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WHAT'S HAPPENING UNDER RULES OF PROCEDURE 735 AND 736? NEW FORMS

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I. INTRODUCTION

The Texas Supreme Court has approved ten forms for use in expedited Tex. R. Civ. Proc. 736 proceedings. Tex. R. Civ. Proc. 735.1 states, “*Rule 736 provides the procedure for obtaining a court order, when required, to allow foreclosure of a lien containing a power of sale in the security instrument, dedicatory instrument, or declaration creating the lien*”. The court order referred to in Rule 735.1 must be obtained before a home equity, reverse mortgage, home equity line of credit, pre-May 29, 2013 property tax lien loan agreement, or property owners’ association assessment lien can be foreclosed.¹

The new Supreme Court promulgated forms were based on the discussion drafts and the work product of a Home Equity Task Force appointed by the Court. This task force was composed of many of the same members who have continually served the Supreme Court as task force advisors on home equity rulemaking since 1997 - when TEX CONST. art XVI §50(a)(6) – (u) was adopted.

The forms discussed in this paper can be obtained at www.supreme.courts.tx.us by typing “Rule 736 forms” in the search function.

The same Home Equity Task Force is also working on revisions to Rule 735 and 736 necessitated by 2013 legislative changes - particularly mediation and the personal service of citation – as well as the normal revisions needed to cure ambiguities and statutory language that created unintended consequences discovered in the application of the rules on an everyday basis. Though the Task Force has finished a draft of proposed revisions to Rule 735 and 736, the Supreme Court’s preference is to wait until the new forms are rigorously tested in practice and wait until the 84th Legislature finishes its business in June 2015 because the Legislature has enacted several provisions that affected Rule 735 and 736 in the past.

CAVEAT: The commentary presented in this paper cannot be considered the opinion of the Texas Supreme Court. However, the paper does attempt to provide the background and thinking - forged in many lively Task Force discussions - that led to the set of forms generally adopted by the Supreme Court as proposed. The Task Force members who spent many hours debating both legal principles and how to make efficient and practical forms that worked for borrowers, lenders, attorneys, title companies, judges, clerks, and court administrators were:

W. Mike Baggett
Judd A. Austin, Jr.
John Fleming
Linda Kellum
Karen M. Neeley
Kelly S. Rodgers

G. Tommy Bastian
Mary Doggett
Fred Fuchs
Paul McNutt, Jr.
Manny Newburger

As a member of the Task Force who prepares most of the research and discussion drafts for the members’ consideration, serves as the liaison with the Supreme Court’s Rules Attorney, and defends the Task Force’s work product before the Supreme Court Rules Advisory Committee, the author has tried to be an honest broker in representing the thoughts and opinions of the Task Force members. However, the commentary presented in this paper is solely that of the author.

¹ Misc. Docket No 14-9047 dated February 10, 2014 pursuant to the Act of May 27, 2013, 83rd Leg., R.S., ch 1044 (HB 2978) and Tex. Gov’t Code § 22.018

ANOTHER CAVEAT: Many cases cited in this paper are not cited for the holding in the case but rather for an “idea” contained in the court’s opinion.

II. AUTHORITY FOR SUPREME COURT TO PROMULGATE FORMS

Whether the Texas Supreme Court has the authority to promulgate forms was thoroughly debated within the State Bar and Texas Legislature at the time the Supreme Court was considering adopting uniform divorce forms finally approved in November 13, 2012.

In a brief prepared for the Supreme Court by the Texas Access to Justice Commission that focused on the authority of the court to promulgate forms, the esteemed authors, James B. Solis, Harry G. Reasoner, Patricia E. McAllister, and Michael A. Heidler, pointed out:

- If the Supreme Court could not promulgate forms, Texas would be the only state in the country whose Supreme Court could not promulgate forms;
- Forty-seven states offer court-approved pleading forms;
- The Texas Legislature tacitly recognized the Supreme Court’s constitutional authority to promulgate forms beginning with Supreme Court Misc. Docket No. 99-9243 (Tex. 1999); and
- Because TEX. CONST. art. V §31(a) and Tex. Gov’t Code §74.021 make the Supreme Court responsible for the efficient administration of the judicial branch, court approved forms would *“reduce the time judges spend on each pleading by enabling the judge to know in advance where to look for key information and, indeed, ensure that each pleading contains the information the judge needs to make a decision.”*

III. ASSUMPTIONS UNDERLYING THE FORMS

This paper does not presume to know what assumptions the Supreme Court considered or used in adopting the new Rule 736 promulgated forms. However, the assumptions discussed below are the same used by the four Task Forces appointed by the Supreme Court to assist in drafting expedited foreclosure rules and forms since 1997.

Assumption I: The constitutional amendment allowing the use of the homestead as collateral for a home equity loan directed the Supreme Court to “*promulgate rules of civil procedure for expedited foreclosure proceedings.*”² “Expedited” is the critical word in the constitutional directive that had to satisfy another constitutional directive that a home equity TEX. CONST. art. XVI §50(a)(6) loan “*may be foreclosed upon only by court order.*”³ The Supreme Court was not directed to promulgate rules for obtaining a judgment for foreclosure - as is the case in a judicial foreclosure proceeding under Tex. R. Civ. Proc. §309, effective January 1, 1967 - because that would make §50(r) superfluous.

² TEX CONST. art XVI §50(r)

³ TEX. CONST. art. XVI §50(a)(6)(D)

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