

# 2005 Webinars

Community and Separate Property and  
Homestead

John Rothermel

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# Property Type and HS are different

- Texas recognizes 2 types of property:
  - Separate
  - Community
- Generally, the type is determined at the acquisition of the property

# Community Property

- The bias in Texas is that all property acquired during marriage is presumed to be community property.
- Tex. Fam. Code § 3.003 (2004)
  - § 3.003. Presumption of Community Property
    - (a) Property possessed by either spouse during or on dissolution of marriage is presumed to be community property.
    - (b) The degree of proof necessary to establish that property is separate property is clear and convincing evidence.

# Separate Property

- Property acquired before marriage or acquired after marriage by gift or inheritance or by the proceeds of a gift or inheritance is separate property

# Community Property under sole management and control

- A special subset of community property is property acquired during marriage but which is under the sole management and control of just one of the spouses.
- In this situation, only the controlling spouse has to sign deeds, liens or other encumbrances

# Examples of CMUSMC

- A builder who buys and sells in individual name
- Owner of car lot
- Owner of convenience store
- Owner of rent house
- Couples who have been separated for some time but are not divorced.
  - Texas does not recognized separation as a legal status unlike some states

# Jean v. Tyson-Jean, 118 S.W.3d 1

- where community property is held in one spouse's name only, there is a presumption that the property is *sole-management* community property. [TEX. FAM. CODE ANN. § 3.104\(a\)](#) (Vernon 1998). [Section 3.104](#) therefore trumps [section 3.102](#). n2 Absent a showing of fraud or notice on the part of persons dealing **[\*\*9]** with the named spouse, this sole-management presumption protects third parties who rely on the spouse's authority to deal with the property. [TEX. FAM. CODE ANN. § 3.104\(b\)](#) (Vernon 1998); [In re. McCloy, 296 F.3d at 373](#). n3

# Historical Requirements

- Whose name is the property in?
- Who pays the taxes?
- Whose funds are used to pay taxes?
- Who pays the mortgage?
- Whose funds pays the mortgage?
- What is the source of the money? Job? Inheritance?
- Whose name is on the bank account?

# Family Code

- The family code as quoted in the Jean case, shows that the presumption of property held in one name is that the property is under the sole management and control of the named spouse.
- But, presumptions can be overcome.

# Red Flags of Community Property

- Contract in both names
- Order from lender in both names
- Spouse calling to set up “our closing” when title is in only one name
- Survey certified to Spouse and Spouse

# Strange separate property situations

- Sandy takes title in 1984 as a single woman. Gets married to Tom in 1988. They divorce in 1996. The property is not mentioned. She marries Fred in 1997 (is there a story there??) She dies in 2002 leaving property to Fred. Fred remarries in 2003 to Janice. Fred dies in 2004 leaving to Janice. Janice marries Joe and moves into Joe's house and wants to sell the property. Does Joe have to sign?

# Analysis of strange story

- 1984: Sandy's separate property
- 1988: still her SP; Tom has HS interest
- 1996: still her SP. Tom has no interest
- 1997: still her SP. Fred has HS interest.
- 2002: Fred's SP.
- 2003: Fred's SP. Janice has HS interest.
- 2004: Janice's SP.
- 2005: Janice's SP. Joe has NO HS.
- Joe does not have to sign.

# Variation on strange story

- Sandy takes title in 1984 as a single woman. Gets married to Tom in 1988. They divorce in 1996. The property is not mentioned. She marries Fred in 1997 (is there a story there??) She dies in 2002 leaving property to Fred. Fred remarries in 2003 to Janice. Fred dies in 2004 leaving to Janice. Janice marries Joe and Joe moves into the property they want to sell the property. Does Joe have to sign?

# Analysis of Variation of strange situation

- Yes.
- Although he has no ownership, he has a homestead interest simply by living there.
- Question: How do we make out the proceeds check? Her or both?
  - Answer: However they tell you. But, unless she says to pay both, you would just pay her since she is the actual owner.

# Debts upon divorce

- While not really a title issue, we are frequently asked about the situation where property is divided in a divorce and certain debts are “awarded” to one spouse. That spouse doesn’t pay and the creditor comes against the “other” spouse. Does she have to pay?
- Yes. Unless the creditor was made a party to the divorce, it has no notice of the decree and is not bound by it. Remedy is to sue the X.

# Community Right of Reimbursement

- Even though a spouse may have no ownership interest, if the “owning” spouse uses community (or co-mingled) funds, the “other” spouse may have a right to have the proceeds of a sale of the separate or CPUSMAC property applied to reimburse the homestead.
- This is especially important to remember in divorces and when one spouse is trying to buy new property while still legally married.

# Homestead

- Homestead rights are possessory. They arise by virtue of your living on a piece of property. They are independent of ownership status.
- Designed to protect family assets from forced sale and give a fresh start to a debtor.

# 2 kinds of Homesteads

- Urban: 10 acres
- Rural: 100 acres if single; 200 acres for family
- Business HS abolished in 1999

# How to tell Urban from Rural

# How to tell Urban from Rural Prop Code 41.002

- c) A homestead is considered to be urban if, at the time the designation is made, the property is:
  - (1) located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision; and
  - (2) served by police protection, paid or volunteer fire protection, **and**  
at least three of the following services provided by a municipality or under contract to a municipality:
    - (A) electric;
    - (B) natural gas;
    - (C) sewer;
    - (D) storm sewer; and
    - (E) water.
- (d) The definition of a homestead as provided in this section applies to all homesteads in this state whenever created.

# What is police protection?

- Provided by a municipality (city)
  - Sworn, paid police officers
  - Other law enforcement officials under contract with the city
    - Sheriff
    - Constable
    - Private ??
- Sheriff driving through subdivision in county 2x day not under contract is not urban.

# Vendor's liens

- Types of permissible liens against homestead are 8
  - Purchase money
  - Ad valorem taxes
  - Improvements
  - Owelty
  - Federal tax liens
  - HEL
  - Rev Mtg
  - MHU

# Vendor's liens p2

- A vendor's lien is the purchase money lien.
- It is usually said to also be superior title
- Has priority over all ownership rights, including homestead
  - Either spouse can sign documents refinancing a purchase money lien without the joinder of the other spouse. (See Zable v. Henry 649 S.W.2d 136, 1983; and Bell v. Pirtle 69 S.W.2d 476, 1934)

# Vendor's lien by implication

- The most familiar illustration of the equitable **lien is the vendor's lien**, which is a **lien** given to a **vendor** of real estate, who has executed an absolute deed, without having received the purchase money, and this **lien** arises even though the recital in the deed acknowledged the receipt of payment, if in fact it was not received. This **lien** has always been favored by the courts of the State of Texas, not as a creature of contract, but as incidental to the same, as an equity for the reason that one who purchases another's land for a deferred consideration should pay for it.
  - **Fennimore v. Ingham, 181 S.W. 513 , 1915**

# Vendor's lien problems

- The vendor's lien only applies to the interest being acquired
  - H&W buy from A&B, each has undivided  $\frac{1}{2}$  interest. VL applies to the whole.
  - H&W divorce, H to buy out W's  $\frac{1}{2}$  but needs to borrow \$ to do so.
    - VL would apply only to W's  $\frac{1}{2}$  not to the  $\frac{1}{2}$  H already owns.
- Oh No!! What do we do??????

# Owely Lien

- The owelty lien is a constitutionally allowed lien Art. 16, Sec. 50a4 of the Texas Constitution
- Covers the interest being acquired and spreads the lien to the interest already owned.
- No vendor's lien should be retained in the owelty deed. It should also say partition

# What if the DV decree doesn't create an owelty

- If the decree actually vests 100% of the title in 1 spouse, subject to a judicially imposed lien, then there can be no owelty and the lien is only on the other spouse's interest.
- To get a lien on 100%, the decree should be reformed by a judgment *nunc pro tunc*.
  - That creates an owelty of partition