



# TEXAS HIGHER EDUCATION COORDINATING BOARD

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RQ-784

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February 9, 1995

The Honorable Dan Morales  
Attorney General of Texas  
P.O. Box 12548  
Austin, Texas 78711-2548  
ATTN.: Sarah Shirley, Chief - Opinions Committee

SJS  
FILE # MC-31751-95  
I.D. # 31751

RE: Request for Attorney General Opinion

Dear General Morales:

The Texas Higher Education Coordinating Board requests an Attorney General Opinion regarding whether or not the Board must, upon a judgment debtor's request, issue a partial release of a student loan judgment lien on property that the judgment debtor contends is a homestead.

This question arises as a result of the holding in the case Tarrant Bank v. Miller, 833 S.W.2d 666 (Tex. App. -- Eastland 1992, writ denied). In Tarrant Bank, the district court found and the appellate court agreed that a bank's refusal to issue a partial release of a judgment lien it had acquired constituted a cloud on title to the judgment debtor's homestead property, notwithstanding the fact that all parties agreed the lien was unenforceable against the homestead. The court reasoned that the fact that a lien may be unenforceable as to a homestead does not mean that the lien does not cast a cloud on the title. A similar issue was recently addressed by the Fifth Circuit in a bankruptcy context. Matter of Henderson, 18 F.3d 1305 (5th Cir. 1994), affirming In re Henderson, 168 B.R. 151 (W.D. Tex. 1993). As the Fifth Circuit stated, "While we recognize that the Hendersons' homestead was not 'legally impaired', the Tarrant case has demonstrated to us that Belknap's judicial lien does impair the Hendersons' homestead exemption in a very real and practical sense." 18 F.3d at 1310.

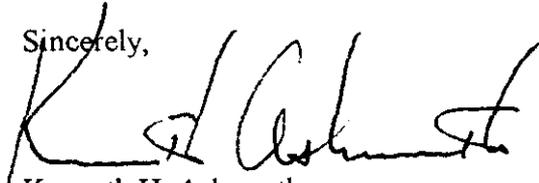
As a result of the Tarrant Bank case, the Board has received numerous requests from student loan judgment debtors for partial release of judgment liens with respect to their homestead property. Our interpretation of the status of the law as it applies to the Board is that since a judgment lien is not enforceable against a homestead, no lien attaches to the property and partial release of the judgment lien is not needed to convey the property. Furthermore, our concern is that if we do issue a partial release of judgment lien to a particular piece of property, we may permanently lose our right to enforce the lien in the event the property ever loses its homestead status. See Hoffman v. Love, 494 S.W.2d 591 (Tex. Civ. App. - Dallas 1972), writ ref'd n.r.e., per curiam 499 S.W.2d 295 (Tex. 1973). ("[A] judgment, though duly abstracted, never fixes a lien on the homestead so long as it remains a homestead.")

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We have several questions. First, does the Tarrant Bank case require the Board to issue a partial release of a student loan judgment lien as to homestead property? If so, may the Board require satisfactory proof that the property sought to be released is in fact homestead? What constitutes satisfactory proof for our purposes? Further, may the Board limit the partial release of a judgment lien only in the situation where the property is being conveyed? If the Board is not required to issue a partial judgment lien release, may it nonetheless choose to do so upon the debtor's request? As the district court in the Henderson case noted, unless the judgment creditor voluntarily agrees to provide a partial release of its lien, the judgment debtor would have no other recourse than to file a state court action for declaratory judgment. In re Henderson, 168 B.R. at 158. In other words, as an alternative to a voluntary partial release of judgment lien, must the judgment debtor obtain a judicial declaration that the Board's judgment lien does not attach to property claimed as homestead?

Since the Board has several requests pending for release of judgment lien, your prompt response to these questions is appreciated.

Sincerely,



Kenneth H. Ashworth