



The Senate of
The State of Texas

J.E. "BUSTER" BROWN
State Senator
District 17

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Opinion Committee

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PRESIDENT PRO TEMPORE
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The Honorable Dan Morales
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-39534-97
I.D.# 39534

Dear General Morales:

Pursuant to Section 402.042 of the Government Code, the Senate Natural Resources Committee makes the following request for an Attorney General's Opinion.

The 74th Legislature amended the Property Code by adding Chapter 29 which authorizes the forced sale of an owner's interest in real property as reimbursement for property taxes paid by a co-owner on the owner's behalf. Tex. Prop. Code Ann. §§ 29.001 - 29.004 (West 1997). It has been brought to my attention that this new statute may be unconstitutional on the basis of two main claims: 1) the statute is unconstitutionally vague, or 2) the statute constitutes a retroactive law in violation of Article I, Section 16 of the Texas Constitution. I will address each of these claims individually.

1. Is Chapter 29 of the Property Code unconstitutionally vague?

a. Under Section 29.002(a) it appears that there may be some confusion as to the proper venue for an action brought under this chapter in the situation where there is property located in more than one county. In this instance must a separate suit be filed in the district court in each county?

b. Under Section 29.002(a)(1) the question arises as to what constitutes "any three years in a five year period." It would seem that "any three years" refers to the number of years of taxes that are paid during a period of five calendar years. It could, however, refer to the annual payment of taxes for a period of three years during a five-year period. Another interpretation could be the payment of two years of delinquent taxes plus the current year's taxes at the same time. In the latter situation, when would the five-year period begin to run?



Would it begin two full years prior to the date the taxes are paid, two full years prior to the date the taxes were first due, two full years from the date the taxes first became delinquent, from the date of payment, or from some other point in time?

c. Under Section 29.002(a)(2), the following questions arise:

- (i) If the defendant has tendered reimbursement to the petitioner during the five-year period, but the tender is rejected, is the tender tantamount to reimbursement? Does a tender during a five-year period constitute a bar to the action?
- (ii) If the petitioner fails or refuses to document the amount of taxes paid on behalf of the defendant during the five-year period, or at the time the demand for reimbursement is made, does this constitute a bar to an action under the statute?

d. Under Section 29.003(2), is tender of payment required after demand for reimbursement is made, or is tender of payment at any time during the five-year period prior to demand being made sufficient to bar the action?

e. Under Section 29.004, the following questions arise:

- (i) Is the court authorized to order the sale of a single tract to satisfy payment due the petitioner if there are multiple tracts involved, or is the court required to order the sale of each tract separately to satisfy the payment due the petitioner?
- (ii) Is either the petitioner or defendant authorized to challenge the fair market value of the defendant's interest in the property as determined by an independent appraiser, or are the parties bound by the opinion of the court appointed appraiser?
- (iii) If the petitioner is entitled to acquire title to the defendant's interest in the property, does the petitioner get a general warranty deed, special warranty deed, deed without warranty, or a quitclaim deed?
- (iv) Does the petitioner acquire title to the defendant's interest in the property subject to pre-existing encumbrances? If there is a mortgage on the co-tenant's interest in the property, does the petitioner acquire the interest subject to an indebtedness which the defendant remains obligated to pay, or does the petitioner become liable for payment of the indebtedness?

2. Is Chapter 29 of the Property Code a retroactive law?

Article I, Section 16 of the Texas Constitution prohibits a statute from taking away or impairing vested rights acquired under existing law. By applying the provisions of Chapter 29 in certain situations, the question arises as to whether the statute, as enacted, constitutes a retroactive law. Consider the situation where one co-tenant requests another co-tenant to pay taxes for a particular year, and in return makes an oral or written promise to re-pay the other co-tenant. The paying co-tenant would have a cause of action for debt against the non-paying co-tenant if there was no repayment as promised. Assuming all other necessary facts existed, if the taxes were paid by one co-tenant for another co-tenant, and not subsequently repaid, the paying co-tenant's cause of action would be barred after four years. Tex. Civ. Prac. & Rem. Code Ann. § 16.004(3). However, under Chapter 29 of the Property Code, the "five year period" would not run for another year. Tex. Prop. Code Ann. §§ 29.002 - 29.003. Thus, although recovery of the taxes paid would be barred under the Civil Practices and Remedies Code, recovery of the payment could occur under an action brought under Chapter 29 of the Property Code if a petition for forced sale was filed. In this manner, is the defaulting co-tenant's vested right of protection under the four-year statute of limitation impaired? Does this constitute a retroactive law?

I would appreciate your official opinion regarding these questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew A. McLean". The signature is written in a cursive, somewhat stylized font.

JEB:sn