# Marital Homestead Rights Protection: Impact of *Hill v. Discover Card?*

*By Kraettli Q. Epperson*

## THE LAW ON 'MARITAL HOMESTEAD' MAY HAVE CHANGED

The recent Oklahoma Court of Civil Appeals holding in the *Hill v. Discover Card* case may mean that in certain circumstances there is no longer a requirement for both spouses' simultaneous execution of a single deed (or mortgage) to a third party, even though both spouses are living, married, and the property is still their homestead. Such situation, under *Hill*, would arise where one spouse has already conveyed his or her legal interest in the homestead to the other spouse. (*Hill v. Discover Card*, 2008 OK CIV APP 111[1]) Such opinion may change the long standing protection created under the constitutional and statutory prohibition against the unilateral conveyance (or encumbrance) of the "marital homestead" to a third party.

### THE MARITAL HOMESTEAD IS ONE OF THE FOUR TYPES OF HOMESTEAD

The primary home or residence of an individual, a married couple or a family is referred to in Oklahoma within the legal profession as the "homestead," or, more specifically, depending on the legal question involved, the "assessment homestead," the "execution homestead," the "probate homestead" or the "marital homestead."[2]

Oklahoma is known as a "populist" state, meaning its statutes reflect a leaning toward protecting those citizens and residents who were, and still are, perceived by the state's policy makers as needing safeguards created and enforced by the government. This includes shielding the debtor from the clutches of the "overreaching" creditor through enactment of anti-deficiency statutes,[3] and preventing a spouse and the minor children from being abandoned and left homeless by a thoughtless and selfish spouse through enforcement of the marital and probate homestead laws,[4] among others.

Historically, public policy sought to protect both the wife and the family, with three principal reasons being given for the creation of homestead laws:

1) To protect the family unit from forced eviction from its home through the enforcement of general creditors' claims;

2) To provide protection to the widow after the death of her husband; and

3) To protect the wife from ill deeds of the husband.[5]

Currently, such homestead rights are equally available to either a husband or wife.

The homestead right is not shown in the land records, and it exists alongside but separate from the normal ownership interest wherein one or more persons hold record legal title to land. This homestead right is overlaid on the recorded legal title interest, such as a fee simple absolute, and, depending on the type of homestead right being asserted, can be held by one or more single persons or by a married couple, and, when there are multiple holders of legal title, they can hold as tenants in common or as joint tenants with right of survivorship. The homestead right is understood better if it is recognized as a personal "right" held by a person and not as an "interest" in real estate. This is a better approach because any sort of "interest" in real estate can be conveyed (unless such right to convey is expressly restricted of record), but a right held personally can be waived for a particular transaction but cannot be conveyed permanently to another person (regardless of whether it is a spouse or a third party).

Unlike dower and courtesy, homestead does not have its roots in the common law. The Oklahoma Supreme Court has explained that the homestead, as it exists in Oklahoma, is a creature of the state constitution and statutes, nothing like it being known at common law.[6] It is a purely constitutional and statutory creation based on public policy considerations.

There are four categories of homestead rights in Oklahoma, including:

1) **assessment:** an *ad valorem* tax exemption, whereby an owner elects which tract of land is his homestead, and the owner receives a discount on his annual county *ad valorem* real property taxes;

2) **execution:** a prohibition exempting the debtor's homestead (for either an unmarried individual or a married couple) from execution for general creditors' debts (as distinguished from special debts whereby a specific tract of land is voluntarily encumbered to serve as collateral for the debt, *i.e.*, a real estate mortgage);

3) **probate:** the preservation of the equivalent of a life estate in the couple's homestead for the benefit of a surviving spouse (and any minor children) when a spouse dies, even where the deceased spouse was the holder of all of the record title; and

4) **marital:** a protection of the spouses' homestead rights against voluntary encumbrancing or conveyancing by one spouse without the joinder of the other spouse, even where the spouse who is attempting to affect the title holds all of the record legal title.[7]

## A SUMMARY OF THE FACTS AND DECISION IN *HILL*

### *The Operative Facts*

In brief summary, the operative facts of the *Hill* case occurred in the following order:

1) the husband, Larry Jennings, unilaterally conveyed of record his interest in the homestead (which he had been holding as a joint tenant with his wife) to his wife, Sue Ann Jennings, then;

2) the wife, Sue Ann, (falsely stating in the deed she was single) unilaterally conveyed of record the land to a third party (plaintiffs Hill herein), then;

3) a general creditor of the first couple (defendant, Discover Card) properly filed a statement of judgment in the land records where it immediately became a lien on all lands actually owned by such first couple (the Jennings), then;

4) the first couple (the Jennings) then signed (both of them) and recorded an identical deed of the same land to the second couple (the Hills), then;

5) the second couple (the Hills, the plaintiffs herein) thereafter filed an action against the creditor to quiet title extinguishing any money judgment lien claim on the land.[8]

### *The Questions to Be Resolved*

The four questions which had to be resolved to reach a decision in *Hill* were:

1) Was the recorded transfer of the legal title to the marital homestead lands from the husband, Larry, to his wife, Sue Ann, valid?

2) Did such transfer of the legal title from the husband, Larry, to his wife, Sue Ann, include a transfer and relinquishment of any further claim by Larry to the protections provided under the Oklahoma Constitution and statutes concerning marital homesteads?

3) Was the conveyance of the legal title for the marital homestead lands from Sue Ann to the Hills invalid, due to the absence of Sue Ann's husband's signature on the same deed as her signature, which signature would have shown his consent to such transfer?

4) Did the judgment lien held by Discover Card against Larry and Sue Ann Jennings attach to and become perfected against the subject lands?

*The Trial Court Decision*

The trial court found the deed from Larry to his wife, Sue Ann, to be valid, but held that the deed from Sue Ann Jennings to the Hills was invalid (due to the absence of Larry's signature), thereby restoring title to the Jennings, but then it held that the Discover Card judgment lien failed to attach to the Jennings' land, stating (as set forth in ¶5 in the *Hill* case):

> ¶5 *The trial court heard argument of the parties' counsel on May 23, 2007, and issued its order on July 5, 2007. The trial court made the following findings:*
>
> > *[Discover's] unsecured judgment against the Jennings was only filed of record against the Jennings after their [sic] was a conveyance of title to [the Hills] by Mrs. Jennings,* ***defective in its failure to convey as well the homestead interest of Mr. Jennings****, and misleading in its characterization of Mrs. Jennings as a single woman. The only notice of judgment filed, the notice against the Jennings, was filed as a general judgment,* ***devoid of even a reference to the real property conveyed to the [Hills].*** *These actions on the part of [Discover] do not constitute legal notice to the [Hills] of the claim against the subject property, and do not meet [sic] an operation of law which perfects the purported lien against that property.*

Assuming this trial court decision was left standing, you would have the situation where the debtors, the Jennings, still owned the subject lands instead of the Hills, but the creditor, Discover Card, had lost its properly filed judgment lien (*i.e.*, apparently due to the absence of a "reference" to specific real property). It should be noted that a statement of judgment, prepared and then submitted to the local county clerk by the creditor, pursuant to 12 O.S. §706, is on a form created by the administrator of the courts, and that neither the statute nor the form calls for the listing of any specific lands. Such statutory lien is intended to be a lien on any and all of the debtor's real estate in that county, whether owned when the statement of judgment is initially filed, or later acquired by the debtor.[9] The appellate court found that the judgment lien did not attach to the subject land for reasons different than those used by the trial court, so this trial court holding – which implies that the statement of judgment must describe the lands being covered by the lien — can be ignored.

*The Appellate Court Decision*

The appellate court answers the four essential questions, listed above, as follows:

1) a deed from one spouse to the other spouse is valid to transfer legal title to such spouse without the grantee's signature on the deed, because:

> (a) "[c]onveyance of the homestead from one spouse to the other is not a sale of the homestead within the meaning of Sec. 2, Art. XII, Constitution" (¶7 of *Hill*, quoting *Howard v. Stanolind Oil and Gas Co.*[10])
>
> (b) a husband's unilateral mortgage of the homestead to the wife does not require the wife's signature because "no effort was made to divest the wife of her estate or right. That remained unimpaired. I can see no reason why she should be required to execute the deed to herself in order [sic] to its validity." (¶8 of *Hill*, quoting *Brooks*, which was quoting *Furrow*[11])
>
> (c) "The case of a deed to the wife is not within the spirit of this section [on marital homestead], which surely cannot intend that the wife do the vain and absurd thing of executing, as grantor, a deed to herself as grantee." (¶8 of *Hill*, quoting *Hall*[12])

2) such unilateral deed of the homestead from one spouse to the other spouse permanently transfers the grantor's marital homestead claims, because:

(a) (*Hill* at ¶10) "There is a statutory presumption that every estate in land granted by a deed shall be deemed an estate in fee simple unless limited by express words." *Clearly Petroleum Corp. v. Harrison*, 1980 OK 188, ¶8, 621 P.2d 528, 532, and 16 O.S. §§18 & 29, and *Atkinson v. Barr*, 1967 OK 103, ¶22, 428 P.2d 316, 320 [note that the *Clearly* case was dealing solely with the question as to whether a conveyance granted an easement or a fee simple, and note this author's discussion of *Atkinson* below]

(b) (*Hill* at ¶10) "Further, the quit-claim deed from Larry [the husband] to Sue Ann [his wife] operated to convey Larry's homestead rights to Sue Ann in addition to all other right, title, and interest he had in the property."

(c) (*Hill* at ¶11) "We find no ambiguity in Larry's quit-claim deed to Sue Ann. The deed intended to and did convey all the right, title, and interest, including **Larry's homestead interest**, to Sue Ann."

3) (*Hill* at ¶11) the Hills received valid title without Larry's signature, because:

"Consequently, at the time that Sue Ann conveyed the property to the [third parties] Hills, it was unnecessary for Larry [her husband] to relinquish his homestead rights to the property **as he had already done so in the quit-claim deed [to Sue Ann].**"

4) (*Hill* at ¶13) while the appellate court held that the "statement of judgment [was] properly filed", the creditor still has no lien on the subject lands, because:

*Discover also contends that the trial court erred when it ruled that* ***a statement of judgment properly filed*** *pursuant to 12 O.S.§706 is insufficient to create a lien and that some additional notice to the Hills was required. Since we hold that the quit-claim deed from Larry to Sue Ann was valid and operated to divest Larry of his homestead rights and since Sue Ann, the sole owner of the property conveyed the property to the Hills before Discover's judgment lien,* ***we find it unnecessary to address this issue as the lien did not attach to the property during either Sue Ann's or Larry's ownership.***

The result of this decision appears to be that hereafter, title examiners will no longer need to ensure that a conveyance or encumbrance of the homestead includes the non-title-holding spouse's signature, if the non-title-holding spouse had previously deeded the legal title to the other spouse.

Such conveyance, placing the entire legal title in one of the two spouses, might be for legitimate reasons, such as to avoid probate, to avoid creditors of the grantor spouse, etc. In those situations (arising pre-*Hill*), the non-title-holding spouse would still be protected against adverse actions by his or her spouse due to such non-title-holding spouse's marital protection, which would require the non-title-holding spouse's signature on any subsequent deeds or encumbrances. But now (post-*Hill*), such conveyances to the other spouse may have the grave consequence of stripping away such constitutional protection.

It should be noted that this significant ruling is not made expressly prospective in nature, which would have thereby made it apply only to future conveyances; therefore, it is possible that it affects all existing deeds and titles as well.[13]

## PROBLEMS WITH THE *HILL* DECISION

*General Background*

According to the Oklahoma Constitution, Art. 12, Section 2:

*The homestead of the family shall be, and is hereby protected from forced sale for the payment of debts, except for the purchase money therefore 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.*

This constitutional homestead is the land that is occupied by the family as a home.[14]

The state Legislature was expressly empowered by such constitutional language to prescribe the "manner" in which a spouse would give their "consent" to the sale (including the conveyancing or encumbrancing) of the marital homestead. Under 16 O.S. §4(A):

*A. No deed, mortgage, or conveyance of real estate or any interest in real estate, other than a*

*lease for a period not to exceed one (1) year, shall be valid unless in writing and subscribed by the grantors.* ***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.*

In recognition of the practical realities associated with married life, the state Legislature, when enacting the initial implementation statutes, carved out a few situations (*i.e.*, abandonment, incapacity, and non-homestead) where it was not deemed necessary for both spouses to sign a deed conveying lands which was the marital homestead, including:

16 O.S. §6 provides (upon abandonment):

*Where the title to the homestead is in the husband, and the wife voluntarily abandons him for a period of one (1) year or from any cause takes up her residence out of the state, he may convey, mortgage or make any contract relating thereto without being joined therein by her; and where the title to the homestead is in the wife and the husband voluntarily abandons her, or from any cause takes up his residence out of the state for a period of one (1) year she may convey, mortgage or make any contract relating thereto without being joined therein by him.*

16 O.S. §7 provides (upon incapacity):

*In case of a homestead held in joint tenancy, if one spouse becomes incapacitated, upon application of the other spouse to the district court of the county in which the homestead is located, and upon due proof of said incapacity, the court may issue an order permitting said other spouse to sell, convey, lease, lease for oil and gas mining purposes, or mortgage the homestead. For purposes of this section and sections 3 and 4 of this act "incapacitated" or "incapacity" means impairment due to mental illness, mental deficiency, physical illness or disability, to the extent the individual lacks sufficient understanding or capacity to make or communicate responsible decisions.*

16 O.S. §§8-10, define the judicial procedure to establish such incapacity and to authorize such sale.

16 O.S. §13 provides (if non-homestead):

*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.*

However, the obstacle to an examiner approving a title where any of these three circumstances might apply – without a judicial proceeding establishing the necessary facts — is that all title examiners must examine title for lenders, buyers or title insurers on the basis of looking for "marketable title," and such title must be determined based on what the public land records show.[15] Unless there is a court proceeding undertaken (as is expressly required to establish incapacity) and the resulting decree filed in the land records, no examining attorney can pass the title even where someone insists that one of these three situations is present. This reluctance is because the consequences of a deed failing to include both spouses' signatures, if it turns out that the land was their marital homestead, is a void deed, a disastrous result.[16]

None of these three statutory exceptions apply to our fact pattern here in the *Hill* matter: 1) there was no allegation of abandonment, 2) there was no claim of incompetency, and 3) the property was admittedly the marital homestead.

Pre-*Hill* precedential case law in Oklahoma supported the first point decided by the *Hill* appellate court. Yes, a unilateral conveyance by one spouse to the other of the marital homestead is valid to convey the legal title. This case-law created principle is reflected in Oklahoma Title Examination Standards 7.1 and 7.2, which deal with marital interests, as approved by the Oklahoma Bar Association House of Delegates.[17] Standard 7.2 provides in part:

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

> **Yes, a unilateral conveyance by one spouse to the other of the marital homestead is valid to convey the legal title.**

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

The practice followed by real estate attorneys in Oklahoma is to require that every deed, or encumbrance (such as a mortgage[18]) must include the statement of marital status and joinder of spouse, if married, except in the single instance covered by TES 7.2(C) (set forth above), which is when the grantee is one of the spouses. Such exception (TES 7.2(C)) matches the first of the two deeds involved in our fact pattern in *Hill* (*i.e.*, from husband Larry to wife Sue Ann).

Also, it would be hard — **assuming** the court's decision on points one to three were correct or were conceded — to argue with point four as decided by the *Hill* court. Yes, if the title to the lands was effectively conveyed from the Jennings to the Hills, **before the judgment lien against the Jennings was created by filing the statement of judgment in the land records**, then the Hills took title free from such lien.

*Unilateral Deed to Other Spouse Does Not Transfer Grantor's Homestead Right*

However, the pronouncements in *Hill* regarding points two and three are directly contrary to three existing Oklahoma Supreme Court opinions.

When title to the marital homestead is being conveyed to the other spouse, there are three possible combinations as to how title was held before such conveyance: 1) all of the title is held by the grantor spouse, 2) the title is held jointly by the spouses (either as tenants in common or joint tenants), or 3) all of the title is held by the grantee spouse.

If one was trying to prove that a spouse grantee had received the entire legal title including a permanent transfer of any personal homestead protections, the third scenario (*i.e.*, grantor did not hold any legal title at the time of executing the deed) is the most supportive of such an argument. This is because the granting spouse has only a homestead claim to transfer and has no legal title to convey, so they "must" intend (it would be argued) that they were conveying something — whatever they had — meaning their homestead rights. In the other two scenarios (*i.e.*, the spouse grantor had either all of or half of the legal title to convey), there could be an effective counter argument that the spouse grantor had some legal title to convey, so that it would be unclear whether the intent was to convey only the grantor's legal title or to transfer such legal title plus transfer permanently all of his or her homestead right. The pre-*Hill* Oklahoma Supreme Court opinion (*Atkinson*, discussed immediately below), which is "on-point" with the *Hill* issues, happens to deal with facts identical to the third scenario set out above (*i.e.*, no initial legal title in grantor), and, consequently, its holding cannot be explained away when it holds that any conveyance between spouses does not convey the grantor spouse's marital homestead right.

In the 1967 *Atkinson* case, the Oklahoma Supreme Court rendered a decision where the facts were as follows: 1) the entire legal title was in the wife (scenario three above), and 2) the husband (who held no legal title) unilaterally deeded the marital homestead to the wife (who had used her money to initially acquire the land, and took and held title exclusively in her name), and 3), while the husband was alive, the wife unilaterally deeded the marital homestead to third parties, her children (not by this husband). Such fact pattern is, in all relevant aspects, identical to the one in *Hill*.

The appellate court in *Hill* was aware of and cited *Atkinson* for one point (*i.e.*, a unilateral deed from one spouse to the other spouse is valid to convey the legal title covering the marital homestead, at ¶10 in *Hill)* and then failed to follow the rest of the holding in such case when considering this later point (*i.e.*, whether the grantee spouse can subsequently unilaterally convey the marital homestead to a third party).

At ¶9 of *Atkinson*, the Oklahoma Supreme Court held (directly contrary to *Hill*) that:

> *The trial court found that the property was at all times the homestead of Vinnin [the husband] and Annette [the wife] and concluded as a matter of law that the warranty deed, dated August 17, 1949, from Annette to her children… was void because it did not bear the signature of Vinnin as required by 16 O.S. §4. The court further concluded as a matter of law that when Vinnin executed and delivered to Annette the quit-claim deed of August 12, 1949, it was his intent to convey to Annette any and all right, title and interest he might have in the property,* ***except his homestead right****.*

Finally, at ¶18 of *Atkinson*, the Oklahoma Supreme Court held, *"It is our conclusion that the warranty deed [from Annette unilaterally to her children] was void because Vinnin did not sign it and such conclusion by the trial court was correct."*

Also, in another case cited by the appellate court in *Hill* at ¶8 & 9, to support its position that the unilateral deed from husband Larry to wife Sue Ann was valid, the Oklahoma Supreme Court adopted and quoted favorably this language from an Alabama case:

> ***A conveyance of homestead premises by the husband to the wife,*** *while having effect as an alienation of the land in the sense of passing the legal title to her,* ***is yet not an alienation of the homestead,*** *since that [the homestead right] does not thereby pass either from the husband, the wife, or the family, but is still in every essential quality and attribute, with respect to possession, enjoyment, and all the rights necessary to its protection as exempted property, the homestead alike of the husband, the wife and their children. Brooks v. Butler,* 1939 OK 132, ¶18, 87 P.2d 1092, 1096.

It should be noted that another prior Oklahoma Supreme Court case similarly held that:

> *The constitutional provisions are set forth in article 12, secs. 1, 2, and 3, of the constitution, and are designed to protect the family while both husband and wife are living,* ***regardless of which one of them is vested with title to the land occupied as the homestead.*** *In re Carothers'* ¶10.

## CONCLUSION: JOINDER OF SPOUSE IS STILL REQUIRED

Based on three precedential cases pre-dating *Hill* (*Atkinson, Brooks,* and *In re Carothers'*), the law of Oklahoma is clear that the homestead rights of the husband Larry, in the *Hill* case, survived his conveyance of his legal title to his spouse, Sue Ann, and, consequently, the later unilateral conveyance by Sue Ann of the marital homestead to the Hills, was void, because Larry was living and it was still their homestead.

Hence, the holdings of the Oklahoma Supreme Court in *Atkinson, Brooks* and *In re Carothers'* remain the law of Oklahoma.

Out of deference for the precedential nature of an Oklahoma Supreme Court case, and due to concern about passing title where such title might be "void," this author recommends that a cautious title examiner continue to require that any land must be conveyed with disclosure of marital status and joinder of spouse, if any. And furthermore, any prior deeds discovered in a review of a chain of title which fail to disclose that the grantor was unmarried, or if married, was joined by his or her spouse, should continue – post-*Hill* – to be viewed as being defective and must be cured. The only exception to such required joinder would concern a conveyance from one spouse as grantor to the other spouse as grantee of the legal title, as discussed in Title Examination Standard 7.2(C).

1. On Dec. 1, 2008, Request for Certiorari to the Oklahoma Supreme Court was denied, from an adverse decision from the Court of Civil Appeals (Division II), and on Dec. 31, 2008 mandate issued. The Oklahoma Court of Civil Appeals opinion was published in the *Oklahoma Bar Journal* on Jan. 17, 2009, Vol. 80, No. 2, page 132, and in the Oklahoma Supreme Court system as 2008 OK CIV APP 111.

2. This author previously wrote about the four types of homesteads in Oklahoma in an article in the *Oklahoma Bar Journal* in 2004: "Real Estate Homesteads in Oklahoma: Conveying and Encumbering Such Interest," 75 *The Oklahoma Bar Journal* 1357 (May 15, 2004); some of the text in this current article is repeated from that earlier article; a copy of this earlier article (as paper #162) is available on the author's Web site: www.EppersonLaw.com.

3. 12 O.S.§686.

4. Ok. Const., Art. 12, Secs. 1-2; 16 O.S. §4; 31 O.S. §1(A)(1); 58 O.S.§311.

5. Raymond J. Werner, *Real Estate Law* (Southwestern — Eleventh Edition — 2002), Section 19.03, Homestead.

6. *In re Carothers' Estate*, 1946 OK 111, ¶10, 167 P.2d 899, 902.

7. Ok. Const., Art. 12, Secs. 1-2; 16 O.S.§4; 31 O.S.§1(A)(1); 58 O.S.§311;

68 O.S.§§2888-2889, 2892-2893, 2901.

8. *Hill v. Discover Card*, 2008 OK CIV APP 111, ¶2, ___ P.3d ___, ___; the detailed facts as shown in the Discover Card "Petition for Rehearing Before the Court of Appeals and Brief in Support of the Petition" follow:

| Date of Filing | Instrument | Comment |
|---|---|---|
| 3/18/96 | Deed | Larry & Sue Ann Jennings acquire title to property in joint tenancy. |
| 4/4/03 | Quit-Claim Deed | Larry Jennings gives quit-claim deed to Sue Ann Jennings. |
| 10/2/03 | Joint Tenancy Warranty Deed | Sue Ann Jennings (falsely claiming to be a single woman) conveys property to Hills. Larry Jennings does not join in the execution of the conveyance. |
| 4/8/04 | Statement of Judgment | Discover Bank records a statement of judgment with the county clerk of Rogers County reciting that it recovered judgment against Larry and Sue Ann Jennings in Rogers County Case Number CS-03-351 on April 1, 2004. |
| 9/28/04 | Warranty Deed | Larry and Sue Ann Jennings as husband and wife convey property to Hills. |
| 12/12/05 | Divorce Decree | Larry and Sue Ann Jennings' divorce decree filed in the Rogers County court clerk's office. |

9. The author has written several articles concerning the creation of money judgment liens, which are available on his Web site: www.EppersonLaw.com, including: "Have Judgment Lien Creditors Become 'Bona Fide Purchasers'?", 68 *Oklahoma Bar Journal* 1071 (March 29, 1997) (paper # 106); "Judgment Lien Creation Now Requires a Judgment Affidavit," 59 *Oklahoma Bar Journal* 3643 (Dec. 1988) (paper # 32).

10. *Howard v. Stanolind Oil & Gas Co.*, 1946 OK 56, ¶36, 169 O.2d 737, 744.

11. *Brooks v. Butler*, 1939 OK 132, ¶13, 87 P.2d 1092, 1095; *Furrows v. Athey*, 33 N.W. 208, 209 (Neb. 1887).

12. *Hall v. Powell*, 1899 OK 50, ¶5, 57 P.168, 170.

13. OK Const., Art. 2, Sec. 7.

§7. Due process of law

No person shall be deprived of life, liberty, or property, without due process of law.

14. *In re Carothers' Estate*, 1946 OK 111, ¶16, 167 P.2d 899, 903; *In re Gardner's Estate*, 1926 OK 167, ¶14, 250 P. 490, 493-494.

15. In 1982, the Oklahoma Supreme Court endorsed the Title Examination Standards of the Oklahoma Bar Association by saying: "we deem such Title Examination Standards and the annotations cited in support thereof to be persuasive." *Knowles v. Freeman*, 1982 OK 89, ¶16, 649 P.2d 532, 535.

TES 1.1 MARKETABLE TITLE DEFINED

A marketable title is one free from apparent defects, grave doubts and litigious uncertainty, and consists of both legal and equitable title fairly deducible of record.

16. *Wilson v. Clark*, 1924 OK 233, ¶8, 223 P. 668, 670-671.

17. TES 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. §4.

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

18. There is an earlier case, *Cimarron Federal Sav. Assn. v. Jones*, 1991 OK CIV APP 67, 832 P.2d 426 (approved for publication by the Oklahoma Supreme Court), which allows the enforcement of a purchase money mortgage against the execution and marital homestead even without the signature of the non-title holding spouse. Transactional attorneys and title attorneys typically ignore such holding and require the signature of the non-title holding spouse because 1) it is usually unclear in the record whether the loan is a purchase money mortgage, and 2) because the case is based on an erroneous assumption that a purchase money vendor's claim and a purchase money mortgage are the same thing. OK Const. Art. 12, Section 2, expressly allows a general execution against the execution homestead for a purchase money vendor's claim, which claim is not evidenced by a signed mortgage, but also requires the signature of the non-title holding spouse on any mortgage, whether purchase money or not.

19. *In re Carothers' Estate*, 1946 OK 111, ¶10 167 P.2d 899, 900.

## ABOUT THE AUTHOR

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