THE FOUR "HOMESTEADS" IN OKLAHOMA: SOME OBSERVATIONS ON THEIR IMPACT ON REAL ESTATE

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Presented to

THE OKLAHOMA CITY COMMERCIAL LAW ATTORNEYS ASSOCIATION

at

OKLAHOMA CITY, OKLAHOMA
FEBRUARY 18, 2003

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THE FOUR "HOMESTEADS" IN OKLAHOMA: SOME OBSERVATIONS ON THEIR IMPACT ON REAL ESTATE

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I. THE NATURE OF HOMESTEAD IN OKLAHOMA

Homestead in Oklahoma has, in essence, two natures: as a personal right in land and as an exemption from collection. This dual nature causes confusion among laymen and attorneys as well.

The homestead interest is a separate personal right in land or an exemption that is not shown in the land records, and it exists alongside but separate from the normal ownership interest wherein one or more persons hold title to land. This homestead interest is overlaid on the recorded title interests, such as a fee simple absolute, and co-tenancies such as tenancy in common or joint tenancy.[1]

II. WHY DOES IT EXIST?

Unlike dower and courtesy, homestead does not have its roots in the common law. The Oklahoma Supreme Court has held that the homestead, as it exists in Oklahoma, is a creature of the constitution and statutes, nothing like it being known at common law.[2] It is a purely constitutional and statutory creation based on public policy considerations.

Historically, there are three principal reasons for the creation of homestead laws:

A. To protect the family unit from forced eviction from its home through the enforcement of creditors' claims;

B. To provide a certain amount of protection to the widow after the death of her husband; and

C. To protect the wife from ill deeds of the husband.[3]

III. TYPES OF HOMESTEAD INTERESTS

There are, practically speaking, four types of homestead rights in Oklahoma that include the following:

A. Ad valorem tax exemption, whereby an owner elects which tract of land is his or her homestead, and the owner receives a discount on their annually assessed and collected county ad valorem real property taxes, with the specific land being designated as the taxpayer's homestead at the beginning of each year;

B. Prohibition exempting the debtor's homestead (whether for an individual or a family) from execution for general creditors' debts (as distinguished from special debts whereby this specific tract of land is voluntarily encumbered to stand as collateral for the debt), with the label of homestead being attached to what is shown to be the primary residence of the debtor;

C. Protection of the spouses' homestead rights against voluntary encumbrancing or conveying by one spouse without the joinder of the other spouse, even if the one spouse who is attempting to affect the title holds 100% of the record title; and

D. Preservation of a life estate in the couple's homestead for the benefit of a surviving spouse when a spouse dies, even if the deceased was the holder of 100% of the record title.

The land reported to the county as the owner's homestead at the beginning of each year for the purposes of ad valorem taxes might not be the same land that is asserted to be the debtor's homestead when the other types of homestead come into play. The last three of these types of homesteads (i.e., excluding the ad valorem type) are discussed further below.

III. PROTECTIONS FOR A HOMESTEAD

A. Constitutional Homestead.

The Oklahoma Constitution provides as follows:

> *The homestead of the family shall be, and is hereby protected from forced sale for the payment of debts, except for the purchase money therefor or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon; nor shall the owner, if married, sell the homestead without the consent of his or her spouse, given in such manner as may be prescribed by law; Provided, Nothing in this article shall prohibit any person from mortgaging his homestead, the spouse, if any, joining therein; nor prevent the sale thereof on foreclosure to satisfy any such mortgage.*[4]

The constitutional homestead is the land itself which is occupied by the family as a home.[5]

As part of the implementation of this constitutional provision, the state legislature enacted the following statutory language:

> *The exemption of the homestead provided for in this chapter [34 O.S. §§ 1 et seq.] shall not apply where the debt is due:*
>
> *1. For the purchase money of such homestead or a part of such purchase money.*
>
> *2. For taxes or other legal assessments due thereon.*
>
> *3. For work and material used in constructing improvements thereon.*[6]

B. Exemption from Creditors' Claims.

Debts affecting land usually fall into two distinct categories: voluntary (e.g., a mortgage) or involuntary (e.g., a money judgment).

If a debt is secured by a voluntary lien on land that happens to be the mortgagor's homestead, such lien shall be valid – as to the mortgagor's interest -- only if one of three conditions exist: (1) the mortgagor is single at the time the mortgage is given, or (2) the mortgagor was married at the time the mortgage was given, and either (a) both spouses executed the mortgage, or (b) only the title-holding spouse executed the mortgage, but such mortgage was a purchase money mortgage (because there would not have been an interest acquired by the mortgagor at all except for the lender advancing the purchase money funds). In each of these instances, it is assumed that the mortgagor holds record title to the interest being mortgaged, whether it is a full ownership or an undivided interest, such as a one-half undivided interest.

According to state statute:

A. The homestead of any person in this state, not within any city or town, shall consist of not more than one hundred sixty (160) acres of land, which may be in one or more parcels, to be selected by the owner.

B. Effective November 1, 1997, the homestead of any person in this state, not within any city or town, annexed by a city or town on or after November 1, 1997, owned and occupied and used for both residential and commercial agricultural purposes shall consist of not more than one hundred sixty (160) acres of land, which may be in one or more parcels, to be selected by the owner.

C. The homestead of any person within any city or town, owned and occupied as a residence only, or used for both residential and business purposes, shall consist of not

exceeding one (1) acre of land, to be selected by the owner.

For purposes of this subsection, at least seventy-five percent (75%) of the total square foot area of the improvements for which a homestead exemption is claimed must be used as the principal residence in order to qualify for the exemption. If more than twenty-five percent (25%) of the total square foot area of the improvements for which a homestead exemption is claimed is used for business purposes, the homestead exemption amount shall not exceed Five Thousand Dollars ($5,000.00).[7]

An involuntary lien, such as a money judgment that has been properly created by statute, will attach to the debtor's homestead but cannot be executed on so long as the land remains the debtor's homestead.[8] When the homestead claim is relinquished by the judgment debtor by the abandonment of the land as the owner's homestead, the money judgment lien can then be executed on and the previously exempt land sold.

When homestead land is sold by the debtor to a third party, the law in Oklahoma is unclear as to whether the attached lien becomes immediately executable on the previously exempt land or such lien follows the proceeds of sale instead. If it develops that the lien follows the proceeds of sale, the next question is whether the proceeds can remain exempt from execution by being immediately reinvested in a new homestead, and whether any such portion of the proceeds that are not fully devoted to the purchase of the new homestead can be reached by execution. Because these questions are as yet unanswered, the examiner and title insurer must assume that the previously exempt land becomes subject to execution upon resale. Therefore, when the debtor sells such exempt land, the proceeds of the sale must be applied to the satisfaction and release of the existing judgment that attached to the previously exempt land.

The other state statute that provides that the homestead is exempt from execution state the

following:

A. Except as otherwise provided in this title and notwithstanding subsection B of this section, the following property shall be reserved to every person residing in the state, exempt from attachment or execution and every other species of forced sale for the payment of debts, except as herein provided:

1. The home of such person, provided that such home is the principal residence of such person;

2. A manufactured home, provided that such manufactured home is the principal residence of such person;

3. All household and kitchen furniture held primarily for the personal, family or household use of such person or a dependent of such person;

4. Any lot or lots in a cemetery held for the purpose of sepulcher;

5. Implements of husbandry necessary to farm the homestead;

6. Tools, apparatus and books used in any trade or profession of such person or a dependent of such person;...

B. No natural person residing in this state may exempt from the property of the estate in any bankruptcy proceeding the property specified in subsection (d) of Section 522 of the Bankruptcy Reform Act of 1978, Public Law 95-598, 11 U.S.C.A. 101 et seq., except as may otherwise be expressly permitted under this title or other statutes of this state.

C. In no event shall any property under paragraph 5 or 6 of subsection A of this section, the total value of which exceeds Five Thousand Dollars ($5,000.00), of any person residing in this state be deemed exempt.[9]

C. Marital Homestead

Pursuant to the constitutional directive providing that "nor shall the owner, if married, sell the homestead without the consent of his or her spouse, given in such manner as may be prescribed by law", and "Nothing in this article shall prohibit any person from mortgaging his homestead, the spouse, if any, joining therein; nor prevent the sale thereof on foreclosure to satisfy any such mortgage," the state legislature enacted the following statutory language providing for the method whereby a spouse can give consent to a sale or mortgage of the homestead:

> *No deed, mortgage, or contract affecting the homestead exempt by law, except a lease for a period not exceeding one (1) year, shall be valid unless in writing and subscribed by both husband and wife, if both are living and not divorced, or legally separated, except as otherwise provided for by law.*[10]

However, such "deed, mortgage, or contract", which is initially void (really "voidable"), becomes unassailable after the passage of time, as provided in the statute that states:

> *A deed affecting the homestead shall be valid without the signature of the spouse of the grantor, and the spouse shall be deemed to have consented thereto, when said deed has been recorded in the office of the county clerk of the county in which the real estate is located for a period of ten (10) years prior to a date six (6) months after May 25, 1953, and thereafter when the same shall have been so recorded for a period of ten (10) years, and no action shall have been instituted within said time in any court of record having jurisdiction seeking to cancel, avoid, or invalidate such deed by reason of the alleged homestead character of the real estate at the time of such conveyance.*[11]

Such 10-year curative statute has been tested in the Oklahoma Supreme Court and found

valid.[12]

However, due to the state constitutional language delegating wide powers to regulate the homestead issue, an interpretation of such implementing statutes by the Oklahoma Supreme Court found that the absence of the other spouse's signature will not defeat the enforcement of a purchase money mortgage against the homestead where the record title to the land is solely in the spouse who signed the mortgage.[13]

In Oklahoma there is a requirement for an owner to elect which tract of land is to be designated as his or her homestead exemption for ad valorem tax purposes. However, such election is not filed in the local land records and is not conclusive. Therefore, whenever a challenge arises concerning whether or not a tract of land is someone's homestead (i.e., for execution, marital and probate homestead purposes), the final determination is a fact question to be determined by a fact finder, such as a judge or jury.

D. Probate Homestead

When a spouse dies, the surviving spouse, and any minor children, have a right to the exclusive possession of the homestead for so long as he or she resides there, meaning until the homestead is abandoned or the surviving spouse dies, or, if the surviving spouse either dies or abandons the homestead, the last minor child comes of age.[14] Such possessory right is like a life estate and it is superior to the ownership and possessory rights of third parties who may be acquiring the record title due to the deceased's demise. This means the probate homestead is not subordinate even where the deceased (1) holds title with a non-spouse joint tenant, or (2) devises the title to third parties in a will, or (3) allows distribution through intestacy succession.

In addition to the surviving spouse's right to reside in the homestead for her life, any minor children also hold such a right until the last one reaches their majority. Such rights of

possession of the minors would be senior to everyone including both the holder of a mortgage given by the surviving spouse, and the buyer at a sheriff's sale of such a mortgage.[15]

State statutes also provide:

> *The homestead is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except such as are secured by lien thereon, as provided in the laws relating to homesteads.*[16]

IV. JOINDER OF SPOUSES TO CONVEY OR ENCUMBER THE MARITAL HOMESTEAD

A. Assumption That Every Parcel is Homestead and How to Show Joinder of Spouse

The state statutes provide:

> *The husband or wife may convey, mortgage or make any contract relating to any real estate, other than the homestead, belonging to him or her, as the case may be, without being joined by the other in such conveyance, mortgage or contract.*[17]

However, due to the lack of a requirement in Oklahoma for a person to place a binding election of their homestead in the public land records declaring which land is his or her marital or constitutionally exempt homestead (except for the ad valorem tax purposes), combined with the severe consequences resulting from a failure to secure such joinder (i.e., a totally void conveyance or encumbrance), a title examiner and underwriter must treat every parcel which is owned by one or more individuals as if it is the parties' marital homestead.

This assumption that all land is homestead includes land that might be clearly non-residential in nature upon physical inspection, such as industrial, commercial or agricultural lands. This assumption also causes the title examiner underwriter to always include a

requirement for the current owners, who are signing a deed or other conveyance, (1) to disclose their marital status, and (2), if married, to have their spouse sign the document relating to real property, in order to waive and encumber any claims of potential homestead interest.

The statute says that joinder of spouse is required, but the statute does not declare that such status must be disclosed in a particular manner and does not provide where on the document such status must be disclosed. The practice is to show the marital status on the face of the document, usually in the portion where the grantors' names are listed, although some persons place such statement of marital status in the acknowledgment portion of the document.

The placement of both spouses' names in the granting clause will eliminate any question about what was the intention of the signing spouses. However, if one spouse's name is listed in the granting clause and the other's name is listed in the habendum clause, the signing of the conveyance by both spouses will still meet such joinder requirement.[18]

The language used to describe the grantors' marital status is usually shown as "single", and sometimes as "unmarried", "divorced" or "widowed", or, if appropriate, as "married". The recitation in a deed of conveyance that the grantor was a "single" man is conclusive of such fact in the absence of proof to the contrary.[19] Upon the presentation of contrary evidence, the immediate purchaser from the married person, who had erroneously recited that he or she was single when they were in fact married, shall lose their interest because the conveyance or encumbrance upon which they rely will be found to be void.[20]

Only persons who are at least 18 years old can hold or convey or encumber lands, including homestead and non-homestead lands. A minor (i.e., a person under 18 years old) who has been legally married or has otherwise had the rights of majority conferred on them can hold and convey the homestead, either as a title holder or, if they are a non-title holder, for the

purposes of waiving their marital homestead rights. Such minors can hold and convey or encumber their homestead only if the lands were acquired after such marriage, or after such majority was conferred, or if the title were initially acquired by one of the spouses, while still single, while such acquiring party was already of age.[21]

B. Exceptions To Joinder of Spouse

As noted above, it is impossible to determine from the public land records which lands constitute the marital or constitutional homestead. Consequently, all tracts are treated as homestead which in turn makes the transaction attorney and the title examiner require that all married title holders disclose such married status and also secure the joinder of their spouse on all conveyances and encumbrances.

If the land is the marital homestead, but one of the few statutory exceptions to the requirement for the joinder of both spouses applies, most of the time there is insufficient documentation required by the statutes to conclusively establish such exception status, short of completing a lawsuit to establish such facts. Consequently, only a few of the statutory exceptions are usually accepted as grounds to overlook the failure of a spouse to join on a conveyance or encumbrance.

If one of the spouses either abandons the other spouse, and the homestead, for at least one year, or leaves the state for any period of time, a statute states that such abandonment permits the remaining spouse to convey or encumber the homestead without the absent spouse's joinder.[22] This assumes that the occupying spouse holds all of the title to the land. If the occupying spouse only holds a partial interest in the title, such limited interest is all that could be affected. However, while this statute has been found to be constitutional, there is no way short of a lawsuit, which includes the missing spouse as a defendant in such lawsuit, to establish the

existence of such operative facts.

If a spouse becomes incapacitated, such incapacitated spouse does not have the ability to join in a conveyance or encumbrance affecting the homestead.[23] There is a statute allowing a court to authorize the competent spouse to convey or encumber the homestead without the joinder of a non-competent spouse.[24] While the operative statute does not require that such court order be placed in the local land records, such a filing will help to establish marketable record title.

C. Subscribing the Same Instrument

When the homestead is being conveyed or encumbered, each document that attempts to affect the homestead must bear the signature of both of the spouses thereon. Due to the specific language of the statute calling for both of the spouses to sign the document, the courts have declared that the spouses cannot sign separate deeds and thereby comply with the statute.[25]

However, the conveyance is valid even if the single document was executed by the spouses on different dates.[26]

Where husband and wife both take part in preliminary negotiations for the sale of their homestead, title to which is in the husband, and the wife's signature to the deed is written by the husband, with her knowledge, and she acknowledges the execution of such deed before a notary public, she thereby adopts such signature as her own. Therefore, such adopted signature meets this signing requirement.[27]

Where a husband and wife signed a deed to the homestead, not to be delivered to the grantee named, and the husband, without the consent of the wife, delivered the deed to the grantee having notice of the agreement, the deed could be avoided by the wife even after the death of the husband, as being a deed in which she did not join[28]

This public policy that prohibits enforcing an instrument attempting to affect the homestead in the absence of signatures from both spouses, also prevents the enforcement of a purchase contract on the homestead where it is only signed by one spouse. This halts both an equitable request for specific performance and a suit for damages against either of the spouses including the signing spouse.[29]

However, a real estate broker, who enters into a contract with only one spouse to sell land that is revealed at a later time to be homestead, has an action to collect his or her commission from the signing spouse, even if the other spouse prevents the sale from being completed by refusing to execute the necessary conveyance.[30]

D. Power of Attorney

Until 1993, Title Examination Standard 6.7, which deals with powers of attorney, included a caveat prohibiting the use of a power of attorney to convey a person's or a couple's homestead.

In 1993 this caveat was removed from the Standard because in 1993 the state legislature amended a statute, dealing with the use of a Durable Power of Attorney, that included express language providing as follows:

> *B. The power may grant complete or limited authority with respect to the principal's:*
>
> ***
>
> *2. Property, <u>including homestead property</u>, whether real, personal, intangible or mixed.*[31] (underlined language was added in 1993)

It appears, therefore, that if the Power of Attorney language expressly provides that the

attorney in fact can convey or encumber the homestead, the Power of Attorney can be relied upon to deal with the homestead.

The argument supporting the prior prohibition on conveying or encumbering the homestead through the use of a power of attorney arose because of several Oklahoma appellate court cases stating that if one spouse signed one deed and the other spouse signed a separate deed both deeds were void. This rule applies even if the two deeds included the same grantee and the same legal description, and were signed on the same day, because both spouses must sign the same deed.[32] The earlier argument reasoned that if one or both spouses signed a Power of Attorney and then the attorney-in-fact signed the deed or other similar document on behalf of one or both of the spouses, the two spouses did not both personally sign the same deed, because at least one spouse signed a Power of Attorney, rather than the deed itself. Consequently, under this now-defunct argument, the deed relying on the Power of Attorney was void.

IV. SUFFICIENT INTEREST, AND SIZE AND VALUE OF EXEMPT HOMESTEAD

A. Sufficient Interest

Where a husband and wife are occupying the land which they are buying under a contract, their interest is a homestead interest which is protected against the third-party vendor giving an oil and gas lease without the joinder of the husband and wife who make an homestead claim to the subject land.[33]

Where a husband and wife are divorced, and the homestead is divided up by the court between the parties into divided interests, rather than undivided interests, (i.e., a tract of 160 acres being divided into two separate parcels of 80 acres each) the land might remain the respective homesteads of each of the now-single parties for protection from creditors. However,

because the parties are no longer man and wife, there is no need for the former spouse to execute a conveyance of one spouse's separate and divided property.[34]

When property has once been impressed with the homestead character, it must be made to clearly appear that both the husband and wife have voluntarily intended to relinquish and did abandon the homestead, and that another homestead has been acquired, before either spouse can convey the same without being joined in the deed of conveyance by the other, so long as the relationship of husband and wife exists.[35]

Where conveyance or mortgage of homestead by one spouse is void at time of execution, subsequent abandonment of the homestead will not validate the conveyance.[36]

A marital homestead interest only attaches to the surface interest. However, if the title to the interest being conveyed, such as a surface interest, an easement or a mineral interest, is held at least in part by one or both of the spouses, the other spouse must join in such conveyance or the document will be void. If the only interest being held by a spouse is a non-surface interest, such as a severed mineral interest, or is a non-possessory interest, such as a driveway easement, the title holding spouse can validly convey or encumber such interest without the joinder of the non-title holding spouse.[37]

B. Size and Value of Exempt Homestead

According to the current statute, recently amended in 1997, there are limits on the size and value of the homestead that is exempt from execution for general debts. This statute provides as follows:

> *A. The homestead of any person in this state, not within any city or town, shall consist of not more than one hundred sixty (160) acres of land, which may be in one or more parcels, to be selected by the owner.*

B. Effective November 1, 1997, the homestead of any person in this state, not within any city or town, annexed by a city or town on or after November 1, 1997, owned and occupied and used for both residential and commercial agricultural purposes shall consist of not more than one hundred sixty (160) acres of land, which may be in one or more parcels, to be selected by the owner.

C. The homestead of any person within any city or town, owned and occupied as a residence only, or used for both residential and business purposes, shall consist of not exceeding one (1) acre of land, to be selected by the owner.

For purposes of this subsection, at least seventy-five percent (75%) of the total square foot area of the improvements for which a homestead exemption is claimed must be used as the principal residence in order to qualify for the exemption. If more than twenty-five percent (25%) of the total square foot area of the improvements for which a homestead exemption is claimed is used for business purposes, the homestead exemption amount shall not exceed Five Thousand Dollars ($5,000.00).

D. Nothing in the laws of the United States, or any treaties with the Indian tribes in the state, shall deprive any Indian or other allottee of the benefit of the homestead and exemption laws of the state.

E. Any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired.[38]

V. RECITALS CONCERNING MARITAL HOMESTEAD AND CURATIVE INSTRUMENTS CONCERNING MARITAL HOMESTEAD

There are two Oklahoma Title Examination Standards dealing specifically with the marital homestead interest.

The first one (7.1) provides as follows:

7.1 Marital Interests: Definition; Applicability of Standards; Bar or Presumption of their Non-Existence

"The term "Marital Interest", as used in this chapter, means the rights and restrictions placed by law upon an individual landowner's ability to convey or encumber the homestead and the protections afforded to the landowner's spouse therein.

Severed minerals cannot be impressed with homestead character and therefore, the standards contained in this chapter are inapplicable to instruments relating solely to previously severed mineral interests.

Marketability of title is not impaired by the possibility of an outstanding marital interest in the spouse of any former owner whose title has passed by instrument or instruments which have been of record in the office of the county clerk of the county in which the property is located for not less than ten (10) years after the date of recording, where no legal action shall have been instituted during said ten (10) year period in any court of record having jurisdiction, seeking to cancel, avoid or invalidate such instrument or instruments on the ground or grounds that the property constituted the homestead of the party or parties involved.

Authority: 16 O.S.A. § 4.

Comment: See Title Examination Standard 6.7 as to use of powers of attorney.[39]

The second standard, dealing with homesteads, (7.2) provides as follows:

7.2 Marital Interests and Marketable Title

Except as otherwise provided in Standard 7.1, no deed, mortgage or other conveyance by an individual grantor shall be approved as sufficient to vest marketable title in the grantee unless:

A. The body of the instrument contains the grantor's recitation to the effect that the individual grantor is unmarried; or

B. An affidavit made and recorded pursuant to 16 O.S.A. § 82 recites that the individual grantor was unmarried at the date of such conveyance; or

C. The individual grantor's spouse, identified as such in the body of the instrument, subscribes the instrument as a grantor; or

D. The grantee is the spouse of the individual grantor and that fact is recited by the grantor in the body of the instrument.

Comment: There is no question that an instrument relating to the homestead is void unless subscribed by both husband and wife. The word "void" should be emphasized, Grenard v. McMahan, 441 P.2d 950 (Okla. 1968). It is also settled that husband and wife must execute the same instrument, separately executed separate instruments being both void, Thomas v. James, 84 Okla. 91, 202 P. 499 (1921). Joinder by husband and wife must be required in all cases due to the impossibility of ascertaining from the record whether the property was or was not homestead or whether the transaction is one of those specifically permitted by statute, see 16 O.S.A. §§ 4, 6, 7 and Okla. Const. art. XII, § 2. It is essential that the distinction between a valid conveyance and a conveyance vesting marketable title be made when consulting this standard. See Title Examination Standard 1.1.

Another rather settled point is that one may not rely upon recitations, either in the instrument or in a separate affidavit, to the effect that the property was not in fact homestead. Such a recitation by the grantor may be strong evidence when the issue is litigated, but cannot be relied upon for the purpose of establishing marketability, Hensley v. Fletcher, 172 Okla. 19, 44 P.2d 63 (1935).

Although the distinction may seem tenuous, the examiner may rely upon the grantor's recitation to the effect that the grantor is unmarried. This may have its foundation in Payne v. Allen, 178 Okla. 328, 62 P.2d 1227 (1936), wherein the Court in its syllabus said, "the recitation ... is conclusive ...in the absence of proof to the contrary". (Emphasis supplied.) Perhaps the recitation of one's marital status is a recital of that person's identity, see Title Examination Standard 5.3. Or perhaps this recitation must be relied upon due to the lack of any alternative.

Caveat: The recitation may not be relied upon if, upon "proper inquiry", the purchaser could have determined otherwise, Keel v. Jones, 413 P.2d 549 (Okla. 1966).

It is not clear whether or not the spouse of the individual owner/grantor must be named in the granting clause as a grantor. Until the matter is clarified, the title examiner must so require. The case of Melson [Melton] v. Sneed, 188 Okla. 388, 109 P.2d 509 (1940), so "assumed" but specifically did not so "decide".

Definitions of the word "subscribe" may be found in various sources, but the cases seem to uphold or invalidate instruments because husband and wife did or did not "sign" or "join", without distinguishing between the two words or reconciling them

with the word "subscribe". See Atkinson v. Barr, 428 P.2d 316 (Okla. 1967); Grenard v. McMahan, 441 P.2d 950 (Okla. 1968).

One may convey to one's spouse without the grantee/spouse's joinder as a grantor, but prudence would dictate that the grantor/spouse be identified in the body of the deed as the spouse of the grantee/spouse. This would appear to be a reliable recital and comparable with a recital by a grantor that the grantor is unmarried. See Brooks v. Butler, 184 Okla. 414, 87 P.2d 1092 (1939) and Title Examination Standard 5.3.[40]

It should be noted that the caveat in standard 7.2 deals with the proper placement of the name of the non-title-holding spouse ("Homestead Spouse") within the conveyancing document. The language of this standard admits that "It is not clear whether or not the spouse of the individual owner/grantor must be named in the granting clause as a grantor." However, the standard then directs that "Until the matter is clarified, the title examiner must so require." This directive is based upon the Melson [really Melton] case. In the Melton case the record title to the homestead was held solely by the husband, who was executing a mineral conveyance. The wife signed the deed and included her name immediately following the habendum clause, and it was not in the granting clause. The trial and appellate courts held that the inclusion of her name within the document, combined with her signature made her a grantor for the purpose of meeting the statutory requirement (16 O.S.§4) for her to subscribe the instrument. This complicated resolution of this case shows the importance of both spouses signing a conveyance affecting the homestead. However, if an attorney was representing the Homestead Spouse, such attorney might want to consider whether it might be adequate for the Homestead Spouse to sign the document with his or her spouse, but, rather than showing his or her name in the "granting

clause" to include such name elsewhere in the document with a statement showing that the Homestead Spouse was joining therein for the sole purpose of waiving and subordinating his or her actual or potential homestead interest to the mortgage lien or other interest being conveyed. Otherwise, the Homestead Spouse may find that he or she has agreed to be liable for all the warranties, covenants and other obligations provided in the instrument.

CONCLUSION

The issue of how to best protect homestead interests in Oklahoma continues to be an active one. There have been periodic unsuccessful attempts by the state legislature to pass legislation to require the spouses to elect, in writing, their homestead lands, in order to allow creditors and spouses to deal with the other tracts free and clear of homestead concerns. So far the public policy which favors protecting the "Homestead Spouse" from improper actions by the title-holding spouse has superceded the need to foster certainty of title when dealing with potential homestead tracts.

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[1] In re Carothers' Estate, 196 Okla. 640, 167 P.2d 899 (1946)

[2] In re Carothers' Estate, 196 Okla. 640, 167 P.2d 899 (1946)

[3] Robert Kratovil and Raymond Werner, *Real Estate Law* (Prentis-Hall, Inc., 1983)

[4] Okla. Const. Art. 12, §2

[5] In re Gardner's Estate, 122 Okla. 26, 250 P. 490 (1926); Finerty v. First Nat'l Bank, 92 Okla. 102, 218 P. 859 (1923)

[6] 31 O.S.A. §5

[7] 31 O.S.A. §2

[8] 12 O.S.A. §706

[9] 31 O.S.A. §1

[10] 16 O.S.A. §4

[11] 16 O.S.A. §4

[12] Saak v. Hicks, Okla., 321 P.2d 425 (1958).

[13] Okla. Const. Art. XII § 3; 31 O.S.A. § 5; Cimarron Federal Sav. Ass'n v. Jones, 832 P.2d 426 (Okla.App.1991)

[14] 58 O.S.A.§311

[15] Shawnee Nat. Bank v. Van Zant, 84 Okla. 107, 202 P. 285 (1921); Holmes v. Holmes, 27 Okla. 140, 111 P. 220 (1910)

[16] 58 O.S.A.§313

[17] 16 O.S.A. §13; Irvin v. Thompson, 500 P.2d 283 (Okla. 1972); Farmers' State Bank of Ada v. Keen, 66 Okla. 62, 167 P. 207 (1917); Glaze v. Drawver, 189 Okla. 402, 117 P.2d 544 (1941)

[18] Melton v. Sneed, 188 Okla. 388, 109 P.2d 509 (1940)

[19] Payne v. Allen, 178 Okla. 328 62 P.2d 1227 (1936)

[20] Keel v. Jones, 413 P.2d 549 (Okla. 1966)

[21] 16 O.S.A. § 1, Lawson v. Bridges, 171 Okla. 502, 43 P.2d 111 (1935); Starr v. Vaughn, 113 Okla. 247, 241 P. 152 (1925).

[22] 16 O.S.A.§ 6; Kerr v. Garrison, 101 Okla. 101, 223 P. 609 (1924); Krauss v. Potts, 38 Okla. 674, 135 P. 362 (1913); Matter of Wallace's Estate, 648 P.2d 828 (Okla. 1982); Kerr v. Garrison, 101 Okla. 101, 223 P. 609 (1924); McWhorter v. Brady, 41 Okla. 383, 140 P. 782 (1913); Gomes v. Davis 197 Okla. 126, 169 P.2d 200 (1946).

[23] Alton Mercantile Co. v. Spindel, 42 Okla. 210, 140 P. 1168 (1914)

[24] 16 O.S.A.§§ 7-10; Alton Mercantile Co. v. Spindel, 42 Okla. 210, 140 P. 1168 (1914);

[25] Wilson v. Clark, 97 Okla. 299, 223 P. 668 (1924); Thomas v. James, 84 Okla. 91, 202 P. 499 (1921); Hawkins v. Corbit, 83 Okla. 275, 201 P. 649 (1921)

[26] Melton v. Sneed, 188 Okla. 388, 109 P.2d 509 (1940)

[27] Stidham v. Moore, 227 P. 128, 100 Okla. 26 (1924); Jackson v. Central Commercial Oil Co., 199 Okla. 177, 184 P.2d 974 (1947).

[28] Couch v. Addy, 35 Okla. 355, 129 P. 709 (1912).

[29] Abbott v. Independent Torpedo Co., 98 Okla. 239, 224 P. 708 (1924); Bishoff v. Myers, 101 Okla. 36, 223 P. 165 (1924); Ray v. American Nat. Bank & Trust Co. of Sapulpa, 894 P.2d 1056 (Okla. 1994); Jenkins v. Seiglar, 193 Okla. 226, 142 P.2d 851 (1943); Long v. Talley, 84 Okla. 38, 201 P. 990 (1921)

[30] Pliler v. Thompson, 202 P. 1016, 84 Okla. 200 (1921)

[31] 58 O.S.A.§1072.1

[32] Wilson v. Clark, 97 Okla. 299, 223 P. 668 (1924); Thomas v. James, 84 Okla. 91, 202 P. 499 (1921); Hawkins v. Corbit, 83 Okla. 275, 201 P. 649 (1921)

[33] Carter Oil Co. v. Popp, 70 Okla. 232, 174 P. 747 (1918).

[34] Steiner v. Steiner, 156 Okla. 255, 10 P.2d 641 (1932).

[35] Wilson v. Clark, 97 Okla. 299, 223 P. 668 (1924); Long v. Talley, 84 Okla. 38, 201 P. 990 (1921).

[36] Shannon v. Potter, 83 Okla. 66, 200 P. 860 (1921); Hall v. Powell, 8 Okla. 276, 57 P. 168 (1899).

[37] Farmers' Union Co-op. Royalty Co. v. Adams, 182 Okla. 245, 77 P.2d 68 (1938); Treese v. Shoemaker, 80 Okla. 235, 195 P. 766 (1921); Francen v. Oklahoma Star Oil Co., 80 Okla. 103, 194 P. 193 (1920); Carter Oil Co. v. Popp, 70 Okla. 232, 174 P. 747 (1918); Kelly v. Mosby, 34 Okla. 218, 124 P. 984 (1912); Billy v. Le Flore County Gas & Elec. Co., 190 Okla. 88, 120 P.2d 774 (1941).

[38] 31 O.S.A. §2; also see: "Homestead Exemption Changes", Ezzell, J. David, 68 OBJ 3797 (Nov. 22, 1997)

[39] 16 O.S.A., Ch. 1, App., Standard 7.1

[40] 16 O.S.A., Ch. 1, App., Standard 7.2