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Proposed Legislation-Nebraska Realtor's Association

Nebraska Revised Statutes

Chapter 40. Homesteads

Current through the 2013 legislative session

§ 40-104. Homestead; how conveyed or encumbered; assertion of claim of invalidity of conveyance

The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife except as otherwise provided in this section. A purchase agreement of homestead property need only be signed by the spouses and does not require acknowledgement to be enforceable. The interest of either or both spouses may be conveyed or encumbered by a conservator acting in accordance with the provisions of the Nebraska Probate Code and may also be conveyed or encumbered by an attorney in fact appointed by and acting on behalf of either spouse under any power of attorney which grants the power to sell and convey real property. Any claim of invalidity of a deed of conveyance of homestead property because of failure to comply with the provisions of this section must be asserted within the time provided in sections 76-288 to 76-298.

Cite as Neb. Rev. Stat. § 40-104

Source: Laws 1879, § 4, p. 58; R.S.1913, § 3079; C.S.1922, § 2819; C.S.1929, § 40-104; Laws 1935, c. 91, § 1, p. 312; C.S.Supp.,1941, § 40-104; R.S.1943, § 40-104; Laws 1947, c. 243, § 13, p. 767; Laws 2006, LB 409, § 1.

Case Notes:

1. Signature to instrument
2. Acknowledgment
3. Conveyance or encumbrance
4. Oral contract to convey
5. Ratification and estoppel
6. Miscellaneous
 1. Signature to instrument

Any interest defendant might have had under the homestead law became merged in her new title as surviving joint tenant, and this section was not applicable to the option to sell. *David v. Tucker*, 196 Neb. 575, 244 N.W.2d 197 (1976).

Deed to convey homestead is void if not executed by both

husband and wife. *Krueger v. Callies*, 190 Neb. 376, 208 N.W.2d 685 (1973).

Where the wife of an insane husband did not join with the guardian, who had been duly authorized by the court, in the execution of a mortgage upon the homestead property, such mortgage was not enforceable as a lien against the homestead. *Evans v. First Nat. Bank*, 138 Neb. 727, 295 N.W. 381 (1940).

Execution of joint will by husband and wife does not operate as a conveyance of homestead. *Abboud v. Boock*, 137 Neb. 652, 290 N.W. 713 (1940).

Mortgage on homestead to which signature of wife is forged is void, although executed and acknowledged by husband. *Bacon v. Western Securities Co.*, 125 Neb. 812, 252 N.W. 317 (1934).

Contract for sale of homestead not signed by vendor's wife is unenforceable. *Storrs v. Bollinger*, 111 Neb. 307, 196 N.W. 512 (1923).

Homestead may be conveyed by surviving spouse. *Hill v. Naylor*, 99 Neb. 791, 157 N.W. 922 (1916).

Consort need not sign purchase money mortgage on homestead. *Jackson v. Phillips*, 57 Neb. 189, 77 N.W. 683 (1898); *Prout v. Burke*, 51 Neb. 24, 70 N.W. 512 (1897); *Irwin v. Gay*, 3 Neb. Unof. 153, 91 N.W. 197 (1902).

Deed from husband to wife need not be signed by wife. *Furrow v. Athey*, 21 Neb. 671, 33 N.W. 208 (1887).

2. Acknowledgment

A contract to convey the homestead of a married person is absolutely void and unenforceable unless validly executed and acknowledged by both husband and wife. *Christensen v. Arant*, 218 Neb. 625, 358 N.W.2d 200 (1984).

Where a contract for the sale of real estate includes both homestead and nonhomestead property, but is not duly executed and acknowledged, specific performance may be obtained of the nonhomestead land only if the contract is clearly severable as to the homestead and nonhomestead property. *Struempler v. Peterson*, 203 Neb. 173, 277 N.W.2d 691 (1979).

Where contract for sale of real estate including homestead is not acknowledged by husband and wife, and is not severable as to homestead and nonhomestead, specific performance will not be required. *McIntosh v. Borchers*, 196 Neb. 109, 241 N.W.2d 534 (1976).

An option to purchase land constituting a homestead, or

covering nonseverable homestead and other land, is void when not executed and acknowledged by both husband and wife. *Struempfer v. Peterson*, 190 Neb. 133, 206 N.W.2d 629 (1973).

Lack of statutory acknowledgment to an improvement mortgage on homestead does not preclude enforcement of mortgage. *Miles Homes, Inc. v. Muhs*, 184 Neb. 617, 169 N.W.2d 691 (1969).

Requirement that wife join in execution and acknowledgment of conveyance applies to easement across homestead property. *Martin v. Norris Public Power Dist.*, 175 Neb. 815, 124 N.W.2d 221 (1963).

A contract to sell land constituting the homestead is void where wife does not appear before notary and acknowledge the execution thereof. *Trowbridge v. Bisson*, 153 Neb. 389, 44 N.W.2d 810 (1950).

Instrument, purporting to encumber homestead and falsely certifying that wife acknowledged same, was void. *Storz v. Clarke*, 117 Neb. 488, 221 N.W. 101 (1928).

Mortgage on homestead, acknowledged before stockholder of bank beneficially interested, was void. *Anderson v. Cusack*, 115 Neb. 643, 214 N.W. 73 (1927).

Alteration of mortgage covering homestead property by raising the amount at request of husband alone rendered mortgage void, since mortgage as altered was not acknowledged by wife. *David City Building & Loan Assn. v. Fast*, 114 Neb. 621, 208 N.W. 964 (1926).

Officer and stockholder of mortgagee corporation was disqualified to take acknowledgment of mortgage on homestead. *Trevett, Mattis & Baker Co. v. Reagor*, 112 Neb. 470, 200 N.W. 449 (1924).

A contract for the sale of homestead property signed by both husband and wife, though not acknowledged, when made at the same time with a warranty deed to the property, which deed is executed and duly acknowledged by both, and which is delivered in escrow, is a valid contract. *Farmers Investment Co. v. O'Brien*, 109 Neb. 19, 189 N.W. 291 (1922).

Contract signed by husband and wife, but wife's acknowledgment certified without inquiry as to whether it was her voluntary act, coercion being indicated, is void. *Ambler v. Jones*, 102 Neb. 40, 165 N.W. 886 (1917).

Contract to convey signed by husband and wife, but not acknowledged, is void. *Anderson v. Schertz*, 94 Neb. 390, 143 N.W. 238 (1913).

Conveyance of homestead is void if not signed and acknowledged by both husband and wife. *Kimmerly v. McMichael*, 83 Neb. 789, 120 N.W. 487 (1909); *Thompson v. Foken*, 81 Neb. 261, 115 N.W. 770 (1908);

Weatherington v. Smith, 77 Neb. 369, 112 N.W. 566 (1906); *Interstate S. & L. Assn. v. Strine*, 58 Neb. 133, 78 N.W. 377 (1899); *Havemeyer v. Dahn*, 48 Neb. 536, 67 N.W. 489 (1896); *Horbach v. Tyrrell*, 48 Neb. 514, 67 N.W. 485 (1896); *Hedbloom v. Pierson*, 2 Neb. Unof. 799, 90 N.W. 218 (1902).

Contract for sale of homestead, not acknowledged by vendors, applies to whole tract, regardless of value, and cannot be enforced. *Lichty v. Beale*, 75 Neb. 770, 106 N.W. 1018 (1906); *Solt v. Anderson*, 63 Neb. 734, 89 N.W. 306 (1902); *Clarke v. Koenig*, 36 Neb. 572, 54 N.W. 842 (1893).

Fact of acknowledgment should appear from certificate of officer. *Solt v. Anderson*, 71 Neb. 826, 99 N.W. 678 (1904).

A party who has a direct pecuniary interest in the transaction is disqualified to take an acknowledgment. *Watkins v. Youll*, 70 Neb. 81, 96 N.W. 1042 (1903); *Wilson v. Griess*, 64 Neb. 792, 90 N.W. 866 (1902).

Nonperformance of such contract not acknowledged will not afford a cause of action for damages. *Meek v. Lange*, 65 Neb. 783, 91 N.W. 695 (1902).

The acknowledgment of a wife to a deed conveying the homestead is essential to its validity. *Blumer v. Albright*, 64 Neb. 249, 89 N.W. 809 (1902).

The certificate of acknowledgment of an officer having authority to take acknowledgments cannot be impeached by showing that the officer irregularly performed his duty. *Council Bluffs Savings Bank v. Smith*, 59 Neb. 90, 80 N.W. 270 (1899); *Phillips v. Bishop*, 35 Neb. 487, 53 N.W. 375 (1892).

Instrument purporting to convey homestead may be invalid for want of mental capacity of one of parties to make acknowledgment. *Dewey v. Allgire*, 37 Neb. 6, 55 N.W. 276 (1893).

Conveyance of homestead from one spouse to other does not require that both execute and acknowledge instrument. *Troyer v. Mundy*, 60 F.2d 818 (8th Cir. 1932).

Presumption arising from notary's certificate, that acknowledgment of husband and wife to mortgage on homestead was taken as certified, was not overcome by evidence. *Hamling v. Aetna Life Insurance Co.*, 34 F.2d 112 (8th Cir. 1929).

3. Conveyance or encumbrance

Purchase agreement for sale of real property was not void as unacknowledged encumbrance of homestead. *Overman v. Brown*, 220 Neb. 788, 372 N.W.2d 102 (1985).

Even though mortgage was not properly acknowledged, it

was valid as to land other than the homestead. *Mazanec v. Lincoln Bonding & Ins. Co.*, 169 Neb. 629, 100 N.W.2d 881 (1960).

Lease for right-of-way across homestead for road is void unless executed and acknowledged by both husband and wife. *Eng v. Olsen*, 99 Neb. 183, 155 N.W. 796 (1915).

Lease of homestead for five years is conveyance and void unless executed and acknowledged by both husband and wife. *Kloke v. Wolff*, 78 Neb. 504, 111 N.W. 134 (1907).

Power of attorney to convey homestead, signed by husband alone, is void. *Norbury v. Harper*, 70 Neb. 389, 97 N.W. 438 (1903).

Where a mortgage on the homestead is paid and husband takes assignment of security, a reassignment of the security for a new debt constitutes an encumbrance and is not enforceable. *Downing v. Hartshorn*, 69 Neb. 364, 95 N.W. 801 (1903).

Contract of purchase of premises occupied as homestead cannot be assigned, unless signed and acknowledged by husband and wife. *Rawles v. Reichenbach*, 65 Neb. 29, 90 N.W. 943 (1902).

An amendment to restrictive covenants on land is not an encumbrance on the homestead within the meaning of this section. *Countryside Developers, Inc. v. Peterson*, 9 Neb. App. 798, 620 N.W.2d 124 (2000).

4. Oral contract to convey

That premises were parents' homestead does not make void an oral contract to give them to son for care during parents' lifetime. *Denesia v. Denesia*, 116 Neb. 789, 219 N.W. 142 (1928), overruling *Teske v. Dittberner*, 70 Neb. 544, 98 N.W. 57 (1903).

Oral contract to leave all of property at death to another in consideration of services rendered during lifetime of promisor is not void as to homestead property. *Moline v. Carlson*, 92 Neb. 419, 138 N.W. 721 (1912).

5. Ratification and estoppel

Where deed is executed and acknowledged by both husband and wife covering homestead property, conveyance is valid even though contract for exchange for other property is not signed by wife. *Johnson v. Kelley*, 112 Neb. 60, 198 N.W. 567 (1924).

Where wife voluntarily joins in conveyance of homestead, she is thereafter estopped to assert any right or title therein. *Laughlin v. Gardiner*, 104 Neb. 237, 176 N.W. 727 (1920).

Estoppel cannot supply statutory requirements. *Davis v. Thomas*, 66 Neb. 26, 92 N.W. 187 (1902); *France v. Bell*, 52 Neb. 57, 71 N.W. 984 (1897).

6. Miscellaneous

This section applies to contracts for sale as well as to conveyances or encumbrances. The classification made in this section, that is, the line drawn between married and nonmarried property owners, is one rationally related to a legitimate governmental end. *Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989).

Any interest defendant might have had under the homestead law became merged in her new title as surviving joint tenant, and this section was not applicable to the option to sell. *David v. Tucker*, 196 Neb. 575, 244 N.W.2d 197 (1976).

Issue of homestead was not raised in trial court and hence could not be raised on appeal. *Meyer v. Meyer*, 180 Neb. 379, 142 N.W.2d 922 (1966).

Where husband was a minor and rescinded contract, mortgage on homestead property was void. *Smith v. Wade*, 169 Neb. 710, 100 N.W.2d 770 (1960).

Married man cannot by his own act or neglect deprive wife of homestead right. *Sanne v. Sanne*, 167 Neb. 683, 94 N.W.2d 367 (1959).

Homestead may be waived by abandonment, even though conveyance thereof was not acknowledged by both husband and wife. *Phifer v. Miller*, 153 Neb. 748, 45 N.W.2d 907 (1951).

A homestead, once established, is presumed to continue as such. The burden of proving waiver, loss, or abandonment rests on the party asserting same. *Karls v. Nichols*, 148 Neb. 712, 28 N.W.2d 595 (1947).

Nonresident alien wife is not required to join in conveyance of property resided on by husband alone. *Engen v. Union State Bank of Harvard*, 121 Neb. 257, 236 N.W. 741 (1931).

Married woman, joining husband in note and mortgage for his preexisting debt, under agreement that sole purpose was to bind her dower and homestead rights, is not personally liable on note. *People's State Bank v. Smith*, 120 Neb. 29, 231 N.W. 141 (1930).

Under former law, mortgage on homestead property to the extent of two thousand dollars was valid as against claim of preference under federal bankruptcy act. *Herring v. Whitford*, 119 Neb. 733, 232 N.W. 581 (1930); 119 Neb. 725, 230 N.W. 665 (1930).

Wife's homestead right, in husband's land occupied by family, is real estate. *Mead v. Polly*, 119 Neb. 206, 228 N.W. 369 (1929).

Wife cannot withdraw from homestead selected from her separate property and sue husband in ejectment. *Williams v. Williams*, 106 Neb. 584, 184 N.W. 114 (1921).

Fact that husband and wife are not living together, or insanity of one, does not affect rule. In re Estate of Robertson, Holyoke v. Bishop, 86 Neb. 490, 125 N.W. 1093 (1910); France v. Bell, 52 Neb. 57, 71 N.W. 984 (1897); Whitlock v. Gosson, 35 Neb. 829, 53 N.W. 980 (1892).

Mortgage upon homestead executed by both husband and wife is valid, notwithstanding it was delivered by wife without compliance with instructions given by husband where mortgagee was not aware of conditions. McLanahan v. Chamberlain, 85 Neb. 850, 124 N.W. 684 (1910).

Homestead rights cannot be divested by acts of husband or wife alone. Miller v. Paustian, 79 Neb. 196, 112 N.W. 342 (1907); Nat. Bank of Commerce of Kansas City, Mo. v. Chamberlain, 72 Neb. 469, 100 N.W. 943 (1904); Van Doren v. Wiedeman, 68 Neb. 243, 94 N.W. 124 (1903); Morrill v. Skinner, 57 Neb. 164, 77 N.W. 375 (1898); Silk v. McDonald, 4 Neb. Unof. 34, 93 N.W. 212 (1903).

One who fraudulently puts in currency a mortgage on homestead without procuring wife to join cannot gain an advantage to himself. Pitman v. Mann, 71 Neb. 257, 98 N.W. 821 (1904).

Statutory provision for conveyance or encumbrance of homestead is exclusive. Buettgenbach v. Gerbig, 2 Neb. Unof. 889, 90 N.W. 654 (1902).

Provision requiring acknowledgment of conveyance by both husband and wife is not repugnant to treaty rights with Norway. Todok v. Union State Bank, 281 U.S. 449(1930), reversing Engen v. Union State Bank of Harvard, 118 Neb. 105, 223 N.W. 664 (1929).

Occupancy for purposes of a home is an imperative condition of homestead. United States v. Thurston County, 54 F.Supp. 201 (D. Neb. 1944).

Cross References:

For provisions as to mortgaging interest in homestead of incompetent spouse, see sections 42-501 to 42-503.