Property Code section 42.002. A person may claim either an urban homestead or a rural homestead. The initial characterization of the property as urban or rural continues even if the nature of the surrounding area changes.<sup>iii</sup> Also, one may not have both an urban residential homestead and an urban business homestead (a place to exercise a calling or business). To qualify, the homestead must be used either for residential homestead or as both residential homestead and business homestead.<sup>iv</sup>

The act of living upon and utilizing real property settles the issue of whether or not it is homestead. The possession and use of land by one who owns it and who resides on it makes it homestead in both fact and law. "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."<sup>v</sup>

A family may have only one homestead. The head of household must legally or morally be required to support a least one other family member to qualify as a family. Individual family members may not claim separate homesteads.

## MOVING HOMESTEADS

Property Code section 41.001(5)(c) states that "[t]he 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," permitting homestead protections to be rolled over from one homestead to the next.

## DESIGNATING A HOMESTEAD

For ad valorem tax purposes and for protection from creditors, although not strictly necessary, you should file an affidavit designating the homestead in the real property records of the county where the property is located.<sup>vi</sup> The homestead arises automatically when required legal conditions are met.<sup>vii</sup> Also, if a person receives a homestead tax exemption then creditor protection is automatic. A creditor is on notice that homestead protections will apply if the debtor occupies a homestead. "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."<sup>viii</sup> Moreover, the homestead is presumed to endure. "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."<sup>ix</sup> Once obtained, homestead rights are not easily lost. A homestead claimant may even temporarily rent the property, provided another homestead is not acquired.<sup>x</sup>

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

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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.”<sup>xi</sup> The key issues are intent and preparation. Generally, however, in order to make a conclusive and indisputable 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 (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 nonhomestead property. This is typically referred to as a “nonhomestead affidavit.” 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.

## JUDGMENTS

Although a judgment lien may be unenforceable against a homestead, it may constitute a cloud on title, even if it is invalid.<sup>xii</sup> The homeowner’s remedy is Property Code section 52.0012, which provides a statutory method for securing a release of a judgment lien against homestead property—but only for judgments abstracted after 2007.

## PERSONAL PROPERTY

It is not just realty that is protected. Chapter 42 of the Property Code states that 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:

### § 42.002. Personal Property

- (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;

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(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.

## FRAUDULENT INTENT

Property Code section 42.004 provides 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.

## INVESTMENT PROPERTIES AND BUSINESS ASSETS

Investment properties and business assets do not receive the same treatment, so investors should plan accordingly. As a rule, investment properties should be kept separate from the homestead and placed in an LLC.

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<sup>i</sup> *London v. London*, 342 S.W.3d 768, 776 (Tex. App.–Houston [14th Dist.] 2011, no pet.).

<sup>ii</sup> *PaineWebber, Inc. v. Murray*, 260 B.R. 815, 822 (E.D. Tex. 2001).

<sup>iii</sup> *United States v. Blakeman*, 997 F. 2d 1084 (5th Cir. 1992).

<sup>iv</sup> Tex. Const. art. XVI, § 51; Tex. Prop. Code § 41.002(a); *Majeski v. Estate of Majeski*, 163 S.W.3d 102 (Tex. App.–Austin 2005, no pet.).

<sup>v</sup> *Wilcox v. Marriott*, 103 S.W.3d 469, 472 (Tex. App.–San Antonio 2003, pet. denied).

<sup>vi</sup> TEX. PROP. CODE § 41.005.

<sup>vii</sup> *Graham v. Kleb*, Civ. Act. Nos. H-07-2279, H-07-2878, 2008 WL 243669, at \*4 (S.D. Tex. Jan. 29, 2008) (not selected for publication).

<sup>viii</sup> *Sanchez v. Telles*, 960 S.W.2d 769, 772 (Tex. App.–El Paso 1997, pet. denied).

<sup>ix</sup> *Wilcox v. Marriott*, 103 S.W.3d 469, 472 (Tex. App.–San Antonio 2003, pet. denied).

<sup>x</sup> TEX. PROP. CODE § 41.003.

<sup>xi</sup> *Farrington v. First Nat'l Bank*, 753 S.W.2d 248, 250-51 (Tex. App.–Houston [1st Dist.] 1988, writ denied).

<sup>xii</sup> *Tarrant Bank v. Miller*, 833 S.W.2d 666 (Tex. App.–Eastland 1992, writ denied).

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