A Revised Reprint from the Real Estate Center *Journal*

Homestead Protection: For Whom and How Much?

By Judon Fambrough

Texas homestead laws are unique. No other state affords homeowners similar protection from creditors. Even though the constitutional and statutory homestead provisions have changed, one fact remains constant. Only one homestead can be claimed. It must be either rural or urban. Both cannot be claimed at the same time.

One of the primary differences between the two homesteads is the amount of land protected. Presently, a rural homestead for the head of a family may consist of not more than 200 acres including the residence. A single adult may claim no more than 100 acres. The urban homestead for the head of a family or a single adult may consist of no more than ten contiguous acres including the residence.

Two questions emerge from these rules. First, can a single person be the "head of a family" under homestead laws? Second, when is an area considered urban and when is it considered rural? Both statutes and case law affect the answers to these questions.

As to the first issue, prior to 1973, homestead protection extended only to a "family." The framers of the Texas Constitution intended for the legislature or judiciary to define the term. The legislature has not given the term a statutory definition, but the courts have.

During the past century, Texas courts have applied the following four rules.

- The family relation is one of social status.
- The head of the family must be legally or morally obligated to support at least one other family member.
- The corresponding family member (or members) must depend on the support.
- The head of the family need not be married, nor a father or a mother.

As to the fourth rule, the requisite familial relationship may exist between siblings, adult children and their parents, grandparents and grandchildren, a divorcee and her mother, and a father and minor son even though the father does not have legal custody of the child. The primary consideration in many instances is the moral and/or legal obligation for support and care.

In 1992, the Fifth Federal Circuit Court was asked to examine the impact of the 1973 amendment to the Texas homestead laws in *Matter of Hill,* 972 F. 2d 116. The new language extended protection to single adults for rural homesteads. Did the change alter existing case law so that a person had to be married to claim a "family status?"

The court ruled that the amendment granted additional homestead protection to single adults who could not claim any before the change. It did not decrease the preexisting homestead coverage afforded families with a single adult as head of the household.

As to the second issue, the rural homestead generally has more monetary value than an urban homestead. Consequently, if given a choice, a person would claim the rural homestead. Such choices have led to some interesting case law when the homestead is located on the fringe of an urban area. For years Texas courts struggled to decide what characteristics distinguish a rural homestead from an urban one.

The Texas Constitution simply referenced a rural homestead as "not in a town or city" and an urban one as "in a city, town or village" (Article XVI, Section 51). The Texas Property Code references an urban homestead as being "used for the purposes of an urban home" versus the rural as being "used for the purposes of a rural home." (Section 41.002).

In 1989, Section 41.002(c) was added to the Texas Property Code. It provided that "[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."

This amendment led to more confusion as pointed out in the 1991 case of *In Re Mitchell,* 132 B.R. 553. Mitchell, seeking protection in bankruptcy, claimed 104 acres as a rural homestead exemption. (The exempt property claimed under the Bankruptcy Code may be the same as the property exempted by state law.) The utilities to the property were provided by the Bluebonnet Cooperative that also furnished electrical services to Bastrop. Fire protection was provided by the Bastrop volunteer fire department.

Based on these facts, the creditors claimed Mitchell was entitled to a then urban homestead of one acre, not to the entire 104 rural acres.

The bankruptcy court allowed Mitchell the 104-acre rural homestead based on its interpretation of the legislative intent.

The court ignored a 1903 case (*Mikael v. Equitable Sec. Co.,* 74 S.W. 67). In this case, the court ruled that the landowner had an urban homestead because, in part, the "appellant has all the conveniences and protection that a municipal government affords."

In 1999, Texas voters added clarity to the dilemma by approving

a constitutional amendment to Article XVI, Section 51. Based on the amendment, Texas legislators changed Section 41.002(c) of the Property Code to use the following test for determining an urban homestead.

A homestead is considered urban if, at the time of the designation, the property is:

(1) located within the limits of a municipality or its extraterritorial jurisdiction or within a platted subdivision and

(2) served by police protection, a paid or volunteer fire department and at least three of the following services are provided by a municipality or under contract to a municipality:

- electricity
- natural gas
- sewer
- storm sewer and
- water.

The 1999 test for an urban homestead applies to all homesteads whenever created. Thus, the test applies retroactively.

The statute did not alter the prior case law, which holds that the question of an urban versus rural homestead is a question of fact for a jury, not a question of law for a judge. Likewise, the burden of proof lies with the party making the claim, which can be the landowner or a creditor.

Any land in excess of the amount of the rural or urban homestead may be reached by general creditors to satisfy their claim by execution and sale. However, not all the proceeds may go to the creditors. Any preexisting mortgage on the land must be paid first.

In 2002, the interaction between Texas homestead laws and the federal bankruptcy rules came under scrutiny. Prior to 2002, a debtor in bankruptcy could claim either the federal homestead exemption described in the Bankruptcy Code or the one allowed by the state law of the debtor's residence.

Other states, except Texas and Florida, based the exemption on a maximum monetary amount, not on a maximum geographical area. Creditors felt Texas and Florida attracted individuals bent on filing for bankruptcy because of the states' liberal homestead exemptions.

If this federal legislation passes, a person must live in a state at least 40 months before filing for bankruptcy to claim that state's homestead exemption. Otherwise, the debtor is relegated to the maximum federal homestead exemption of $125,000. The change to the Federal Bankruptcy Code is still pending.

Texas residents enjoy another benefit associated with the homestead that allows a reduction in property taxes. Effective August 9, 1997, the owner of a homestead receives a $15,000 reduction in the evaluation of the homestead for ad valorem tax purposes.

To receive the property tax reduction, the homeowner must designate the homestead with the appraisal district. In urban areas, the tax reduction affects a maximum of ten acres. In rural areas, the tax reduction affects the residence and the immediate surrounding area, including the lawn and garden. There is no set size, but the average is one to two acres.

Thus, in rural areas, the size of the homestead protected **against creditors** is 100 to 200 acres, depending on whether the owner is a single adult or head of family. At the same time, the size of the rural homestead receiving the **property tax reduction** is one to two acres.

When a person designates an area for the homestead property tax reduction, the same area may apply to protection from creditors. Section 41.005(e) of the Texas Property Code provides that unless a separate designation is made for protection from creditors, the designation for property tax reduction applies to both. In rural areas, the difference between the two could be as great as 199 acres. Rural residential owners should be aware of the ramifications of this statute.

This column is for information only; it is not a substitute for legal counsel.

For more information on homestead protection, see "There's No Place Like a Homestead: Texas Law Offers Unique Protection" by Fambrough (recenter.tamu.edu/pdf/525.pdf).

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Tierra Grande (ISSN 1070-0234), formerly *Real Estate Center Journal*, is published quarterly by the Real Estate Center at Texas A&M University, College Station, Texas 77843-2115. Subscriptions are free to Texas real estate licensees. Other subscribers, $20 per year.