

“A HOUSE DIVIDED”: THE RIGHTS AND DUTIES OF HOMESTEADERS, LIFE TENANTS & REMAINDERMEN

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* J.D., University of Houston Law Center, 1987.

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I. INTRODUCTION: COMPETING INTERESTS

Anyone who has dealt with decedent's estates for any considerable period of time has likely confronted one or all of the following scenarios:

- A. A person dies intestate owning separate and community property, leaving behind a surviving spouse, from a second marriage that does not get along with the decedent's children from a previous marriage;
- B. A person dies owning community and separate property, and the decedent's will leaves it to someone other than a surviving spouse;
- C. A person either dies intestate leaving several surviving descendants or has a will devising property to the children or grandchildren in equal, undivided interests;
- D. A person devises only a life-estate to someone, or a surviving spouse inherits a life estate in one-third of a real estate, and the remainder passes to individuals with whom the life-tenant does not get along.

Each of these common scenarios give rise to competing interests, particularly concerning real estate and, more particularly, with respect to the homestead.¹

1. See W.R. Habeeb, 171 A.L.R. 649 (1947).

This article will explore the often confounding relationship between the homesteader, the life tenant, or both, and the remaindermen or co-tenants.² This article will also discuss the various rights and duties among them.³

II. THE HOMESTEAD

A. *What Is a Homestead?*

The primary purpose of the homestead is to preserve the family as a basic unit of society.⁴ A secondary purpose is to protect the head of the family, or debtor, individual.⁵ The homestead allows heads of families to continue to support themselves and their families.⁶ The homestead right was thought to benefit society as a whole because it prevented the family from becoming a public charge.⁷

The “fundamental idea connected with a homestead is. . .that of a place of residence for the family, where the independence and security of a home may be enjoyed, without danger of its loss, or harassment and disturbance.”⁸ Homestead protections are liberally construed to prevent people from losing their homes.⁹ A homestead is defined in the Texas Constitution and in the Texas Property Code, and the definition distinguishes between whether the homestead is rural or urban and whether the homesteader has a family or is a single adult.¹⁰ The following is a summary of the extent of the homestead right:

Family - Urban Homestead

- One or more contiguous lots amounting to not more than 10 acres;
- in a city, town, or village;
- used for the purposes of a home or both as an urban home and a place to exercise a business or calling of the claimant;
- together with improvements.¹¹

Family - Rural Homestead

- 200 acres;
- not in a city, town, or village;

2. See *infra* Parts II–IV.

3. See *infra* Parts II–IV.

4. See *Hoeffling v. Hoeffling*, 167 S.W. 210, 359 (Tex. 1914) (illustrating the historical view of homestead exemption).

5. *Woods v. Alvarado State Bank*, 19 S.W.2d 35, 36 (Tex. 1929).

6. *Id.*

7. See *Trawick v. Harris*, 8 Tex. 312, 315 (1852).

8. *Cocke v. Conquest*, 35 S.W.2d 673, 678 (Tex. 1931); *Grant v. Clouser*, 287 S.W.3d 914, 919 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

9. See *Gilbreath v. Steed*, 2013 WL 2146230 at *4 (Tex. App.—Tyler 2013); *Solomon v. Lesay*, 369 S.W.3d 540, 554 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

10. Compare TEX. CONST. art. XVI, § 51, with TEX. PROP. CODE ANN. §§ 41.002(a), 41.005(b) (West 2016).

11. TEX. CONST. art. XVI, § 51; PROP. §§ 41.002(a), 41.005(b).

- used for the purposes of a home;
- together with improvements.¹²

Single Adult - Urban Homestead

- One or more contiguous lots amounting to not more than 10 acres;
- in a city, town, or village;
- used for the purposes of a home or both as an urban home and a place to exercise a business or calling of the claimant;
- together with improvements.¹³

Single Adult - Rural Homestead

- 100 acres;
- not in a city, town, or village;
- used for the purposes of a home;
- together with improvements.¹⁴

A person cannot claim both a rural homestead and an urban homestead.¹⁵ A homestead must be attached to land.¹⁶ Mobile homes are generally considered personality, therefore they are not normally considered to be a homestead.¹⁷ If, however, a mobile home becomes an improvement, it can become protected as a homestead.¹⁸ An improvement requires annexation with an intent to make the personality a permanent fixture to real property.¹⁹

B. How Is the Probate Homestead Acquired?

The probate homestead right is acquired as a matter of law based upon whether there is a surviving spouse, surviving minor children, or both.²⁰ Texas does not require designation of a homestead; it arises automatically.²¹ The homestead right arises at the date of death of the decedent spouse, and it is immaterial whether the probate court has set aside the homestead.²² Furthermore, the homestead right arises even if the deceased spouse's will is not probated.²³ The respective interests of the children and surviving spouse,

12. TEX. CONST. art. XVI, § 51; PROP. §§ 41.002(b)(1), 41.005(a).

13. TEX. CONST. art. XVI, § 51; PROP. §§ 41.002(a), 41.005(b).

14. TEX. CONST. art. XVI, § 51; PROP. §§ 41.002(b)(2), 41.005(a).

15. *Farmington v. First Nat'l Bank of Bellville*, 753 S.W.2d 248, 250 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

16. *See Norris v. Thomas*, 215 S.W.3d 851, 857–58 (Tex. 2007) (showing how a yacht used as primary residence did not qualify as a homestead exemption because not attached to land).

17. *Id.* at 858.

18. *Id.* at 854–55.

19. *Id.* at 855.

20. TEX. EST. CODE ANN. § 102.003 (West 2016).

21. *Blake v. Fuller*, 184 S.W.2d 148, 151 (Tex. Civ. App.—Dallas 1944, no writ); *Good v. Good*, 293 S.W. 621 (Tex. Civ. App.—Waco 1927, no writ) (explaining that homestead rights vests immediately on death and continues until abandoned).

22. *Am. Bonding Co. v. Logan*, 166 S.W. 1132, 1137 (Tex. 1914).

23. *Barrow v. Webb*, 208 S.W.2d 157, 159 (Tex. Civ. App.—Eastland 1948, no writ) (illustrating that because J. C. and Laura were residing upon the property as their homestead, Laura had the right, under

including homestead rights, are unaffected and not contingent upon disposition of the homestead as community property of the decedent and the surviving spouse or as separate property of the decedent.²⁴ There is no legal difference between vesting in the transfer of a homestead or the transfer of other real property to a surviving spouse upon the death of a decedent; both are treated and transferred in the same manner.²⁵ If a probate court takes any action regarding a homestead, it will be void unless the constitution permits it because probate courts do not administer probate homesteads.²⁶ However, the probate court has jurisdiction to determine a surviving spouse's homestead rights despite the appointment of an independent executor.²⁷

Even when a divorce action is pending when the decedent dies the surviving spouse is still entitled to a homestead or an allowance in lieu thereof.²⁸ Furthermore, a common law spouse has the same rights as does one who became a spouse through ceremonial marriage.²⁹ If the decedent's estate includes a homestead, the surviving spouse cannot decline to assert homestead right and instead take an allowance in lieu thereof under Texas Estates Code § 353.053.³⁰ However, a surviving spouse may be entitled to an allowance in lieu of homestead where the mortgage debt is substantial and the equity is minimal.³¹ If the spouse does not claim the homestead right, the minor children can claim it.³² A minor child's right to the homestead is extinguished upon reaching the age of majority.³³ When an incapacitated person under guardianship "is incapable of forming the intent necessary to establish homestead," a guardian can establish that intent for the incapacitated individual and take the necessary steps to secure homestead protection.³⁴ The fact that a surviving spouse owns a house where the surviving spouse could live does not preclude assertion of the homestead right of occupancy, even though the spouse claimed that house as homestead for property tax purposes.³⁵ The homestead right is not merely during the widowhood of the surviving spouse but last as long as the surviving spouse might elect to use or occupy the same as the homestead.³⁶ A homesteader "is

the law, to occupy the premises as her home so long as she lived, regardless of whether J.C.'s will was probated).

24. TEX. EST. CODE ANN. § 102.002 (West 2016).

25. *Id.* § 102.003.

26. *Thompson v. Thompson*, 236 S.W.2d 779, 788 (Tex. 1951).

27. *Womack v. Redden*, 846 S.W.2d 5, 9 (Tex. App.—Texarkana 1992, writ denied).

28. *Cooper v. Cooper*, 168 S.W.2d 686, 690 (Tex. Civ. App.—Galveston 1943, no writ).

29. *Chapman v. Chapman*, 41 S.W. 533, 535 (Tex. Civ. App. 1897, writ ref'd).

30. EST. § 102.003.

31. *Ward v. Braun*, 417 S.W.2d 888, 891 (Tex. Civ. App.—Corpus Christi 1967, no writ).

32. *Id.*

33. *Id.*

34. *State ex rel. Tex. Dep't of Mental Health & Mental Retardation v. Ellison*, 914 S.W.2d 679, 684 (Tex. App.—Austin 1996, no writ).

35. *Hunter v. Clark*, 687 S.W.2d 811, 815–16 (Tex. App.—San Antonio 1985, no writ).

36. TEX. CONST. art. 16, § 52.

not required of her that she both use and occupy, but only that she either use or occupy.”³⁷ It is important to add that “[i]n the absence of actual occupancy, [however], there must be an intention by the head of the family to reside upon it with the family as a home, coupled with some overt act of preparation evidencing that intention.”³⁸ However, “[m]ere intention alone is not sufficient.”³⁹ The homestead right ceases upon the death of the homesteader.⁴⁰ It does not extend to a spouse.⁴¹ In *Murphey*, upon the death of the first wife an undivided one-half interest in the land passed to the plaintiffs as the heirs of the first wife.⁴² Thomas Murphey, the surviving husband, and his second wife were entitled to continue to occupy the homestead to the exclusion of all others so long as he lived.⁴³ However, upon his death, his surviving widow’s right of use and occupancy was limited to the descendant of Thomas Murphey’s interest in the property, and it was subject to the interest that the children of the first marriage inherited and their right to demand a partition thereof.⁴⁴ Therefore, the appointment of a receiver was found to be proper.⁴⁵

C. Can a Homestead Be Subject to Debts or Liens?

A homestead passes to a decedent’s heirs and is not subject to the decedent’s debts.⁴⁶ Furthermore, neither sale nor abandonment affect the status.⁴⁷ If a spouse or minor child survives the decedent, the homestead is liable only for payment of the following debts:

- (1) purchase money for the homestead;
- (2) taxes due on the homestead;
- (3) work and material used in constructing improvements on the homestead if the requirements of article XVI, section 50(a)(5), of the Texas Constitution, are met;
- (4) an owelty of partition imposed against the entirety of the property by a court order or written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting

37. *Rancho Oil Co. v. Powell*, 175 S.W.2d 960, 963 (Tex. 1943).

38. *Gilmore v. Dennison*, 115 S.W.2d 902, 902 (Tex. Comm’n App. 1938).

39. *Id.* (indicating the testimony that one intends at some indefinite time in the future to reside upon the property as a home “falls short of presenting a fact issue on the homestead question”); *Cheswick v. Freeman*, 287 S.W.2d 171, 173 (Tex. 1956) (showing that mere intent to reside on the land without some overt act in preparation for physical occupancy is insufficient).

40. *Murphey v. Murphey*, 131 S.W.2d 158, 161 (Tex. Civ. App.—Waco 1939, no writ).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *See Hoeftling v. Hoeftling*, 167 S.W. 210, 213–14 (Tex. 1914).

47. *Id.* (emphasis added).

from a division or an award of a family homestead in a divorce proceeding;

- (5) the refinance of a lien against the homestead, including a federal tax lien resulting from the tax debt of both spouses, if the homestead is a family homestead, or from the tax debt of the decedent;
- (6) an extension of credit on the homestead if the requirements of article XVI, section 50(a)(6), Texas Constitution, are met; or
- (7) a reverse mortgage.⁴⁸

The homestead is protected because it “may not be sold to pay general debts of the estate.”⁴⁹ Taxes owed to the federal government are a lien on the whole estate.⁵⁰ The homestead would not be liable for the federal taxes so long as any other property of the estate existed out of which the taxes could be paid.⁵¹ However, 26 U.S.C. § 7403 grants power to a federal district court to order the sale of the home itself, not just the delinquent taxpayer’s interest in the property.⁵² Therefore, “the Government’s right to seek a forced sale of the entire property in which a delinquent taxpayer had an interest does not arise out of its privileges as an ordinary creditor, but out of the express terms of [26 U.S.C.] § 7403.”⁵³ Additionally, “the use of the power granted by § 7403 is not the act of an ordinary creditor, but the exercise of a sovereign prerogative, incident to the power to enforce the obligations of the delinquent taxpayer himself, and ultimately grounded in the constitutional mandate to lay and collect taxes.”⁵⁴ However, if the property is sold to satisfy the lien, the surviving spouse’s portion of the proceeds could not be used to discharge the tax lien and must be set aside to the surviving spouse.⁵⁵

The exempt nature of the homestead is wholly independent of the homestead right of occupancy.⁵⁶ The latter is dependent upon the occupancy of the surviving spouse or minor children.⁵⁷ Freedom from creditor claims depends merely on the existence of a surviving spouse or minor child.⁵⁸ The surviving spouse’s subsequent voluntary sale or abandonment of the homestead does not affect the exempt status, even if the decedent’s estate was solvent at the time of death.⁵⁹ If the surviving spouse voluntarily sells the homestead after the decedent’s death, the exemption from creditor claims

48. TEX. EST. CODE ANN. § 102.004 (West 2016) (emphasis added).

49. *Thompson v. Thompson*, 236 S.W.2d 779, 789 (Tex. 1951).

50. *Id.*

51. *Id.*

52. *United States v. Rodgers*, 461 U.S. 677, 697 (1983).

53. *Id.*

54. *Id.*

55. *Id.* at 698.

56. *Hoeffling v. Hoeffling*, 167 S.W. 210, 210 (Tex. 1914) (discussing the exempt nature of the homestead).

57. *Id.*

58. *Id.*

59. *Id.* at 215.

extends to the sale proceeds.⁶⁰ If the sale proceeds are invested in another property, the new property receives the same protection as the decedent's homestead.⁶¹ When a decedent is survived by a minor child who was living with the other parent at the time—post-divorce—the homestead passed free of creditor's claims even if the child did not live with the decedent parent and the child's guardian did not assert the child's homestead right of occupancy.⁶²

D. A Homestead Is Akin to a Life Estate

Many courts have attempted to describe the nature of the homestead right.⁶³ Most courts say the homestead “contains every element of a life estate, and is therefore at least in the nature of a life estate, or, in other words, a life estate created by operation of law.”⁶⁴ However, a homestead right is not a life estate in the pure sense of that term.⁶⁵ Rather, “although not an estate in realty, [it] nevertheless partakes of the nature of an estate for life. . . .”⁶⁶ This treatment of the homestead estate as a life estate lasts “so long as the property retains its homestead character.”⁶⁷ As is discussed more fully below, the homestead character and the homestead right can be lost through abandonment.⁶⁸ This fact distinguishes the homestead from being a true life estate.⁶⁹

E. What Are the Rights of a Homesteader?

An individual's rights when exercising the homestead right can be extensive and substantial.⁷⁰

60. *Butler v. Summers*, 253 S.W.2d 418, 421 (Tex. 1952).

61. *Watkins v. Davis*, 61 Tex. 414, 417 (1884).

62. *Nat'l Union Fire Ins. Co. v. Olson*, 920 S.W.2d 458, 462 (Tex. App.—Austin 1996, no writ).

63. *Hill v. Hill*, 623 S.W.2d 779, 780 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.); *Thompson v. Thompson*, 236 S.W.2d 779, 786 (Tex. 1951) (indicating that the right of “homestead is in the nature of a life estate”); *Sargeant v. Sargeant*, 15 S.W.2d 589, 593 (Tex. Comm'n App. 1929) (indicating that a homestead interest is akin to “a life estate created by operation of law”).

64. See *Hill*, 623 S.W.2d at 780; *Thompson*, 236 S.W.2d at 786; *Sargeant*, 15 S.W.2d at 593.

65. *Jones v. Dewbre*, 13 S.W.2d 233, 234 (Tex. Civ. App.—Austin 1928, no writ).

66. *Id.*

67. *Sparks v. Robertson*, 203 S.W.2d 622, 623 (Tex. Civ. App.—Austin 1947, writ ref'd).

68. See *Rancho Oil Co. v. Powell*, 175 S.W.2d 960, 963 (Tex. 1943); *La Brier v. Williams*, 212 S.W.2d 828, 830 (Tex. Civ. App.—San Antonio 1948, writ ref'd n.r.e.); *McDaniel v. Thompson*, 195 S.W.2d 202, 203 (Tex. Civ. App.—San Antonio 1946 writ ref'd).

69. See *Rancho Oil Co.*, 175 S.W.2d at 963; *La Brier*, 212 S.W.2d at 830; *McDaniel*, 195 S.W.2d at 203.

70. See *infra* Section II.E.

1. *Right to Possession*

The homesteader has the full right of possession of the premises.⁷¹ As long as the homestead rights exist, none of the heirs has any legal right to interfere with possession.⁷² “A remainderman has no possessory title and therefore is unable to maintain trespass to try title before the life tenant’s death.”⁷³

2. *Right to Income*

The homesteader is entitled to the income from the property so long as the homestead right exists.⁷⁴ The surviving spouse is entitled to oil and gas royalties from rural homestead under the open mine doctrine.⁷⁵ This doctrine has been described as “an exception to the general rule that a life tenant is entitled to nothing but interest on mineral royalties and bonuses.”⁷⁶ Due to this doctrine “a homestead claimant is entitled to receive and expend all oil and gas royalties from the homestead, where the homestead property was producing oil or gas when the right in the property came into existence.”⁷⁷

3. *Right to Bring Actions for Damages*

The homesteader has the right to bring an action against a third party for damages to the property just as if the spouse were the sole owner.⁷⁸

4. *Protection from Partition*

The homestead cannot be sold or partitioned out from under the person asserting the homestead.⁷⁹ The homestead may be partitioned only if:

- (1) the surviving spouse dies, sells the interest in homestead, or elects to no longer use or occupy the property as a homestead, or
- (2) the court no longer permits the guardian of the minor children to use and occupy the property as a homestead.⁸⁰

Re-marriage does not extinguish the homestead.⁸¹ However, once the surviving spouse dies, the homestead does not extend to the spouse from the

71. TEX. CONST. art. XVI § 52.

72. *Rettig v. Hous. West End Realty Co.*, 254 S.W. 765, 768 (Tex. Comm’n App. 1923).

73. *Cooke v. Caswell*, 17 S.W. 385, 387 (Tex. 1891).

74. *Sargeant v. Sargeant*, 15 S.W.2d 589, 592 (Tex. Comm’n App. 1929).

75. *Riley v. Riley*, 972 S.W.2d 149, 155 (Tex. App.—Texarkana 1998, no pet.).

76. *Id.*

77. *Id.*

78. *See Coffman v. Gulf, C. & S.F. Ry. Co.*, 23 S.W.2d 304, 305 (Tex. Comm’n App. 1930).

79. TEX. EST. CODE ANN. § 102.005 (West 2016).

80. *Id.* § 102.006.

81. *See Murphey v. Murphey*, 131 S.W.2d 158, 161 (Tex. Civ. App.—Waco 1939, no writ).

second marriage.⁸² Upon the death of the surviving spouse or the abandonment of the property, the heirs have a right to partition the homestead.⁸³ The heirs' establishment of their own homestead on the property does not defeat the right of partition.⁸⁴

F. What Are the Responsibilities or Duties of a Homesteader?

Although the rights of the one asserting the probate homestead are substantial, the responsibilities and potential liabilities are not insignificant.⁸⁵

1. Responsible for Upkeep and Ordinary Repairs

The surviving spouse who exercises the right to occupy the homestead is chargeable with expenses of upkeep of the property, meaning ordinary repairs.⁸⁶ The homesteader is not entitled to reimbursement for improvements made voluntarily.⁸⁷ However, reimbursement for improvements may be allowed if the spouse makes the improvements with the bona fide belief that the spouse is the fee simple owner of the property.⁸⁸

2. Payment of Property Taxes but Gets Property Tax Exemption

The homesteader is liable for the payment of ad valorem and other property taxes.⁸⁹ However, a surviving spouse who holds a life estate in marital residence holds an ownership interest entitling the spouse to homestead exemption from property taxation.⁹⁰

3. Payment of Mortgage Interest but not Principal

The homesteader is liable for payment of mortgage interest.⁹¹ However, the homesteader is not responsible for payment of mortgage principal.⁹²

82. *See id.*

83. *Grant v. Clouser*, 287 S.W.3d 914, 920 (Tex. App.—Houston [14th Dist.], 2009, no pet.).

84. *Id.*

85. *Sargeant v. Sargeant*, 15 S.W.2d 589, 593 (Tex. Comm'n App. 1929).

86. *Id.*

87. *Id.*

88. *Williams v. Davis*, 133 S.W. 2d 275, 279 (Tex. Civ. App.—Fort Worth 1939, no writ).

89. *Daken v. Daken*, 83 S.W.2d 620, 625 (Tex. 1935); *Hill v. Hill*, 623 S.W.2d 779, 781 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.).

90. *Copeland v. Tarrant Appraisal Dist.*, 906 S.W.2d 148, 151 (Tex. App.—Fort Worth 1995, writ denied); TEX. TAX CODE ANN. § 11.13 (West 2016) (providing a homestead exemption for a portion of the assessed value of the homestead).

91. *Hill*, 623 S.W.2d at 780.

92. *Id.* at 780—81.

4. Not Responsible for Insuring Property

The holder of the underlying title is responsible for payment of casualty insurance premiums.⁹³ Therefore, unless the homesteader also owns all or part of the underlying interest, the homesteader is not responsible for insuring the property.⁹⁴

However, while the law does not require a homesteader to insure the property for those who own the underlying interest, the homesteader may want to insure the property or may be a signatory on a mortgage that requires the homesteader to maintain insurance on the property.⁹⁵ In those instances, the individual who holds a homestead interest for life and who purchased the policy of insurance, is entitled to the full amount of proceeds of the policy to the extent of the loss because the owner of the homestead interest has an insurable interest to the full value of the property.⁹⁶ In spite of this, “if one abandons the homestead, he is not entitled to the entire amount of the insurance policy covering the full value of the homestead dwelling, but is only entitled to the portion of the proceeds in an amount equal to his interest in the property.”⁹⁷ Instead, “he would be entitled to be reimbursed for the cost of the insurance premiums paid on behalf of the other joint owners.”⁹⁸ If the executor, during an administration of the estate, chooses to insure the homestead property that expense is properly chargeable as an expense of the estate.⁹⁹ Further, the deceased spouse’s debts are exempt from payment with regard to the collection of proceeds from a homestead fire insurance policy and the proceeds of the sale of a homestead, with the exception of debts owed for the homestead purchase money or the homestead taxes thereon.¹⁰⁰

G. Homestead Right Can Be Waived or Abandoned

Property that “has been designated as a homestead. . . will only lose that character through abandonment, death, or alienation.”¹⁰¹ Evidence establishing the abandonment of a homestead “must be undeniably clear and [must show] beyond almost the shadow, at least [of] all reasonable ground of dispute, that there has been a total abandonment with an intention not to

93. *Id.*

94. *Id.*

95. *Id.*

96. Doss v. Roberts, 487 S.W.2d 839, 841 (Tex. Civ. App.—Texarkana 1972, writ ref’d n.r.e.).

97. *Id.* at 841–42.

98. *Id.* at 842.

99. See Richardson v. McCloskey, 276 S.W. 680, 684 (Tex. Comm’n App. 1925).

100. Alvord Nat’l Bank v. Ferguson, 126 S.W. 622, 625 (Tex. Civ. App.—Fort Worth 1910, writ ref’d).

101. Majeski v. Estate of Majeski, 163 S.W.3d 102, 107 (Tex. App.—Austin 2005, no pet.).

return and claim the exemption.”¹⁰² In order for “an abandonment [to occur] that would subject [the homestead property] to seizure and sale, there must be a voluntary leaving or quitting of the residence.”¹⁰³ Whether one has abandoned a homestead is generally a question of fact.¹⁰⁴ The trier of fact determines the issue on a case-by-case basis given all the evidence presented.¹⁰⁵ “[I]n cases of physical absence the lack of a definite intention not to return and use and occupy the homestead is the controlling fact.”¹⁰⁶

The mere fact that the homesteader is not in physical occupancy of the premises does not, of itself, establish abandonment.¹⁰⁷ If the homesteader is physically absent from the premises, “the lack of a definite intention to return and [reoccupy the premises] is the controlling fact.”¹⁰⁸

The homesteader’s right of use and occupancy is not lost or forfeited if the homestead has been rented.¹⁰⁹ The homesteader’s offer to sell the property alone does not constitute abandonment.¹¹⁰ However, “proof that a new homestead has been acquired establishes abandonment of the old homestead as a matter of law.”¹¹¹ In *Norman*, the court found a designation of a new residence as a homestead for tax purposes “is some evidence of [the] intention of making [the] property [a] homestead.”¹¹² Further, “removal to a different residence and use and occupancy of it as a homestead, unaccompanied by any act evidencing an intention to return to his former home. . . is evidence that a new homestead has been acquired and the old one abandoned.”¹¹³ In *Sanchez*, the court found that the homesteader abandoned

102. *Burkhardt v. Lieberman*, 159 S.W.2d 847, 852 (Tex. 1942); *Drake Interiors, L.L.C. v. Thomas*, 433 S.W.3d 841, 848 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *Estate of Montague v. Nat’l Loan Inv’rs, L.P.*, 70 S.W.3d 242, 248 (Tex. App.—San Antonio 2001, pet. denied).

103. *King v. Harter*, 8 S.W. 308, 309 (Tex. 1888); *McWilliams v. Adoue*, 51 S.W.2d 1104, 1107 (Tex. Civ. App.—El Paso 1932, writ ref’d).

104. *Scott v. Estate of Scott*, 973 S.W.2d 694, 695–96 (Tex. App.—El Paso 1998, no pet.); *Good v. Good*, 293 S.W. 621, 624 (Tex. Civ. App.—Waco 1927, no writ).

105. *Scott*, 973 S.W.2d at 695–96; *Good*, 293 S.W. at 624.

106. *Scott*, 973 S.W.2d at 695–96; *Good*, 293 S.W. at 624.

107. *Rancho Oil Co. v. Powell*, 175 S.W.2d 960, 964 (Tex. 1943); *Keenan v. Burgess*, 206 S.W.2d 1021, 1023–24 (Tex. Civ. App.—Amarillo 1947, no writ) (holding that it was not abandonment when a homesteader moved a portion of his furniture from the homestead as a temporary expediency and for use while he was cultivating his farm).

108. *Good*, 293 S.W. at 624 (showing that “the only circumstance relied on by appellees to show abandonment is that . . . in order to be with his newly wedded wife, he accepted temporarily the shelter of her roof while he aided her in cultivating and gathering the crops growing on her farm when he married her” is insufficient to support the finding of abandonment).

109. *Orr v. Orr*, 226 S.W.2d 172, 175–76 (Tex. Civ. App.—Amarillo 1949) (indicating that where “land was purchased for the purpose of establishing thereon a tourist court to be occupied as a personal and business homestead; cabins [and] improvements were necessary and properly used in connection with the operation of the tourist court”).

110. *La Brier v. Williams*, 212 S.W.2d 828, 829 (Tex. Civ. App.—San Antonio 1948, writ ref’d n.r.e.); *Thigpen v. Russell*, 118 S.W. 1080, 1082 (Tex. Civ. App. 1909, writ ref’d).

111. *Norman v. First Bank & Tr.*, 557 S.W.2d 797, 801 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref’d n.r.e.).

112. *Norman*, 557 S.W.2d at 801.

113. *Id.*

the homestead because the homesteader never claimed the property as the homestead with the El Paso Central Appraisal District, the subsequent purported deed did not refer to the property as a homestead, and the deed of trust also stated: “This is not my homestead[sic].”¹¹⁴ “Payment of taxes by the devisee of the property under the [deceased spouse’s] will is not a showing of abandonment” by the surviving spouse occupying the property.¹¹⁵

A spouse’s denial of homestead rights due to having murdered a spouse does not violate the constitutional provision that conviction shall not work forfeiture of estate.¹¹⁶ However, a spouse’s detention in a mental institution does not affect homestead rights.¹¹⁷

A pre-marital agreement can act to waive the homestead.¹¹⁸ However, clear and convincing evidence must show that there was informed consent that the homestead right is being waived.¹¹⁹ There does not appear to be any authority to support the waiver of the homestead right in a post-marital agreement.¹²⁰

Once the homestead is abandoned, it is difficult to reclaim the property as homestead.¹²¹ In *Smith*, the surviving spouse exercised his homestead right on his deceased spouse’s separate real property, but he later re-married and moved to another property.¹²² The court held the spouse could not return to the former spouse’s property and claim it as a homestead because he had abandoned the homestead.¹²³ It should be pointed out, however, that the spouse still maintained his life estate in one-third, which he acquired in intestate distribution based upon his status as a surviving spouse.¹²⁴

H. Does a Homestead Right Itself Have Monetary Value?

The legal right to homestead prevents the attachment of liens, and the constitution creates and protects this legal right.¹²⁵ As such, “[t]his interest gives protective legal security rather than vested economic rights.”¹²⁶ The

114. *Sanchez v. Telles*, 960 S.W.2d 762, 771 (Tex. App.—El Paso 1997, writ denied).

115. *Hunter v. Clark*, 687 S.W.2d 811, 815 (Tex. App.—San Antonio 1985, no writ).

116. *Ford v. Long*, 713 S.W. 2d 798, 799 (Tex. App.—Tyler 1986, writ ref’d n.r.e.) (showing that “[s]ince by his willful act Ford made certain his survival, he should be precluded from keeping and enjoying property he takes as a survivor in the community”).

117. *Flynn v. Hancock*, 80 S.W. 245, 396 (Tex. Civ. App. 1904) (illustrating that “[t]he detention was not voluntary on her part, and without a voluntary abandonment upon the part of the survivor the status of the homestead would not be disturbed”).

118. *Williams v. Williams*, 569 S.W.2d 867, 871 (Tex. 1978) (emphasis added).

119. *Hunter*, 687 S.W.2d at 817 (holding as a matter of law that the pre-marital agreement in question was not a waiver of the surviving spouse’s homestead rights) (emphasis added).

120. *Id.*

121. *Smith v. Moss*, 68 S.W. 533, 534 (Tex. Civ. App. 1902, writ ref’d).

122. *Id.* at 534.

123. *Id.*

124. *Id.*

125. *Id.*; *Dominguez v. Castaneda*, 163 S.W.3d 318, 329 (Tex. App.—El Paso 2005, pet. denied).

126. *See Smith*, 68 S.W. 533; *Dominguez*, 163 S.W.3d at 329.

valuation of the life interest is not to take into account the homestead rights, which the surviving spouse was entitled to have set apart in the separate estate of the deceased spouse.¹²⁷ The homestead interest is a “possessory right only, and forms no part of the distributive share to be allotted in the partition proceeding.”¹²⁸

However, the recent decision in *In re Sloan* highlights that the homestead right can, in fact, have economic value.¹²⁹ In *Sloan*, the wife passed away leaving a last will that left her interest in the homestead to a trust created under the will.¹³⁰ However, the wife’s will provided that the husband, who was also the executor, could purchase real property from the estate for fair market value.¹³¹ The husband later traded two rent homes for the interest in the homestead, calculating the value of the interest in the property at \$222,000.00.¹³² After the husband’s death, the trustee sued the husband’s executor claiming the husband breached his fiduciary duty because he did not pay fair market value for the wife’s estate’s interest in the homestead.¹³³ The probate court ruled that the homestead was the wife’s separate property and that the husband did not pay fair market value for the interest because the interest was worth twice the amount paid.¹³⁴ The court of appeals reversed the trial court, finding that the husband’s homestead right was akin to a life estate and that such right would affect what a willing buyer would have paid for the property.¹³⁵ The court concluded that the husband’s constitutional right in the homestead reduced the fair market value of the property.¹³⁶ The court did not reach the issue of the amount of the reduction because the parties had stipulated that the husband’s estate would not owe anything if the court found the homestead interest reduced the value of the wife’s estate’s interest.¹³⁷ It would appear, however, that because the homestead is akin to a life estate, its value would be calculated in the same fashion as a life estate.¹³⁸ Discussion of life estate valuation is below.¹³⁹

127. *In re Odes Ho Kim*, 748 F.3d 647, 661 (5th Cir. 2014) (stating that “from our examination of Texas law, it is not entirely clear that Texas courts would place exactly the same economic value on homestead rights as it would on a life estate”).

128. *Haley v. Hail*, 135 S.W. 663, 664 (Tex. Civ. App.—1911, writ refused); *see also* *Cruse v. Reinhard*, 208 S.W.2d 598, 607 (Tex. Civ. App.—Beaumont 1948, writ ref’d n.r.e.) (holding that because “Mrs. Mouton’s right of occupancy is non-transferable—because it automatically terminates when Mrs. Mouton abandons the property—it should not be assigned any value in determining how the estate shall be partitioned [sic]”).

129. *In Re Sloan*, 496 S.W.3d 299 (Tex. App.—Fort Worth 2016, no pet.).

130. *Id.* at 301.

131. *Id.* at 302.

132. *Id.* at 301.

133. *Id.* at 302.

134. *Id.* at 303.

135. *In Re Sloan*, 496 S.W.3d 299, 305 (Tex. App.—Fort Worth 2016, no pet.).

136. *Id.* at 307.

137. *Id.* at 307–08.

138. *See id.*

139. *See infra* Part III.

However, if the property is taken by condemnation or eminent domain, the spouse continues to have the right to enjoy the use of the proceeds to purchase a substitute homestead.¹⁴⁰

Many times, the spouse asserting a homestead right also has a life-estate in one-third under the intestacy statutes.¹⁴¹ In that instance, the spouse may abandon the homestead but would still have the right to the value of the life estate in one-third.¹⁴² Discussion of life estate valuation is in a later section.¹⁴³ It is worth noting 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.”¹⁴⁴

I. Can a Homestead be Placed in a Trust?

Transferring the homestead into a “qualifying trust” does not affect the homestead status of the property.¹⁴⁵ However, Chapter 5 of the Texas Family Code requires compliance with the joinder rules if a married individual, using a qualified trust, transfers property to a trustee.¹⁴⁶ On the other hand, subsection (c) does not require a trustee who wishes to sell, convey, or encumber property to join the spouse unless expressly prohibited by the document creating the trust or by court order.¹⁴⁷ Transfer of a homestead into a “qualifying trust” does not affect the rights granted to children or a surviving spouse.¹⁴⁸

III. LIFE ESTATES

A. What Is a Life Estate?

A life estate is an interest in real property that entitles the life estate owner (sometimes referred to as the life tenant) to the right to occupy, possess, or otherwise use the property for the lifetime of one or more individuals usually the lifetime of the person or persons who hold the life

140. *Lucas v. Lucas*, 147 S.W. 310, 311 (Tex. Civ. App.—Galveston 1912, no writ) (indicating that such proceeds were upon the same basis of ownership as the homestead before its conversion into money); *Hunter v. Woodert*, 55 Tex. 433, 436 (Tex. 1881) (showing that “although a sale under a deed of trust is not a forced sale, within the meaning of that term as used in the [Constitution], it is still far from being like an ordinary voluntary sale or exchange of property, where the vendor has full control and can make his own arrangements to secure the reinvestment of the proceeds”).

141. *See* TEX. EST. CODE ANN. § 201.002(b)(3) (West 2016).

142. *Cockrell v. Curtis*, 18 S.W. 436, 436 (Tex. 1892); *see Mecaskey v. Morris*, 89 S.W. 1085, 1085 (Tex. Civ. App.—Fort Worth 1905, no writ).

143. *See infra* Section III.D.

144. TEX. PROP. CODE ANN. § 41.001 (West 2016).

145. TEX. PROP. CODE ANN. § 41.001 (b) (West 2016).

146. *Id.* at (c).

147. *Id.* at (d) .

148. *Id.* at (e).

estate interest.¹⁴⁹ A life estate is one which lasts during the life or lives of one or more persons in being.¹⁵⁰

The Texas Administration Code, which codifies regulations regarding Medicaid eligibility, contains its own definition of life estate.¹⁵¹ That code defines a life estate as follows:

(1) Life estates. A life estate provides a person, for the person's lifetime, certain rights in a property, while transferring ownership of the property to another person. The duration of a life estate is measured by the lifetime of the owner of the life estate, or by the occurrence of some event. The contract establishing a life estate, however, may restrict one or more rights of the owner of the life estate. The owner of a life estate does not have fee simple title to the property nor the right to sell the entire property. In most situations, the owner of a life estate has the right to:

- (A) possess the property;
- (B) use the property;
- (C) get profits from the property; and
- (D) sell his or her life estate interest.¹⁵²

A life estate owner has the right to possess and use the property for the duration of the life estate.¹⁵³ A remainderman has an ownership interest in the real property, but has no right to possess or use it until the life estate terminates.¹⁵⁴

A life estate is generally created:

- when a person with property rights in real property transfers a remainder interest in the property to another and retains a life estate interest in the property; or
- when a person purchases a life estate interest in someone else's property; or
- by operation of probate law.¹⁵⁵

A life estate is generally terminated when the life estate owner, or another specified person, dies.¹⁵⁶ Some life estates specify one or more other conditions, known as conditional limitations, these conditions cause the life estate to be terminated, such as when the life estate owner leaves the home

149. See TEX. ADMIN. CODE ANN. § 358.350 (West 2016).

150. *Financial Freedom Sr. Funding Corp. v. Horrocks*, 294 S.W.3d 749, 755 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

151. See § 358.350.

152. *Id.*

153. *Id.*

154. See *id.*

155. See *id.*

156. See *id.*

for six months or more.¹⁵⁷ A life estate document specifies when the life estate terminates.¹⁵⁸

B. What Are the Rights of the Life Tenant?

The rights of a life tenant can be extensive, but have some limitations.¹⁵⁹

1. Right to Occupy and Possess

The life estate owner has the right to occupy, possess, or otherwise use the property until the life estate is terminated.¹⁶⁰ Real property owned by a life tenant and remainderman is listed in the name of the life tenant.¹⁶¹

2. Right to Sell His Interest but Cannot Make Testamentary Disposition of the Interest

A life tenant can sell or transfer his interest, but he cannot transfer any greater interest in the property than that which ceases with his life.¹⁶² Therefore, “[w]here a life tenant conveys to another, the grantee takes an estate limited by the life of the grantor.”¹⁶³

A life estate terminates upon the death of the life tenant.¹⁶⁴ Furthermore, “[a] life tenant cannot dispose of property by will; [and this rule cannot] be changed by contractual agreement between the parties.”¹⁶⁵

3. Right to Income and Profits

The life estate owner is entitled to all income and profits from the life estate interest, such as rent on the property.¹⁶⁶ It has been stated that “[t]he right of a life tenant is to the use, and not the corpus, of the estate.”¹⁶⁷ Additionally, “[w]here his title is in an undivided interest, and not in the

157. *See id.*

158. *See id.*

159. *See infra* Section B.1–4).

160. *Williams v. Walker*, No. 10-00-00303-CV, 2004 WL 691637, at *2 (Tex. App.—Waco, Mar. 31, 2004).

161. TEX. TAX CODE ANN. § 25.05 (West 2016).

162. *First Nat. Bank of Amarillo v. Amarillo Nat. Bank*, 531 S.W.2d 905, 907 (Tex. Civ. App.—Amarillo 1975, no writ); *Montgomery v. Browder*, 930 S.W.2d 772, 778 (Tex. App.—Amarillo 1996, writ denied).

163. *Morris v. Eddins*, 44 S.W. 203, 204 (Tex. Civ. App.—Fort Worth 1898, writ ref’d); *Zambrano v. Olivas*, 490 S.W.2d 218, 220 (Tex. Civ. App.—El Paso 1973, writ ref’d n.r.e.).

164. *Id.*

165. *Montgomery v. Browder*, 930 S.W.2d 772, 777 (Tex. App.—Amarillo 1996, writ denied) (showing that even where the life tenant is given absolute and unlimited powers of disposition, he or she does not have the power to make a testamentary disposition).

166. TEX. ADMIN. CODE ANN. § 358.350 (West 2016).

167. *Swayne v. Lone Acre Oil Co.*, 86 S.W. 740, 743 (Tex. 1905).

whole of the land, and a sale is ordered for partition, his right in the proceeds is not a part proportionate to the undivided interest in which he has the life estate, but to the interest on that part as long as the life estate may continue to exist.”¹⁶⁸

A life tenant is not, however, strictly a trustee; generally a life tenant may use the property for his or her exclusive benefit and take all the income from the property.¹⁶⁹ In general, “a life estate tenant. . . is entitled to all profits or income accruing during his tenancy and cannot dispose of the corpus of estate unless expressly authorized to do so” by the instrument creating the life estate.¹⁷⁰

A life tenant is “under a duty not to take oil or gas, as against the remainderman or reversioner.”¹⁷¹ The life tenant can, however, receive the income generated by the payment of royalties.¹⁷² An exception to the rule that a life tenant is entitled to nothing but interest on the royalties and bonus is found in the open mine doctrine.¹⁷³ Traditionally, “if mines or pits were open at the time the life estate began, it was not waste for the life tenant to continue digging for his own use; and the proceeds were regarded as a profit from the land.”¹⁷⁴ Also of note, “creation of an oil and gas lease prior to the vesting of a life estate, absent language in the deed, will, or trust agreement expressing a different intention of the creator of the life estate, will give rise to the application of the open mine doctrine.”¹⁷⁵ Further, “[t]he rights of a life tenant in the production of oil from wells which were producing at the time the life tenancy came into being, have the use and enjoyment of that part of the production payable under the terms of the instrument permitting the production.”¹⁷⁶ It is also important to understand that “[t]here is no distinction between conventional and legal life estates in determining whether the open mine doctrine is applicable.”¹⁷⁷

C. What Are the Responsibilities of the Life Tenant?

As discussed, with respect to one exercising the homestead right, the responsibilities of the life tenant can be substantial.¹⁷⁸

168. *Id.*

169. TEX. PROP. CODE ANN. § 5.009(b); *Randall v. Estes*, 218 S.W.2d 338, 341 (Tex. Civ. App.—Dallas 1949, writ ref’d n.r.e.).

170. *Hobson v. Shelton*, 302 S.W.2d 268, 272 (Tex. Civ. App.—Waco 1957, writ refused n.r.e.).

171. *Davis v. Bond*, 158 S.W.2d 297, 302 (Tex. 1942).

172. *Id.*

173. *Moore v. Vines*, 474 S.W.2d 437, 442 (Tex. 1972).

174. *Id.*

175. *Id.*

176. *Thompson v. Thompson*, 236 S.W.2d 779, 786 (Tex. 1951).

177. *Cook v. Cook*, 331 S.W.2d 77, 80 (Tex. Civ. App.—Waco 1959, no writ).

178. *See supra* Part II Section E.

1. Upkeep and Repair Property

The life estate owner is responsible for the upkeep and repair of the property.¹⁷⁹ The courts have stated that “one who takes a life estate in the property of a decedent elects to take as a whole with the benefits of the income and profits, and under the corresponding burdens of the current expenses, such as taxes, repairs, and other upkeep.”¹⁸⁰ It is the life tenant, not the remainderman, who typically bear the cost of maintaining the property.¹⁸¹ Also, when “improvements have been made by the life tenant, the remainderman is not chargeable with those improvements, even if their erection or construction is of a permanent nature.”¹⁸²

2. No Obligation to Insure Property

The life tenant is not required insure the premises for the benefit of the remaindermen.¹⁸³ If the life tenant obtains insurance for her own benefit, the remaindermen has no claim on the proceeds if the property is damaged or destroyed by fire.¹⁸⁴ Waste does not include a lifetenant neglecting to pay insurance premiums.¹⁸⁵

3. Liable for Taxes

It is usually found “that the life tenant in possession is liable for taxes.”¹⁸⁶ However, “[i]n the absence of some contrary intent manifested by the creator of the life estate and remainder interests, a life tenant in possession of real estate has a duty to pay the ordinary taxes on the property.”¹⁸⁷

179. *Richardson v. McCloskey*, 276 S.W. 680, 685 (Tex. Comm’n. App. 1925).

180. *See id.*

181. *Coleman v. Banks*, 349 S.W.2d 737, 741 (Tex. Civ. App.—Dallas 1961, writ ref’d n.r.e.); *Calhoun v. Stark*, 35 S. W. 410, 412 (Tex. Civ. App.—San Antonio 1896, writ ref’d).

182. *Coleman v. Banks*, 349 S.W.2d 737, 741 (Tex. Civ. App.—Dallas 1961, writ ref’d n.r.e.); *Calhoun v. Stark*, 35 S. W. 410, 412 (Tex. Civ. App.—San Antonio 1896, writ ref’d).

183. *Richardson*, 276 S.W. at 684; *Hill v. Hill*, 623 S.W. 2d 779, 781 (Tex. App.—Amarillo 1981, writ ref’d n.r.e.).

184. *Richardson*, 276 S.W. at 684.

185. *In re Wells*, 448 B.R. 909, 912 (Bankr. W.D. Tex. 2011); *Barrera v. Barrera*, 294 S.W. 2d 865, 867 (Tex. Civ. App.—San Antonio 1956, no writ.).

186. *Roberts v. Roberts*, 150 S.W.2d 236, 238 (Tex. 1941).

187. *Trimble v. Farmer*, 305 S.W.2d 157, 161 (Tex. 1957); *see* TEX. TAX CODE ANN. § 25.05 (for purposes of local property tax appraisal listing of taxable property, “[r]eal property owned by a life tenant and remainderman shall be listed in the name of the life tenant”).

4. *Liable for Mortgage Interest*

Generally, “[a] life tenant has a duty to pay the interest on any existing encumbrances.”¹⁸⁸ However, a life tenant who pays off the principal sum or debt in order to preserve the estate is entitled to reimbursement or contribution from the remaindermen.¹⁸⁹

5. *Liable for Waste*

A life tenant may be held liable for waste if the vested interests of a future holder is damaged.¹⁹⁰ Waste is the “permanent harm to real property by tenants for life that is not justified as a reasonable exercise of ownership and enjoyment by the possessory tenant, and that results in a reduction in value of the interest of the remainderman.”¹⁹¹

6. *Must Protect Remainder from Forfeiture*

A life tenant must protect “the interest of remaindermen from forfeiture by reason of any act or omission on his part and to preserve the estate in which he holds a life tenancy.”¹⁹²

7. *Cannot Impair Remainder Estate*

In most cases, “a life tenant can do nothing during the continuance of the estate to impair the estate in remainder and must use reasonable precautions to preserve the property intact without injury or diminution.”¹⁹³ Aside from very specific situations, “a life tenant cannot use fraudulent means to defeat the rights of the remaindermen.”¹⁹⁴

8. *Cannot Sell the Remainder Unless Testator Authorizes Disposition*

Outside of a few exceptions, generally “a life tenant may not dispose of the corpus of the estate.”¹⁹⁵ The courts have exemplified this by stating “[a]bsolute and unlimited powers of disposition given to life tenant under will do not empower life tenant to make testamentary disposition of property

188. *Hill v. Hill*, 623 S.W. 2d 779, 780 (Tex. App.—Amarillo 1981, writ ref’d n.r.e.).

189. *Brokaw v. Richardson*, 255 S.W. 685, 688 (Tex. Civ. App.—Fort Worth 1923, no writ).

190. *Moore v. Vines*, 474 S.W.2d 437, 439 (Tex. 1971).

191. *Id.*

192. *Hill*, 623 S.W. 2d at 780.

193. *Id.*; *Gonzalez v. Gonzalez*, 457 S.W.2d 440, 447 (Tex. Civ. App.—Corpus Christi 1970, writ ref’d n.r.e.); *White v. Blackman*, 168 S.W.2d 531, 534 (Tex. Civ. App.—Texarkana 1942, writ ref’d w.o.m.).

194. *Anderson v. Kennon*, 353 S.W.2d 241, 245 (Tex. Civ. App.—Austin 1961, writ ref’d n.r.e.).

195. *Singleton v. Donalson*, 117 S.W.3d 516, 518 (Tex. App.—Beaumont 2003, pet. denied).

in which life tenancy is held.”¹⁹⁶ It clearly follows that “[g]iving a life tenant extensive powers of disposition under will does not convert life estate into fee simple title.”¹⁹⁷

A testator may, however, give a power of disposition with the life estate, “[w]here life tenant. . .has unqualified power to dispose of property during his lifetime, remainder beneficiaries have no justiciable interest in any property except that which [has not been disposed] of at the life tenant’s death.”¹⁹⁸ The power to dispose of the property in the life estate does not necessarily divest the remaindermen of all title or right to the proceeds derived from the sale of the property.¹⁹⁹ Unless otherwise provided in the will, whatever is not disposed of when the life tenant dies will pass to the remaindermen.²⁰⁰

The Texas Property code states that “[i]f the life tenant of a legal life estate is given the power to sell and reinvest any life tenancy property, the life tenant is subject, with respect to the sale and investment of the property, to all of the fiduciary duties of a trustee imposed by the Texas Trust Code or the common law of Texas.”²⁰¹ However, “a life tenant may retain, as life tenancy property, any real property originally conveyed to the life tenant without being subject to the fiduciary duties of a trustee; however, the life tenant is subject to the common law duties of a life tenant.”²⁰²

D. How Do You Value a Life Estate?

In the event of the need to value the life estate, “the present value of the interest is computed by multiplying the value of the property by the appropriate remainder interest actuarial factor that corresponds to the applicable section 7520 interest rate and remainder interest period” set forth in 26 U.S.C.A. section 7520.²⁰³ Table B of Internal Revenue Publication 1457 features actuarial factors for a remainder interest after a term of years, while Table 5 includes these factors for after the life of one individual when the valuation date is on or after May 1, 2009.²⁰⁴ Though, “term-of-years and life interest actuarial factors are not included in Table B in § 20.2031-7(d)(6) of this chapter or Table S in § 20.2031-7(d)(7) (or in § 20.2031-7A).”²⁰⁵

196. *Montgomery v. Browder*, 930 S.W.2d 772, 778 (Tex. App.—Amarillo 1996, writ denied).

197. *Id.* at 777.

198. *In re Estate of Gibson*, 893 S.W.2d 749, 751 (Tex. App.—Texarkana 1995, no writ); *see also* *Edds v. Mitchell*, 184 S.W.2d 823, 825 (Tex. 1945).

199. *Edds*, 184 S.W.2d at 825–26.

200. *Id.*

201. TEX. PROP. CODE § 5.009(a) (West 2016) (emphasis added).

202. *Id.* at § 5.009(b).

203. 26 U.S.C.A. § 7520 (West 2012).

204. *Actuarial Valuations*, INTERNAL REVENUE SERV. (2009), <https://www.irs.gov/pub/irs-pdf/p1457.pdf> [<https://perma.cc/35xg-hm4j>].

205. *Id.*

Calculating an actuarial factor mathematically is appropriate if Internal Revenue Service Publication 1457 or any other source for life interest and term-of-years actuarial factors are not conveniently available.²⁰⁶ If necessary, “[t]his actuarial factor may be derived by subtracting the correlative remainder factor (that corresponds to the applicable section 7520 interest rate) in Table B (for a term of years) in § 20.2031-7(d)(6) or in Table S (for the life of one individual) in § 20.2031-7(d)(7), as the case may be, from 1.000000.”²⁰⁷

26 U.S.C.A. § 7520 provides, in part, as follows:

(a) General rule.—For purposes of this title, the value of any annuity, any interest for life or a term of years, or any remainder or reversionary interest shall be determined—

- (1) under tables prescribed by the Secretary, and
- (2) by using an interest rate (rounded to the nearest $\frac{2}{10}$ ths of 1 percent) equal to 120 percent of the Federal midterm rate in effect under section 1274(d)(1) for the month in which the valuation date falls.²⁰⁸

For purposes of paragraph (2), “[i]f an income, estate, or gift tax charitable contribution is allowable for any part of the property transferred, the taxpayer may elect to use such federal midterm rate for either of the [two] months preceding the month in which the valuation date.”²⁰⁹ Additionally, “[i]n the case of transfers of more than [one] interest in the same property with respect to which the taxpayer may use the same rate under paragraph (2), the taxpayer shall use the same rate with respect to each such interest.”²¹⁰

Below is an example of how the calculation of a life estate interest is performed, provided by Timothy P. Crawford.²¹¹ Stella sold her life estate in September 2009. The homestead has two remaindermen.²¹²

Stella is ninety-one years old—the section 7520 Interest rate is 3.4%, as can be seen in Table S.²¹³ The life interest is 12.571%, with a remainder interest of 87.429%.²¹⁴ The life estate owner is entitled to receive 12.571% of the sales proceeds, while the remaindermen are entitled to split 87.429%

206. *Id.*

207. *Id.*

208. § 7520(a).

209. *Id.*

210. *Id.*

211. Timothy P. Crawford, *Life Estate Interests*, Your Asset Protection Law Firm (last visited Nov. 3, 2016) http://www.tpclaw.com/images/Life_Estate_Interests_Handout.pdf [https://perma.cc/9zww-ye6f].

212. *Id.*

213. *Id.*

214. *Id.*

of the sales proceeds.²¹⁵ The resulting sale is \$53,181.53 (total sales proceeds after expenses: survey, title policy, realtor’s commission, attorney’s fees, real estate tax credit, repair credit, transfer taxes, etc.).²¹⁶ The resulting portions are \$6,685.45 for Stella (IRS calculation: \$6,685.45 to Stella \$53,181.53 x .12571 = \$6,685.45) and \$46,496.08 for the remaindermen.²¹⁷

E. Statutory Life Estate in One-Third Acquired Through Intestacy

Beginning as early as the Code of Hammurabi, the protection of a decedent’s spouse from disinheritance can be found in Roman, Germanic, Scandinavian, and Saxon Law.²¹⁸ Even in common law, a “surviving spouse was not an heir.”²¹⁹ At common law, “widows were protected by the device of dower which was a life estate in one-third of all lands in which her deceased husband was seized of an estate of inheritance at any time during the marriage.”²²⁰ However, a widower “was protected by curtesy if a live child was born of the marriage.”²²¹ Curtesy in the majority of cases “consisted of a life estate in all of the wife’s inheritable land.”²²²

The life estate in one-third made its way to the first codification of Texas statutes in 1859.²²³ It can be seen in “[a]rticle 347, section 4 of the first code states that if there is a surviving child or children, the surviving husband or wife is entitled to an estate for life, in one-third of the land and slaves of the intestate.”²²⁴ The one-third interest appears to have stuck because it is still part of the Texas statutes and is now codified as § 201.002 of the Texas Estates Code, which provides:

(a) If a person who dies intestate leaves a surviving spouse, the estate, other than a community estate, to which the person had title descends and passes as provided by this section.

(b) If the person has one or more children or a descendant of the child:

(3) the surviving spouse is entitled to a life estate in one-third of the person’s land, with the remainder descending to the person’s child or children and the descendants of a child or children.²²⁵

215. *Id.*

216. *Id.*

217. *Id.*

218. John W. Fisher II & Scott A. Cumutte, *Reforming the Law of Intestate Succession and Elective Shares: New Solutions to Age Old Problems*, 93 W. VA. L. REV. 61, 101 (1990).

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. Darien A. McWhirter, *The Ancient Origins of Texas Probate Law*, 49 TEX. B.J. 1060, 1061 (1986).

224. *Id.* (citing TEX. REV. CIV. STAT. ANN. art. 347 § 4 (1859)).

225. TEX. EST. CODE ANN. § 201.002(a), (b)(3) (West 2016) (emphasis added).

Therefore, in the event the life estate interest is limited to one-third, or such as an interest inherited under § 201.002(a)(3) of the Texas Estates Code, then the value of the interest is adjusted to account for the fact that the life estate interest is not in the whole of the property at issue.²²⁶ There is no clear authority, however, as to whether the owner of a life-estate in one-third should only be responsible for one-third of the expenses attributable to a life-tenant if the person is not exercising a beneficial right such as the homestead right.²²⁷ Often, the surviving spouse will have a life estate acquired through intestacy and the homestead right simultaneously.²²⁸ However, the surviving spouse could abandon the homestead without affecting his right as a life tenant.²²⁹ Arguably, in such an instance, the spouse (life tenant) who is not exercising his homestead right would only be responsible for his proportionate share of the expenses attributable to a life-tenant.²³⁰ No reported opinions in Texas have addressed this issue.²³¹

IV. REMAINDER INTEREST

A. *What Is the Remainder?*

The remainderman has an ownership interest in the property subject to the life estate interest.²³² The remainderman does not have the right to occupy, possess, or otherwise use the property until the life estate is terminated.²³³

The Texas Administration Code, which codifies regulations regarding Medicaid eligibility, contains its own definition of “remainder.” That code defines a “remainder interest” as follows:

(2) Remainder interest. A remainder interest, which is created when a life estate is established, gives a person owning a remainder interest the right to ownership of the property upon the death of the owner of the life estate.²³⁴ A person owning a remainder interest in the property has

226. See, e.g., *Davis v. Atl. Oil Producing Co.*, 87 F.2d 75, 77 (5th Cir. 1936) (explaining that the right of a life tenant who inherited such interest by intestacy was limited to one-third of the proceeds of the sale of oil).

227. See *Moss v. Smith*, 68 S.W.533, 534 (Tex. Civ. App.—San Antonio 1902, writ ref’d) (showing a spouse who was found to have abandoned homestead retained his life estate in one-third).

228. See *id.*

229. See *id.*

230. See *id.*

231. See *id.*

232. *Rae v. Baker*, 38 S.W.2d 366, 368 (Tex. Civ. App.—Austin 1931, writ ref’d); *Hensley v. Conway*, 29 S.W.2d 416, 418 (Tex. Civ. App.—Eastland 1930, no writ).

233. *Rae v. Baker*, 38 S.W.2d 366, 368 (Tex. Civ. App.—Austin 1931, writ ref’d); *Hensley v. Conway*, 29 S.W.2d 416, 418 (Tex. Civ. App.—Eastland 1930, no writ).

234. 1 TEX. ADMIN. CODE § 358.350 (West 2016).

the right to sell his or her remainder interest unless the person is prohibited from doing so by a legal restriction.²³⁵

B. What Are the Rights of the Remaindermen?

The remainderman can sell their interest in the property even before the life estate interest terminates if allowed by the legal instrument establishing the life estate interest.²³⁶ In such cases, the life estate owner retains the life estate interest until the life estate terminates, and the sale cannot affect the homestead right.²³⁷

C. What Are the Responsibilities of the Remaindermen?

The responsibility of payment of casualty insurance premiums and mortgage principal payments is on the holder of the underlying title.²³⁸ As previously mentioned, the holder of a remainder interest in a life estate cannot take possession of the property until the death of the life tenant.²³⁹

D. How Do You Value a Remainder Interest?

The remainder interest is valued in a similar fashion to the life estate, as discussed above.²⁴⁰

V. CO-TENANTS

Many times, a group of people, particularly the decedent's children, will inherit real property in undivided interests.²⁴¹ Unless the property is sold, this scenario gives rise to potential conflict between those living on the property and those who are not.²⁴² In addition, sometimes in cases of intestacy, the children will inherit real property subject to a life estate and, possibly, a homestead right of the surviving spouse.²⁴³

As was discussed previously, the homestead right in that instance would delay the enjoyment of the co-tenants.²⁴⁴ However, once the life estate and

235. *Id.*

236. *Id.*

237. McGill v. Reed, 64 S.W.2d 358, 360 (Tex. Civ. App.—Texarkana 1933, no writ).

238. Hill v. Hill, 623 S.W. 2d 779, 780, 781 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.).

239. Rae v. Baker, 38 S.W.2d 366, 368 (Tex. Civ. App.—Austin 1931, writ ref'd); Hensley v. Conway, 29 S.W.2d 416, 418 (Tex. Civ. App.—Eastland 1930, no writ).

240. *See supra* Part III Section D.

241. Rae v. Baker, 38 S.W.2d 366, 368 (Tex. Civ. App.—Austin 1931, writ ref'd).

242. *See id.*

243. *See id.*

244. Hensley v. Conway, 29 S.W.2d 416, 418 (Tex. Civ. App.—Eastland 1930, no writ).

homestead rights end, the co-tenants may occupy and possess the property and exercise their rights as co-tenants.²⁴⁵

A. What Are the Rights of a Co-Tenant?

1. Right to Possession

A tenancy-in-common gives any co-tenant the right to possession of the property in which he or she owns an interest.²⁴⁶ A co-tenant may “use jointly owned property without liability for its rental value.”²⁴⁷ A co-tenant who occupies joint property is not required to account for the value of its use unless there is an ouster or denial of use to other co-tenants.²⁴⁸ Between co-tenants, possession alone by one is not necessarily hostile to the other.²⁴⁹ However, if “an overt act, evidencing an unequivocal intent on the part of one joint owner to claim the entire common property to the exclusion of the other joint owner, is committed, and that act is so notorious as to reasonably convey that impression, it is then sufficient to constitute in law an ouster.”²⁵⁰

2. Right to Possess Without Paying Rent

In instances where “[o]ne co-tenant who, without objection from the other joint owners, occupies all or more than his proportionate share of the common premises, [he] is not liable to his co-tenants for the use of the common property in absence of an express agreement or implied understanding to the contrary.”²⁵¹ In order to support this theory the courts have stated, “[t]he rule has its foundation in the fact that each cotenant is entitled to occupy the property, and that sometimes property can be made to produce revenue only through the efforts of the occupant, and often this is insufficient to justify the payment of rent.”²⁵² The court in *Hernandez v. Hernandez*, citing prior authority, points out:

It is not unusual for one cotenant to have exclusive possession and make beneficial use of lands for rather long periods of time and ordinarily such use is with the acquiescence of the other cotenants. Cotenancy is a common form of land tenure when owners belong to the same family. This results largely by the operation of the statute of descent and distribution and

245. *See id.*

246. *Todd v. Bruner*, 365 S.W.2d 155, 160 (Tex. 1963).

247. *See Eddings v. Black*, 602 S.W.2d 353, 358 (Tex. Civ. App.—El Paso 1980, writ ref’d n.r.e., 615 S.W.2d 168 (Tex. 1981) (per curiam).

248. *See Potka v. Potka*, 205 S.W.2d 51, 55 (Tex. Civ. App.—Waco 1947, writ ref’d n.r.e.).

249. *Republic Prod. Co. v. Lee*, 132 Tex. 254, 263 (Tex. 1938).

250. *Id.*

251. *Roberts v. Roberts*, 150 S.W.2d 236, 237 (Tex. 1941).

252. *Id.*

commonly followed customs and practices relating to the making of devices of lands. The legal presumption follows a generally recognized habit or practice based upon years of observed experience.²⁵³

3. *Not Required to Account for Use*

A co-tenant “who occupies joint property without complaint from his co-tenants is not required to account for the value of the use thereof.”²⁵⁴ However, where he “seeks contribution from his co-tenants for funds expended in the betterment of the common estate. . .he should be required to. . .allow as an offset the value of the use of the premises.”²⁵⁵

4. *Right to Reimbursement for Some Items*

Courts have stated that “[a] co-tenant who incurs expense for the necessary preservation of property is entitled to reimbursement from her co[-]tenant.”²⁵⁶ A co-tenant is entitled to reimbursement from other co-tenants for their proportionate share of the payment of taxes, insurance, and repairs and improvements in the preservation of common property.²⁵⁷

Furthermore, it has been established that “[a] co-tenant can not impose any burden upon the estate of his co-tenants by voluntarily placing upon the common property improvements of a permanent character.”²⁵⁸ Though, in a partition in kind, the co-tenant may set aside the portion of the common property upon which the improvements have been placed for himself, but only if this does not interfere with the rights of his co-tenants.²⁵⁹ A co-tenant who “seeks equitable contribution from co-tenants for funds expended to benefit the common property” must allow as an offset the use value of the property.²⁶⁰

5. *Right to Partition*

Each co-tenant “has a right to demand partition of the property, and upon dissolution of the co-tenancy there are certain rights which the parties may assert when the property is so partitioned.”²⁶¹ However, “[w]hen the property is of such a character that it cannot be equally divided without impairing the value of all the portions, it may be divided into shares of

253. *Id.* at 735.

254. *Roberts v. Roberts*, 150 S.W. 2d 236, 238 (Tex. 1941).

255. *Id.*

256. *Bailey-Mason v. Mason*, 334 S.W.3d 39, 45 (Tex. App.—Dallas 2008, pet. denied).

257. *Duke v. Squibb*, 392 S.W.2d 885, 888 (Tex. Civ. App.—Texarkana 1965, no writ).

258. *Sparks v. Robertson*, 203 S.W.2d 622, 624 (Tex. Civ. App.—Austin 1947, writ ref’d).

259. *Id.*

260. *Scott v. Scruggs*, 836 S.W.2d 278, 281 (Tex. App.—Texarkana 1992, writ denied).

261. *Sayers v. Pyland*, 161 S.W.2d 769, 771 (Tex. 1942).

unequal value, and the inequality corrected by means of a charge or lien upon the more valuable parts in favor of the less valuable ones.”²⁶² Special treatment is applied to “[t]he payment of the amount charged upon the more valuable portion, to equalize the partition, [and] is not a condition precedent to the vesting of such portion in the party to whom it is assigned, but it creates an incumbrance in the nature of a vendor’s lien.”²⁶³

B. What Are the Duties of a Co-Tenant?

1. Duty to Preserve the Property

Co-tenant duties include “[t]he duty to preserve the common property rests on all of the co-tenants.”²⁶⁴ Also of note, “[s]ince the care, maintenance, upkeep and preservation of the property rests upon the owners collectively, a co-tenant who expends common funds for the necessary or proper preservation of the common properties is entitled in a judicial partition of the jointly owned properties to have all such expenditures charged to the tenants in common in accordance with their pro-rata ownership.”²⁶⁵

2. Duty to Account for Income

If the tenant in possession rents the property to a third person, they must account to the other co-tenant for the proceeds received, because the proceeds are profits received beyond the permitted personal occupancy and use.²⁶⁶ As stated previously, a co-tenant who “occupies joint property without complaint from his co-tenants is not required to account for the value of the use thereof.”²⁶⁷ However, where co-tenants seek contribution from other co-tenants for funds expended in the betterment of the common estate, they may be required to deduct the value of their use of the premises.²⁶⁸

262. *Id.* at 772.

263. *Id.*

264. *Gonzalez v. Gonzalez*, 552 S.W.2d 175, 181 (Tex. Civ. App.—Corpus Christi 1977, writ refused n.r.e.).

265. *Id.*

266. *Potka v. Potka*, 205 S.W.2d 51, 55 (Tex. Civ. App.—Waco 1947, writ ref’d n.r.e.); *Trevino v. Trevino*, 64 S.W.3d 166, 174 (Tex. App.—San Antonio 2001, no pet.) (showing that “co-tenants are required to share income generated from property held in common”).

267. *Roberts v. Roberts*, 150 S.W. 2d 236, 238 (Tex. 1941) (emphasis added).

268. *Id.*

3. Duty Not to Exclude Other Co-Tenants

A co-tenant must act in a manner that is not detrimental to the other co-tenants’ ownership and enjoyment of the property.²⁶⁹ When “an overt act, evidencing an unequivocal intent on the part of one joint owner to claim the entire common property to the exclusion of the other joint owner”, is committed, and that act is “so notorious as to reasonably convey that impression,” that act is then sufficient to constitute an ouster.²⁷⁰

4. Cannot Use Homestead to Trump Other Co-Tenant’s Rights

Except in the situation where there is a surviving spouse or minor child exercising his or her probate homestead rights in the premises, as between the co-tenants, homestead rights in property held in tenancy in common are subordinate to other co-tenant’s rights.²⁷¹ One co-tenant cannot defeat this right in the other by moving on the property and asserting homestead rights therein.²⁷²

VI. CONCLUSION

Regardless of whether someone dies with or without a will, there are often competing interests when it comes to the right of possession and control of estate assets, particularly real estate.²⁷³ The holder of the homestead right may or may not have an ownership interest in the property.²⁷⁴ The owner of the remainder interest may or may not be friendly.²⁷⁵ Finally, the person exercising the homestead right may or may not be in a position to meet the obligations associated with the right.²⁷⁶ The author hopes this overall summary of the various rights and duties associated with the varying interests will help advise clients so that they can make the best decision as to whether to keep the interest or reach some agreement to part ways.²⁷⁷

269. Scott v. Scruggs, 836 S.W.2d 278, 282 (Tex. App.—Texarkana 1992, writ denied); *see also* Fuqua v. Fuqua, 750 S.W.2d 238, 246 (Tex. App.—Dallas 1988, writ denied) (showing that “although each tenant in common has a right to occupy the jointly owned property, none may occupy it to the exclusion of the others”).

270. Republic Prod. Co. v. Lee, 132 Tex. 254, 263 (Tex. 1938).

271. *Id.*

272. Sayers v. Pyland, 161 S.W. 2d 769, 773 (Tex. 1942); Grant v. Clouser, 287 S.W.3d 914, 921–22 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

273. *See supra* Part I.

274. *See supra* Section II.E.

275. *See supra* Section II.E.3.

276. *See supra* Part I.

277. *See supra* Part I.