

**PRESENTED AT**

24<sup>th</sup> Annual Estate Planning, Guardianship and Elder Law Conference

August 4-5, 2022  
Galveston, TX

**Real Estate Issues in Elder Law**

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## REAL ESTATE ISSUES IN ELDER LAW

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One of the largest assets for a family or individual is their home. Real estate is a part of elder law whether you are helping your client with estate planning, a trust, guardianship, or probate. In research conducted by Wesley Wright on legal malpractice, out of 26 areas of law, real estate law accounts for 14% of malpractice lawsuits.<sup>1</sup> The topics for this presentation include inspections, surveys, homestead exemptions, reverse mortgages, home equity loans, the Garn-St. Germain Act, and affidavits of heirship.

### INSPECTIONS

In Texas, exercising the right to inspect is important because homebuyers do not have much state protection against residential homebuilding defects.<sup>2</sup> The agency that came closest to protecting the public against such defects, the Texas Residential Construction Commission, TRCC, was abolished in 2009 by the Sunset Commission.<sup>3</sup> Although not perfect, the TRCC's gap remains unfulfilled and over time usage of trade continues to fade away from the construction standards, warranty, inspection, and state-sponsored dispute resolution processes it provided to Texas homebuilding and homebuyer protection.<sup>4</sup>

The right to inspect is an invaluable tool to help a homebuyer make an informed decision about the actual condition of a home.<sup>5</sup> If information about the type of inspections is available people would have the ability to decide which ones are pertinent for their residential needs, especially during the option period of their agreement that would render upfront information of at least some patent defects.<sup>6</sup>

If people realized that when a construction related dispute occurs, the available alternatives are dim and most lead to litigation.<sup>7</sup> A homebuyer could diminish the likelihood of litigation, especially if the opposing party is a seller or homebuilder who is sophisticated and has deeper pockets.<sup>8</sup> Inspections are a simple, relatively inexpensive way that may avoid the possibility of litigation.<sup>9</sup> Buyers are encouraged to inspect because once they purchase a home the larger the cost to repair and the extent of the defect the more likely it will result in litigation.<sup>10</sup> Some residential buyers forego inspections especially during a seller's market when multiple offers abound, but that can be like playing Russian roulette.<sup>11</sup>

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<sup>1</sup> Wesley W., Clark T., *Malpractice Claims a Review of the America Bar Association's Profile of Legal Malpractice Claims*, 2012-2015, UT School of Law, Tex. Ch. NAELA 2018.

<sup>2</sup> M. Friedman, *Contracts and Conveyances of Real Property* §2:12 (7<sup>th</sup> ed. 2005).

<sup>3</sup> Sunset Advisory Commission, Final Report: *Texas Residential Construction Commission*, at 1 (July 2009).

<sup>4</sup> *Id.*

<sup>5</sup> *Robberson Steel, Inc. v. J. D. Abrams, Inc.*, 582 S.W.2d 558, 563-564, 27 U.C.C. Rep. Serv. 114 (Tex. Civ. App. El Paso 1979).

<sup>6</sup> *Lutfak v. Gainsborough*, No. 01-15-01068-CV, 2017 Tex. App. LEXIS 4554 (Tex. App.—Houston [1st Dist.] May 18, 2017).

<sup>7</sup> *Hernandez v. Lautensack*, 201 S.W.3d 771 (Tex. App. Fort Worth 2006).

<sup>8</sup> *Centex Homes v. Buecher*, 95 S.W.3d 266, 273 (Tex. 2002).

<sup>9</sup> *Hernandez v. Lautensack*, 201 S.W.3d 771 (Tex. App. Fort Worth 2006).

<sup>10</sup> *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69,75 AL.L.R.2d 1 (1960).

<sup>11</sup> M. Friedman, *Contracts and Conveyances of Real Property* §2:12 (7<sup>th</sup> ed. 2005).

Texas continues experiencing affordability issues in real estate.<sup>12</sup> In April of 2022, the median home price in the state of Texas was \$349,000.00.<sup>13</sup> Texas continues leading the nation in new home construction.<sup>14</sup> The Houston metro area has the largest number of permits filed for new construction of single family homes in the nation and Dallas had the highest growth in new home construction in the state.<sup>15</sup> During 2021, the median age of homes sold in Texas was 29 years old.<sup>16</sup> The average home requires additional maintenance and major repairs ten (10) years after being built.<sup>17</sup> If additional conditions exist in the home the possibility of deterioration and decrease in value is likely to follow.<sup>18</sup> Therefore, exercising the right to inspect is particularly important.

Countless interrelated components in home construction, including the Texas plasticity index, referring to water content in the soil, which causes foundation defects, and faulty terrain increase the likelihood that Murphy's law will apply even when a home is originally built in a workmanlike manner. A homeowner could spend less time exercising their right of use and enjoyment rather than in litigation related matters, which might be prevented or corrected by performing inspections prior to closing.<sup>19</sup>

The test for a homebuyer could be: what is the worst that could happen? If the homebuyer can live with that, then proceed with the purchase, if not rescind the agreement and find another home.<sup>20</sup> Buyers are advised to conduct at least the basic inspections according to their residential needs prior to acquiring a home, whether new or used, to prevent the possibility of defects, particularly major ones that likely will result in litigation.<sup>21</sup>

Prospective home purchasers who conduct inspections are advised to heed the reports, especially when they disclose serious defects.<sup>22</sup> If doubtful get a second opinion from another qualified inspector.<sup>23</sup> A buyer may get into a rut because after starting the purchasing process and generally having invested one percent in earnest money, plus option fee, appraisal, survey, inspection, and sometimes re-inspection fees, the tendency is to proceed to closing.<sup>24</sup> However, this is when the purchaser could objectively assess the actual condition of the home and decide whether to cut their losses and find another home or proceed to closing facing known patent defects that were not contemplated when the purchase offer was

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<sup>12</sup> Joshua Roberson et al., Texas Housing Insight, Texas A&M University Real Estate Center, at 6 (June 2022).

<sup>13</sup> Joshua Roberson et al., Texas Housing Insight, Texas A&M University Real Estate Center, at 6 (July 2022).

<sup>14</sup> National Association of Homebuilders, *Building Permits by State and Metro Area* (Apr. 2022).

<sup>15</sup> *Id.*; National Association of Homebuilders, *Building Permits by State and Metro Area* (Apr. 2022).

<sup>16</sup> National Association of Realtors, Research Group: *Home Buyers and Sellers Generational Trends Report* at 31 (2022).

<sup>17</sup> Dave Ramsey, *3 Major Considerations Before Buying a 20-Year-Old House*, InterNACHI (2019).

<https://www.daveramsey.com/blog/3-major-considerations-20-year-old-house>

<sup>18</sup> *Id.*

<sup>19</sup> M. Friedman, *Contracts and Conveyances of Real Property* §2:12 (7<sup>th</sup> ed. 2005).

<sup>20</sup> *Symphony Space v. Pergola Properties*, 88 N.Y.2d 466, 669 N.E.2d 799, 646 N.Y.S.2d 641 (1996).

<sup>21</sup> M. Friedman, *Contracts and Conveyances of Real Property* §2:12 (7<sup>th</sup> ed. 2005).

<sup>22</sup> *Sun Dev., L.P. v. Hughes*, No. 09-12-00524-CV, 2014 Tex. App. LEXIS 10762 (Tex. App.—Beaumont Sep. 25, 2014).

<sup>23</sup> *Levy Props., Inc. v. Essex Ins. Co.*, Civil Action No. 1:12-CV-199-C, 2014 U.S. Dist. LEXIS 189602 (N.D. Tex. 2014).

<sup>24</sup> *Id.*

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First appeared as part of the conference materials for the  
24<sup>th</sup> Annual Estate Planning, Guardianship and Elder Law Conference session  
"Real Estate Issues in Elder Law"