



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 83- 28

Honorable James L. Francisco
Senator, Twenty-Sixth District
Room 136-N, State Capitol
Topeka, Kansas 66612

Re: Kansas Constitution--Miscellaneous--Homestead
Exemption

Synopsis: An act providing for the forfeiture of a home-
stead purchased with proceeds derived from an
illegal sale of controlled substances would
contravene Article 15, Section 9, of the Kansas
Constitution. Cited herein: Kan. Const., Art.
15, §9.

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Dear Senator Francisco:

You ask whether 1983 Senate Bill No. 113 could be amended to provide that a homestead be forfeited if the property was purchased with proceeds derived from an illegal sale of controlled substances.

The decision of the Supreme Court in State, ex rel., v. Mitchell, 194 Kan. 463 (1965), in our judgment, compels that your question be answered in the negative. The issue in that case was whether a homestead which was used for the illegal possession and sale of intoxicating liquor was subject to being padlocked, as appeared to be required by a statute. (K.S.A. 41-806.) The district court held that the statute had no application to a homestead. In affirming the trial court's conclusion, the Supreme Court said:

"The padlocking of a homestead for the violation of any law is not specifically mentioned or even implied in the exceptions . . . [stated in Article 15, Section 9]. Admittedly, padlocking of a homestead is

not a forced sale, but this section is enlarged by the clause 'and shall not be alienated without the joint consent of husband and wife.' The word 'alienated' as used in our constitution means a parting with or surrendering of some interest in the homestead. (Vining v. Willis, 40 Kan. 609, 613, 20 Pac. 232.)

"Nearly one hundred years ago, in Morris v. Ward, 5 Kan. 239, 244, Justice Valentine, in speaking for this court, stated:

' . . . It [the homestead] was not established for the benefit of the husband alone, but for the benefit of the family and of society--to protect the family from destitution, and society from the danger of her citizens becoming paupers.

'The other view of the homestead laws, and the one which we adopt, is that no incumbrance or lien or interest can ever attach to or affect the homestead, except the ones specifically mentioned in the constitution. . . . These are liens for taxes, for the purchase money, for improvements made on the homestead, and liens given by the "joint consent of the husband and wife." No alienation of the homestead by the husband alone, in whatever way it may be effected, is of any validity; nothing that he alone can do or suffer to be done, can cast the slightest cloud upon the title to the homestead; it remains absolutely free from all liens and incumbrances except those mentioned in the constitution.'

"In keeping with this decision, this court later held in Coughlin v. Coughlin, 26 Kan. 116, that a husband could not, without the consent of his wife, execute a lease of a homestead, and give possession thereof to a tenant, although the title to the premises was in his own name, when the lease interfered with the possession and enjoyment of the premises by the wife as a homestead.

"The constitutional provision defines a homestead as a residence occupied by the

family of the owner. Clearly, by the very nature of this provision, the possession of the homestead is an acquired interest. Therefore, the state's act of padlocking the premises would not only deny the interest of both defendant and her husband but would also defeat the very purpose of the provision: to protect the family and society from the hardships which occur when a family loses its home. It cannot be said that the padlocking of a homestead is within a specified exception or is voluntarily permitted with the consent of both husband or wife.

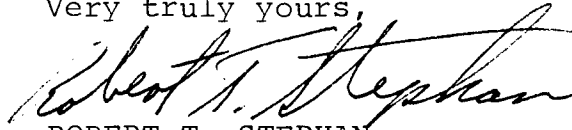
"The homestead provision of our constitution sets forth the exceptions and provides the method of waiving the homestead rights attached to the residence. These exceptions are unqualified. They create no personal qualifications touching the moral character of the resident nor do they undertake to exclude the vicious, the criminal, or the immoral from the benefits so provided. The law provides for punishment of persons convicted of illegal acts, but the forfeiture of homestead rights guaranteed by our constitution is not a part of the punishment.

"The parties have stipulated the property in question is the homestead of the defendant and her husband, and no useful purpose can be served by restating the law as set forth in our prior homestead decisions. It suffices to say that Kansas has zealously protected the family rights in homestead property by liberally construing the homestead provision in order to safeguard its humanitarian and soundly social and economic purposes; and nothing less than the free consent of the resident owner of the homestead, and joint consent of husband and wife where the relation exists, will suffice to alienate the homestead, except under the specified exceptions provided in the constitution. (In re Estate of Dittimore, 152 Kan. 574, 576 106 P.2d 1056; Hawkins v. Social Welfare Board, 148 Kan. 760, 763, 84 P.2d 930.)" (Emphasis added.) 194 Kan. at 465-466.

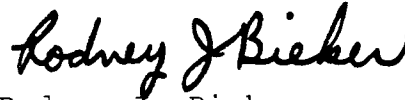
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In our judgment, it is unnecessary in resolving your inquiry to add anything to these clear and unambiguous statements of the Court.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Rodney J. Bieker
Assistant Attorney General

RTS:BJS:RJB:jm