

Laster v. First Huntsville Properties Co.

Texas Supreme Court
826 S.W.2d 125 · April 22, 1992

OPINION

COOK, Justice.

This case presents the question whether one ex-spouse who, pursuant to a consent decree of divorce, holds a future interest in property subject to the homestead right of the other ex-spouse, can mortgage that interest. We hold that such an interest can be validly mortgaged. For the following reasons, the judgment of the court of appeals is affirmed and this cause is remanded to the trial court for a determination of the rights of the parties.

I

When Melissa and Richard Laster divorced in 1976, they entered into an agreed judgment which, among other things, divided the couple's property. Under the decree, Melissa was given a 73.83 percent interest in the community property residence and Richard was given the remaining undivided 26.17 percent interest. Melissa and the children were also given the right to the use and occupancy of the residence *128 until the younger of the two children reached eighteen years of age or was no longer in school.

This right in the residence was further made subject to Melissa making the monthly payments on the residence, maintaining the premises, and ensuring that any absence from the residence did not exceed three years. The judgment provided that at the occurrence of one or more of these conditions, Melissa's right of use and occupancy of the residence would terminate and the rights of the parties in the property would be determined in accordance with their interests as set out in the judgment. Melissa currently remains in sole possession of the residence.

In 1979, Richard executed a deed of trust conveying his interest in the residence to secure payment on a promissory note, upon which he later defaulted. Richard's interest was sold by substitute trustee's deed in 1981 to the First National Bank of Huntsville, which later sold the property to First Huntsville Realty Corporation in 1983. First Huntsville Properties purchased the property from First Huntsville Realty in 1985. The couple's youngest child turned eighteen in 1988, and First Huntsville Properties filed suit seeking to partition the residence in 1989. In Melissa's answer, she alleges the entire property was, both at the time the deed of trust was executed and at the time suit was filed, subject to her homestead interest in the entire residence. Thus, she claims, the residence is protected from forced sale.

A bench trial was had and the trial court rendered judgment holding that: the residence was protected from forced sale by Melissa's continuing homestead right in the entire residence; the continuing homestead right was paramount to First Huntsville's interest in the property; and the writ of partition was thereby denied as "premature." The court further stated that in light of its holding, it was unnecessary to determine the question of the parties' respective interests in the residence. In the findings of fact and conclusions of law filed later, however, the court stated that First Huntsville Properties had acquired title to Richard's 26.17 percent interest in the residence "subject to the right of occupancy of Melissa L. Laster."

First Huntsville Properties appealed, claiming that Melissa no longer had a homestead right which extended to its undivided interest in the property at the time the partition action was filed and, therefore, partition should be granted. The court of appeals reversed the trial court's judgment, holding that the trial court erred in not partitioning the residence because First Huntsville's interest in the property which was held in cotenancy with Melissa, was paramount to her homestead right. 797 S.W.2d 151 (Tex.App.1990). Melissa appeals from that judgment.

II

Melissa argues the court of appeals erred both when it held that a cotenant's right to seek partition was paramount to another cotenant's homestead rights, and when it did not find that the mortgage executed by Richard was void because it was levied against homestead property to secure general indebtedness. We turn first to the issue of what relation the parties bear to one another in regards to the residence.

A

The court of appeals found that Melissa and Richard held their respective interests in the residence as "joint owners," with Melissa retaining a homestead interest in the whole until the younger of the two children reached eighteen. The court also determined that, by way of Richard's mortgage, Melissa and First Huntsville now hold the residence as tenants in common. The court of appeals did not discuss whether the mortgage was void under Texas homestead laws. Although we agree that First Huntsville and Melissa are now cotenants in the residence, we disagree with the court's reasoning in reaching this result.

The term "joint owner" is utilized in the statute which authorizes partition of jointly held property. See Tex.Prop.Code § 23.001. This term, however, is imprecise because its use does not signify any one type of ownership. The term has, in the *129 past, been used to refer both to property-held in joint tenancy, see *Stauffer v. Henderson*, 801 S.W.2d 858 (Tex.1990), and property held in cotenancy. See *Harrell v. Harrell*, 692 S.W.2d 876 (Tex.1985) (per curiam). In the context that the term is used by the court of appeals in the instant case, it appears the court considered Melissa and Richard to be tenants in common in the residence. This classification is incorrect.

A cotenancy is formed when two or more persons share the unity of exclusive use and possession in property held in common. 4A R. Powell & P. Rohan, *Real Property*, ¶ 601[1] (1991); 2 H. Tiffany, *Real Property*, § 319 (3rd ed. 1939). The present right to possession of the property is essential because one who is never entitled to possession of property held in common is not a cotenant. *Reed v. Turner*, 489 S.W.2d 373, 381 (Tex.Civ.App.—Tyler 1972, writ ref'd n.r.e.); *LeBus v. LeBus*, 269 S.W.2d 506, 510 (Tex.Civ.App.—Fort Worth 1954, writ ref'd n.r.e.). Therefore, Melissa and Richard did not hold the residence as tenants in common because the divorce decree gave Melissa the right to the use and possession of the residence to the exclusion of Richard.

In Texas, the homestead right constitutes an estate in land. *Woods v. Alvarado State Bank*, 118 Tex. 586, 593-94, 19 S.W.2d 35, 37-38 (1929). This estate is analogous to a life tenancy, with the holder of the homestead right possessing the rights similar to those of a life tenant for so long as the property retains its homestead character. *Fiew v. Qualtrough*, 624 S.W.2d 335, 337 (Tex.App.—Corpus Christi 1981, writ ref'd n.r.e.); *Sparks v. Robertson*, 203 S.W.2d 622, 623 (Tex.Civ.App.—Austin 1947, writ ref'd). Although the homestead estate is not identical to a life estate because one's homestead rights can be lost through abandonment, "it may be said that the homestead laws have the effect of reducing the underlying

ownership rights in a homestead property to something akin to remainder interests and vesting in each spouse an interest akin to an undivided life estate in the property.” *United States v. Rodgers*, 461 U.S. 677, 686, 103 S.Ct. 2132, 2138, 76 L.Ed.2d 236 (1983).

Therefore, the divorce decree created in Melissa rights in the residence analogous to those of a life tenant, and created in Richard a future interest in the residence similar to that held by a vested remainderman.¹ See generally *Guilliams v. Koonsman*, 154 Tex. 401, 406, 279 S.W.2d 579, 582 (1955) (setting out the rule used to determine whether a remainder interest has vested); *Medlin v. Medlin*, 203 S.W.2d 635, 641 (Tex.Civ.App.—Amarillo 1947, writ ref’d) (a remainderman’s interest in property is usually vested). It is undisputed that at the time Richard mortgaged his interest in the residence, the property as a whole was designated as Melissa’s homestead. The question arises, then, whether the mortgage executed by Richard against his interest in the residence is void under the Texas homestead laws.

B

The homestead of a single adult or family is protected from forced sale for the payment of a debt unless the debt is for purchase money on the homestead, for work and materials used to construct improvements on the homestead property, or for unpaid taxes. Tex. Const, art. XVI, § 50; Tex.Prop.Code § 41.002. Any attempt to mortgage homestead property, except as approved by the Texas Constitution, is void. *Burkhardt v. Lieberman*, 138 Tex. 409, 159 S.W.2d 847, 850 (Tex. Comm’n App.1942, opinion adopted); *Anglin v. Cisco Mortgage Loan Co.*, 135 Tex. 188, 193, 141 S.W.2d 935, 937 (Tex.1940); *Toler v. Fertitta*, 67 S.W.2d 229, 230-31 *130 (Tex.Comm’n App.1934, judgm’t adopted). A mortgage or lien that is void because it was illegally levied against homestead property can never have any effect, even after the property is no longer impressed with the homestead character. *Toler*, 67 S.W.2d at 230-31.

This homestead protection, however, can arise only in the person or family who has a present possessory interest in the subject property. See *Inwood North Homeowners’ Assoc., Inc. v. Harris*, 736 S.W.2d 632, 636 (Tex.1987); *Greene v. White*, 137 Tex. 361, 380, 153 S.W.2d 575, 586 (1941); *Gann v. Montgomery*, 210 S.W.2d 255, 258 (Tex.Civ.App.—Fort Worth 1948, writ ref’d n.r.e.). Accordingly, one who holds only a future interest in property with no present right to possession is not entitled to homestead protection in that property.² See *Rettig v. Houston West End Realty Co.*, 254 S.W. 765, 768 (Tex. Comm’n App.1923, judgm’t adopted); *Massillon Engine & Thresher Co. v. Barrow*, 231 S.W. 368, 369-70 (Tex.Comm’n App. 1921, judgm’t adopted).

Applying this rule to the present situation, no homestead right arose in Richard’s interest in the residence because he held only a future right to possession in the property subject to Melissa’s homestead rights. It has long been the rule that the holder of a vested future interest in property can mortgage or alienate that interest. See, e.g., *Estes v. Estes*, 267 S.W. 709, 711 (Tex.Comm’n App.1924, judgm’t adopted); *Caples v. Ward*, 107 Tex. 341, 345, 179 S.W. 856, 857-58 (1915). Since Richard held no protective homestead right which would prevent the mortgage of his interest, we now turn to the issue of whether Melissa’s homestead right in the entire property served to invalidate the mortgage. The case of *Johnson v. Prosper State Bank*, 125 S.W.2d 707, 709-11 (Tex.Civ.App.—Dallas 1939), aff’d, 134 Tex. 677, 138 S.W.2d 1117 (1940), is instructive on this point.

In *Johnson*, a bank properly abstracted a judgment rendered for the non-payment of a note for general indebtedness against the real property interests the debtor owned or would obtain in the future. *Id.* at 708. The abstract was perfected in 1934. In 1929, the debtor’s mother had died intestate, causing certain real

estate to pass to the debtor subject to his father's continued homestead interest in the property. The debtor's father died in 1935, and the property passed to the debtor under his father's will. *Id.*

In 1936, the bank sought a writ of partition against the debtor's inherited land for the payment of the abstracted judgment. The debtor argued that the bank had no interest in the inherited property because the lien had been placed on homestead property. *Id.* at 709. The court held that a homestead right could not exist on his interest in the property at the time the lien attached, because a future estate "whether vested or contingent, will not support a claim of homestead, irrespective of intention and preparation of one out of possession to occupy the land when and if the right of possession and occupancy become a reality." *Id.* As his homestead right did not arise until after the death of his parents, the court found that the bank's preexisting lien was valid and enforceable against the debtor's ownership interest in the property. *Id.* at 710-11.

Thus, in accordance with the general rule that one's homestead rights will not protect property in which no possessory interest is held, a non-possessory, future interest in property is not protected by the homestead right of the person with the present right to occupy the property. See also *Cheswick v. Freeman*, 155 Tex. 372, 375, 287 S.W.2d 171, 172 (1956) (holding that a son's non-possessory interest in his mother's homestead was subject to creditor's lien because property cannot be impressed with two ***131** homestead rights at the same time); 40 C.J.S. Homesteads § 211 (1944). In the instant case, the deed of trust executed by Richard did not create a lien against the homestead itself but instead created a lien against his non-possessory interest in the property which was not impressed with any homestead interest.

As the mortgage attached only to Richard's interest and did not affect any property interest protected by Melissa's homestead right, the mortgage was not invalidated by that protection. Therefore, Richard executed a valid lien against his interest. When the youngest child reached eighteen years of age, Melissa's court-awarded homestead estate in the entire residence ended, entitling Richard, or his successor in interest, to fee simple ownership of the undivided 26.17 percent interest. Thus, Richard's interest in the property is now owned in fee simple by First Huntsville Properties and held in cotenancy with Melissa's remaining 73.83 percent interest. See *Sparks v. Robertson*, 203 S.W.2d 622, 624 (Tex.Civ.App.—Austin 1947, writ ref'd).

C

The last question to be resolved is whether Melissa's remaining homestead rights in the property prevent the forced sale and partition of the residence. On divorce, a trial court has broad power to order the "just and right" division of the divorcing couple's estate, including the ability to award the use of the homestead to one spouse, even if title to the homestead property is held by the other spouse. *Hedtke v. Hedtke*, 112 Tex. 404, 410-11, 248 S.W. 21, 23 (1923); see Tex.Fam.Code § 3.63. The power to order a "just and right" division also includes the power to order the sale of the homestead and the partition of the proceeds. *Kirkwood v. Domnau*, 80 Tex. 645, 16 S.W. 428 (1891); *Hedtke*, 112 Tex. at 408, 411, 248 S.W. at 22-23 (1923); *McIntyre v. McIntyre*, 722 S.W.2d 533, 537 (Tex.App.—San Antonio 1986, no writ); *Brock v. Brock*, 586 S.W.2d 927, 930 (Tex.Civ.App.—El Paso 1979, no writ); *Delaney v. Delaney*, 562 S.W.2d 494, 495-96 (Tex.Civ.App.—Houston [14th Dist.] 1978, writ diss'd); *Brunell v. Brunell*, 494 S.W.2d 621, 622-23 (Tex.Civ.App.—Dallas 1973, no writ); see Tex.Fam.Code § 3.63.

In the instant case, Melissa and Richard agreed, with the trial court's approval, to simply postpone the partition of the homestead until both children either obtained the age of eighteen or no longer attended

school. Pursuant to the divorce decree in this case, the division of the homestead can now take place just as if the court had ordered the division at the time of divorce. Furthermore, it would be manifestly unjust to allow Richard's rights in the estate to be prejudiced simply because the division of the homestead property took place after the younger of the two children turned eighteen rather than at the time of divorce.³

We need not reach the question of whether Melissa's current homestead interest is a family or single adult homestead. In this case, the result would be the same under either classification.⁴ Melissa's homestead interest protects the portion of the property that she owns. Before both children reached eighteen, Melissa owned a fee interest in 73.83 percent of the residence and a limited present possessory interest in 26.17 percent of the residence.

***132** Melissa's ownership interest in 26.17 percent of the property terminated when both children reached the age of eighteen. Therefore, Melissa's homestead right only covers the 73.83 percent of the property that she currently owns.

After the partition sale, Melissa's homestead right carries over to her portion of the proceeds of sale. Melissa may seek continued homestead protection for the proceeds of the partition sale as she could for the proceeds of any other type of sale of her homestead interest. Melissa has not been divested of her homestead rights.

The trial court may not charge the cost of the suit to partition the property to Melissa's homestead interest. Kirkwood, 80 Tex. at 648, 16 S.W. at 429. However, this does not restrict the trial court's power to tax some or all costs of the partition to Melissa personally. *Id.*

III

For the foregoing reasons, we hold that the mortgage and transfer of Richard's interest in the residence was permissible under the constitution and laws of Texas. We further hold that, under the divorce decree in this case, the residence is now subject to division just as if it had been apportioned at the time of divorce. We affirm the judgment of the court of appeals and remand this cause to the trial court for a disposition of the rights of the parties consistent with this opinion.

DOGGETT, J., joins in the court's judgment but not its opinion.

GAMMAGE, J., dissents, joined by MAUZY, J.

Footnotes

1 The homestead interest in this case could also be analogized to an estate for years, with Richard's future interest in the property similar to an executory interest. See *Villarreal v. Laredo National Bank*, 677 S.W.2d 600, 606 (Tex.App.— San Antonio 1984, writ refd n.r.e.). The distinctions between a vested remainder and an executory interest, however, are virtually nonexistent. See T. Bergin & P. Haskell, *Preface to Estates in Land & Future Interests*, 115 (2nd ed. 1984).

2 However, if a remainderman has a present right to possession in property sufficient to impress it with his homestead interest, and the property is not subject to the preexisting homestead interest of another, the property will be impressed with the homestead character when he receives it in fee simple, and its protection will date back to the time he began occupying it as his homestead. *W.R. Thompson & Sons Lumber Co. v. Clifton*, 124 S.W.2d 106, 107 (Tex. Comm'n App. 1939, opinion adopted).

3 It is not necessary to address the question of which right in the residence, as between Melissa's homestead interest and First Huntsville's right of partition, is paramount. The court of appeals misconstrued *Sayers v. Pyland* when it determined that

the Sayers court stated that a cotenant's right to partition was paramount to another cotenant's homestead right because that case rested its holding on the fact that the homestead right had been voluntarily subordinated to another cotenant's rights. *Sayers v. Pyland*, 139 Tex. 57, 64-65, 161 S.W.2d 769, 773 (1942).

- 4 The constitution allows the same size urban homestead for a family and a single adult. See Tex. Const. Art. XVI, § 51. If Melissa no longer qualifies for a family homestead, her single homestead would relate back to the time of the creation of the family homestead for the family of her and her children. *Rendido v. Bank of San Antonio*, 630 S.W.2d 638, 639 (Tex.1982) ("a family unit entitled to a homestead may consist of a divorced person and a dependent child"). The effective date of that homestead would relate back to the creation of the family homestead for the family of Melissa and Richard.