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To: Clients and Friends

From: Shawn P. Black

Subject: Trustee Consenting to Lien on Homestead as Individual, Without Additional Reference to Fiduciary Capacity, Does Not Invalidate the Lien.

The protection of the homestead against forced sale by creditors in Texas is incorporated into the State's Constitution and is central to its lending laws. Article XVI, Section 50 of the Texas Constitution "has long protected the homestead, strictly limiting the types of loans that may be secured by a homestead lien." *Wood v. HSBC Bank USA*, 505 S.W.3d 542, 545 (Tex. 2016). It provides that "[n]o mortgage, trust deed, or other lien on the homestead shall ever be valid unless it secures a debt described by this section, whether such mortgage, trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married." TEX. CONST. art. XVI, § 50(c).

The scope of this protection was recently addressed by the Court of Appeals of Texas, San Antonio, in *Reverse Mortgage Solutions, Inc. v. Greg Held, Joe Reilly, Jr., and Allstate Vehicle and Property Insurance Company* --- S.W.3d ---, 2024 WL 1864744 (April 30, 2024) in the context of reverse mortgages authorized under Article XVI, § 50(a)(7) of the Texas Constitution. At issue was the requirement that a reverse mortgage be "[s]ecured by a voluntary lien on homestead property created by a written agreement with the consent of each owner and each owner's spouse." *Id.* § 50(k)(1) (emphasis added).

Joe Reilly, Sr. purchased 11715 Pepper Tree Street in San Antonio ("Property") when he was single and held title in his name as separate property. In 1989, he married Mona P. Reilly, and they occupied the Property as the family homestead. At the time of the marriage, Joe Sr. had two children (Appellee Joe J. Reilly, Jr. and Teresa Reilly) and Mona had three children (Appellee Greg Held, Lisa Lansing, and another daughter who predeceased Joe Sr.). That year, Joe, Sr. executed a Last Will and Testament which created a testamentary trust ("Trust"), which provided Mona with income for life with the ability to receive principal if her own property and income was insufficient to provide for her health, support, and maintenance, and also appointed Mona as Trustee. Upon Mona's death, any remaining assets of the Trust were devised to Joe Jr. and Teresa. A few years later, Joe Sr. and Mona signed an "Agreement to Change Separate Property to Community Property." However, there was no recorded instrument concerning the Property with Mona in the chain of title. Joe Sr. died in 2007. At the time of his death, Mona was still his spouse. *Held* at 1.

In 2013, Mona obtained a reverse mortgage in the amount of \$412,500 ("the Loan"). The Loan was evidenced by a note ("First Note") and deed of trust ("First Deed of Trust") to Cherry Creek Mortgage Co., Inc. and a second note ("Second Note") and deed of trust ("Second Deed of Trust") in favor of the Secretary of Housing and Urban Development. The signatures on the First Deed of Trust and the Second Deed of Trust were set up and signed as "Mona P. Reilly" and both Deeds of Trust state that the grantor of the security interest is "Mona P. Reilly, A Single Woman." The First Deed of Trust and Second Deed of Trust were later assigned to Reverse Mortgage Solutions, Inc. ("RMS"). *Id.* at 2.

Mona passed away in 2019. A year later, the Property was destroyed by a fire and declared to be a total loss. Allstate Vehicle and Property Insurance Company, which insured the property under a residential homeowner's insurance policy, agreed to pay entire dwelling and debris removal limits under its policy for the loss. It then interpleaded the insurance proceeds in the registry of the court and requested the trial court to distribute the funds to the proper parties. RMS brought a claim for affirmative relief, requesting that the trial court declare that RMS's lien on the Property was valid, and that RMS held the position as senior creditor with superior right to the interpleaded funds. Greg Held and Joe J. Reilly, Jr. brought similar cross claims for declaratory judgment, requesting that the trial court declare that RMS had no valid lien on the Property and, therefore, had no claim to the insurance proceeds deposited with the court. *Id.* Specifically, they brought three arguments regarding RMS's liens on the Property.

Their first argument was that RMS failed to obtain consent of "all owners" to a reverse mortgage on homestead, as required by the Texas Constitution. *See* TEX. CONST. art. 16, § 50(k). They claimed that RMS's First and Second Deeds of Trust were invalid because both Mona and the Trust owned the Property and Mona signed the First Deed of Trust and Second Deed of Trust as "Mona P. Reilly". Therefore, the deeds of trust reflected that Mona consented to the reverse mortgages only in her individual capacity. Because Mona did not also consent to the reverse mortgage on behalf of the Trust, they argued the First and Second Deeds of Trust did not create a valid lien. *Id.* at 4.

Their second argument was that the liens were invalid due to a violation of HUD rules for reverse mortgages. Specifically, they argued that a testamentary trust cannot enter into a reverse mortgage as, for it to insure, HUD requires that any trust which will hold property for a reverse mortgage must be an *inter vivos* trust. *Id.*

Their final argument was that the liens were not valid because the terms of the Trust could not allow the trustee to obtain a reverse mortgage, as reverse mortgages were not allowed in Texas at the time the Trust was created. *Id.*

After hearing arguments and reviewing the evidence, the trial court determined RMS did not have valid liens on the Property because the deeds of trust were "ineffective to establish a valid lien upon [the Property]" and ordered that any purported lien which was attempted to be established by the First Deed of Trust and Second Deed of Trust be released, and awarded the interpleaded funds to be divided between Greg Held and Joe Reilly, Jr. *Id.* at 3.

RMS appealed the trial court's decision. Regarding the constitutional requirement that "all owners" consent to a reverse mortgage on homestead, RMS argued that "because Mona was the trustee, her signature was sufficient to show the Trust also consented to the reverse mortgage as, under Texas law, the 'term "trust" refers not to a separate legal entity but rather to the fiduciary relationship governing the trustee with respect to the trust property.'" *Id.* at 5 quoting *Ray Malooly Tr. v. Juhl*, 186 S.W.3d 568, 570 (Tex. 2006). Thus, RMS argued "[b]ecause the trustee, and not the trust, holds trust property, Mona's signature on the First and Second Deeds of Trust was sufficient to also show consent by the Trust to the reverse mortgage." *Held* at 5.

In opposition, the appellees argued that Mona signing only individually did not create a valid lien under the Texas Constitution, as it did not show consent to the reverse mortgages by the Trust. They pointed to provisions of the Texas Property Code that establish that trust property is not liable to satisfy the personal obligations of the trustee of the trust. *See* TEX. PROP. CODE §§ 101.002, 114.0821. They argued "that a trustee who is a party to an agreement, note, or deed should [have been] described as 'Mona P. Reilly, as Trustee of the Testamentary Trust established in Joe J. Reilly's Last Will and Testament dated October 31, 1989,' and [that] the signature block should [have] also list[ed] the trustee this way." *Held* at 5. As that was

not done on the loan documents, the appellees concluded that “the First and Second Deeds of Trust reflect that Mona consented to the reverse mortgage only in her individual capacity.” *Id.*

As to the first argument, the Court of Appeals agreed with RMS noting that it had previously considered the issue of whether a trustee who did not explicitly sign a deed “as trustee” conveyed trust property in *West 17th Resources, LLC v. Pawelek*, 482 S.W.3d 690, 691 (Tex. App.—San Antonio 2015, pet. denied). In that case, a person owned an undivided 1/6 interest in a property as an individual and an undivided 1/10 interest as a trustee of a trust. This individual joined on a deed conveying interest to a third party but only signed the deed as an individual. Afterwards, subsequent beneficial owners of the trust attempted to argue that the trust’s 1/10 interest was not conveyed by this deed. The court stated in its *West* decision that it had disagreed with this argument, noting that this was a matter of deed construction in which the four corners of the deed are analyzed using rules of interpretation and construction. In the *West* case, the unambiguous language of the deed was to convey all of the property subject to only a utility easement, and that arguing an implicit reservation for the trust would have been in conflict with this unambiguous language. *Held* at 5-6.

The court applied the same logic from its *West* case to its decision. It stated that the same rules of interpretation and construction that applied to the deed in *West* would apply to the deeds of trust. Using these rules, the court found that the unambiguous language in the reverse mortgage deeds of trust were to convey the entire property. Due to this language that all of the subject property was conveyed, the court found all of the owners of the property consented to the reverse mortgage despite Mona not indicating that she was signing as trustee of the trust. *Id.* at 5-7.

The court dismissed the appellees’ second argument that the deeds were invalid because HUD will not insure mortgages on properties held in testamentary trusts. The court stated that no Texas authority has established that following HUD rules was necessary to establish a valid lien under Texas law. Instead, the court noted that HUD rules deal with relations between a mortgagee and the federal government and do not affect the validity of a lien under a Texas analysis. *Id.* at 8-9.

Finally, the court dismissed an argument that because the testamentary trust was created before reverse mortgages were permissible in Texas, the testamentary trust did not have the authority to enter into a reverse mortgage. Instead, the court found that the broad authority of the trust agreement did not impose any restriction to enter into a reverse mortgage, and that it was irrelevant that reverse mortgages were not permitted in Texas when the trust was created. *Id.* at 9.

In a helpful decision for lenders, the court reversed the trial court’s decision, upheld the validity of RMS’s liens on the Property, and instructed the trial court to release the interpled funds to RMS.

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