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Bobbie J. Baker

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THE HOMESTEAD EXEMPTION IN WYOMING

Homestead rights are peculiar American innovations representing an effort on the part of the state to protect families from financial misfortune. These rights "exist only by virtue of constitutional and statutory provisions creating them."¹ The Wyoming Constitution provides that there shall be "a homestead as provided by law."² The legislature has enacted statutes under this provision for the purposes of exempting the homestead from claims by creditors³ and for securing a homestead for the benefit of the surviving spouse or minor children of a deceased person.⁴

The original purpose of the homestead right was to insure that the family would have a home secure from attachment by creditors.⁵ Due to the exploding cost of homes and to the much less rapid increase in the amount allowed as a homestead exemption, it is doubtful that this purpose could be satisfied today in Wyoming. It thus appears that some re-evaluation of the homestead rights might be in order. A re-evaluation of this type, however, could be better accomplished by a social scientist or the legislature than by a lawyer.

Homestead rights, whatever their value to society, are certainly of concern to the practicing attorney. The Wyoming lawyer must consider these rights whenever he has a question involving creditors' claims decedents' estates or the execution of conveyances. This article is intended to provide a summary of homestead rights as they are defined by the statutes and the decisions of the Supreme Court of Wyoming.

The three areas in which homestead rights are relevant and in which they will be considered are: debtors' rights; decedents' estates; and conveyancing.

(1) *Debtors Rights*

In this first area of consideration the applicable statutes are found in the Code of Civil Procedure, Title 1 of Wyoming Statutes, 1957.⁶

It should be noted that while the homestead, which is exempt to the value of \$4,000.00,⁷ is the most important exemption allowed a debtor, it is not the only one. In addition to the homestead, a debtor is allowed as other exempt property: wearing apparel to the value of \$150.00,⁸ furniture to the value of \$500.00,⁹ and tools or implements of his trade or profession to the value of \$150.00¹⁰

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1. 40 C.J.S. 431.
 2. Wyo. Const., Art. 19, § 9.
 3. Wyo. Stat. §§ 1-498 to 1-503 (1957).
 4. Wyo. Stat. §§ 2-213 to 2-218 (1957).
 5. 40 C.J.S. 431.
 6. Wyo. Stat. §§ 1-498 to 1-503 (1957).
 7. Wyo. Stat. § 1-498 (1957).
 8. Wyo. Stat. § 1-504 (1957).
 9. Wyo. Stat. § 1-505 (1957).
 10. Wyo. Stat. § 1-507 (1957).

In order for a debtor to be entitled to the exemption, the homestead must be the actual home of the debtor and his family in which they can be said to be presently residing and not to have abandoned.¹¹ The loss or relinquishment of a homestead exemption is not favored by law,¹² and temporary absence from a homestead, therefore, is not considered abandonment, provided that there was a present intent to return at the time of moving away from the homestead coupled with a constant and abiding intention to return to it. Prolonged absence from the homestead does not in and of itself raise a presumption of abandonment, nor does temporary removal to obtain better educational facilities constitute abandonment so long as there is the constant intention to return.¹³

The homestead exemption is for the protection of the family as a whole.¹⁴ That is, it is not only for the protection of the debtor's family but the debtor as well. Therefore, once a person as the head of a household acquires a homestead, he does not lose his right by the death of his wife, even though he has no children, so long as he continues to occupy the premises as a home.¹⁵

The Supreme Court of Wyoming in the case of *Altman v. Schuneman*¹⁶ stated: "homestead laws are remedial in character and should be liberally construed with a view of effecting their objects." The court then held that a husband, in possession of the property claimed as homestead, could bring an action to redeem the homestead that had been leveled upon by a creditor, although legal title was in his wife. It was further held that even though he had conveyed the homestead to his wife with the intent to defraud his creditors, they could not question the conveyance as the property was exempt before the transfer.

There is dicta in the *Altman* case to the effect that any equitable title coupled with possession is enough to support a homestead exemption. A homestead may even be acquired by one partner and his wife in property purchased with partnership funds where the other partner acquiesces, and by the same token a homestead may be acquired in an undivided interest in land.¹⁷ A wife, against whom a personal judgment has been rendered, also can claim a homestead exemption in her separate property on which she and her husband live.¹⁸

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11. *Harney v. Montgomery*, 29 Wyo. 362, 213 Pac. 378 (1923). This case is especially interesting on this point because at the time the cause of action arose there was a statute, Wyo. Comp. Stat. § 4756 (1910), that stated: "Such homestead shall only be exempt . . . while occupied as such by the owner thereof . . . or while the owner is actually living within the state." (This statute was in effect from 1909 to 1915.) This caused Justice Blume to go into great detail as to what a homestead was both before and after and during the time this statute was in effect. Also, see *Altman v. Schuneman*, 39 Wyo. 414, 273 Pac. 173 (1929).
 12. *Jones v. Kepford*, 17 Wyo. 468, 100 Pac. 923 (1909).
 13. *State Bank of Wheatland v. Bagley Bros.*, 44 Wyo. 244, 11 P.2d 572 (1932).
 14. *Altman v. Schuneman*, supra note 11.
 15. *Towne v. Rumssey*, 5 Wyo. 11, 35 Pac. 1025 (1893).
 16. Supra note 11.
 17. *State Bank of Wheatland v. Bagley Bros.*, supra note 13.
 18. *Bachman v. Hurtt*, 26 Wyo. 332, 184 Pac. 709 (1919); Wyo. Stat. § 20-25 (1957).

The proceeds from the sale of a homestead up to \$4,000.00 or another homestead bought with such proceeds are exempt from attachment or levy.¹⁹ This applies whether the sale was made voluntarily by the claimant²⁰ or was forced by the claimants' creditors. The creditors have a right to sell a homestead if it has a value greater than \$4,000.00, but they must pay the \$4,000.00 to the owner of the homestead.²¹ The sale of the homestead property must be made in conformity with the statute²² and the execution creditor, the purchaser and the officer making the sale all have an obligation to see that the rights of the homestead claimant are protected. The sale should not be confirmed until the homestead claimant has paid his statutory exemption.²³ A judgment creditor who initiates levy and sale against the property, alleging that the property was homestead, cannot, subsequent to such levy and sale, take a contrary position that the property was not exempt.²⁴

There are certain debts (taxes, indebtedness incurred for the purchase of the property and indebtedness incurred for improvements placed thereon) from which the homestead is not, by the provisions of the Constitution,²⁵ to be exempted. These exceptions have necessarily been clarified by statutes and decisions. The only tax, for which a homestead is liable to be sold, is that which is due on itself,²⁶ and the homestead is exempt from inheritance tax.²⁷ The case of *Powers v. Pense*²⁸ holds that a mortgage given as security for the purchase price of the homestead, whether a purchase money mortgage executed to the grantor or a mortgage executed by the grantee to third person, has as a principal in equity precedence over any prior general lien and for that same reason is superior to the homestead right of the mortgagor. So even if the wife or husband of the vendee does not join in the execution of the mortgage or if the right of homestead is not expressly released, the mortgagee, nevertheless, has the right to foreclose, and a purchaser at a foreclosure sale of such a mortgage acquires all the lien of such mortgage and the same precedence over the homestead right as that held by the mortgagee. In the event that a mortgage is executed to a third party to obtain money to pay off the original mortgage, the subsequent mortgagee stands in the same position as the original mortgagee and so has the same precedence over the homestead rights of the mortgagor. The homestead is not exempt from a mechanics lien,²⁹ and a mortgage given to secure the release of a judg-

19. Wyo. Stat. § 1-503 (1957).

20. There is no case in which the Supreme Court of Wyoming has had to decide this point but the Federal Court for the district of Wyoming in a recent case, *United States v. Field*, 190 F. Supp. 216, has held that under the Wyoming law the proceeds from such voluntary sales are exempt.

21. Wyo. Stat. § 1-502 (1957).

22. Wyo. Stat. § 1-502 (1957) is our present statute on sale of homestead by creditors.

23. *Altman v. District Court*, 36 Wyo. 290, 354 Pac. 691 (1927).

24. *Altman v. Schuneman*, supra note 11.

25. Wyo. Const., Art. 19, § 9.

26. Wyo. Stat. § 39-127 (1957).

27. Wyo. Stat. § 39-337 (1957).

28. 20 Wyo. 327, 123 Pac. 925, 40 L.R.A., N.S., 785 (1912).

29. Wyo. Stat. § 29-24 (1957).

ment and decree upon a mechanics lien merges the mechanics lien into the mortgage so that the mortgage then has precedence over the homestead right to the extent of the debt for the improvements and interest thereon.³⁰

(2) *Decedents' Estates*

The homestead right in this area is substantially different than the right discussed in area (1). The statutes applicable to this area are found under Title 2, Wyoming Statutes, 1957.³¹ Title 2 statutes pertain to wills, decedents' estates and the probate code.

Persons entitled to the homestead exemption in this area are the widow or widower or minor children of the decedent, but if the surviving spouse is not the parent of any of the surviving children, the exempt property (this includes not only the homestead, but all other exempt property discussed under the Title 1 statutes as well) is divided one-half to the spouse and one-half to the children who are not children of the surviving spouse.³² The homestead is not automatically set over, but any interested person, upon showing the necessary facts, may petition to have the homestead set over to the proper party or parties. A hearing will be held after notice has been given in order to allow persons interested to come in and show cause why the property should not be set over.³³

The statutes indicate that a surviving spouse will be entitled to the homestead. However, there may be times when the court will not set the homestead over to the person requesting it, although such person is legally the spouse of the deceased person. In the case of *Ulman v. Abbott*³⁴ the court held that a wife who had not lived with her husband for thirty years and who had never resided in the state is not entitled to a homestead right in her husband's estate. On the other hand, a woman who is living with her husband at the time of his death and who has gone through a ceremonial marriage with him is entitled to have the homestead set over to her although there may be some question as to the validity of the marriage.³⁵ The wife has the burden of showing a marriage to the deceased. Once she shows this the burden shifts,³⁶ and there is then a presumption that the marriage is valid, so that anyone who would attack the marriage has the burden of showing that the marriage was not valid.³⁷

Unlike the homestead right with regard to creditors, the homestead exemption allowed from a decedent's estate does not necessarily have to be a residence. Under Title 2 statutes, if the decedent's estate should not contain all the property exempt from execution,³⁸ then the person or

30. *Wright v. Walker*, 31 Wyo. 233, 225 Pac. 75 (1924).

31. Wyo. Stat. §§ 2-213 to 2-218.

32. Wyo. Stat. § 2-213 (1957).

33. Wyo. Stat. § 2-214 (1957). Publication is sufficient to satisfy the requirement for notice. If all the estate is found to be exempt, then no further proceedings are necessary in the administration of the estate.

34. 10 Wyo. 97, 67 Pac. 467 (1902).

35. *St. Clair v. St. Clair*, 46 Wyo. 446, 28 P.2d 894 (1934).

36. *In re Kiesel's Estate*, 35 Wyo. 300, 249 Pac. 81 (1926).

37. *St. Clair v. St. Clair*, supra note 34.

38. See notes 8, 9, and 10 for exempt property other than homestead.

persons entitled to the exempt property may have other property to the value of the exemption set over or may take the value of the exemption in money.³⁹ This is one situation in which the value of the homestead and other exempt property is readily apparent. If a person died with large debts and assets insufficient to pay them, this exemption would still save something for his family unless the estate was so small the preferred claims, set out in the next paragraph, would exhaust it.

A homestead arising out of a decedent's estate, like any other homestead, is subject under the Constitution to execution for taxes, indebtedness incurred for the purchase of the property and indebtedness incurred for improvements placed on the property. It is provided by statute,⁴⁰ however, that liens and encumbrances against the homestead are to be paid out of the estate, but if the funds in the estate are not sufficient for this, then such liens or encumbrances shall be paid proportionally with other claims allowed, and they shall be enforced against the homestead only for any deficiency remaining after such payment. In addition to not being exempt from these debts, a homestead arising out of a decedent's estate is also liable for the payment of expenses of administration, the last sickness of the decedent and funeral expenses when there is no other property in the estate sufficient to pay such expenses.⁴¹ If the person entitled to the homestead pays off non-preferred claims before the preferred claims, then that person is not entitled to the homestead exemption as against such preferred creditors.⁴²

(3) *Conveyancing*

The third area in which the homestead right is important is conveyancing. To effectively understand this area it is necessary to keep in mind the definitions and distinctions discussed in the first two areas.

Homesteads, even homesteads arising out of a decedent's estate,⁴³ may be conveyed. It is necessary, however, that the owner and the owner's spouse sign and acknowledge a waiver on the instrument of conveyance.⁴⁴ Unless there is a homestead right, as defined in the first two areas, in existence at the time of the execution of the instrument of conveyance, there is no necessity of mentioning nor of releasing such a non-existent right.⁴⁵ The best rule, however, is to recite a release of homestead in every conveyance. There can then be no question, either at the time of the conveyance or in the future when someone else may be making a title examination, of any defect in the title so far as a homestead right might be concerned.

39. Wyo. Stat. § 2-213 (1957), *In re Edelman's Estate*, 68 Wyo. 30, 228 P.2d 408 (1951).

40. Wyo. Stat. § 2-215 (1957).

41. Wyo. Stat. § 2-213 (1957).

42. *Dobler v. Clark*, 42 Wyo. 160, 292 Pac. 246 (1930).

43. *Goodson v. Smith*, 69 Wyo. 439, 243 P.2d 163 (1952).

44. Wyo. Stat. § 34-53 (1957).

45. *Harney v. Montgomery*, supra note 11; *McConnell v. Dixon*, 68 Wyo. 301, 233 P.2d 877 (1951).

The case of *State Bank of Wheatland v. Bagley Bros.*⁴⁶ holds that a conveyance in which the spouse does not join to release homestead is void. The statute in effect at the time of the *Bagley Bros.* case stated that an instrument in which the wife did not join was "absolutely void."⁴⁷ Our present statute would probably reach the same result although it does not say that such a conveyance is absolutely void, but that a homestead may be conveyed if the right is properly waived.⁴⁸ However, if a tract of land is conveyed by an instrument insufficient to pass homestead and the tract contains both the homestead and land in excess of the homestead then the conveyance though void as to the homestead is valid as to any excess. This was the holding in the leading case, *Jones v. Losekamp*,⁴⁹ in which a homestead along with other land was conveyed by a mineral lease, not executed so as to release the homestead. There is dicta in the case of *Delfelder v. Teton Land Co.*⁵⁰ that this principal is also applicable to mortgages.

There are, as mentioned earlier in this article, two occasions when a mortgage will be entirely valid even though the homestead right has not been released. It is not necessary that homestead be released on a mortgage given as security for the purchase price of the homestead,⁵¹ nor on a mortgage given to secure the release of a judgment on a mechanics lien.⁵²

Finally, it is necessary to consider the case of *Delfelder v. Teton Land Co.*,⁵³ which raises an important question on which the court was divided. In this case a husband and wife executed a mortgage releasing all homestead rights. Soon after this, the husband died and the wife was appointed executrix of his estate. The mortgage was reduced in size and the widow gave several renewal notes for the debt to extend payment. No formal claim was ever filed by the mortgagee to the widow as executrix. Finally, an assignee of the mortgage foreclosed and sometime after brought an action of ejectment. Along with other defenses, the widow claimed that the foreclosure of the mortgage was not valid as she resided on and claimed as homestead a portion of the land, and that no presentation of the claim had been made to the executrix of the estate. This raised the question of whether or not a release of homestead in a mortgage released only the present homestead right under the Title 1 (exemption from creditors) statutes or if it also released the future homestead right under the Title 2 (decedents' estates) statutes.

Justice Blume, stated in his opinion, that only the rights arising under Title 1 statutes are released. His reasoning is that rights under Title 2 statutes arise at a time subsequent to the execution of the waiver, and that

46. *Supra* note 13.

47. Wyo. Rev. Stat. § 97-205 (1931).

48. Wyo. Stat. § 34-53 (1957).

49. 19 Wyo. 83, 114 Pac. 673 (1911).

50. 46 Wyo. 142, 24 P.2d 702 (1933).

51. *Powers v. Pense*, *supra* note 27.

52. *Wright v. Walker*, *supra* note 29.

53. *Supra* note 49.

it is against public policy to allow such an exemption to be waived in advance. Upon the facts of the case, however, Justice Blume held that as the widow had never moved to save the homestead, and as she had renewed the note long after the time for filing claims against the estate, and as by her own actions she had caused taxes and interest to run up against the estate, there was no possibility at the time of the action of preserving the homestead.

Justice Riner, on the other hand, speaking in a separate opinion, stated that all homestead rights may be waived as it is fair to assume that at the time of executing the instrument the parties concerned knew of whatever rights they might have under the statutes, and knowing this intended to waive such rights.

BOBBIE J. BAKER