TEXAS TITLE EXAMINATION STANDARDS

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By

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The Real Estate, Probate and Trust Law Section and
The Oil, Gas and Energy Resources Law Section
The State Bar of Texas

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TEXAS TITLE EXAMINATION STANDARDS

PREFACE

The Texas Title Examination Standards are guidelines intended to assist title examiners and others called upon to assess the marketability of land titles, focusing on the manner in which a prudent examiner approaches matters that may be encountered during the course of examination. The standards are compiled by a board consisting of Texas experts in the title examination field.

In 1989, the Council of the Section of Real Estate, Probate and Trust Law of the State Bar of Texas approved the formation of a committee to study the formulation and development of title examination standards. The Oil, Gas and Energy Resources Law Section soon became a cosponsor. After a great deal of study of the use of title examination standards of other states and many hours of drafting and meeting time, the committee (now the "Title Standards Joint Editorial Board"), proposed the first Texas Title Examination Standards, which were approved by REPTL and OGERL at the State Bar of Texas Annual Meeting on June 27, 1997, as the first Texas title examination standards.

The Title Standards Joint Editorial Board appointed by these two sections now meets at least semiannually to consider additional standards, amendments to existing standards, and commentary. Amendments and new standards are presented to the membership of the two sections prior to formal adoption by the Sections. The Board itself makes changes to the comments and cautions as needed. The Board welcomes comments and suggestions, which may be submitted to the chair or to the editor.

DISCLAIMER AND INTRODUCTION

Disclaimer: These title examination standards represent the collective consensus of The Title Standards Joint Editorial Board established by the Section of Real Estate, Probate and Trust Law and the Oil, Gas and Energy Resources Law Section of the State Bar of Texas. These standards should not be construed as reflecting the opinion of the State Bar of Texas, its officers, members or staff. These standards are presented with the understanding that neither the publisher nor the Joint Editorial Board is engaged in rendering legal services. In no event shall the Joint Editorial Board, the reviewers, or the publisher be liable for any direct, indirect, or consequential damages resulting from the use of this publication, including damages resulting from the sole or concurrent negligence of the Joint Editorial Board, its members, the reviewers, or the publisher.

Because statutory law prohibits title insurance companies from insuring against loss by reason of unmarketable title, these standards do not apply to title examination for purposes of title insurance. See Tex. Ins. Code § 2502.002. Moreover, these standards do not apply to the exercise of discretion by a title insurance company in determining the insurability of title. Title insurance is a contract of indemnity. Southern Title Guaranty Co., Inc. v. Prendergast, 494 S.W.2d 154 (Tex. 1973).

Standards for real estate title examinations are statements that declare an answer to a question or a solution for a problem that is commonly encountered in the process of a title examination. Their purpose is to alleviate disagreements among members of the bar regarding real estate transactions and to set forth propositions (standards) with which title lawyers can generally agree concerning title documents to promote uniformity in the preparation, use, and meaning of such documents. In other words, title standards can be viewed as a reference that can be consulted in the preparation and examination of title documents. Although standards do not, by themselves, impose compulsory legal requirements, they do establish guidelines upon which a reasonable and practical examination can be based. And although standards should state fundamental and enduring principles, they are subject to amendment as required by changes in governing law and in title and conveyancing practice.

Title standards may address a variety of concerns, including the attitudes and relationships among examiners and between examiners and the public, the appropriate duration of a title search, the effect of the lapse of time on a defective or improperly recorded title document, the appropriate presumptions of fact that can be relied upon in the course of an examination, and the law applicable to commonly encountered situations. Standards should represent the near unanimous opinion of the experienced and competent title bar.

Even with title standards, however, title examiners should advise their clients honestly as to their beliefs and opinions regarding the ownership of a particular interest in land. The judgment of an examiner should necessarily reflect rules of law (both legislative and case law) as well as justifiable presumptions that are applicable to title documents and to fact situations arising from the chain of title appearing of record. For example, when the name of a grantee in one deed corresponds with the name of the grantor in a later deed, the universal practice is to presume that they are the same person. And although there is nothing of record to show that the grantor was competent, that the signature is genuine, or that the deed was actually delivered, the universal practice is to presume that these are facts. Indeed, any attempt to require proof of these matters regarding each document in the chain of title would create chaos.

Of course, when minor title questions do arise, the reaction of different examiners may not always be the same. For example, title examiners may respond differently regarding the effect of a recorded, unacknowledged deed; of a deed that fails to state the marital status of the grantor; or of a deed from a married grantor that does not contain the signature of the grantor's spouse. Thus, a chief objective of title standards is to set forth uniform principles to resolve certain common title problems.

Users of these Standards are cautioned that individual Standards, Comments, and Cautions may not reflect current case law and statutes. There is a lapse of time between the time that changes in law occur and the updating of the Standards, Comments, and Cautions. Users are invited to notify the Joint Editorial Board if they believe that any of the Standards, Comments, or Cautions fail to reflect current law.

CHAPTER I

TITLE EXAMINER

Standard 1.10. Objective of the Title Examiner

An examiner examines and opines on title to advise the client of the status of title and of material irregularities, defects, and encumbrances that may reasonably be expected to affect materially the value or use of the property or that may expose the owner to litigation or adverse claims even if the litigation or adverse claims can reasonably be expected to be successfully defended. Nevertheless, an examiner does not ordinarily determine the outcome of disputable matters but should advise how a particular matter may be cured so that the client may secure marketable title.

Comment:

A major goal of title standards is to eliminate technical objections that do not impair marketability and common objections that are based upon a misapplication of law. An examiner should determine what material irregularities, defects, and encumbrances exist. Then an examiner should determine, to the extent reasonably possible, who, if anyone, can take advantage of each material irregularity, defect, or encumbrance against the owner or client, and if there are consequent risks. Although an examiner may opine on the possible outcomes arising from material irregularities, defects, and encumbrances, the examiner ordinarily advises only how such matters may be cured.

Source:

Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 2.1 (1960). History:

Adopted June 27, 1997; amended June 16, 2006; amended March 6, 2026.

The original standard provided:

"The purpose of an examination of title and comments, objections, and requirements is to advise an examiner's client of the status of title and of the methods by which the client may secure marketable title to real property. Based upon the materials examined, the title opinion should advise an examiner's client of all irregularities, defects, and encumbrances that may reasonably be expected to affect materially the value or use of the property; or that may expose the owner to litigation or adverse claims even if the litigation or adverse claims can reasonably be expected to be successfully defended."

The 2006 amended standard provided:

"The purpose of an examination of title and comments, objections, and requirements is to advise the examiner's client of the status of title and of the methods by which the client may secure marketable title to real property. Based upon the materials examined, the title

opinion should advise an examiner's client of all irregularities, defects, and encumbrances that may reasonably be expected to affect materially the value or use of the property or that may expose the owner to litigation or adverse claims even if the litigation or adverse claims can reasonably be expected to be successfully defended. The examiner does not ordinarily determine the validity or priority of irregularities, defects, and encumbrances."

Standard 1.20. Review By Examiner

Based upon the intended scope of the examination, an examiner should review any documents, records, deeds, abstracts, affidavits, or other reliable materials that are necessary to form a legal opinion as to the status of title to the property. The materials that are examined should be set forth in the title opinion or as an exhibit to the opinion.

Comment:

An examiner's opinion will usually be based upon the entire chain of title. The chain of title is the successive conveyances, commencing with the severance of title from the sovereign down to and including the conveyance to the present holder. Munawar v. Cadle Company, 2 S.W. 3d 12, 20 (Tex. App.—Corpus Christi 1999, pet. denied). Note that severance from the sovereign occurs on the date of the survey of the property for severance purposes, not on the date of the patent, which always post-dates severance— sometimes by many years. Occasionally, an examiner may base an opinion upon a chain of title covering a shorter period. For example, an examiner may limit the examination to instruments in the chain of title that were recorded after the period covered by a prior title opinion that was submitted by the client and prepared by another attorney; however, in this instance, the examiner is well advised to make certain that the client understands that the client assumes the risk of any deficiencies in the prior opinion. The documents that are available for examination may vary, but they should be sufficient for an examiner to be legally satisfied as to the status of title to the property. Disclosure of the documents examined is necessary to advise the client of the basis for the opinion and to protect an examiner from documents and matters not considered. The examining attorney is usually not responsible for identifying or gathering the documents to be examined, but the examiner should assess the acceptability of the methods employed in doing so and should disclose any instance in which the methods employed are not generally considered to be the most reliable.

The scope of an examiner's opinion may be limited at the request of the client or to suit the client's particular purpose or property interest. The nature and scope of the documents examined may be limited accordingly. Under such circumstances, an examiner should carefully set forth the limited scope of the opinion, and an examiner should be reasonably certain that the opinion is adequate for the client's purpose.

For example, an opinion may be limited to: the ownership of oil and gas, thus not covering title to the surface, easements, and coal, lignite, iron ore, uranium and other minerals; the ownership of the surface of the land, thus not covering title to oil, gas, uranium, or any other minerals; title to oil and gas leasehold interests; title of one particular interest owner; title for financing purposes; or the status and priority of the liens securing payment

of debt. Moreover, a title opinion might not reflect the current ownership of particular interests, such as an easement, although it notes the burden.

A title opinion is prepared in accordance with the law existing when the opinion is prepared. Examiners do not ordinarily modify an opinion or inform a client that a change in law has affected title as reflected in a prior opinion.

Because the title examiner is ordinarily examining only record title, title opinions do not address all risks and circumstances that affect title. The following are examples of risks and circumstances that often cannot be determined in the course of a title examination, although the examiner may comment on the need to resolve such risks and circumstances:

(a) rights of parties in possession;

(b) ownership of the beds of any watercourses, and ownership of water or water rights;

(c) the existence or validity of an interest in wind rights or solar rights apart from the surface estate;

(d) the location of the subject lands on the ground, questions of boundary, conflicts with adjacent surveys, vacancies, access, area, or other matters as would be revealed by investigation, by a current on the ground survey, or both, including without limitation the effects of accretion, erosion, avulsion, reliction, and subjacent and lateral support

(e) the genuineness, authenticity, or possible defenses against the enforceability of any instruments;

(f) matters not evident from the materials examined such as fraud, forgery, duress, undue influence, incapacity or incompetency of parties due to mental condition, minority, or marital status; the existence of unknown heirs; incorrectly indexed instruments; delivery and alteration after delivery; receivership, bankruptcy or insolvency; homestead rights; unrecorded instruments, such as mechanic's and materialman's liens, operator's liens, production tax liens, liens for ad valorem taxes not yet due, inchoate liens or interests; and the status of a party as a bona-fide or non-bona-fide purchaser;

(g) matters of title that are not reasonably expected to affect marketable title;

(h) filings, regulations, orders, or opinions of any governmental or public authority other than as identified in the materials examined, including, without limitation, the Texas General Land Office, the Texas Railroad Commission, the Attorney General, and the Federal Energy Regulatory Commission;

(i) matters relating to title to fixtures or personal property, including Uniform Commercial Code filings;

(j) compliance with governmental laws, rules, ordinances or regulations affecting the use of land, including without limitation any zoning, platting, and land designated as a wetland;

(k) any other matter not pertaining to title and ownership, including without limitation environmental matters and flood plain limitations; and

(l) the validity of a correction instrument not executed by all parties to the original instrument and current owners.

Source:

Title Standards Joint Editorial Board.

History:

Adopted June 27, 1997.

Proposed Standard 1.30. Consultation With Prior Examiner

When an examiner discovers a situation that creates a question regarding the status of title and an examiner has knowledge that another examiner has examined the title or is familiar with the situation in the context of other property, an examiner may, with the client's consent, before preparing the opinion, communicate with the other examiner if such communication is in the best interests of an examiner's client and does not violate the Texas Disciplinary Rules of Professional Conduct.

Comment:

Communication with the prior attorney is a discretionary matter. A prior examiner may not be readily available for consultation, or communication with the prior examiner may not be economically justified.

Caution:

A prior examiner may represent an adverse or potentially adverse party, making such communication inappropriate.

Source:

Oklahoma Title Examination Standards, Std. 1.2; Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 2.2 (1960).

History:

Adopted June 27, 1997; amended March 6, 2026. The original standard provided:

"When an examiner discovers a situation that creates a question regarding the status of title and an examiner has knowledge that another examiner has examined the title or is familiar with the situation in the context of other property, an examiner may, before preparing the opinion, communicate with the other examiner if such communication is in the best interests of an examiner's client and does not violate the Texas Disciplinary Rules of Professional Conduct."

CHAPTER II MARKETABLE TITLE

Proposed Standard 2.10. Marketable Title Defined

All title examinations should be based on marketability of title. A marketable title is a record title that is free from reasonable doubt such that a prudent person, with knowledge of all salient facts and circumstances and their legal significance, would be willing to accept it. To be marketable, a title need not be free from every possible suspicion. The mere possibility of a defect that has no probable basis does not show an unmarketable title.

Comment:

Except as otherwise provided in these standards, if a title examination reveals the need to rely on facts outside of the record, the title is unmarketable. An example would be facts that must be proven by parol evidence or by presumptions of fact that would probably become genuine issues of fact in the event of a lawsuit. Whether the potential lawsuit would likely be won by the party with apparent record title is immaterial because threat or probable likelihood of litigation renders the title unmarketable. On the other hand, a title need not be perfect to be marketable. A doubt about title must be a reasonable doubt and be serious enough to affect its value.

Usually, the buyer's attorney examines the title and identifies any title defects. If the examiner prepares a written opinion, any title defects will be listed together with a statement of the necessary requirement(s) to cure each defect. The opinion may also contain comments about the title that are intended to inform the buyer of any concerns about the title that do not affect marketability. Usually in response, the seller's attorney or other agent obtains the curative instruments or takes other necessary action to cure any title defects. Such curative efforts are usually submitted to the buyer's attorney for approval prior to closing. If a title defect cannot be cured prior to closing, the buyer must decide whether to accept the defective title or rescind the transaction.

Caution:

In Texas, an owner cannot be a bona fide purchaser if the owner derives its title under a quitclaim. Woodward v. Ortiz, 237 S.W.2d 286, 291-92 (Tex. 1951) (purchaser under a quitclaim takes with notice of all prior unrecorded conveyances and equitable claims of third persons). Nevertheless, because quitclaims are often found in chains of title, an examiner does not typically question marketability merely because a quitclaim is found within a chain of title if other factors, such as the long passage of time, sufficiently mitigates the practical risk of unmarketability. Moreover, case law is not clear as to what constitutes a quitclaim. See, e.g., Bryan v. Thomas, 365 S.W.2d 628, 629-630 (Tex. 1963) (conveyance of all of grantor's interest in a tract is not a quitclaim). For further discussion of quitclaims, see Standard 4.90.

Matters that may make a title unmarketable include:

(a) Land acquired by limitation title, Greer v. International Stock Yards Co., 43 Tex. App. 370, 96 S.W. 79 (1906, writ ref'd).
(b) Land acquired by accretion, Gaines v. Dillard, 545 S.W.2d 845, 853-854 (Tex. App.—Fort Worth 1976, writ ref'd n.r.e.).
(c) Title that is subject to an outstanding oil and gas lease, Roberts & Corley v. McFaddin, Weiss & Kyle, 74 S.W. 105, 109 (Tex. App. 1903, writ denied).
(d) Title that is subject to an outstanding royalty interest, Sweet v. Berry, 236 S.W. 531, 543 (Tex. App.—Amarillo 1921, writ dism'd).
(e) Title that is subject to an outstanding covenant, Dupree v. Savage, 154 S.W. 701, 703 (Tex. App.— Amarillo 1913, writ ref'd).
(f) Title that is subject to an outstanding easement, Shaw v. Morrison, 14 S.W.2d 953, 954 (Tex. App.— Eastland 1929, no writ).
(g) Title that is subject to a mortgage, judgment lien, or tax lien, Crutcher v. Aiken, 252 S.W. 844, 845 (Tex. App.—El Paso 1923, no writ).

Effective September 1, 2011, the Texas Property Code was revised to authorize the correction of instruments containing incorrect or ambiguous property descriptions, as well as mistakes relating to the names of parties, acknowledgments, marital status, dates, and recording data. Tex. Prop. Code §§ 5.0275.031, as amended. For further discussion, see Standard 2.20, below.

Effective September 1, 2019, Section 5.152 was added to the Texas Property Code. It voids any instrument, other than a top lease (defined in subsection (b) (1) – (3)), titled as an oil and gas lease or oil and gas royalty lease or the like, that conveys permanently or for a term, any or all of the owner's mineral interest or royalty interest in an existing oil, gas or mineral lease *unless* the instrument includes a 14 point caption on the first page, on the top of each subsequent page, and above the signature of the conveying party the following: "THIS IS NOT AN OIL AND GAS LEASE. YOU ARE SELLING ALL OR A PORTION OF YOUR MINERAL OR ROYALTY INTERESTS." Thus, an oil and gas lease that is not a top lease (i.e., an oil and gas lease that takes effect upon the expiration of the existing oil and gas lease), the caption must be included, or the instrument is void.

Source:

Lund v. Emerson, 204 S.W.2d 639 (Tex. App.—Amarillo 1947, no writ); Owens v. Jackson, 35 S.W.2d 186 (Tex. App.—Austin 1931, writ dism'd w.o.j.); Texas Auto Co. v. Arbetter, 1 S.W.2d 334 (Tex. App.— San Antonio 1927, writ dism'd w.o.j.). Austin v. Carter, 296 S.W. 649 (Tex. App.—Eastland 1927, writ dism'd); Alling v. Vander Stucken, 194 S.W. 443 (Tex. App.—San Antonio 1917, writ ref'd); Adkins v. Gillespie, 189 S.W. 275 (Tex. App.—Dallas 1916, no writ); 3A Aloysius A. Leopold, Land Titles and Title Examination § 10.6 n. 1 (Texas Practice 3d ed. 2005).

History:

Adopted June 27, 1997; amended March 6, 2016. The original standard provided:

"All title examinations should be based on marketability of title. A marketable title is a record title that is free from reasonable doubt such that a prudent person, with knowledge of all salient facts and circumstances and their legal significance, would be willing to accept it. To be marketable, a title need not be free from every possible suspicion. The mere possibility of a defect that has no probable basis does not show an unmarketable title."

Standard 2.20. Correction Instruments

An examiner may rely on a correction instrument to establish, or as an aid to establishing, marketable title. However, a correction instrument materially altering the effect of a prior conveyance or other instrument that it purports to correct should be considered effective only if joined by all parties whose interests are affected.

Comment:

Tex. Prop. Code. §§ 5.027–.031, effective September 1, 2011, and subsequently revised, expressly sanction use of correction instruments to correct errors and omissions in conveyances. The legislation is a reaction to Myrad Properties, Inc. v. LaSalle Bank, 300 S.W.3d 746 (Tex. 2009), which held that a correction deed was void because it added a tract of land that was not included in the earlier deed that it purported to correct but might be read to suggest that a correction deed is inherently unreliable. Tex. Prop. Code § 5.028 addresses the requirements for making a nonmaterial correction, and Tex. Prop. Code § 5.029 addresses the requirements for making a material correction. Tex. Prop. Code § 5.030 addresses the effect of a correction instrument that complies with statute. Such an instrument is, inter alia, effective as of the date of the recorded original instrument but subject to the rights of creditors and subsequent purchasers without notice acquired on or after the date of the original instrument was "acknowledged, sworn to, or proved and filed for record…and before the correction instrument has been acknowledged, sworn to, or proved and filed for record…." Tex. Prop. Code § 5.031 provides that a correction instrument recorded prior to September 1, 2011, that substantially complies with Tex. Prop. Code § 5.028 or 5.029 is effective unless a court renders a final judgment determining that the correction instrument is not in substantial compliance.

Caution:

In Broadway Nat'l. Bank v. Yates Energy Corp., 631 S.W.3d 16 (Tex. 2021), the Texas Supreme Court held that a material correction made in a correction instrument signed by parties who no longer held an interest in the property was valid without the joinder of the then current owners. Notwithstanding this holding, an examiner should not rely on a purported correction instrument that makes a material correction to an earlier instrument under Tex. Prop. Code § 5.029 unless all who could be adversely affected by the correction,

i.e., creditors and subsequent purchasers, have joined in its execution because an examiner cannot ordinarily determine whether such party is protected or unprotected by Tex. Prop. Code § 5.030. In the case of a nonmaterial correction, if the correction instrument has not been executed by all parties to the original instrument and current owners, then the examiner should not presume that the parties that executed the correction instrument complied with the requirements of subsection 5.030(d). Moreover, because of the difficulty in determining the materiality of a correction, absent a judicial resolution, the examiner should exercise caution in relying on a correction instrument in which not all affected persons have joined.

Source:

Citations in the Comment History:

Adopted July 17, 2014.

CHAPTER III

NAME VARIANCES

[Note: For entity name variances, see Standard 6.70]

Standard 3.10. Idem Sonans

An examiner may presume that differently spelled names refer to the same person when the names sound alike, when their sounds cannot be distinguished easily, or when common usage by corruption or abbreviation has made their pronunciation identical.

Comment:

This standard expresses the common law rule of "idem sonans." If a name in a legal document is incorrectly spelled but, when commonly pronounced, conveys to the ear a sound practically identical to the correct name as commonly pronounced, then the name thus given can be accepted as sufficient identification. Means v. Protestant Episcopal Church Council, 503 S.W.2d 591, 592 (Tex. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.); Dingler v. State, 705 S.W.2d 144, 145 (Tex.Crim. App.1984). Thus, if the grantee in one deed is "John Macomber" and the grantor in the next deed is "John McOmber," these names are presumed to refer to the same person. Or, if the grantee in one deed is "William Conolly" and the grantor in the next deed is "William Conley," the same presumption may be made.

In Cockrell v. Estevez, 737 S.W.2d 138, 139 n.1 (Tex. App.—San Antonio 1987, no writ), the court noted that under the rule of idem sonans, absolute accuracy in the spelling of a name is not required in a legal document. As long as the incorrect spelling sounds practically identical to the correct name (in this instance "Cockrall" and "Cockrell"), there is sufficient identification of the named person. See also Chumney v. Craig, 805 S.W.2d 864 (Tex. App.—Waco 1991, writ denied) ("Damon" and "Damond"); O'Brien v. Cole, 532 S.W.2d 151 (Tex. App.—Dallas 1976, no writ) ("O'Brian" and "O'Brien"). In Hill v. Foster, 181 S.W.2d 299, 304 (Tex. App.—Amarillo 1944), aff'd, 186 S.W.2d 343 (Tex. 1945), the court applied the rule of idem sonans and held that it is immaterial if a slight discrepancy exists between the name used in the body of the deed and the name signed thereto. The court determined that, through typographical error, the name "Barclay" used in the body of the deed was intended to be "Baxley," but the two names, although spelled differently, sounded enough alike to be idem sonans.

Caution:

Similarity of names is never more than a mere rebuttable presumption of identity. Turner v. Roberts, 513 S.W.2d 957, 959 (Tex. App.—Fort Worth 1974, no writ). Texas law is unclear where the difference in spelling regards the first letter of the surname (e.g.,"Pfister" and "Fister," "Pharnsworth" and "Farnsworth"). Because the official title indices in Texas are

grantor-grantee and grantee-grantor (in contrast with a tract index), names like "Fister" and "Pfister" would not be indexed in the same portion of the indices.

Source:

Citations in the Comment; Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 5.1 (1960); 5 Aloysius A. Leopold, Land Titles and Title Examination § 32.4 (Texas Practice 3d ed. 2005).

History:

Adopted June 27, 1997.

Standard 3.20. Middle Names Or Initials

Unless otherwise put on inquiry, an examiner may presume that the use of a middle name or initial in one instrument and its nonuse in another instrument does not raise an issue of identity that affects title.

Comment:

Similarity of names is ordinarily sufficient identity in the chain of title. In the absence of evidence casting doubt upon the identity of a party to a conveyance, such similarity is controlling in nearly every instance. Knox v. Gruhlkey, 192 S.W. 334 (Tex. App.—Amarillo 1917, writ ref'd). The similarity of "H. Percy Forster" to "H. P. Forster" was found to be sufficient evidence of identity in a trespass-to-try title action in Corder v. Foster, 505 S.W.2d 645, 649 (Tex. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).

Caution:

Similarity of names is never more than a mere rebuttable presumption of identity. Turner v. Roberts, 513 S.W.2d 957, 959 (Tex. App.—Fort Worth 1974, no writ).

Source:

Citations in the Comment; Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 5.2 (1960).

History:

Adopted June 27, 1997.

Standard 3.30. Abbreviations

An examiner may presume that any customary and generally accepted abbreviation of a first or middle name is the equivalent of the full name.

Comment:

A commonly known diminutive or abbreviation is sufficient to identify a person in the absence of evidence indicating that a different person was intended. Salazar v. Tower, 683 S.W.2d 797, 799 (Tex. App.—Corpus Christi 1984, no writ). "Terry" is a sufficient identification of "Terrance." O'Brien v. Cole, 532 S.W.2d 151 (Tex. App.—Dallas 1976, no writ).

Caution:

Similarity of names is never more than a mere rebuttable presumption of identity. Turner v. Roberts, 513 S.W.2d 957, 959 (Tex. App.—Fort Worth 1974, no writ).

Source:

Citations in the Comment; Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 5.3 (1960).

History:

Adopted June 27, 1997.

Standard 3.40. Recitals Of Identity

An examiner may rely upon a recital of identity contained in a conveyance executed by the party whose identity is recited, unless the examiner has a reasonable basis for questioning the recital. If title is held in a name that appears to be a business name, an examiner may rely on a recital of identity that incorporates the words "doing business as" ("dba") or similar words (e.g., "John Smith, dba Wholesome Grocery Store"), unless the form of name or other facts appearing from the materials examined raise a contrary inference.

Comment:

An examiner often encounters conveyances in which the grantor's name is not the same as that of the record owner, but which recite the identity between the two. Frequent examples include instruments using words such as "also known as" ("aka") ("Robert T. Jones, Jr., aka Bobby Jones"); "formerly" or "formerly known as" ("fka") ("Mary Smith, formerly Mary Jones"); and "nee," which means "born as" ("Mary Lincoln, nee Todd"). Even though these instruments are usually executed only by the person whose identity is recited and might technically be regarded as self-serving, such recitals are, practically universally, accepted as fact to complete the chain of title.

The rule here expressed is grounded in the notion that similarity of names is sufficient to establish identity of persons when there is no evidence to the contrary. See Chamblee v. Tarbox, 27 Tex. 139, 144– 45 (1863). Cf., Dittman v. Cornelius, 234 S.W. 880 (Tex. Comm'n App. 1921, judgm't adopted) (holding that proof of identity need not be conclusive). In Haney v. Gartin, 113 S.W. 166 (Tex. App. 1908, writ denied), the objection was made that "Mary E. Kurtz," one of the grantors, was not shown to have a connection with the title, although the deed contained a recital that "Mary E. Kurtz" was "formerly Mary E. Newlin." This recital was sufficient, said the court, to show that "Mary E. Kurtz," who signed the deed, was the same person as "Mary E. Newlin," to whom the land had been devised. Recitals of identity were likewise deemed sufficient to explain discrepancies between the names of grantors and the record owners in Auerbach v. Wylie, 19 S.W. 856 (Tex. 1892) and Russell v. Oliver, 14 S.W. 264 (Tex. 1890). With some exceptions, the Assumed Business or Professional Name Act, Tex. Bus. & Com. Code Ch. 71, requires persons and entities doing business under an assumed name to file a certificate thereof in specified offices. Failure to file the required certificate does not void or impair transactions by the offending party. Paragon Oil Syndicate v. Rhoades Drilling Co., 277 S.W. 1036 (Tex. 1925); Tex. Bus. & Com. Code § 71.201. Reference to a county's assumed name certificate records may be helpful in resolving identity questions regarding a person using an assumed name. Tex. Bus. & Com. Code § 71.054. Assumed names for a corporation, limited partnership, limited liability partnership, limited liability company, or foreign filing are filed with the Secretary of State. Id. § 71.103(a). An examiner may rely on assumed name certificates, absent inconsistent information.

As to the use of recitals generally, see Standard 13.40. For guidance generally concerning conveyances involving business entities, see Chapters VI and VII, infra.

Caution:

On occasion an examiner may encounter names which, although recited to be alternative names of the same person, are entirely dissimilar. Under such circumstances the examiner should bear in mind that names that are not the same are presumed to refer to different persons. See Fox v. Grand Union Tea Co., 236 S.W.2d 561, 563 (Tex. App.—Austin 1951, no writ). Unless the instrument recites some further explanation or qualifies as an ancient document (see Comment to Standard 13.40), or supporting facts otherwise appear in the record, an examiner should require further inquiry.

Although recitals of identity may be relied upon for business entities in the chain of title as well as for individuals, authority for reliance may be weaker in the case of business entities. See Texas Co. v. Lee, 157 S.W.2d 628, 630–31 (Tex. 1941). Prudence dictates the exercise of greater care in considering recitals of the identity of business entities, particularly when it is practical to obtain documentation. See Standard 6.70.

The name of a business entity may raise an inference contrary to a recital of identity. For example, appellations such as "Inc." or "Corporation," ordinarily denoting a particular form of organization, would contradict a recital that the entity is an individual, or a different kind of entity, doing business under the corporate name. If a business entity's name tends to

contradict a recital of identity, a requirement of further investigation and proof of identity is warranted. Other examples of words and abbreviations that connote a particular kind of entity are "L.L.C.," "L.C.," or "Ltd. Co." for a limited liability company, "Ltd." or "L.P." for a limited partnership; and "L.L.P." for a limited liability partnership. On the other hand, the word "Company" or "Co." in the name of a business entity is widely used in many different forms of business and should not be regarded as signifying any particular one. (The examiner should bear in mind that words and abbreviations occurring in the names of entities incorporated or registered in other jurisdictions might have connotations different from those that would apply to Texas entities.)

Source:

Citations in the Comment; Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 5.4 (1960); 5 Aloysius A. Leopold, Land Titles and Title Examination §§ 32.6, 32.9 (Texas Practice 3d ed. 2005).

History:

Adopted June 27, 1997; amended June 15, 2001. This amendment was primarily adopted for the purpose of accommodating a new chapter on affidavits and recitals. (Chapter XIII). The original standard provided: "Absent actual or constructive notice that a recital of identity may be untrue, an examiner may rely upon a recital of identity contained in a conveyance executed by the person whose identity is recited. A recital of a statement of fact, marital status or identity of heirship is prima facie evidence of the truth of the recital if the document containing such statement has been of record in the deed records of the applicable county for at least five years. A recital in an 'ancient document' is admissible as evidence of the recited facts."

Standard 3.50. Suffixes

Although identity of a name raises a presumption of identity of a person, an examiner should take note of the addition of a suffix, such as "Jr." or "II," to the name of a subsequent grantor because such a suffix may rebut the presumption of identity with the prior grantee.

Comment:

Ordinarily a suffix is not considered a part of the name. Thus, where the grantee in one instrument is "John Doe, M.D." and the grantor in the next instrument is merely "John Doe," it would be presumed that they are the same person. However, if the grantee in one instrument is "John Doe, Sr." and the grantor in the next instrument is "John Doe, Jr.," or if the grantee in one instrument is "John Doe," and in another instrument the grantor is "John Doe, Jr.," the presumption is rebutted.

Although not involving conveyances, many Texas cases support this standard in the context of service of process. The Texas Supreme Court, in a case concerning service of

process, reversed a decision of the court of appeals that had held that the addition or omission of the suffix "Sr." or "Jr." was immaterial. Uvalde Country Club v. Martin Linen Supply Co., 690 S.W.2d 884 (Tex. 1985). The issue in the case was whether a citation that had been issued in the name of "Henry Bunting" satisfied the rules of civil procedure where the registered agent was listed as "Henry Bunting, Jr." Without elaborating, the Texas Supreme Court held that the discrepancy in names invalidated the service of process under the rules of civil procedure.

However, Texas Property Code § 5.028(a)(2)(A) provides that correcting:a party's name, including the spelling of a name, the first or middle name or initial, a suffix, an alternate name by which a party is known, or a description of an entity as a corporation, company, or other type of organization; is a nonmaterial correction to an instrument.

Source:

Citations in the Comment; Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 5.5 (1960).

History:

Adopted June 27, 1997.

Standard 3.60. Variance In Name Within An Instrument

Generally, where no issue is raised as to the identity of persons in a chain of title, the identity of names from one instrument to another is sufficient to establish such identity. Where a grantor's signature differs from the grantor's name as it appears in the body of the deed, but the name given in the habendum, the signature line, or in the acknowledgment agrees with either the signature or the name as it appears in the body of the deed, an examiner should accept the certificate of acknowledgment as providing adequate identification.

Comment:

An officer may not take an acknowledgment unless the officer knows or has satisfactory evidence that the acknowledging person is in fact the person who executed the instrument. Tex. Civ. Prac. & Rem. Code § 121.005. This requirement is sufficient to create a presumption of identity when the signature differs from the body of the deed, but the acknowledgment agrees with one or the other. Numerous cases have held that a certificate of acknowledgment is considered prima facie evidence of all facts therein recited and that the recitals are conclusive unless fraud or duress is shown. Bell v. Sharif–Munir– Davidson Dev. Corp., 738 S.W.2d 326 (Tex. App.—Dallas 1987, writ denied) (holding that the certificate of acknowledgement was prima facie evidence that the deed was executed for the purpose of conveying the land); Stout v. Oliveira, 153 S.W.2d 590 (Tex.—El Paso 1941, writ ref'd w.o.m.) (holding that a certificate of acknowledgment is prima facie evidence of all facts therein recited, and that the recitals are conclusive unless fraud or imposition are shown, and

that the burden of proof is on one who denies the genuineness of the acknowledgment and instrument to show such facts).

While a deed must disclose with certainty the identity of the grantor, the name of the grantor is not required to appear in the deed if enough information is shown in the deed by which, with the aid of extrinsic evidence, the name of the grantor can be made certain. See French v. Koenig, 27 S.W. 1079 (Tex. App. 1894, writ ref'd) (holding that although grantor and grantee names were reversed, the recitation of consideration correctly identified the grantor); Texas Pac. Coal & Oil Co. v. Patton, 238 S.W. 202 (Tex. Comm'n. App. 1922) (holding deed valid even though it failed to name the spouse but was signed by both husband and wife); Vasquez v. Texas Loan Agency, 45 S.W. 942 (Tex. 1898) (holding that use of the word "I" is sufficient if the party is otherwise identified); Vineyard v. O'Connor 36 S.W. 424 (Tex. 1896) (holding that identification of grantor in the habendum clause was sufficient).

Caution:

This general rule should not be extended beyond relatively minor variances, such as the use of a full given name in one place and initials in another, or a variance between a middle initial used in the body of the deed and a different one in the signature. A deed purporting to be from a person, e.g., Robert Jones, grantor, but which contains a signature, e.g., John Smith, that varies significantly from the named grantor certainly should not be accepted by an examiner.

Source:

Citations in Comment; Stout v. Oliveira, 153 S.W.2d 590 (Tex. App.—El Paso 1941, writ ref'd w.o.m.); Oklahoma Title Examination Standards, Std. 5.2; Lewis A. Simes & Clarence B. Taylor, Model Title Standards, Std. 5.6 (1960); 5 Aloysius A. Leopold, Land Titles and Title Examination §§ 32.6, 32.9 (Texas Practice 3d ed. 2005).

History:

Adopted June 27, 1997; amended March 6, 2026. The original standard provided:

"Where a grantor's signature differs from the grantor's name as it appears in the body of the deed, but the name given in the acknowledgment agrees with either the signature or the name as it appears in the body of the deed, an examiner should accept the certificate of acknowledgment as providing adequate identification."

Standard 3.70. Variances In Name Of Spouse

If a grantee spouse in one instrument of conveyance is identified only by a title and last name (e.g., "John Smith and Mrs. John Smith, grantees") and such spouse is apparently identified in a succeeding instrument in the chain of title by both a given and last name (e.g., "John Smith and Mary Smith, grantors"), an examiner should require further evidence showing that such spouse (e.g., Mrs. John Smith) in the first instrument is the same person as

the spouse (e.g., Mary Smith) in the second instrument. The same requirement should be made if these succeeding forms of identification are reversed (e.g., the grantees in the first instrument are "John Smith and Mary Smith" and the grantors in a succeeding instrument in the chain of title are "John Smith and Mrs. John Smith").

Comment:

This standard conforms to the practice of Texas title examiners.

A deed made to a married woman but using her maiden name, where her identity was shown in the instrument, was effective to convey the land. Wilkerson v. Schoonmaker, 14 S.W. 223 (Tex. 1890). Where "Mary E. Kurtz" was a grantor, but title was in "Mary E. Newlin," and a recital in the deed was that "Kurtz" was formerly "Newlin," the recital was competent evidence of identity where there was no controverting evidence. Accordingly, this recital was sufficient to show they were the same person, and it was presumed that the change in surname was brought about by marriage. Haney v. Gartin, 113 S.W. 166 (Tex. App. 1908, writ ref'd).

Caution:

Although this standard conforms to title examination practice, no Texas cases are directly on point.

Where a certificate of acknowledgement signed by the wife is attached to a deed naming her husband as grantor even though the wife owned the property at issue, the deed does not convey the wife's title. Stone v. Sledge, 26 S.W. 1068 (Tex. 1894). *Stone* was distinguished in Creosoted Wood Block Paving Co. v. McKay 211 S.W. 822 (Tex. App.—Dallas 1919, no writ) where the name of Mrs. McKay did not appear as a grantor, but the premises of the deed purported to be from "Mr. McKay and his wife," as owners, the court held that the deed was sufficient to convey Mrs. McKay's interest because the entirety of the deed with the aid of extrinsic evidence identified the grantors with sufficient certainty.

Source:

Citations in the Comment and Caution; 5 Aloysius A. Leopold, Land Titles and Title Examination §§ 32.2, 32.5, and 32.6 (Texas Practice 3d ed. 2005; Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 5.8 (1960).

History:

Adopted June 27, 1997.

Standard 3.80. Grantee Must Exist and be Capable of Taking

A deed will not pass a present interest in land to a named grantee that does not exist when the grant was made.

Comment:

Except as discussed in the next paragraph, a conveyance to a person who is deceased on the effective day of the conveyance is void for lack of an existing grantee, and no title passes in that conveyance to the heirs or devisees of such deceased person. "It is a well-established rule that a deed can be made only to grantees in existence or life, at the time of the execution of the deed. A deed made to the heirs of a dead person is valid, if it can be shown who was intended, but a deed to the heirs of a living person without specifying their names is held to be void, and this would be especially true where the heirs of the living were yet unborn" Vineyard v. Heard, 167 S.W. 22, 25-26 (Tex. App.—San Antonio 1914), *aff'd*, 212 S.W. 489 (Tex. 1919). A conveyance to a living grantee and the grantee's "heirs and assigns" or to "the estate of" a dead grantee is valid. Haile v. Holtzclaw, 414 S.W.2d 916, 927 (Tex. 1967) (holding that a conveyance to the "estate" of a grantee was sufficient because the "estate" or heirs were capable of being ascertained).

A deed is not void on the sole ground that the grantee who paid the consideration died before execution of the deed as the rule that the grantee must be in existence at the time of the grant applies to equitable rights growing out of such a conveyance. Further, if it was the intention that a grant be made to a person in existence, the intention of the parties may be effectuated, although the grantee is described by the name of a person deceased." Sparks v. Humble Oil & Refining Co., 129 S.W.2d 468, 472 (Tex. App.— Texarkana 1939, writ ref'd). In Johns v. Wear, 230 S.W. 1008 (Tex. App.--Texarkana 1921, no writ), the court held that a deed was ineffective because the grantee, Ludwig C. L. Treame, was not a living person and was a fictitious grantee when the land was purportedly conveyed on October 3, 1895. This general rule, however, is subject to statutory modification. See Gould v. West, 32 Tex. 338 (1869) (holding that a grant by the State to a dead man, although a nullity under common law and under civil law, was validated by a statute that provided that such a deed is not void. For current examples of such a statute, see Tex. Nat. Res. Code § 51.245, validating patents issued to a deceased person, and Tex. Nat. Res. Code § 161.229 validating a Veterans Land Board deed to a deceased grantee.

For conveyances involving corporations, including defunct corporations, see Chapter 6 of these Standards.

Caution:

Although a grantor ordinarily cannot convey to himself, Hopkins v. Walters, 224 S.W. 516 (Tex. App.— Amarillo 1920, no writ), (dictum), see comment to Standard 19.20 addressing Joint Tenancy with Right of Survivorship.

Source:

Citations in the Comment and Caution; Texas Practice Series, V. 5, Land Titles and Title Examination, 3rd, Aloysius A. Leopold, §§ 32.1, 32.20, and 32.30.

History:

Adopted March 6, 2026.

CHAPTER IV

EXECUTION, ACKNOWLEDGMENT, AND RECORDATION

Standard 4.10. Omissions And Inconsistencies

Omission of the date of execution from an instrument affecting title does not, in itself, impair marketability. An examiner may presume that an undated instrument has been timely executed if the dates of acknowledgment and recordation, and other circumstances of record, support the presumption.

Inconsistencies in recitals or dates (such as among dates of execution, attestation, acknowledgement, or recordation) do not, in themselves, impair marketability, and an examiner may presume that a proper sequence of formalities occurred.

Comment:

The date of execution is not essential to an instrument's validity or delivery. Dunn v. Taylor, 113 S.W. 265, 268 (Tex. 1908); Webb v. Huff, 61 Tex. 677, 679 (1884); Owen v. State, 26 S.W.2d 251, 253 (Tex.Crim.

App.1930). See generally 5 Aloysius A. Leopold, Land Titles and Title Examination § 36.2 (Texas Practice 3d ed., 2005). The date on an instrument, like other recitals, is important, if the date is in issue, and the given date is presumptively correct, but subject to rebuttal or explanation. Farrell v. Comer, 84 S.W.2d 300, 303 (Tex. App.—Fort Worth 1935, no writ); Owens v. Jackson, 35 S.W.2d 186, 188 (Tex. App.—Austin 1931, writ dism'd w.o.j.); Brown v. Rodgers, 248 S.W. 750 (Tex. App.—Amarillo 1923, no writ). The same is true of the date of attestation and, generally, of acknowledgment. Wilson v. Curry, 151 S.W.2d 356, 358 (Tex. App.—Fort Worth 1941, writ dism'd).

The critical date—that of delivery—is not normally found in the instrument. See Standard 4.30. Hence, omission of the date from one conveyance in an ordinary series of conveyances may be disregarded. Even though special importance may attach to the date of execution, as in the case of a power of attorney, there is a presumption of timely execution (i.e., in proper sequence in relation to other instruments) if such is supported by other dates and circumstances of record.

Because recitals of dates may be omitted or explained, are notoriously inaccurate, and are more generally in error than are the actual sequences of formalities, inconsistencies in the indicated dates of formalities (e.g., acknowledgment dated prior to execution or execution dated subsequent to indicated date of recordation) should be disregarded. Further, the inconsistency or impossibility of a recited date should not be regarded as vitiating the particular formality involved. Brown v. Rodgers, supra; Wilson v. Curry, supra; Owen v.

State, supra; Panhandle Construction Co. v. Flesher, 87 S.W.2d 273, 275 (Tex. App.—Amarillo 1935, writ dism'd).

Regarding instruments that have been filed for record, an examiner should consider Tex. Civ. Prac. & Rem. Code § 16.033, which contains a two-year statute of limitations that bars certain actions to recover real property based upon acts and omissions specified in the statute. For further discussion, see Comment and Caution to Standard 4.20. In addition, Tex. Loc. Gov't Code § 191.007(k) provides that a recorded instrument that fails to meet certain specifications relating to page size, paper weight, font size, legibility, and other technical matters, is deemed to have been properly recorded.

Tex. Prop. Code § 12.0011 addresses the requirements for recordation. Effective September 1, 2007, this was amended to provide that a paper document attached as an exhibit to a paper affidavit or other document having an original signature or signatures and acknowledged, sworn to with a proper jurat, or proved according to law, may be recorded and, if recorded, imparts notice.

Effective July 1, 2018, personal appearance may be by way of two-way video and audio conference technology that meets specified standards. See Tex. Gov't Code Ch. 406, new subchapter C (addressing online notary public services). In 2019, the Texas Legislature added Tex. Prop. Code § 12.0013 to permit the recordation of a paper or tangible copy of an electronic record, otherwise recordable, if authenticated by a notary public using the form of authentication set out in § 12.0013. Recordation of such a copy constitutes constructive notice, Tex. Prop. Code § 12.001 (b)(3).

Caution:

If, under the circumstances indicated by the record, a date has a particular significance (e.g., for a priority or for an important presumption), an inconsistency or impossibility should not be disregarded.

Source:

Citations in the Comment; Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 6.2 (1960); 5 Aloysius A. Leopold, Land Titles and Title Examination § 36.2 (Texas Practice 3d ed. 2005).

History:

Adopted June 27, 1997.

Standard 4.20. Defective Acknowledgments

If a certificate of acknowledgment does not conform to the exact wording of the applicable statute but shows substantial compliance with the statutory requirements for acknowledgments, an examiner should not require corrective action. If a deed or other

instrument contains an acknowledgment in substantial noncompliance with the applicable statute or does not contain any acknowledgment whatever, an examiner should not require that such defects be cured if the instrument has been of record for at least twenty years and no adverse claim appears. Otherwise, the examiner should require a corrected acknowledgment and re-record the instrument, or require and record a new, corrected instrument. A proper jurat may substitute for an acknowledgment for instruments recorded on or after September 1, 1989.

Comment:

In general, an instrument is entitled to be recorded only if acknowledged or proven by witnesses according to law. Tex. Prop. Code § 12.001. The proper forms for acknowledgments are expressed by statute. Tex. Civ. Prac. & Rem. Code §§ 121.001—121.015. A jurat may substitute for an acknowledgment in instruments recorded on or after September 1, 1989. Tex. Prop. Code § 12.001(a).

A jurat is a certificate signed by the officer before whom an instrument was executed, stating that the instrument was subscribed and sworn to before the officer by the person executing the instrument. Carpenter v. State, 218 S.W.2d 207, 208 (Tex.Crim. App.1949); Robertson v. State, 8 S.W. 659 (Tex.Crim. App.1888). Subject to an exception (discussed in the following paragraph), an acknowledgment certificate must include the officer's seal of office, Tex. Civ. Prac. & Rem. Code § 121.004, and this is also presumably true for a proper jurat, if the officer has a seal. Missouri Pacific Railway Co. v. Brown, 53 S.W. 1019 (Tex. 1899). For a listing of the officers who may take acknowledgments or proofs, see Tex. Civ. Prac. & Rem. Code § 121.001. For a listing of officers who may administer oaths and supply a jurat, see Tex. Gov't Code §§ 602.002—602.005.

An acknowledgment or jurat that does not include an official seal and that is taken in the United States, or in its territories, is invalid only if the jurisdiction in which the acknowledgment or jurat is taken requires the attachment of an official seal. Tex. Civ. Prac. & Rem. Code § 121.004. The secretary of state must annually furnish the county clerks with a list of states that require an official seal. Tex. Gov't Code § 405.019.

An acknowledgment or jurat that does not include an embossed or printed seal is not invalid on an electronically transmitted authenticated document that legibly reproduces the required elements of the seal. Tex. Gov't Code § 406.013. An acknowledgment or jurat may be satisfied by the electronic signature of the notary public so long as all required information is attached to or logically associated with the signature or record. Tex. Bus. & Com. Code § 322.011.

Subject to the Caution noted below, the absence or presence of a proper acknowledgment does not affect the validity of a deed or other instrument. Tex. Prop. Code § 13.001(b); Haile v. Holtzclaw, 414 S.W.2d 916, 928 (Tex. 1967). Substantial compliance with the statutory acknowledgment requirements is sufficient. "If the strict compliance with the letter of the law was exacted, we have no doubt that it would destroy and invalidate thousands of records, long since made and believed to have been in accordance with the law." Dorn v.

Best, 15 Tex. 62, 66 (1855). Omission of mere formal parts of the acknowledgment certificate, such as the recitation that the instrument was executed "for the consideration and purposes therein stated," will not invalidate it, so long as the material parts are present, though all such parts should be included for the sake of regularity. Monroe v. Arledge, 23 Tex. 478 (1859). No particular form of words is required, so long as the certificate shows on its face that all prerequisites to a valid acknowledgment were in fact complied with. Williams v. Cruse, 130 S.W.2d 908 (Tex. App.—Beaumont 1939, writ ref'd).

The necessary prerequisites for an acknowledgment are that the signer personally appeared before the officer, that the signer was known to the officer to be the person whose name is subscribed to the instrument, and that the signer acknowledged that the signer executed the same for the purposes and considerations therein stated. Sheldon v. Farinacci, 535 S.W.2d 938, 942 (Tex. App.—San Antonio 1976, no writ). Since August 31, 1981, these essential elements may be fulfilled by a simple certificate stating that the instrument "was acknowledged" by the signer (and, if other than as an individual, the signer's particular capacity). Tex. Civ. Prac. & Rem. Code §§ 121.006, 121.008. An acknowledgment may be considered in connection with the deed to which it is attached to supply some missing ingredient. Thus, where the acknowledgment is made by a corporate officer but fails to state the officer's capacity or that the acknowledgment is that of the corporation, it is nonetheless sufficient if it states that the deed was executed for the purposes therein expressed and the deed purports to be the act of the corporation. Ballard v. Carmichael, 18 S.W. 734 (Tex. 1892); Muller v. Boone, 63 Tex. 91 (1885).

If an acknowledgment is defective because it was made "in an individual, rather than a representative or official, capacity" or fails "to show an acknowledgment or jurat that complies with applicable law," a person with a right of action to recover real property or an interest therein must bring suit within two years after an instrument is filed for record; however, this limitations period does not apply to a forged instrument. Tex. Civ. Prac. & Rem. Code § 16.033. In addition, an instrument "filed for record containing a ministerial defect, omission, or informality in the certificate of acknowledgment that has been filed for record for longer than two years ... is considered to have been lawfully recorded and to be notice of the existence of the instrument on and after the date the instrument is filed." Tex. Civ. Prac. & Rem. Code § 16.033(c). But see Caution, below.

To prove title, an instrument in the chain of title to land may be admitted into evidence as an "ancient document," without further proof of its execution if it has been in existence for at least twenty years. (See discussion of the "ancient document" rule in the Comment to Standard 13.40.) This rule of evidence does not require the instrument to have been acknowledged. A former statute, which was deemed repealed upon promulgation of the rules of evidence effective September 1, 1983, provided that an instrument without a proper acknowledgment is admissible if it has been of record for at least ten years. There is no similar specific provision in the current rules of evidence. Arguably, the record of an unacknowledged, or improperly acknowledged, instrument which has been of record for at least twenty years is admissible into evidence under the ancient document rule, but this is not certain. See 3 Aloysius A. Leopold, Land Titles and Title Examination §§ 8.6, 8.48 (Texas Practice 3d ed. 2005) and 5 Id. § 35.18. Even if admissible into evidence to prove title, an instrument

improperly acknowledged, although of record for at least twenty years, still cannot be regarded as having been validly recorded so as to impart constructive notice. Of course, one who has examined the instrument or the record of the instrument would have actual notice of it. Where no adverse claim appears from the record after twenty years, marketability would not ordinarily be questioned because the possibility of a successful adverse claim based on a defective acknowledgment is remote.

Caution:

An examiner should exercise caution in relying on the two-year statute of limitations discussed in the Comment. Tex. Civ. Prac. & Rem. Code § 16.033. Except for a "ministerial defect, omission, or informality" in the certificate of acknowledgment that has been filed for record for longer than two years, Tex. Civ. Prac. & Rem. Code § 16.033(c), this statute does not expressly validate the recording of an improperly acknowledged instrument. The statute does not explain what constitutes "a ministerial defect, omission, or informality." Moreover, the period of limitation will not run against persons under disability. A defectively acknowledged instrument probably cannot be proven through a certified copy from the public records, at least until it qualifies as an "ancient document." Tex. R. Evid. 902(4).

An instrument executed by a married woman prior to August 22, 1963, but not "privily and apart" acknowledged in the manner then prescribed by statute, was void as to her. Tex. Rev. Civ. Stat. art. 1299 (repealed by Acts 1963, 58th Leg., p. 1189, ch. 473, § 1); Humble Oil & Refining Co. v. Downey, 183 S.W.2d 426 (Tex. 1944); Sun Oil Co. v. Rhodes, 71 S.W.2d 413 (Tex. App.—Beaumont 1943, writ ref'd).

The supreme court declared former Article 1299 to be unconstitutional in Wessely Energy Co. v. Jennings, 736 S.W.2d 624 (Tex. 1987) (affirming a married woman's pre-repeal conveyance despite its noncompliance with Article 1299). However, the ruling was made prospective only. 736 S.W.2d at 629. Thus, an examiner should still be alert to a deed which: pre-dates August 22, 1963, is executed by a married woman, but is not "privily and apart" acknowledged.

An unacknowledged and unrecorded instrument is void as to creditors and subsequent purchasers for value without notice. Tex. Prop. Code § 13.001(a). Further, the recordation of an instrument does not impart constructive notice unless the instrument has been properly acknowledged or proved. Hill v. Taylor, 14 S.W. 366 (Tex. 1890). Moreover, the acknowledgment of the grantee only, without that of the grantor, is insufficient. Sweeney v. Vasquez, 229 S.W.2d 96, 97 (Tex. App.—San Antonio 1950, writ ref'd). Of course, an examiner who encounters such an instrument in the course of examining title would gain actual notice of its contents and such notice would likely be imputed to the examiner's client.

An examiner should exercise caution when determining that an acknowledgment is in substantial, though not literal, compliance with the necessary formalities. The general rule is that omitted words can be supplied by inference if it is clear what they should be. Sheldon v. Farinacci, 535 S.W.2d 938 (Tex. App.—San Antonio 1976, no writ). However, an acknowledgment was held insufficient where the certificate recited that the subscribing

party, by name, had appeared and "acknowledged that _____ had signed, sealed and delivered" the instrument, omitting only the personal pronoun. Huff v. Webb, 64 Tex. 284 (1885).

A jurat (as distinguished from an acknowledgment) is required for the perfection of certain claims (e.g., a mechanic's lien). Tex. Prop. Code § 58.004.

Source:

Citations in the Comment; Oklahoma Title Examination Standards, Stds. 6.1, 6.2; 3 Aloysius A. Leopold, Land Titles and Title Examination §§ 8.6, 8.48 (Texas Practice 3d ed. 2005) and 5 Id. § 35.18.

History:

Adopted June 27, 1997.

Standard 4.30. Delivery; Effective Date; Delay In Recordation

An examiner may presume the delivery of instruments acknowledged and recorded. Delay in recordation, with or without record evidence of the intervening death of the grantor, does not rebut the presumption or create an unmarketable title; however, as an added exceptional protection to the client, an examiner may choose to make an inquiry outside of the record.

Comment:

Delivery is a formality essential to the effectiveness of conveyances, recorded or otherwise. Dikes v. Miller, 24 Tex. 417 (1859). Delivery may be actual or constructive. An example of constructive (or conditional) delivery is the typical situation where a deed is delivered to a closing agent to be subsequently delivered to a buyer upon the satisfaction of all contractual conditions to closing. Delivery is a question of fact focusing on two elements: (1) was the instrument placed within the control of the grantee by the grantor, and (2) did the grantor intend that the instrument operate as a conveyance? Ragland v. Kelner, 221 S.W.2d 357 (Tex. 1949); Bell v. Rudd, 191 S.W.2d 841 (Tex. 1946); Steffian v. Milmo National Bank, 6 S.W. 823 (Tex. 1888).

Unless it provides its own effective date, a deed takes effect from the date of its delivery to the grantee. Rosenberg v. Levin, 181 S.W.2d 832 (Tex. App.—Dallas 1944, writ ref'd w.o.m.). Possession of a deed raises the presumption of its due delivery. Tuttle v. Turner, Wilson & Co., 28 Tex. 759 (1866). The date affixed to an instrument is prima facie evidence of the date of delivery. Lichtenstein v. F&M Nat'l Bank, 372 S.W.2d 716 (Tex. App.—Dallas 1963, no writ). In the absence of contrary evidence, a deed must be presumed to have been delivered on the date it was executed and acknowledged. Hooks v. Vanderburg, 328 S.W.2d 467 (Tex. App.—Fort Worth 1959, no writ). Where a deed is dated one date and the acknowledgment is on a different date, however, it is presumed that it was delivered on the

date of the deed and not on the date of the acknowledgment in the absence of evidence showing the date it was actually delivered. Rogers v. Gunn, 545 S.W.2d 861 (Tex. App.—Amarillo 1976, no writ); Popplewell v. City of Mission, 342 S.W.2d 52 (Tex. App.—San Antonio 1960, writ ref'd n.r.e).

See Standard 3.80 respecting requirements that the grantee be in existence.

Caution:

Neither a delay in recordation nor a post-mortem recordation presumptively impairs marketability; however, if the record reflects either the death of the grantee prior to the recording of the instrument, or a long delay in recording, the examiner should inquire outside the record if the examiner reasonably believes, based upon the facts, that a claim of non-delivery is probable. Burris v. McDougald, 832 S.W.2d 707 (Tex. App.—Corpus Christi 1992, no writ); Perkins v. Damme, 774 S.W.2d 765 (Tex. App.—Corpus Christi 1989, writ denied).

Because recorded instruments raise a prima facie presumption of delivery, an examiner is usually not concerned with evidentiary questions; however, because this presumption may be overcome, an examiner may have a duty to inquire further when an examiner knows, or reasonably should know, of facts or circumstances indicating: (1) that the deed was delivered or recorded for a different purpose; (2) that fraud, accident or mistake accompanied the delivery or recording; or, (3) that the grantor had no intention of divesting title. Stephens County Museum, Inc. v. Swenson, 517 S.W.2d 257, 261–262 (Tex. 1974); Thornton v. Rains, 299 S.W.2d 287 (Tex. 1957); Vannerberg v. Anderson, 206 S.W.2d 217, 219 (Tex. 1947). Moreover, a deed must be accepted by the grantee. Recordation of a deed is also prima facie evidence of acceptance; however, this presumption can also be overcome. Martin v. Uvalde Savings & Loan Ass'n, 773 S.W.2d 808 (Tex. App.—San Antonio 1989, no writ).

Source:

Citations in the Comment; Oklahoma Title Examination Standards, Std. 6.4; Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 6.3 (1960); 5 Aloysius A. Leopold, Land Titles and Title Examination §§ 36.2, 36.6 (Texas Practice 3d ed. 2005).

History:

Adopted June 27, 1997.

Standard 4.40. Notice Recording System

Because Texas has a "notice" recordation statute, an examiner should not presume that the order of filing or recording of competing instruments establishes priority of right or that unrecorded instruments are subordinate to recorded instruments.

Comment:

Common Law Background: "Our system of registration was unknown to the common law." Ball v. Norton, 238 S.W. 889, 890 (Tex. Comm'n App. 1922, judgm't adopted). "At common law in England, there was no system of registration or recording, and the rule between claimants of the same title was found in the maxim 'prior in tempore potior est in jure,' which means, he who is first in time has the better right." 2 Maurice Merrill, Merrill on Notice § 921 (Vernon 1952). This is still the law except as abrogated by statute. Thus, as between claimants who are not entitled to the special protections conferred by recording statutes, the first in time is first in right.

Types of Recording Statutes: In general, recording statutes limit the first-in-time, first-in-right rule and were enacted to protect a bona fide purchaser, as defined in the comments to Standard 4.90, including a lienholder, who is without notice of prior unrecorded claims to real property. Three basic types of recording systems are recognized in the United States: race, race-notice, and notice.

A race statute provides that a purchaser or lienholder who is second in time of conveyance prevails if she records first, regardless of whether that person has notice of other unrecorded interests.

Under a race-notice statute, the subsequent purchaser or lienholder must acquire an interest without notice of the prior unrecorded interest and also must file for record before recordation of the prior unrecorded interest.

A notice statute protects a subsequent purchaser or lienholder who acquires an interest without notice of a prior unrecorded conveyance or lien, regardless of when the subsequent purchaser's deed is recorded, if ever. Nevertheless, because a party who takes without notice may lose out to another subsequent purchaser or lienholder who takes without notice, every grantee should promptly record. Texas has a notice recordation statute. Tex. Prop. Code § 13.001.

How A Notice Recordation Statute Operates: Under a notice statute, if the subsequent instrument is executed and delivered before the prior instrument is filed for record and if the subsequent purchaser or lienholder pays value and has no notice of the prior instrument, then the subsequent instrument prevails regardless of whether the prior instrument is filed for record before the subsequent instrument is filed. Houston Oil Co. v. Kimball, 122 S.W. 533 (Tex. 1909); Watkins v. Edwards, 23 Tex. 443 (1859); White v. McGregor, 50 S.W. 564 (Tex. 1899); Penny v. Adams, 420 S.W.2d 820 (Tex. App.—Tyler 1967, writ ref'd); Matthews v. Houston Oil Co., 299 S.W. 450 (Tex. App.—Beaumont 1927, no writ); Raposa v. Johnson, 693 S.W.2d 43 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.). For example, assume that Homeowner grants an oil and gas lease on February 1 to A, who does not file for record. Thereafter, Homeowner gives another oil and gas lease to B, a bona fide purchaser, as defined in the comments to Standard 4.90, on February 5. As between A and B, B prevails regardless of whether either A or B records. And, under Texas case law, if A assigned his lease to C on February 10, B would also prevail over C even if B has not recorded. Houston Oil

Co. v. Kimball, 122 S.W. 533 (Tex. 1909). However, if Homeowner, on February 15, granted a third oil and gas lease to D for value, who took without notice of B's lease (and assuming that B has still not recorded), D would prevail over B.

Filing and Recording: A paper document filed for record may not be validly recorded or serve as notice of the paper document unless: (1) the paper document contains an original signature or signatures that are acknowledged, sworn to with a proper jurat, or proved according to law; or (2) on or after September 1, 2007, the paper document is attached as an exhibit to a paper affidavit or other document that has an original signature or signatures that are acknowledged, sworn to with a proper jurat, or proved according to law. Tex. Prop. Code § 12.0011. In 2019, the Texas Legislature added Texas Property Code 12.0013 to permit the recordation of a paper or tangible copy of an electronic record, otherwise recordable if authenticated by a notary public using the form of authenticating set out in 12.0013. Similarly, Texas Property Code 12.001 (b)(3) was added to recognize the "papering out" of the electronic record as a recordable original, which serves as notice. An original signature is not required for an electronic document that complies with the requirements of Chapter 15, Tex. Prop. Code (Uniform Real Property Electronic Recording Act); Chapter 195, Tex. Local Gov't Code (electronic filing of records); Chapter 322, Tex. Bus. & Comm. Code (Uniform Electronic Transactions Act); "or other applicable law." Tex. Prop. Code § 12.0011. See Standard 4.120. If made as provided by law, a certified copy, when recorded, has the same effect as the original. Tex. Local Gov't Code § 191.005 and Tex. Evid. Rules 902(4).

An instrument meeting the requirements of the preceding paragraph imparts constructive notice upon filing. An instrument is filed "when deposited for that purpose in the county clerk's office, together with the proper recording fees." Jones v. MacCorquodale, 218 S.W. 59, 61 (Tex. App.—Galveston 1919, writ ref'd). Tex. Local Gov't Code § 191.003. However, a lien created by an abstract of judgment is not effective until the filing is indexed. Texas Property Code 52.001. "The county clerk [is] not authorized to 'impose additional requirements' for filing or recording a legal paper such as the removal of irrelevant notations." Ready Cable, Inc. v. RJP Southern Comfort Homes, Inc., 295 S.W.3d 763 (Tex. App.—Austin 2009, no pet.) (the words "unofficial document" on the top of an exhibit was an irrelevant notation). Tex. Local Gov't Code § 191.007(k).

"[A]n electronic document or other instrument is filed with the county clerk when it is received by the county clerk, unless the county clerk rejects the filing within the time and manner provided by this chapter and rules adopted under this chapter." Tex. Local Gov't Code § 195.009. "An electronic document or other instrument that is recorded electronically … is considered to be recorded in compliance with a law relating to the recording of electronic documents or other instruments as of the county clerk's business day on which the electronic document or other instrument is filed electronically." Id. § 195.005. In general, the county clerk must confirm or reject an electronic filing "not later than the first business day after the date the electronic document or other instrument is filed." Id. § 195.004. See Standard 4.110.

(a) The county clerk is required to Record instruments in a well-bound book, microfilm records, or other medium, such as optical imaging. Tex. Local Gov't Code § 191.002 and Chapters 204 and 205;

(b) Record within a reasonable time after delivery, any instrument that is authorized or required to be recorded in that clerk's office and that is proved, acknowledged, or sworn to according to law. Tex. Prop. Code § 11.004(a)(1);

(c) Record instruments relating to the same property in the order the instruments are filed. Tex. Prop. Code § 11.004(a)(3); and

(d) Make a record of the names of the parties to the instrument in alphabetical order, the date of the instrument, the nature of the instrument, and the time the instrument was filed. Tex. Local Gov't Code § 193.001.

Although local practice varies, county clerks may maintain separate books with corresponding indices for:

(a) Deed Records (since 1836)
(b) Probate Records (since 1836)
(c) Release Records (since 1836)
(d) Marriage Records (since 1837)
(e) Deed of Trust Records (since 1879)
(f) Abstract of Judgment Records (since 1879)
(g) Vendor's Lien Records (since 1879)
(h) Lis Pendens Records (since 1905)
(i) Oil and Gas Lease Records (since 1917)
(j) Federal Tax Lien Records (since 1923)
(k) Mechanic's and Materialmen's Lien Records (since 1939)
(l) State Tax Lien Records (since 1961)
(m) Financing Statements (since 1966)
(n) Utility Security Records (since 1966)

As of September 1, 1987, a clerk may consolidate the real property records into a single class known as "Official Public Records of Real Property" or "Official Public Records." Tex. Local Gov't Code §§ 193.002, 193.008.

The clerk must maintain alphabetical indices, Direct (Grantor) Index and Reverse (Grantee) Index, for all recorded deeds, powers of attorney, mortgages, and other instruments relating to real property. The Grantor Index must refer to the names of the corresponding grantees, and the Grantee Index must refer to the names of the corresponding grantors. If the instrument is executed by a representative (e.g., executor, administrator, guardian, agent, attorney in fact, or trustee), then both that person and the principal's name must be indexed. Tex. Local Gov't Code §§ 193.003, 193.004. The index entries for a correction instrument must contain the names of the grantors and grantees as stated in the correction instrument. Tex. Local Gov't Code § 193.003. Records maintained on microfilm and microfiche must also contain a brief description of the property, if any, and the location of the microfilm or microfiche image. Tex. Local Gov't Code §§ 193.009 and 193.010.

Caution:

An instrument properly filed for record but not yet indexed or not properly indexed nevertheless imparts constructive notice upon filing. See Standard 4.50. However, a lien created by an abstract of judgment is not effective until the filing is indexed. Texas Property Code 52.001.

A properly filed instrument imparts constructive notice even if the records have been destroyed. For a list of Texas counties whose records are not complete because of fires or other record deficiencies, see 3 Aloysius A. Leopold, Land Titles and Title Examination § 3 8.7 (Texas Practice 3d ed. 2005). In some cases, copies of or information pertaining to destroyed records may have been maintained by an independent abstract or title company, and examiners customarily rely on such records.

Source:

Citations in the Comment.

History:

Adopted August 2, 2013; amended July 17, 2014.

The prior standard provided: "Because Texas has a 'notice' recordation statute, an examiner must not assume that the order of filing or recording of competing instruments establishes priority of right or that unrecorded instruments are subordinate to recorded instruments."

Standard 4.50. Constructive Notice

An examiner should examine all instruments within the record chain of title as of the date and time of the examination, including instruments that have been recently filed for record but not yet indexed.

Comment:

Definition: Instruments filed for record within the chain of title impart constructive notice. Constructive notice is notice imputed as a matter of law as a result of an instrument having been filed for record. "An instrument that is properly recorded in the proper county is … notice to all persons of the existence of the instrument." Tex. Prop. Code § 13.002. An instrument that appears of record but does not meet the statutory requirements for recordation does not impart constructive notice, Hill v. Taylor, 14 S.W. 366 (Tex. 1890); however, such an instrument may impart actual or inquiry notice to one who learns of its existence. See Farmers Mut. Royalty Synd. v. Isaacks, 138 S.W.2d 228 (Tex. App.—Amarillo 1940, no writ).

Effect of filing: Except for abstracts of judgment and lis pendens, instruments that meet the statutory requirements for recordation, once filed, impart constructive notice even though never actually or accurately recorded or indexed. A party claiming under a properly filed instrument has no duty to verify that the clerk actually or accurately recorded it. William Carlisle & Co. v. King, 133 S.W. 241 (Tex. 1910); Throckmorton v. Price, 28 Tex. 605 (1866); David v. Roe, 271 S.W. 196 (Tex. App.—Fort Worth 1925, writ dism'd w.o.j.). Recordation in the wrong records (such as a mortgage in the deed records) does not defeat constructive notice. Kennard v. Mabry, 14 S.W. 272 (Tex. 1890); Knowles v. Ott, 34 S.W. 295 (Tex. App. 1895, writ ref'd).

An electronic instrument is deemed filed and generally imparts constructive notice when it is received by the county clerk, unless rejected by the next business day. Tex. Local Gov't Code § 195.009 and 13 Tex. Admin. Code § 7.144.

Abstracts of judgment are not effective to create judgment liens until recorded and indexed. Belbaze v. Ratto, 7 S.W. 501 (Tex. 1888). See Standard 15.30. However, a federal tax lien is effective as constructive notice from the time filed, even though it was never recorded or indexed. Hanafy v. United States, 991 F. Supp. 794 (N. D. Tex. 1998).

"To be effectively recorded [to impart constructive notice], an instrument relating to real property must be eligible for recording and must be recorded in the county in which a part of the property is located." Tex. Prop. Code § 11.001(a). Thus, if a tract of land is partly located in more than one county, recordation of an instrument affecting the tract in any of the counties imparts constructive notice in each of the counties of its existence and contents. Hancock v. Tram Lumber Co., 65 Tex. 225, 232 (1885); Aston Meadows, Ltd. v. Devon Energy Production Co., 359 S.W.3d 856 (Tex. App.—Fort Worth 2012, pet. denied).

If an instrument was recorded in the proper county at the time but a new county containing the land conveyed was subsequently created, that event does not affect the validity of the prior recording. Tex. Prop. Code § 11.001(b); Lumpkin v. Muncey, 17 S.W. 732 (Tex. 1886).

Like most instruments, a lis pendens filed for record before September 1, 2011, imparts constructive notice from date of filing; thus proper indexing of a lis pendens was not required. A lis pendens filed for record on or after September 1, 2011 must be filed for record and indexed in order to be constructive notice. Tex. Prop. Code § 13.004. However, a lis pendens does not impart constructive notice of matters not appearing on the face of the pleadings as of the time of the title examination, although it is effective as to papers that were lost by the clerk. Kropp v. Prather, 526 S.W.2d 283 (Tex. App.—Tyler 1975, writ ref'd n.r.e.); Latta v. Wiley, 92 S.W. 433 (Tex. App. 1905, writ ref'd). A lis pendens imparts constructive notice only while the underlying cause of action is pending; however, it may nevertheless impart actual or inquiry notice, unless "expunged." Tex. Prop. Code § 12.0071(f). For more information on lis pendens, including termination of constructive notice, see Standard 15.110.

Interests Not Subject To The Recording Statutes: Various rights and interests are not subject to the recording statutes and thus are not rendered void by the recording statutes

as to a subsequent purchaser or lienholder without notice even though the rights or interests are not of record in the county clerk's office. Those rights and interests include:

(a) Patents. Arrowood v. Blount, 41 S.W.2d 412 (Tex. 1931) (holding that the record of a patent in the General Land Office is notice to the world).

(b) Heirship. New York & T. Land Co. v. Hyland, 28 S.W. 206 (Tex. App. 1894, writ ref'd); Ross v. Morrow, 19 S.W. 1090 (Tex. 1892). See Standard 11.70.

(c) The appointment of a receiver. First Southern Properties, Inc. v. Vallone, 533 S.W.2d 339 (Tex. 1976) (the property is in custodia legis).

(d) An equitable interest or title. However, equity may protect a bona fide purchaser, as defined in the comments to Standard 4.90, against outstanding equitable interests. Cetti v. Wilson, 168 S.W. 996, 998 (Tex. App. 1914, writ ref'd).

(e) A forfeiture order in favor of the United States. United States v. Colonial National Bank, N.A., 74 F.3d 486 (4th Cir. 1996) (if the United States recovers land by forfeiture order, it does not have to file the order in the real property records or to file a lis pendens to protect its interest from the effect of a subsequent lien or conveyance by the former owner of the land).

(f) Title acquired by prescription or adverse possession. Houston Oil Co. v. Olive Sternenberg & Co., 222 S.W. 534 (Tex. Comm'n App. 1920, judgm't adopted); Heard v. Bowen, 184 S.W. 234 (Tex. App.– San Antonio 1916, writ ref'd); MacGregor v. Thompson, 26 S.W. 649 (Tex. App. 1894, no writ).

(g) An easement by necessity. Fletcher v. Watson, No. 14-02-00508, 2003 WL 22901026 at *8 (Tex. App.—Houston [14th Dist.] Dec. 4, 2003, pet. denied) (mem. op.) ("[I]t makes sense that an easement by estoppel could be defeated by a purchaser in good faith without notice, but that an estoppel by necessity would not be defeated.").

(h) Uniform Commercial Code (UCC) filings covering growing crops and promissory notes, whether or not secured by an interest in land. These security interests are perfected by filing in the central filing office of the state of location of the debtor, whether they specifically or generally describe the collateral and with or without a legal description of the affected lands. Tex. Bus. & Com. Code §§ 9.301, 9.501. However, security interests in fixtures, in as-extracted collateral (oil, gas, and other minerals), and in timber to be cut are perfected by filing in the real property records of the county where the property is located. Tex. Bus. & Com. Code § 9.501.

(i) A bankruptcy court order (confirming a reorganization plan) that extends the maturity date of a mortgage debt. Wind Mountain Ranch, LLC v. City of Temple, 333 S.W.3d 580 (Tex. 2010).

Title under a will probated in Texas may not be subject to the recording statutes, so that notwithstanding that the will is not of record in the county where the land is located, a purchaser from the decedent's intestate heirs without knowledge of the will cannot acquire title free of the devisees' title. See Howth v. Farrar, 94 F.2d 654 (5th Cir. 1938) (holding that the probate of a will is an in rem proceeding and notice to the world). Although that case has never been overruled, some commentators have expressed serious doubt that it accurately

represents Texas law. See 17 M. K. Woodward & Ernest E. Smith, III, Tex. Prac., Prob. & Decedents' Estates § 87 (1971) § 87 (1971), in which the authors, pointing out that a purchaser should not be expected to search all of the counties in the state, offer the opinion that to impart notice to persons other than the parties to a probate proceeding and their privies as to land outside the county of probate, the decree must be recorded in the records of the county in which the land lies. The authors further note that title examiners customarily require the recording of proceedings for the probate of a will in the county where the land under examination is located. In view of the uncertainty whether a will and its Texas probate must be recorded in the county where the land is located, in addition to the county where the will was probated, to impart constructive notice of the devisees' title, the only prudent course for the examiner is to require that any known will and its probate be recorded in the county where the land under examination is located.

Chain Of Title: A bona fide purchaser, as defined in the comments to Standard 4.90, of property is not charged with constructive notice of instruments that, although recorded, are outside of the chain of title. "Chain of title" refers to the documents that show the successive ownership history of a tract of land, commencing with the severance of title from the sovereign down to and including the conveyance to the present holder. Munawar v. Cadle Co., 2 S.W. 3d 12, 18 (Tex. App.—Corpus Christi 1999, pet. denied). Note that severance from the sovereign occurs on the date of the survey of the property for severance purposes, not on the date of the patent, which always post-dates severance—sometimes by many years.

Examples of instruments that are not in the chain of title and that do not impart constructive notice include:

(a) Instruments executed by a grantor and recorded before the grantor acquired title. Breen v. Morehead, 136 S.W. 1047 (Tex. 1911).

(b) Mortgages covering land by an after-acquired property clause. First Nat'l Bank v. Southwestern Lumber Co., 75 F.2d 814 (5th Cir. 1935).

(c) Disclosure of an unrecorded deed by a grantee's affidavit recorded in the real property records. Reserve Petroleum Co. v. Hutcheson 254 S.W.2d 802 (Tex. App.–Amarillo 1952, writ ref'd n.r.e.).

(d) Instruments executed by a stranger to title. Lone Star Gas Co. v. Sheaner, 297 S.W.2d 855, 857 (Tex. App.—Waco 1956), rev'd in part on other grounds, 305 S.W.2d 150 (Tex. 1957) ("It is the law of this state that the record of a deed or mortgage by a stranger to the title to real estate, although duly recorded, is not constructive notice to a subsequent purchaser from the record owner of the property, because such instrument is not in the chain of title to such property.").

(e) Instruments executed by the grantee of a prior unrecorded instrument from a common grantor. Southwest Title Ins. Co. v. Woods, 449 S.W.2d 773 (Tex. 1970).

(f) Instruments executed by a grantor after the grantor has previously conveyed the property.

> If a grantor conveys the same property twice, and the second grantee puts his deed upon record, is it notice to one who subsequently purchases from the first grantee? We think not. The record is not notice to the first grantee, for he is a prior purchaser. Nor do we think it was intended to be notice to any one who should purchase from him. In other words, we think the subsequent purchasers who are meant are only those the origin of whose title is subsequent to the title of the grantee in the recorded deed. And it is such subsequent purchasers alone to whom the registry acts extend. The language of these statutes, so far as they affect deeds, is that, unless recorded, such deeds shall be void as against subsequent purchasers. When recorded, therefore, they have been held to operate as notice to such persons. The object of all the registry acts, however expressed, is the same. They were intended to affect with notice such persons only as have reason to apprehend some transfer or encumbrance prior to their own, because none arising afterwards can, in its own nature, affect them; and after they have once, on a search instituted upon this principle, secured themselves against the imputation of notice, it follows that every one coming into their place by title derived from them may insist on the same principle in respect of himself.

White v. McGregor, 50 S.W. 564, 565 (Tex. 1899).

Texas cases that discuss chain of title issues are based upon a grantor-grantee title examination, not a tract index examination; however, an abstract company may provide a means of locating instruments on a geographic or tract basis.

Process Of Examination: While county clerks do not maintain tract indices, most abstract and title companies maintain records by tract, usually by section, survey, or subdivision. Unless the examiner is provided an abstract of title compiled by an abstract company, the examiner will usually use or prepare a run sheet (list of instruments in chain of title) from an abstract company's tract records and general name indices or from the indices and register of the county clerk. The information provided or used should identify all instruments affecting title that have been recorded or filed for record. The examiner should identify the source and the time interval of the records examined.

Index Search: Because Texas maintains only official grantor and grantee indices, an examiner should search under the name of each grantor from the date the grantor acquired the property forward to the date of filing for record the instrument that transfers the property to a grantee. White v. McGregor, 50 S.W. 564, 565-566 (Tex. 1899). The date of the conveyance itself, not the date of filing for record, controls whether an instrument is within the chain. Fitzgerald v. Le Grande, 187 S.W.2d 155 (Tex. App.—El Paso 1945, no writ).

However, Texas case law provides that: "A purchaser is required to look only for conveyances made prior to his purchase by his immediate vendor, or by any remote vendor through whom he derives his title." Houston Oil Co. v. Kimball, 122 S.W. 533, 540 (Tex. 1909). The decision in Delay v. Truitt, 182 S.W. 732 (Tex. App.—Amarillo 1916, writ ref'd), illustrates that late-recording grantees who recorded their instrument outside the chain of

title may prevail over a later grantee who recorded first. Consider the following example: O conveys Blackacre to A, who does not immediately record. Thereafter, O conveys to B, who records but with actual notice of O's prior conveyance to A. Thus, B cannot be a bona fide purchaser, as defined in the comments to Standard 4.90. Thereafter, A records. If B subsequently conveys to C, C must look beyond the date of recordation of B's deed for the late recorded O to A deed because the O to A deed imparts constructive notice under Texas law (in most states, the late-recorded O to A deed would be "outside the chain of title" and thus not impart constructive notice). In this example in Texas, A would defeat C. In the absence of a judicial determination of such facts, the record will not reveal whether B had actual notice of O's prior conveyance to A. Thus, the record alone will not determine title between A and C. Because this scenario is unlikely to occur, an examiner often considers it reasonably safe to forgo this extended forward search, instead opting to do the more limited search described above immediately under this subheading, especially where the risk is mitigated by factors such as the passage of time since a remote grantor's deed or the examiner's reliance on an abstract company's indices.

Source:

Citations in the Comment.

History:

Adopted August 2, 2013.

Standard 4.60. Recitals In Instruments In Chain Of Title

The examiner should advise the client of outstanding encumbrances and other matters apparently affecting the title and disclosed by recitals in instruments appearing in the chain of title.

Comment:

A purchaser will be charged with constructive notice of the contents of instruments in that person's chain of title, including instruments incorporated by reference or otherwise identified in a series of unrecorded instruments where a reference in the chain of title would lead an examiner to become aware of them. Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903 (Tex. 1982); Houston Title Co. v. Ojeda De Toca, 733 S.W.2d 325 (Tex. App.—Houston [14 Dist.] 1987), rev'd on other grounds, Ojeda de Toca v. Wise, 748 S.W.2d 449 (Tex. 1988); Abercrombie v. Bright, 271 S.W.2d 734 (Tex. App.—Eastland 1954, writ ref'd n.r.e.); MBank Abilene, N.A. v. Westwood Energy, Inc., 723 S.W.2d 246 (Tex. App.— Eastland 1986, no writ). A purchaser is charged with constructive notice of the referenced instrument unless the purchaser can prove that the purchaser made a diligent search to obtain the instrument and was unable to obtain it. Loomis v. Cobb, 159 S.W. 305 (Tex. App.–El Paso 1913, writ ref'd); Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903 (Tex. 1982); Waggoner v. Morrow, 932 S.W.2d 627 (Tex. App.—Houston [14th Dist.] 1996, no writ).

The rationale of the rule is that any description, recital of fact, or reference to other documents puts the purchaser upon inquiry, and he is bound to follow up this inquiry, step by step, from one discovery to another and from one instrument to another, until the whole series of title deeds is exhausted and a complete knowledge of all the matters referred to and affecting the estate is obtained.

Loomis v. Cobb, 159 S.W. 305, 307 (Tex. App.—El Paso 1913, writ ref'd). Other examples of the binding effect of such references include:

(a) A reference to a vendor's lien even though the deed that created the lien was unrecorded, Gilbough v. Runge, 91 S.W. 566 (Tex. 1906).

(b) A reference in a deed to an unrecorded deed of trust, Garrett v. Parker, 39 S.W. 147 (Tex. App. 1896, writ ref'd).

(c) A recitation in a deed to a prior contract covering the land, Houston Ice & Brewing Co. v. Henson, 93 S.W. 713 (Tex. App. 1906, no writ); Cumming v. Johnson, 616 F.2d 1069, 1075 (9th Cir. 1979).

(d) A recitation in a deed to other deeds that granted easements over the land. Jones v. Fuller, 856 S.W.2d 597 (Tex. App.—Waco 1993, writ denied).

(e) A reference to a deed of trust in an assignment of oil and gas leases. MBank Abilene, N.A. v. Westwood Energy, Inc., 723 S.W.2d 246 (Tex. App.—Eastland 1986, no writ).

Source:

Citations in the Comment.

History:

Adopted August 2, 2013.

Standard 4.70. Duty Of Inquiry Based On Actual Notice

The examiner should advise the client of matters affecting the title that are known by the examiner even though not revealed by the record, including unfiled instruments and facts known to the examiner that would impart either actual or inquiry notice of matters affecting title.

Comment:

A purchaser is charged with notice (a) of information appearing of record (constructive notice), (b) of information within the purchaser's knowledge (actual notice), and (c) of information that the purchaser would have learned arising from circumstances that would prompt a good-faith purchaser to make a diligent inquiry (inquiry notice).

While constructive notice serves as notice as a matter of law, actual notice is notice as a matter of fact. Inquiry notice results as a matter of law from facts that would prompt a reasonable person to inquire about the possible existence of an interest in property. Noble Mortgage & Investments, LLC v. D&M Vision Investments, LLC, 340 S.W.3d 65 (Tex. App.—Houston [1st Dist.] 2011, no pet.); Mann v. Old Republic National Title Insurance Co., 975 S.W.2d 347 (Tex. App.—Houston [14th Dist.] 1998, no writ); City of Richland Hills v. Bertelsen, 724 S.W.2d 428, 430 (Tex. App.—Fort Worth 1987, writ denied). Also see Standard 4.80.

Actual notice includes, not only known information, but also facts that a reasonably diligent inquiry would have disclosed. Hexter v. Pratt, 10 S.W.2d 692 (Tex. Comm'n App. 1928, judgm't adopted); Mann v. Old Republic National Title Insurance Co., 975 S.W.2d 347 (Tex. App.—Houston [14th Dist.] 1998, no writ).

In common parlance "actual notice" generally consists in express information of a fact, but in law the term is more comprehensive. … So that, in legal parlance, actual knowledge embraces those things of which the one sought to be charged has express information, and likewise those things which a reasonably diligent inquiry and exercise of the means of information at hand would have disclosed. Hexter v. Pratt, 10 S.W.2d 692, 693 (Tex. Comm'n App. 1928, judgm't adopted). See also Flack v. First Nat'l Bank, 226 S.W.2d 628, 632 (Tex. 1950).

Circumstances that give rise to a duty to inquire include obvious ones, such as a person's assertion of a claim to an interest in property, Zamora v. Vela, 202 S.W. 215 (Tex. App.—San Antonio 1918, no writ); Price v. Cole, 35 Tex. 461 (1871), rev'd on other grounds, 45 Tex. 522 (1876), as well as others that merely arouse suspicion. For example, the refusal of a spouse to sign an instrument may give notice of the inability of the other spouse to execute it. Williams v. Portland State Bank, 514 S.W.2d 124 (Tex. App.– Beaumont 1974, writ dism'd).

A purchaser with constructive notice of a deed of trust is put on inquiry to determine the status of the deed of trust, such as whether it had been released or foreclosed. Realty Portfolio, Inc. v. Hamilton, 125 F.3d 292 (5th Cir. 1997); Clarkson v. Ruiz, 140 S.W.2d 206 (Tex. App.—San Antonio 1940, writ dism'd). Notice to an agent will constitute notice to the principal if the agent is one who had the power to act with reference to the subject matter to which the notice relates. J.M. Radford Grocery Co. v. Citizens Nat'l Bank, 37 S.W.2d 1080 (Tex. App.—El Paso 1931, writ dism'd). Accordingly, a purchaser is generally legally charged with such facts that come to his or her attorney's knowledge in the course of employment as an attorney to examine title, Hexter v. Pratt, 10 S.W.2d 692 (Tex. Comm'n App. 1928, judgm't adopted) and Ramirez v. Bell, 298 S.W. 924 (Tex. App.—Austin 1927, writ ref'd), or with such facts that would have become known to the purchaser's attorney upon further inquiry into irregularities arising in connection with the closing of a transaction. Carter v. Converse, 550 S.W.2d 322 (Tex. App.—Tyler 1977, writ ref'd n.r.e.). Therefore, even though a case may have been dismissed for want of prosecution, the attorney and principal have a further obligation to investigate the suit to determine if there is any claim which may remain outstanding although the lis pendens does not continue as constructive notice to the world. Hexter v. Pratt,

10 S.W.2d 692 (Tex. Comm'n App. 1928, judgm't adopted). In contrast, a title company does not become an insured's agent in examining title or in acting as escrow agent, and notice that the title company acquires is not imputed to the insured. Tamburine v. Center Savings Assoc., 583 S.W.2d 942 (Tex. App.—Tyler 1979, writ ref'd n.r.e.) (in examining title in order to issue a title insurance policy, the title company does not act on behalf of the parties to the real estate transaction but acts exclusively for itself; in supervising the transfer of title in accordance with the commitment, the title company acts for its own benefit and protection; and in acting as escrow agent, the authority of the title company does not extend to examination of title).

If notice is given to a party, that party only has a reasonable obligation of investigation at that time and does not have a continued obligation of monitoring to see if an event transpires at a later day. For example, if tax agents of the Internal Revenue Service are notified that a divorce is pending, this fact does not obligate the IRS to continue to monitor to see if the divorce later occurs, and if the land is awarded to the non-taxpayer. Prewitt v. United States, 792 F.2d 1353 (5th Cir. 1986).

Source:

Citations in the Comment.

History:

Adopted August 2, 2013.

Standard 4.80. Duty Of Inquiry Based On Possession

The examiner should advise the client to inspect the land to determine possible rights in third parties that may not be reflected in the record, such as an apparent easement or third parties in possession.

Comment:

Notice of title given by possession or apparent use of property is equivalent to the notice that is afforded by recording a deed. Strong v. Strong, 98 S.W.2d 346 (Tex. 1936). The duty to inquire arises only if the possession or apparent use is inconsistent with record title and is (1) visible, (2) open, (3) exclusive, and (4) unequivocal, implying exclusive dominion over the property. Strong, 98 S.W.2d at 350 (holding that possession by a member of the record title-owner's family was not open or exclusive).

Possession by a tenant creates a duty to inquire. Mainwarring v. Templeman, 51 Tex. 205, 209 (1879). Possession of a single rental-unit dwelling was sufficient to create constructive notice. See, e.g., Moore v. Chamberlain, 195 S.W. 1135 (Tex. 1917); Collum v. Sanger Bros., 82 S.W. 459 (Tex. 1904). A purchaser is charged with constructive notice of each tenant's rights in occupied units of a multi-unit property. Inquiry of a tenant's rights may result in actual notice of the tenant's claim to additional units; however, possession of a unit

in a multi-unit structure may not satisfy the criteria for claiming rights in more than just the occupied unit. Madison v. Gordon 39 S.W.3d 604 (Tex. 2001).

Ordinarily, a subsequent purchaser need not inquire whether a grantor who remains in possession has any claim to the property. For example, there is no obligation to inquire whether the grantor's deed was, instead, a mortgage, whether the deed was fraudulently secured, or whether the deed was executed by mutual mistake. Eylar v. Eylar, 60 Tex. 315 (1883). However, special circumstances may impart constructive notice of a possible claim by a grantor. See, e.g., Anderson v. Barnwell, 52 S.W.2d 96 (Tex. App.—Texarkana 1932), aff'd sub nom. Anderson v. Brawley, 86 S.W.2d 41 (Tex. 1935) (grantor was in possession over six years after conveying the property and conveyed additional interests in the property).

If possession by a third party has terminated before the buyer acquires an interest in the land, then the buyer need not inquire as to the rights of the third party in the property, even if the buyer knew of the former possession. Maxfield v. Pure Oil Co., 91 S.W.2d 892 (Tex. App.–Dallas 1936, writ dism'd w.o.j.).

When acquiring an interest from a cotenant, the acquiring party should inquire of the interest of any other party in possession. See Collum v. Sanger Bros., 82 S.W. 459 (Tex. 1904) and Aldridge v. North East Independent School Dist., 428 S.W.2d 447, Tex. App—San Antonio, Apr. 03, 1968, writ refused n.r.e. (Oct 02, 1968) order set aside (Nov 06, 1968) writ refused (Nov 06, 1968). But see, Madison v. Gordon, 39 S.W.3d 604 (Tex. 2001) (no duty to inquire of tenants in a multi-unit facility whether a tenant held an unrecorded deed to the premises).

Not all possession or apparent use gives rise to a duty to inquire, e.g.:

(a) A nonvisible buried pipeline. Shaver v. National Title & Abstract Co., 361 S.W.2d 867, 869 (Tex. 1962).

(b) Minor children's occupancy of mother's homestead. Boyd v. Orr, 170 S.W.2d 829, 834 (Tex. App.— Texarkana 1943, writ ref'd).

(c) A crop. De Guerin v. Jackson, 50 S.W.2d 443, 448 (Tex. App.—Texarkana 1932), aff'd 77 S.W.2d 1041 (Tex. 1935).

Caution:

The above comments do not address adverse possession and prescription. See comments to Standard 4.50, supra, under subheading "Interests Not Subject To The Recording Statutes," and comments to Standard 4.90, infra, under subheading "Bona Fide Purchaser Not Protected."

Source:

Citations in the Comment.

History:

Adopted August 2, 2013.

Proposed Standard 4.90. Bona Fide Purchaser Status

An examiner cannot determine whether any party in the chain of title is a bona fide purchaser. Accordingly, an examiner should not disregard any interest in the chain of title based solely on an assumption that it was extinguished by a bona fide purchaser under the recording laws. However, if title passed by a quitclaim, then the grantee and the grantee's successors are not bona fide purchasers as to claims existing at the time of the quitclaim, except that Texas Prop. Code § 13.006 applies to quitclaims recorded on or after September 1, 2021.

Comment:

Definition: A bona fide purchaser is one who, in good faith, pays valuable consideration without actual, constructive, or inquiry notice of an adverse claim. Sparks v. Taylor, 99 Tex. 411, 90 S.W. 485 (1906). The terms "good faith purchaser" and "bona fide purchaser" have the same meaning. Bank of America v. Babu, 340 S.W.3d 917 (Tex. App. – Dallas 2011, no pet.). A lender acquiring a mortgage, deed of trust, or other lien based on sufficient consideration and without notice of a prior claim is a bona fide purchaser. Graves v. Guaranty Bond State Bank, 161 S.W.2d 118 (Tex. App.—Texarkana 1942, no writ). For discussion of the Texas recording law, see Standard 4.40.

This discussion will make numerous references to the following terms that were previously defined: Constructive notice—See Standard 4.50; Actual notice—See Standard 4.70; and Inquiry notice—See Standards 4.70 and 4.80.

Consideration: To be a bona fide purchaser, the party must show that, before the party had actual, constructive, or inquiry notice of an interest, the purchaser's deed was delivered and value was paid. La Fon v. Grimes, 86 F.2d 809 (5th Cir. 1936). A recital in the deed that consideration was paid is not sufficient. That consideration was paid must be independently proven, Watkins v. Edwards, 23 Tex. 443, 448 (1859), although a recital of consideration may be an element of that proof, Davidson v. Ryle, 124 S.W. 616, 619 (Tex. 1910).

The purchaser may be a bona fide purchaser even if the purchaser has paid less than the "real value" of the land, unless the price paid is grossly inadequate. Nichols-Stewart v. Crosby, 29 S.W. 380, 382 (Tex. 1895) ($5 paid for land then worth $8,000 is grossly inadequate); McAnally v. Panther, 26 S.W.2d 478, 480 (Tex. App.—Eastland 1930, no writ) (providing numerous examples of inadequate consideration). To show that the purchaser has paid valuable consideration, the purchaser must pay more value than merely cancelling an antecedent debt. Similarly, where a grantor executes a deed of trust or mortgage for an antecedent debt, the grantee has not paid sufficient value. Turner v. Cochran, 61 S.W. 923 (Tex. 1901); Jackson v. Waldstein, 30 S.W. 47 (Tex. App.—Austin 1895, writ ref'd).

Good Faith: To be a bona fide purchaser, a purchaser must take the property in good faith. "A transferee who takes property with knowledge of such facts as would excite the suspicions of a person of ordinary prudence and put him on inquiry of the fraudulent nature of an alleged transfer does not take the property in good faith and is not a bona fide purchaser." Hahn v. Love, 321 S.W.3d 517, 527 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). Whether a person takes in good faith depends on whether the purchaser is aware of circumstances within or outside the chain of title that would place the purchaser on notice of an unrecorded claim or that would excite the suspicion of a person of ordinary prudence. Noble Mortgage & Investments, LLC v. D&M Vision Investments, LLC, 340 S.W.3d 65 (Tex. App.— Houston [1st Dist.] 2011, no pet.).

Quitclaims: In Texas the grantee of a quitclaim cannot qualify as a bona fide purchaser for value against unrecorded instruments and equities that existed at the time of the quitclaim, Threadgill v. Bickerstaff, 29 S.W.757 (Tex. 1895); Rodgers v. Burchard, 34 Tex. 441 (1870-71). The rationale is that the fact that a quitclaim was used, in and of itself, attests to the dubiousness of the title. See Richardson v. Levi, 3 S.W. 444, 447-48 (Tex. 1887). Although a quitclaim is fully effective to convey whatever interest the grantor owns in the property described in the deed, Harrison Oil Co. v. Sherman, 66 S.W.2d 701, 705 (Tex. App.— Beaumont 1933, writ ref'd), the grantee takes title subject to any outstanding interest or defect, whether or not recorded and whether or not the grantee is aware of it or has any means of discovering it. See, e.g., Woodward v. Ortiz, 237 S.W.2d 286, 291-92 (Tex. 1951). Moreover, in Texas not only is the grantee under a quitclaim subject to any outstanding claims or equities, all subsequent purchasers in his chain of title, however remote, are likewise subject to any unknown and unrecorded interests that were outstanding at the time of the quitclaim. Houston Oil Co. v. Niles, 255 S.W. 604, 60911 (Tex. Comm'n App. 1923, judgm't adopted).

Effective September 1, 2021, Texas Prop. Code § 13.006 was modified to provide as follows:

> After the fourth anniversary of the date a quitclaim deed for real property is recorded in the deed records of the county in which the real property is located, the quitclaim deed:
>
> (1) does not affect the question of the good faith of a subsequent purchaser or creditor; and
> (2) is not notice to a subsequent purchaser or creditor of any unrecorded conveyance of, transfer of, or encumbrance on the real property.

Except as to a quitclaim recorded on or after September 1, 2021, any title dependent on a quitclaim as a link in the chain of title cannot be marketable title because it might at any time be defeated by some unknown claimant. However, if the quitclaim is recorded on or after September 1, 2021, four years after the quitclaim was recorded, an unknown claimant based on an unrecorded interest cannot assert a claim challenging the good faith of a subsequent purchaser or creditor based on the existence of the quitclaim in the chain of title. Absent application of Tex. Prop. Code § 13.006, without long passage of time, or other factors

that may remove the practical risk, if the chain of title includes a quitclaim, then the examiner should advise the client of its existence in the chain of title and of its effect. Whether a purchaser who acquires the quitclaimed property during the four-year period following recordation of the quitclaim may acquire protection under Tex. Prop. Code § 13.006 is uncertain.

Any title dependent on a quitclaim as a link in the chain of title cannot be marketable title, since it might at any time be defeated by some unknown claimant. Accordingly, absent passage of time or other factors that may remove the practical risk, if the chain of title includes a quitclaim, then the examiner should advise the client of its existence in the chain of title and of its effect.

Unfortunately, it is often difficult for a title examiner to reach a definite conclusion whether a deed is a quitclaim. A quitclaim, as traditionally defined, is one that purports to convey not the land or a specific interest but only the grantor's right, title and interest in it. See Rogers v. Ricane Enters., Inc., 884 S.W.2d 763, 769 (Tex. 1994); Richardson v. Levi, 3 S.W. 444 (Tex. 1887). Nevertheless, building on a line of reasoning that seems to have originated with F. J. Harrison & Co. v. Boring & Kennard, 44 Tex. 255 (1875), in which the court's discussion of the issue does not bear on its ultimate decision, Texas courts have developed and liberally applied the notion that if the language of a deed as a whole reasonably implies a purpose to effect a transfer of particular rights in the land, it will be treated as a conveyance of those rights, not a mere quitclaim, despite the presence of traditional quitclaim language and even the word "quitclaim" itself. See, e.g., Cook v. Smith, 174 S.W. 1094 (Tex. 1915); Benton Land Co. v. Jopling,300 S.W. 28 (Tex. Comm'n App. 1927, judgm't adopted). (This manner of construction of apparent quitclaims has been treated by at least one authority as being peculiar to Texas. See Annotation, Grantee or Mortgagee by Quitclaim Deed or Mortgage in Quitclaim Form as Within Protection of Recording Laws, 59 A.L.R. 632, 648-49 (1929).) Construing a deed in which the grantors conveyed "all of our undivided interest" in the minerals in a tract of land, the court in Bryan v. Thomas, 365 S.W.2d 628, 630 (Tex. 1963), stated unequivocally, "To remove the question from speculation and doubt we now hold that the grantee in a deed which purports to convey all of the grantor's undivided interest in a particular tract of land, if otherwise entitled, will be accorded the protection of a bona fide purchaser." See also Miller v. Hodges, 260 S.W. 168, 171 (Tex. Comm'n App. 1924, judgm't adopted).

Notwithstanding that many deeds in traditional quitclaim form have been held otherwise by Texas courts, the principle that a deed is a mere quitclaim if it conveys only a grantor's "right, title, and interest," as opposed to a specific interest in described land, has never been overruled. See Geodyne Energy Income Prod. P'ship I-E v. Newton Corp., 161 S.W.3d 482 (Tex. 2005); Rogers v. Ricane Enters, Inc., 884 S.W.2d 763 (Tex. 1994). Although neither of the latter supreme court decisions addressed whether the grantee was deprived of the status of bona fide purchaser for value under the recording laws because of the nature of the conveyance, and cases such as Bryan v. Thomas might be distinguished on that basis, they are unequivocal in denominating a conveyance of a grantor's right, title and interest as a quitclaim. Unless a conveyance of only a grantor's right, title, and interest contains words that otherwise amply demonstrate the parties' intention that some particular interest be conveyed,

a determination that may be very difficult for a title examiner to make objectively, the deed's quitclaim form must be considered to pose the risk that the grantee's title might be defeated by some unrecorded and unknown claim. See Enerlex, Inc. v. Amerada Hess, Inc., 302 S.W.3d 351 (Tex. App.—Eastland 2009, no writ); Riley v. Brown, 452 S.W.2d 548 (Tex. App.—Tyler 1970, no writ). Further, it is frequently overlooked that blanket conveyances, for example of all the grantor's interests in land in a particular county or in the entire state, have generally been held to be quitclaims. See, e.g., Miller v. Pullman, 72 S.W.2d 379 (Tex. App.—Galveston 1934, writ ref'd). In case of doubt the examiner should err on the side of construing deeds as quitclaims.

There are two statutory exceptions to the general rule that a grantee under a quitclaim cannot be a bona fide purchaser. Tex. Civ. Prac. & Rem. Code § 34.045 provides that the officer who has sold a judgment creditor's property at an execution sale is to deliver to the purchaser a conveyance of "all the right, title, interest, and claim" that the defendant in execution had in the property sold. Tex. Civ. Prac. & Rem. Code § 34.046 then provides, "The purchaser of property sold under execution is considered to be an innocent purchaser without notice if the purchaser would have been considered an innocent purchaser without notice had the sale been made voluntarily and in person by the defendant." Although the statute appears dispositive, and the status of a purchaser at an execution sale as a bona fide purchaser has been upheld, Triangle Supply Co. v. Fletcher, 408 S.W.2d 765 (Tex. App.—Eastland 1966, writ ref'd n.r.e.), officers' deeds resulting from execution sales have nevertheless been construed as quitclaims, affording the grantee no protection as a bona fide purchaser. Diversified, Inc. v. Hall, 23 S.W.3d 403 (Tex. App.— Houston [1st Dist.] 2000, pet. denied); Smith v. Morris & Co., 694 S.W.2d 37 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.) (neither case addressing the effect of Tex. Civ. Prac. & Rem. Code § 34.046 or its predecessor statute). Under Tex. Tax Code § 34.21(j), "A quitclaim deed to an owner redeeming property under this section is not notice of an unrecorded instrument. The grantee of a quitclaim and a successor or assign of the grantee may be a bona fide purchaser in good faith for value under the recording laws."

Statutes Permitting Or Requiring Recordation: Although not a complete list, the following statutes permit or require recording of particular instruments:

- Tex. Bus. Orgs. Code § 252.005 (reliance on recorded statement of authority of unincorporated nonprofit association).
- Tex. Civ. Prac. & Rem. Code §§ 16.035-16.037 (extension of liens).
- Tex. Civ. Prac. & Rem. Code § 34.046 (purchaser of property sold under execution considered to be an innocent purchaser without notice, if the purchaser would have been so considered had the sale been made voluntarily and in person by the defendant).
- Tex. Family Code § 3.004 (schedule of spouse's separate property).
- Tex. Family Code § 3.104 (presumed authority of spouse who is record owner).
- Tex. Family Code §§ 3.306, 3.308 (order affecting the management of community).
- Tex. Family Code § 4.106 (a partition or exchange agreement of spouses).

- Tex. Family Code § 4.206 (an agreement converting separate property to community property).Tex. Occ. Code § 1201.2055 (a real property election for a manufactured home is not considered perfected until a copy of the statement of ownership has been filed in the real property records in which the home is located).Tex. Estates Code § 33.055 ("a bona fide purchaser of real property who relied on a probate proceeding that was not the first commenced proceeding, without knowledge that the proceeding was not the first commenced proceeding, shall be protected with respect to the purchase unless before the purchase an order rendered in the first commenced proceeding admitting the decedent's will to probate, determining the decedent's heirs, or granting administration of the decedent's estate was recorded in the office of the county clerk of the county in which the purchased property is located.").
- Tex. Estates Code § 114.055 (to be *valid*, a statutory transfer on death deed must be recorded before the transferor's death in the county where the property is located). See Standard 11.10.
- Tex. Estates Code § 201.053 (good faith purchaser relying on affidavit of heirship takes free of interest of child not disclosed in affidavit if child not found under court decree to be entitled to treatment as child and not otherwise recognized).
- Tex. Estates Code § 256.003 (if will is not probated within four years of date of death, purchaser can rely upon deed from heir).
- Tex. Estates Code § 256.201 (certified copies of the will and order probating the will may be recorded in other counties).
- Tex. Estates Code §§ 503.051, 503.052 (ancillary probate).
- Tex. Estates Code § 205.006 (reliance on small estates affidavit).
- Tex. Estates Code §§ 751.054, 751.055 (conclusive reliance on affidavit of lack of knowledge of termination of Power of Attorney).
- Tex. Estates Code § 751.151 (recording Powers of Attorney for real property transactions requiring execution and delivery of instruments).
- Tex. Prop. Code § 5.030 (correction instrument). See Standard 5.10.
- Tex. Prop. Code § 5.063(c) (affidavit stating that executory contract is properly forfeited).
- Tex. Prop. Code § 12.0012 (regarding foreclosure sales, appointment of a trustee or successor trustee, notice of sale, notice of default, documentation that a debtor was not on military duty, proof of notice, and statements of an attorney representing a trustee or mortgage servicer, even if not in recordable form, may be recorded if attached as exhibits to recordable trustee's deed or affidavit).
- Tex. Prop. Code § 12.005 (a court order partitioning or allowing recovery of title to land must be recorded).
- Tex. Prop. Code § 12.007 (a party seeking affirmative relief may file a notice of pending action in an eminent domain proceeding or a pending suit affecting title).
- Tex. Prop. Code § 12.0071 (procedure to expunge lis pendens).

- Tex. Prop. Code § 12.008 (procedure for cancellation of lis pendens).
- Tex. Prop. Code § 12.017 (affidavit as release of lien).
- Tex. Prop. Code § 12.018 (affidavit or memorandum of sale, transfer, purchase or acquisition agreement between receiver and conservator of failed depository institution and another depository institution).
- Tex. Prop. Code § 12.019 (affidavit of authority to transfer).
- Tex. Prop. Code § 13.004 (a recorded lis pendens is notice to the world of its contents).
- Tex. Prop. Code § 64.052 (recordation and perfection of security interest in rents).
- Tex. Prop. Code § 101.001 (conveyance by trustee if trust not identified and names of beneficiaries not disclosed).
- Tex. Prop. Code § 141.017 (third party, "in the absence of knowledge," may deal with any person acting as custodian under Texas Uniform Transfers to Minors Act).

- Tex. Prop. Code § 202.006 (effective January 1, 2012, a dedicatory instrument has no effect until the instrument is filed in the real property records).
- Tex. Prop. Code § 209.004(e) (a lien of a property owners' association that fails to file a management certificate to secure an amount due on the effective date of a transfer to a bona fide purchaser is enforceable only for an amount incurred after the effective date of sale).
- Tex. Transp. Code § 251.058(b) (a copy of the order closing, abandoning, and vacating a public road shall be filed in the deed records).
- 11 U.S.C. §§ 362(b)(20), 362(d)(4) (lift of stay order finding that filing of bankruptcy petition part of scheme to delay, hinder, or defraud creditors shall be binding in any other bankruptcy case filed within two years of order, if recorded in real property records).
- 11 U.S.C. § 544 (trustee and debtor in possession are treated as bona fide purchasers and lien creditors for avoidance of unperfected interests).
- 11 U.S.C. § 547 (deed, mortgage, or other instrument may be avoidable preference in bankruptcy unless perfected within 30 days after it takes effect).
- 11 U.S.C. § 549(c) (protection of transfer from debtor to good faith purchaser without knowledge of commencement of bankruptcy case unless a copy or notice of the bankruptcy petition is filed).
- Bankruptcy Rule 4001(c)(1)(B)(vii) (a motion for authority to obtain a mortgage during a bankruptcy case may include a waiver or modification of the applicability of non-bankruptcy law relating to the perfection of a lien on property of the estate).
- 28 U.S.C. § 1964 (recordation of notice of action concerning real property pending in a United States district court, if required by state law).

Equitable Interests: A bona fide purchaser will be protected as a matter of equity and take title free of unrecorded equitable interests. Hill v. Moore, 62 Tex. 610, 613 (1884). For example, a bona fide purchaser may take free and clear of the following equitable interests:

- A right to reform due to a mutual mistake. Farley v. Deslande, 69 Tex. 458, 6 S.W. 786 (1888).
- A claim that the deed was induced by fraud. Pure Oil Co. v. Swindall, 58 S.W.2d 7 (Tex. Comm'n App. 1933, holding approved); Ramirez v. Bell, 298 S.W. 924 (Tex. App.–Austin 1927, writ ref'd); Hickman v. Hoffman, 11 Tex. App. 605, 33 S.W. 257 (1895, writ ref'd).
- Any rights of parties based on adoption by estoppel. Moran v. Adler, 570 S.W.2d 883 (Tex. 1978).
- A claim of equitable subrogation, AMC Mortgage Services Inc. v. Watts, 260 S.W.3d 582 (Tex. App.—Dallas 2008, no pet.).
- An easement by estoppel. Cleaver v. Cundiff, 203 S.W.3d 373 (Tex. App.—Eastland 2006, pet. denied). (However, if possession and use are sufficient to place the purchaser on inquiry, then the purchaser will not be bona fide).
- A claim that the deed was, in actuality, given as a mortgage. Brown v. Wilson, 29 S.W. 530 (Tex. App. 1895, no writ).

A party also can be a bona fide purchaser even though the party acquires only an equitable title (such as a contract purchaser who has paid the contract price). Batts & Dean v. Scott, 37 Tex. 59, 64 (1872).

Bona Fide Purchaser Not Protected: Even a bona fide purchaser's title is subject to certain claims, whether or not these claims are disclosed in the real property records:

- A claim of title by adverse possession or prescription, Houston Oil Co. v. Olive Sternenberg & Co., 222 S.W. 534 (Tex. Comm'n App. 1920, judgm't adopted); Heard v. Bowen, 184 S.W. 234 (Tex. App.– San Antonio 1916, writ ref'd); MacGregor v. Thompson, 26 S.W. 649 (Tex. App. 1894, no writ).
- A claim that a deed was given while the person was a minor or insane, Gaston v. Bruton, 358 S.W.2d 207 (Tex. App.–El Paso 1962, writ dism'd w.o.j.); Pure Oil Co. v. Swindall, 58 S.W.2d 7 (Tex. Comm'n App. 1933, holding approved); McLean v. Stith, 112 S.W. 355 (Tex. App. 1908, writ ref'd).
- A claim that the deed was forged, Pure Oil Co. v. Swindall, 58 S.W.2d 7 (Tex. Comm'n App. 1933, holding approved).
- A claim of heirs, regardless of whether known by the bona fide purchaser, New York & Tex. Land Co. v. Hyland, 28 S.W. 206 (Tex. App. 1894, writ ref'd).
- A conveyance by a person who had the identical name of the record owner but who was not the same person, Blocker v. Davis, 241 S.W.2d 698 (Tex. App.–Fort Worth 1951, writ ref'd n.r.e.); Pure Oil Co. v. Swindall, 58 S.W.2d 7 (Tex. Comm'n App. 1933, holding approved).

Burden Of Proof: Although status as a bona fide purchaser is an affirmative defense in a title dispute, Madison v. Gordon, 39 S.W.3d 604, 607 (Tex. 2001), a person claiming title through principles of equity has the burden to establish that the subsequent purchaser is not a bona fide purchaser. Noble Mortgage & Investments, LLC v. D&M Vision Investments, LLC, 340 S.W.3d 65 (Tex. App.—Houston [1st Dist.] 2011, no pet.); NRG Expl., Inc. v. Rauch, 671 S.W.2d 649 (Tex. App.—Austin 1984, writ ref'd n.r.e.); see Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903 (Tex. 1982). On the other hand, a claimant under a junior deed has the burden to prove bona fide purchaser status against a prior unrecorded conveyance of legal title, Watkins v. Edwards, 23 Tex. 443 (1859); Ryle v. Davidson, 115 S.W. 28 (Tex. 1909); Raposa v. Johnson, 693 S.W.2d 43 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.), unless the junior deed was delivered before the passage of the registration act of 1840. Kimball v. Houston Oil Co., 99 S.W. 852 (Tex. 1907).

Source:

Citations in the Comment.

History:

Adopted August 2, 2013; amended July 17, 2014; amended March 6, 2026.

The prior standard provided: "An examiner cannot determine whether any party in the chain of title is a bona fide purchaser. Accordingly, an examiner should not disregard any interest in the chain of title based solely on an assumption that it was extinguished by a bona fide purchaser under the recording laws. However, if title passed by a quitclaim, then the grantee and the grantee's successors are not bona fide purchasers as to claims existing at the time of the quitclaim."

The original standard provided: "An examiner cannot determine whether any party in the chain of title is a bona fide purchaser. Accordingly, an examiner must not disregard any interest in the chain of title based solely on an assumption that it was extinguished by a bona fide purchaser under the recording laws. However, if title passed by a quitclaim, then the grantee and the grantee's successors are not bona fide purchasers as to claims existing at the time of the quitclaim deed."

Standard 4.100. Qualification As Lien Creditor

A lien creditor without notice has a status similar to a bona fide purchaser.

Comment:

The recording statutes provide that a lien creditor without notice takes free of a prior deed, mortgage, or other instrument that has not been acknowledged, sworn to, or proved and filed for record. Tex. Prop. Code § 13.001. A "creditor" is a claimant whose claim is fixed by some legal process as a lien on the land, such as by attachment, execution, judgment, landlord or mechanic's lien, or a tax lien (such as IRS or state tax lien). Johnson v. Darr, 272

S.W. 1098, 1100 (Tex. 1925.) ("The Texas courts have construed the words 'all creditors' of the statute to mean creditors who acquired a lien by legal proceedings without notice of the unrecorded instrument."); Prewitt v. United States, 792 F.2d 1353 (5th Cir. 1986); United States v. Creamer Industries, Inc., 349 F.2d 625 (5th Cir. 1965); Underwood v. United States, 118 F.2d 760 (5th Cir. 1941); Bowen v. Lansing Wagon Works, 43 S.W. 872 (Tex. 1898). A junior lender whose mortgage secures an antecedent debt is not a lien creditor and cannot take priority over a prior unrecorded deed. Turner v. Cochran, 61 S.W. 923 (Tex. 1901). A trustee or debtor-in-possession in a bankruptcy will be treated as a judgment creditor in order to set aside unrecorded interests. 11 U.S.C. § 544; Faires v. Billman, 849 S.W.2d 455 (Tex. App.—Austin 1993, no pet.); Segrest v. Hale, 164 S.W.2d 793 (Tex. App.—Galveston, 1941, writ ref'd w.o.m.).

A lien creditor will take free and clear of prior unrecorded (but recordable) interests, unless the creditor has notice of them. Examples of such recordable interests are:

- An equitable right to have a deed corrected to convey a lot originally intended to be included in the conveyance (but not included due to mutual mistake), United States v. Creamer Industries, Inc., 349 F.2d 625 (5th Cir. 1965); Henderson v. Odessa Building & Finance Co., 24 S.W.2d 393 (Tex. Comm'n App. 1930); North East Independent School District v. Aldridge, 528 S.W.2d 341 (Tex. App.–Amarillo 1975, writ ref'd n.r.e.).
- An unrecorded contract for sale, Linn v. Le Compte, 47 Tex. 440 (1877).
- A prior unrecorded deed, Whitaker v. Farris, 101 S.W. 456 (Tex. App. 1907, writ ref'd).
- A divorce decree not filed of record in the real property records; Prewitt v. United States, 792 F.2d 1353 (5th Cir. 1986).
- An unrecorded sheriff's deed; Wiggins v. Sprague, 40 S.W. 1019 (Tex. App. 1897, no writ).
- An unrecorded extension of deed of trust. Cadle Co. v. Butler, 951 S.W.2d 901 (Tex. App.—Corpus Christi 1997, no writ).
- An entry of a constable's sale in the litigation records (execution docket) of the county clerk's office. Noble Mortgage & Investments, LLC v. D&M Vision Investments, LLC, 340 S.W.3d 65 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

Bona fide purchasers for value are protected against the assertion of equitable titles because of the doctrine of estoppel, and not because of the registration statutes. Johnson v. Darr, 272 S.W. 1098 (Tex. 1925). Unlike a bona fide purchaser, a lien creditor cannot invoke estoppel, and must rely solely upon the recording statute to assert that its rights are superior to an unrecorded interest. The lien creditor will not extinguish "unrecorded equities" such as

- An executory contract to convey real property where the purchaser goes into possession of the property. Cadle Co. v. Harvey, 46 S.W.3d 282, 287 (Tex. App.—Fort Worth 2001, pet. denied).

- A completed contract for sale where no deed had been executed to the purchaser, Texas American Bank v. Resendez, 706 S.W.2d 343 (Tex. App.—Amarillo 1986, no writ).
- A deed intended as a mortgage, Michael v. Knapp, 23 S.W. 280 (Tex. App. 1893, no writ).
- A deed of trust released by mutual mistake, First State Bank v. Jones, 183 S.W. 874 (Tex. 1916).
- A right to reform a deed where by mutual mistake the grantor conveyed a greater interest than intended, Cetti v. Wilson, 168 S.W. 996 (Tex. App.—Fort Worth 1914, writ ref'd).

Source:

Citations in the Comment.

History:

Adopted August 2, 2013.

Standard 4.110. Electronic Filing And Recordation

An examiner may presume that any additional requirements for electronic filing of instruments (beyond those required for recordation of paper instruments) have been met.

Comment:

Electronic filing of instruments in the real property records is governed by (1) the Uniform Electronic Transactions Act (Tex. Bus. & Com. Code §§ 322.001-322.021) (UETA), (2) the Uniform Real Property Electronic Recording Act (Tex. Prop. Code §§ 15.001-15.008) (URPERA), (3) Tex. Local Gov't Code§§ 195.001-195.009, and (4) 13 Tex. Admin. Code §§ 7.141-7.145. The federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7001 et seq.) (E-SIGN) has been largely modified, limited, and superseded by Texas law. Tex. Prop. Code § 15.007; Tex. Bus. & Com. Code § 322.019. The Texas State Library and Archives Commission has adopted rules by which a county clerk may accept electronic documents by electronic filing and record electronic documents and other instruments. Tex. Local Gov't Code § 195.002(a).

The persons (authorized filers) who may file electronic documents or other documents electronically with a county clerk that accepts electronic filing and recording are specified in Tex. Local Gov't Code § 195.003.

An electronic instrument or instrument filed electronically must be available for public inspection in the same manner and at the same time as an instrument filed by other means. Tex. Local Gov't Code § 195.007(a). An electronic document or instrument filed electronically is filed with the county clerk when it is received, unless the county clerk rejects the filing within the time and manner provided by Chapter 195 or by applicable rules. Tex. Local Gov't

Code § 195.009. A county clerk that accepts an electronic filing shall confirm or reject the filing no later than the first business day after the date of filing. If the county clerk fails to provide notice of rejection within the time provided, the filing is considered accepted and may not subsequently be rejected. Tex. Local Gov't Code § 195.004. An electronic document or other instrument that is filed electronically is considered recorded in compliance with a law relating to electronic filing as of the county clerk's business day of filing. Tex. Local Gov't Code § 195.005. If a law requires as a condition for recording that a document be an original or be in writing, the requirement is satisfied by an electronic document (a document received by a county clerk in an electronic form) that complies with Chapter 15, Texas Prop. Code. If a law requires as a condition for recording that a document be signed, the requirement is satisfied by an electronic signature. A requirement that a document be notarized, acknowledged, verified, witnessed, or made under oath is satisfied if the electronic signature of the person authorized to perform that act, and all other information required to be included, is attached or logically associated with the document or signature. A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature. Tex. Prop. Code § 15.004; Tex. Bus. & Com. Code § 322.011. An original signature may not be required for an electronic instrument or other document that complies with Chapter 15, Tex. Prop. Code; Chapter 195, Tex. Loc. Gov't. Code; Chapter 322, Tex. Bus. & Com. Code, or other applicable law. Tex. Prop. Code §§ 12.0011 and 12.0013.

Source:

Citations in the Comment.

History:

Adopted August 2, 2013; amended July 17, 2014.

The prior standard provided: "An examiner may assume that any additional requirements for electronic filing of instruments (beyond those required for recordation of paper instruments) have been met."

Standard 4.120. Estoppel By Deed

The examiner may rely upon the doctrine of estoppel by deed for vesting of an interest in title, where applicable.

Comment:

If a grantor does not own the interest he purports to convey, estoppel by deed will automatically vest title in the grantee or the grantee's successors if the grantor later acquires title to the interest. Estoppel by deed also applies more broadly to bind the parties to a deed by the recitals in the deed. Box v. Lawrence, 14 Tex. 545 (1855); Surtees v. Hobson, 4 S.W.2d 245 (Tex. App.—El Paso 1928), aff'd, 13 S.W.2d 345 (Tex. Comm'n App. 1929); XTO Energy Inc. v. Nikolai, 357 S.W.3d 47 (Tex. App.—Fort Worth 2011, pet. denied).

A deed will operate to vest the after-acquired title of the grantor in the grantee if the deed is not a quitclaim, Wilson v. Wilson, 118 S.W.2d 403 (Tex. App.–Beaumont 1938, no writ), and it is not essential that a deed contain a warranty in order for the doctrine to apply. Wilson v. Beck, 286 S.W. 315, 320 (Tex. App.—Dallas 1926, writ ref'd); Lindsay v. Freeman, 18 S.W. 727 (Tex. 1892); Blanton v. Bruce, 688 S.W.2d 908 (Tex. App.—Eastland 1985, writ ref'd n.r.e.); Texas Pacific Coal & Oil Co. v. Fox, 228 S.W. 1021 (Tex. App.—Fort Worth 1921, no writ). Estoppel will apply even in the case of a gift deed. Robinson v. Douthit, 64 Tex. 101 (1885). See discussion of quitclaims in the comment to Standard 4.90.

If the grantor conveys without excepting to a lien and thereafter acquires title (at a foreclosure sale or later), then the title it acquires will inure to its prior grantee. Burns v. Goodrich, 392 S.W.2d 689 (Tex. 1965); Robinson v. Douthit, 64 Tex. 101 (1885). Presumably the benefits to a grantee of the doctrine of estoppel by deed are assigned to a later grantee who receives a quitclaim from the first grantee. Burns v. Goodrich, 392 S.W.2d 689 (Tex. 1965); Robinson v. Douthit, 64 Tex. 101 (1885).

The rule of after-acquired title also applies to mortgages. Shield v. Donald, 253 S.W.2d 710 (Tex. App.—Fort Worth 1952, writ ref'd n.r.e.). A party who executes notes and mortgages on land (or assumes existing liens) cannot take title under a foreclosure of a prior lien without discharging the notes secured by inferior mortgages; the mortgagees' liens will be reinstated. Milford v. Culpepper, 40 S.W.2d 163 (Tex. App.—Dallas 1931, writ ref'd).

Where a deed conveys land and reserves a mineral interest, but fails to except prior reserved minerals, thus creating an overconveyance, the grantor loses his title as necessary to make his grantee whole. Duhig v. Peavy-Moore Lumber Co, 144 S.W.2d 878 (Tex. 1940). The Duhig rule of estoppel will not apply, however, if the deed refers to a prior deed reserving a mineral interest by language such as "reference to which is made for all purposes" or "for all legal purposes." Harris v. Windsor, 294 S.W.2d 798 (Tex. 1956). A grantee in a deed will be bound by the deed's contents, including a reference to a disputed prior reservation of minerals, and may not thereafter acquire superior title free of the reservation. Adams v. Duncan, 215 S.W.2d 599 (Tex. 1948); Greene v. White, 153 S.W.2d 575 (Tex. 1941). However, before the grantor can secure a mineral interest by estoppel, the grantee must have all of the interest that the grantor purported to convey. Dean v. Hidalgo County Water Imp. Dist. No. Two, 320 S.W.2d 29 (Tex. App.—San Antonio 1959, writ ref'd n.r.e.).

A conveyance signed by a party only in a representative capacity will, nevertheless, convey whatever interest that person owns individually where that party's deed purports to convey the property (as opposed to a quitclaim). Conveyances where such estoppel has been recognized include those by an estate representative, Tomlinson v. H.P. Drought & Co., 127 S.W. 262 (Tex. App. 1910, writ ref'd); agents on behalf of principals, Ford v. Warner, 176 S.W. 885 (Tex. App.—Amarillo 1915, no writ); trustee, Grange v. Kayser, 80 S.W.2d 1007 (Tex. App.–El Paso 1935, no writ); and corporations by officers, Carothers v. Alexander, 12 S.W. 4 (Tex. 1889) (where the issue was discussed although estoppel was inapplicable); see also American Savings & Loan Assoc. v. Musick, 517 S.W.2d 627 (Tex. App.—Houston [14th Dist.] 1974), rev'd on other grounds, 531 S.W.2d 581 (Tex. 1975).

Source:

Citations in the Comment.

History:

Adopted August 2, 2013.

Standard 4.130. Warranties Of Title

The examiner generally does not need to address the issue of title warranties, because warranties are not a part of the conveyance and do not enlarge the title.

Comment:

A warranty is not part of the conveyance and does not enlarge the title. City of Beaumont v. Moore, 202 S.W.2d 448 (Tex. 1947). "A covenant of warranty is not required in a conveyance." Tex. Prop. Code § 5.022(b). A deed without warranty conveys all of grantor's interest as fully as one with warranty. Flanniken v. Neal, 4 S.W. 212 (Tex. 1887). The Supreme Court in White v. Dupree, 40 S.W. 962, 964 (Tex. 1897) said:

A grantor with an undisputed title may decline to warrant it, while one with a doubtful claim may be willing to covenant for the repayment of the purchase money and interest in case the title should fail. Covenants of warranty are mere matters of contract in reference to the title and may or may not be incidents of the conveyance. The conveyance is complete without them.

The presence of a warranty in a deed does not prevent the deed from being a quitclaim where the deed purports to transfer only the grantor's "right, title, and interest," Enerlex, Inc. v. Amerada Hess, Inc., 302 S.W.3d 351 (Tex. App.—Eastland 2009, no pet.), although the presence or absence of a warranty in an instrument with that or similar wording has sometimes been regarded as a significant factor in determining whether the instrument is or is not a quitclaim, Lockhart v. Chisos Minerals LLC, 621 S.W.3d 89 (Tex. App.—El Paso 2021, pet. denied); Jackson v. Wildflower Prod. Co., 505 S.W.3d 80, 91-92 (Tex. App.—Amarillo 2016, pet. denied); and the comments to Standard 4.90. However, a deed without warranty that also expressly disclaims any warranties is not a quitclaim if it otherwise purports to convey the property or an interest in the property, not merely the grantor's right, title, and interest. See Tex. Prop. Code § 5.022.

Caution: While the examiner is not concerned about title warranties generally, the examiner needs to consider the possible application of the doctrine of estoppel by deed. See Standard 4.120. In addition, an examiner should distinguish a reservation of an interest or an exception to the grant from exceptions to the warranty. A reservation generally refers to an interest that the grantor is retaining from the transfer. While an exception to the grant should refer to an interest that the grantor does not own and cannot convey, many deed forms confuse grant exceptions and reservations. On the other hand, an exception to the

warranty merely excludes an interest from the warranty benefits without retaining an interest in the grantor and without excepting an interest from the grant. Cf. Wenske v. Ealy, 521 S.W.3d 791 (Tex. 2017); Cosgrove v. Cade, 468 S.W.3d 32 (Tex. 2015); Pich v. Lankford, 302 S.W.2d 645 (Tex. 1957); and Griswold v. EOG Resources, Inc., 459 S.W.2d 713 (Tex. App.—Fort Worth 2015, no pet.). See generally Sara A. Dysart, Reservation or Exception—What is it going to be?, 39th Annual Advanced Real Estate Law, Texas Bar CLE (July 13, 2017 ch. 2).

Source:

Citations in the Comment.

History:

Adopted February 12, 2018.

CHAPTER V

LAND DESCRIPTIONS

Standard 5.10. Land Descriptions Generally

Although an examiner does not determine actual boundaries on the ground, an examiner should determine whether each land description in the chain of title is sufficient to identify the land under examination.

Comment:

A legal description affords the means of identifying the land. Morrow v. Shotwell, 477 S.W.2d 538, 539 (Tex. 1972); Wilson v. Fisher, 188 S.W.2d 150, 152 (Tex. 1945); Chandler v. Kountze, 130 S.W.2d 327, 331 (Tex. App.—Galveston 1939, writ ref'd); 4 Aloysius A. Leopold, Land Titles and Title Examination § 15.2 (Texas Practice 3d ed. 2005). With the exception of blanket or global descriptions, also called a general grant, a conveyance in the chain of title that does not identify the land under examination is ineffective to pass title. Greer v. Greer, 191 S.W.2d 848 (Tex. 1946).

The intention of the parties concerning the identification of the land conveyed and its boundaries is determined from the face of the instrument in light of surrounding circumstances. Stafford v. King, 30 Tex. 257 (1867). The intention of the parties to a deed containing a metes and bounds description is presumed to be the same as that of the surveyor who surveyed the tract. Strong v. Sunray DX Oil Co., 448 S.W.2d 728 (Tex. App.—Corpus Christi 1969, writ ref'd n.r.e.). The instrument need not contain such a full description as will enable the property to be ascertained without the aid of extrinsic evidence. Chandler v. Kountze, 130 S.W.2d 327 (Tex. App.—Galveston 1939, writ ref'd). An instrument must describe the conveyed interest with sufficient precision, however, so that a person who is familiar with land in the area can identify the land with reasonable certainty or reference a related instrument that does so. Broaddus v. Grout, 258 S.W.2d 308 (Tex. 1953); Siegert v. Seneca Resources Corp., 28 S.W.3d 680 (Tex. App.—Corpus Christi 2000, no pet.). Attached surveys, maps, or plats may provide enough additional data to make adequate an otherwise defective description. See, e.g., Pritchard v. Burnside, 167 S.W.2d 159 (Tex. 1943); MTrust Corp. N.A. v. LJH Corp., 837 S.W.2d 250, 254 (Tex. App.—Fort Worth 1992, writ denied) (a survey that included acreage and that was attached to a commonly used commercial map that included abstract numbers, survey information, and block identification was found adequate). Such graphical attachments, however, may not be sufficiently descriptive if they also lack other crucial information. See, e.g., U. S. Enterprises, Inc. v. Dauley, 535 S.W.2d 623 (Tex. 1976); Guenther v. Amer-Tex Const. Co., 534 S.W.2d 396 (Tex. App.—Austin 1976, no writ) (a survey with no scale and that did not show the size of the tract or number of acres therein, and which contained no reference to recorded deeds or other instruments was found inadequate). See generally 1 Ernest E. Smith and Jacqueline Lang Weaver, Texas Law of Oil and Gas §

3.3(A). A legally sufficient description depicts the tract's boundaries as located on the ground by the surveyor.

The boundaries of a tract as originally surveyed are described by the field notes of the surveyor and are commonly found in the patent or other grant from the sovereign. The footsteps of the original surveyor, if they can be ascertained, should be followed. Silver Oil & Gas, Inc. v. EOG Resources, Inc., 246 S.W.3d 197 (Tex. App.—San Antonio 2007, no pet.). In the case of a conflict between two or more patented surveys, the senior (oldest) survey controls over any junior (younger) survey. Silver Oil & Gas, Inc. v. EOG Resources, Inc., 246 S.W.3d 197, 204 (Tex. App.—San Antonio 2007, no pet.) ("The description in a senior survey controls when locating a line of that survey over any junior survey of that line, unless the evidence proves that the senior survey is in error."). When the senior survey can be easily identified, a junior survey cannot be made to control the senior survey. Hill v. Whiteside, 749 S.W.2d 144, 151 (Tex. App.—Fort Worth 1988, writ denied). If the actual boundary lines and corners run by the original surveyor can be found they are controlling, even if they are inconsistent with the calls and references found in the field notes. If the footsteps of the original surveyor cannot be ascertained with reasonable certainty, the surrounding facts and circumstances should be considered to determine the intent and purpose of the surveyor. Silver Oil & Gas, Inc. v. EOG Resources, Inc., 246 S.W. 3d 197 (Tex. App.—San Antonio 2007, no pet.).

Generally, the standards for measurement are governed by Tex. Nat. Res. Code Ch. 21. The units of measurement in Section 21.077, which defines a meter, a foot and a vara, were slightly changed effective September 1, 2021.

An examiner is not responsible for identifying a boundary defect, such as an encroachment or a survey conflict or error, that is not apparent from the instruments examined unless the examiner has other notice of the defect. Moreover, not all boundary defects are apparent from the record.

In determining the legal sufficiency of a description, an examiner may presume that errors, irregularities, deficiencies, and inconsistencies in a land description in the chain of title are not material unless, under the circumstances, a substantial uncertainty exists as to the identity of the land or unless the description fails to satisfy the minimal requirements essential to an effective conveyance. When examining a marginally sufficient or questionable land description, the examiner should consider all relevant factors, including the lapse of time, subsequent conveyances, the manifest or typographical nature of an error or omission, and accepted rules of construction.

Practical considerations justify reliance upon corrections or improved land descriptions appearing in later conveyances and upon the passage of time if no apparent difficulties have arisen from a less than perfect land description. Further, all matters of record (e.g., adjoining descriptions, other land owned by the grantor, and the like) may become sources of explanation for what might be a dubious description by itself. Pickett v. Bishop, 223 S.W.2d 222, 223 (Tex. 1949); Abercrombie v. Bright, 271 S.W.2d 734 (Tex. App.—Eastland 1954, writ ref'd n.r.e.). Likewise, typographical mistakes and similar apparent errors and

omissions in land descriptions do not detract from the obvious intent of instruments. Reserve Petroleum Co. v. Harp, 226 S.W.2d 839, 841 (Tex. 1950); Barnard v. Good, 44 Tex. 638 (1876); Rhoden v. Bergman,75 S.W.2d 993 (Tex. App.—Beaumont 1934, writ ref'd); Holman v. Houston Oil Co., 152 S.W. 885 (Tex. App.— Galveston 1912, writ dism'd). Where elements of the description conflict or where the calls do not close, the examiner may utilize rules of construction to construe descriptive calls that are conflicting or ambiguous. The order of dignity of calls is summarized in the following provision from the Texas Administrative Code, which is consistent with Texas case law:

The order of dignity of calls in a survey is as follows:

1. Natural objects (rivers, etc.).
2. Artificial objects (marked trees, stone mounds, adjoinder calls, etc.).
3. Courses (bearings).
4. Distances.
5. Acreage.

31 Tex. Admin. Code § 7.5 (General Land Office surveying rules for licensed state surveyors). See also, Frost v. Socony Mobil Oil Co., 433 S.W.2d 387 (Tex. 1968) (holding that calls to course and distance control over mistaken calls for an unmarked line which was not located on the ground); Stafford v. King, 30 Tex. 257 (1867) (recognizing that the general rules as to controlling calls are: "natural objects; artificial objects; course and distance."); Mohnke v. Greenwood, 915 S.W.2d 585 (Tex. App.—Houston [14th Dist.] 1996, no writ) (holding that the law of legal preferences gives dignity to calls in the following order: natural objects; artificial objects; course; and distance and that where there is a conflict, calls to natural objects will prevail over calls to artificial objects); Cox v. Piwonka, 257 S.W.2d 955 (Tex. App.— Galveston 1953, writ dism'd) (holding that a line of a located survey is an artificial object that controls over distance); Duff v. Moore, 68 Tex. 270 (1887) (calls to an adjoining tract shall control over distance). Calls for adjoinder prevail even if the adjoinder is with an unmarked but ascertainable line. Frost v. Socony Mobil Oil Co., 433 S.W.2d 387 (Tex. 1968). An exception exists if the call for adjoinder was made upon mistake, apprehension, or conjecture. Turner v. Smith, 61 S.W.2d 792 (Tex. 1933). A call for course is considered more reliable and will prevail over a call for distance. Lilley v. Blum, 6 S.W.279 (Tex. 1887). Calls for quantity of acreage will be given the least priority. Collins v. Warfield, 140 S.W.107 (Tex. App.— Galveston 1911, no writ). Nevertheless, if the instrument shows that the parties intended that other objects or calls should prevail, then their intention should be given effect over the usual order of priority or dignity. Port Aransas Properties, Inc. v. Ellis, 129 S.W.2d 699 (Tex. App.—San Antonio 1939, writ dism'd judgm't cor.); Stuart v. Coldwell Banker & Co., 552 S.W.2d 904 (Tex. App.— Houston [1st Dist.] 1977, writ ref'd n.r.e.).

Global or blanket descriptions of all of the grantor's real property, wherever located in a specified city or county, are sufficient to satisfy the Statute of Frauds, even if other tracts are also specifically described. Witt v. Harlan, 2 S.W.41 (Tex. 1886); Holloway's Unknown Heirs v. Whatley, 131 S.W.2d 89 (Tex. 1939). However, in J. Hiram Moore, Ltd. v. Greer, 172 S.W. 3d 609 (Tex. 2005), the deed at issue contained both a specific description and a global description. Because the grant under the specific description failed, the court refused to

enforce the global description on the ground that the deed was ambiguous. Greer was subsequently limited by Davis v. Mueller, 528 S.W.3d 97 (Tex. 2017), in which the court construed a similar deed, but one with specific descriptions that did not comply with the Statute of Frauds before the global description, as not ambiguous so that the general conveyance complied with the Statute of Frauds and operated to pass title to all the grantor's land. Moreover, a global or blanket description is distinguishable from a "Mother Hubbard" or "cover-all" clause, which is ordinarily construed as including in the description only small strips of land adjacent to the land described. Sun Oil Co. v. Burns, 84 S.W.2d 442 (Tex. 1935). But see Davis v. Mueller, 528 S.W.3d 97 (Tex. 2017) (reaffirming that a global (general) description is adequate to convey real property).

Boundaries may be established by means other than through the calls recited in the instrument, including by express agreement, by the passage of time, or by the action or acquiescence of the parties.

Written Agreements: Boundary lines may be established by written agreement, but all parties with an interest in the property must join in the written agreement for it to be effective as to all interests in the property. The agreement must be filed for record with the county clerk of the county where the land is located to be binding upon subsequent purchasers without notice. Where the boundary separates two platted lots, a boundary agreement that includes a conveyance of land may be valid between the parties, but absent replatting, the agreement may violate subdivision regulations, leading to civil and criminal penalties and possible denial of city and utility services. Tex. Loc. Gov't Code § 212.004.

Oral Agreements: Where the location of the boundary described in the conveyance is doubtful, uncertain, or disputed, the parties may agree upon a division line through an oral boundary agreement without violating the Statute of Frauds. Duval County Ranch Co. v. Foster, 318 S.W.2d 25 (Tex. App.— San Antonio 1958, writ ref'd n.r.e.). The oral agreement must be definite, unconditional, and "executed" by the parties through (1) erection of monuments on the agreed line or by otherwise marking it and by the actual and physical possession or use to the line or (2) improving or developing the property with reference to the line. Farmer v. Kornfuehrer, 271 S.W.2d 501 (Tex. App.—San Antonio 1954, no writ). Otherwise, an oral agreement does not bind subsequent purchasers.

Acquiescence: Where there is uncertainty, doubt, or dispute as to the true boundary, the location may be resolved, without an express agreement, by acquiescence. Taylor v. Benton, 390 S.W.2d 509 (Tex. App.—Eastland 1965, no writ). The acquiesced line becomes the new boundary line by subsequent transfers that describe it. Sullivan v. Michael, 87 S.W. 1061 (Tex. App. 1905, no writ).

Caution:

A defective description is one of the most frequent causes of title failure. In general, courts construe land descriptions objectively, i.e., how the land was described in the instrument, and not subjectively, i.e., what the parties intended to describe in the instrument but did not. Thus, ordinarily, if the land description is unambiguous, the parties' subjective

intent not expressed in the instrument is of no consequence. Accordingly, the examiner should ascertain that the description in the instruments involved in a chain of title sufficiently describes the land so that it can be identified and located on the ground with reasonable certainty. If extrinsic evidence is necessary to determine the boundaries, then the descriptive words in the deed or deeds must furnish a basis or guide for its admission.

An examiner should be aware that it is not always easy to distinguish global or blanket descriptions, which are broadly construed, from Mother Hubbard or cover-all clauses that apply only to small strips of land. See Caution to Standard 15.10.

Source:

Citations in the Comment; 4 Aloysius A. Leopold, Land Titles and Title Examination, ch. 15 (Texas Practice 3d ed. 2005).

History:

Adopted June 27, 1997; replaced June 11, 2010; amended July 17, 2014.

The prior standard provided: "Although examiners do not determine actual boundaries on the ground, an examiner must determine whether each land description in the chain of title is sufficient to identify the land under examination."

The original standard provided: "An examiner may presume that errors, irregularities, deficiencies, and inconsistencies in land descriptions in the chain of title do not impair marketability unless, after considering all circumstances of record, (a) a substantial uncertainty exists as to the land involved or (b) the description falls beneath the minimal requirements of sufficiency and definiteness essential to an effective conveyance. When examining marginally sufficient or questionable descriptions, the examiner should consider all relevant factors, including the lapse of time, subsequent conveyances, the manifest or typographical nature of errors or omissions, and accepted rules of construction."

Standard 5.20. Land Descriptions in Patents

An examiner may ordinarily rely on the land description contained in a patent recorded in the county records.

Comment:

Titles to Texas land are derived from land grants by Spain and Mexico and from patents issued by the Republic of Texas and the State of Texas, including patents issued during the Civil War and Reconstruction. In each case, in the absence of evidence indicating an error, an examiner may rely upon the land description in the land grant or patent when considering whether the sovereign's title has been divested.

Significant lands in West Texas remain unpatented and the General Land Office still issues patents through its Office of the General Counsel.

Regarding patents issued by the Republic or State of Texas, before a patent may be issued for an unsevered tract, the tract may be required to be surveyed and the field notes, prepared by a Licensed State Land Surveyor or the County Surveyor of the county where the land is located, returned to the General Land Office. Field notes prepared by a Registered Professional Land Surveyor are not acceptable to the General Law Office. Those original field notes are then incorporated in the patent. See Atlantic Refining Co. v. Noel, 443 S.W.2d 35 (Tex. 1968).

Patents are not required to be recorded in the county where the land is situated, Mathews v. Caldwell, 258 S.W. 810, 813-14 (Tex. Comm'n App. 1924), although the patent—or a certified copy obtained from the General Land Office—usually is recorded, for a fee paid by the applicant, sent directly by the General Land Office to the applicable county for recording.

It is possible, although uncommon, for the field notes in the patent to differ from those of the original survey. In such case the original field notes control. State v. Sun Oil Co., 114 S.W.2d 936, 944 (Tex. App.—Austin 1938, writ ref'd). However, unless the conflict is disclosed in the course of the examination, examiners customarily rely on the patent as it appears in the county records. If there is evidence of a conflict, it may be necessary for the examiner to consult the records of the General Land Office to resolve the issue.

Caution:

As to patents to lands sold by the State of Texas between September 1, 1895 (the effective date of the General Mineral Release Act of 1895) and August 21, 1931 (the effective date of the Sales Act of 1931), the examiner should not rely on the patent to ascertain whether the State reserved minerals in the patented lands but should obtain from the General Land Office a letter or certificate of classification or Certificate of Facts, which will indicate any reservation of minerals.

Source:

Citations in the Comment.

History:

Adopted June 11, 2010.

Standard 5.30. Water Boundaries

Although an examiner does not determine actual water boundaries on the ground or the character of waters, an examiner should be aware of the following general principles governing riparian and littoral boundaries along tidelands, lakes, and streams.

Riparian and littoral boundaries are governed by the applicable law in effect on the date of severance of title from the sovereign.

The boundary of a tract bounded by a non-navigable stream is generally located at the thread of the stream.

Title to the bed of tidelands and to natural navigable lakes is in the State.

Title to the bed of navigable streams is determined by the common law and by the "thirty-foot" statute. Title to other streams is determined by the law in effect on the date of severance of title from the sovereign. State title to the bed of parts of some streams may be relinquished under the "Small Bill."

Comment:

Tidelands: The owner of land adjacent to a shore is a "littoral owner." Tex. Nat. Res. Code § 61.001(6). The location of littoral boundaries is determined according to the law in effect at the time of severance from the sovereign. See Rudder v. Ponder, 293 S.W.2d 736 (Tex. 1956); Humble Oil & Ref'g Co. v. Sun Oil Co., 190 F.2d 191 (5th Cir. 1951). After the Republic of Texas adopted the common law on January 20, 1840, the boundary of the sea was established as the mean ordinary high tide of the sea waters. DeMeritt v. Robison, 116 S.W. 796 (Tex. 1909). Prior to that time, the boundary of the sea was controlled by civil law, which established the boundary as the mean higher high tide, i.e., the average of the higher of the two daily high tides rather than the average of all high tides. See William Gardner Winters, Jr., The Shoreline for Spanish and Mexican Grants in Texas, 38 Tex. L. Rev. 523 (1960). The civil law line is calculated over regular tidal cycles of 18.6 years. Luttes v. State, 324 S.W.2d 167 (Tex. 1958). See also Kenedy Memorial Foundation v. Dewhurst, 90 S.W.3d 268, 272 (Tex. 2002) ("A mean daily higher high tide—which the parties agree in this case is synonymous with mean daily higher high water—is calculated by averaging the highest elevations reached by water each day over a tidal epoch of 18.6 years. Of course, as we recognized in Luttes, water level data is not available at all locations on the coast, and where it is available it may cover only part of the lengthy epochal cycle. But averages may nevertheless be obtained by extrapolation from data that is available, adjusting for known, cyclical variations. At times on the Texas coast there are two daily high tides and two daily low tides. Mean higher high tide is an average of only the higher of the daily levels. Mean high tide is an average of both high levels. This distinction is immaterial in areas of the Laguna Madre where tidal influences and daily fluctuations in water levels are ordinarily quite small. Thus, for purposes of this case, daily higher high water is indistinguishable from daily high water.").

Seashore boundaries established at the time of the grant of the land by the sovereign do not necessarily remain fixed. Accretion, the gradual onshore deposit of alluvium that causes the mean tide line to recede, may add to the land included in the grant. Giles v. Basore, 278 S.W.2d 830 (Tex. 1955); State v. Balli, 190 S.W.2d 71 (Tex. 1944). By the same token, erosion of the shoreline may reduce it. See Coastal Industrial Water Auth. v. York, 532 S.W.2d 949, 952 (Tex. 1976). A sudden change (avulsion), such as one brought about by a

hurricane, does not result in relocation of the boundary. See Severance v. Patterson, 370 S.W.3d 705 (Tex. 2012) ("…when a beachfront vegetation line is suddenly and dramatically pushed landward by acts of nature, an existing public easement on the public beach does not 'roll' inland to other parts of the parcel or onto a new parcel of land").

The Texas Open Beach Act, Tex. Nat. Res. Code §§ 61.001-.254, addresses the public's right to access state-owned beaches. Id. 61.011(a). This public right extends landward to the line of the mean high tide (under the common law) or the mean higher high tide (under Spanish and Mexican law), as discussed above, and farther inland to the vegetation line if the public has acquired an easement by prescription or dedication. Additional landward access may exist by express or implied access rights. In Severance v. Patterson, 370 S.W.3d 705 (Tex. 2012), the Texas Supreme Court construed the Open Beaches Act and extensively discussed Texas law regarding shore boundaries, including the effects of accretion, erosion, and avulsion thereon, and held that although the public had previously established an easement in the "dry beach" to the vegetation line on the littoral landowner's property, the public did not possess a "rolling" easement that would encompass land, including a residence, that was formerly landward of the vegetation line but relocated within the dry beach by avulsion, nor did the public have an implied easement of access, as in some other jurisdictions, to the portion of the beach between the high-tide line and the line of vegetation, citing with approval Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. App.—Houston 1964, writ ref'd n.r.e.).

Streams: Title to the bed of streams may depend upon whether a stream was perennial or torrential, or is navigable or non-navigable, and on whether the stream has been affected by erosion, accretion, or avulsion.

In land grants made prior to January 20, 1840, in accordance with Spanish or Mexican civil law, the sovereign retained title to the bed of a perennial stream (including all minerals) flowing through or along the granted land, whether navigable or not. Manry v. Robison, 56 S.W.2d 438, 446 (Tex. 1932) (addressing mineral title to a portion of the Brazos River, a perennial stream). A perennial stream flows most of the year, as opposed to a torrential stream, which flows only after substantial rainfall. Title to the bed of a torrential stream was deemed granted to the riparian owners. McCurdy v. Morgan, 265 S.W.2d 269 (Tex. App.—San Antonio 1954, writ ref'd) (addressing mineral title to a portion of Chiltipin Creek in San Patricio County, a torrential stream).

The Republic of Texas modified Mexican civil law, effective December 14, 1837, by adding the so called "thirty-foot" statute and by no longer referring to torrential and perennial streams, but distinguishing navigable and non-navigable streams. Under this statute, a stream that has an "average width of 30 feet from the mouth up" is defined as a navigable stream. Tex. Nat. Res. Code § 21.001(3). Thus, regarding land grants made on or after December 14, 1837, the sovereign retains title to the bed of such streams (including all minerals) as to their entire length. City of Austin v. Hall, 57 S.W. 563 (Tex. 1900); see Motl v. Boyd, 286 S.W. 458 (Tex. 1926) (addressing Spring Creek, a tributary of the South Concho River, located in Tom Green County, explaining that the bed of a stream is that portion of the soil alternately covered and left bare during the course of a year without reference to

extremes); Hix v. Robertson, 211 S.W.3d 423, 425 (Tex. App.—Waco 2006, pet. denied) (finding that there is no single methodology that must be followed to measure this width to determine whether a particular stream falls within the statute). Therefore, regarding severances from the Republic of Texas between December 14, 1837, and January 20, 1840, Texas retained sovereign title to the beds of perennial streams and to any streams that met the requirements of the "thirty-foot" statute.

Texas adopted the common law in 1840. Act approved Jan. 20, 1840, 4th Cong., R.S., § 1, 1840 Republic of Texas Laws 3, 3-4, reprinted in 2 H.P.N. Gammel, Laws of Texas 177, 177-178 (1898) (current version at Tex. Civ. Prac. & Rem. Code § 5.001). Since then, the thirty-foot statute remains in effect and the sovereign also retains, as a matter of common law, title to the beds of streams that are navigable in fact regardless of the width of the stream. See Taylor Fishing Club v. Hammett, 88 S.W.2d 127 (Tex. App.— Waco 1935, writ dism'd).

To determine the boundary line between the bed of a navigable stream and riparian land (between public and private ownership), the law requires compliance with the gradient boundary methodology. The gradient boundary methodology utilizes two factors: (i) the location of the "key bank," and (ii) the gradient or rate of fall of the water. Brainard v. State, 12 S.W.3d 6, 16 (Tex. 1999). The gradient boundary of a navigable stream is "the water-washed and relatively permanent elevation or acclivity at the outer line of the riverbed that separates the bed from the adjacent upland, whether valley or hill, and serves to confine the water within the bed and to preserve the course of the river." Oklahoma v. Texas, 260 U.S. 606, 631 32 (1923). The boundary is the bank at the average or mean level attained by the water when washing the bank without overflowing it, located halfway between the point where the flowing water first touches the bank and the highest point where the water reaches the top of the bank without overflowing it. Brainard, 12 S.W.3d at 16; Oklahoma v. Texas, 265 U.S. 493, 497-98 (1924). The boundary between the private riparian landowner and the State of Texas is the mean level midway between the line made by the flowing water that just reaches the cut bank (the water-washed and relatively permanent elevation separating the bed from the adjacent upland) and the higher level that just does not overtop the cut bank. Diversion Lake Club v. Heath, 86 S.W.2d 441, 446-47 (Tex. 1935). The stream width includes the entire bed whether the full bed has water over the entire width or not. Motl v. Boyd, 286 S.W. 458, 467-68 (Tex. 1926).

The boundary rules related to erosion and accretion are applicable to navigable and non-navigable streams. Maufrais v. State, 180 S.W.2d 144, 148-49 (Tex. 1944); Tyler v. Gonzales, 189 S.W.2d 519 (Tex. App.—San Antonio 1945, writ ref'd w.o.m.). Where a stream gradually or imperceptibly changes or shifts by accretion or erosion, the body of water that makes up the boundary also shifts or changes for both surface and mineral rights. Brainard v. State, 12 S.W.3d 6, 17-18 (Tex. 1999).

Accretion is the gradual and imperceptible process of adding land by the action of water thereby creating dry land that was previously covered by the water. Land may be added or accreted by alluvian or reliction. Accretion by alluvian is the gradual addition made to the land by the action of the water depositing solid material or mud. Accretion by reliction is the gradual and imperceptible addition of land by the recession of the water, whereby water

recedes below its previously normal watermark, thereby uncovering previously submerged land. Brainard v. State, supra, at 17. A change in the boundary is gradual or imperceptible when a person witnessing the boundary from time to time can see that progress is being made but cannot perceive it while the process is occurring. Denny v. Cotton, 22 S.W.122 (Tex. App. 1893, writ ref'd).

Avulsion is the sudden and perceptible loss or addition of land by the action of the water resulting in a sudden change in the bed or course of the stream. Brainard, 12 S.W.3d at 17. Where a navigable stream suddenly and perceptibly creates a new bed, the owner through whose property the stream now passes loses title to the bed, except for a possibility of reverter, which may again ripen into fee title should the stream bed return to its previous location. The State obtains a determinable fee interest in the newly washed land. The former riparian owners of land abutting on the abandoned bed are entitled to claim the abandoned bed. See Manry v. Robison, 56 S.W.2d 438 (Tex. 1932). However, the owner of the land lying between the old and the new bed does not lose title to it, even if the land is an island washed by the stream on both sides. Maufrais v. State, 180 S.W.2d 144 (Tex. 1944).

Patent survey lines are not supposed to cross navigable streams, Tex. Nat. Res. Code § 21.012(b). Nevertheless, the Small Bill (Tex. Rev. Civ. Stat. art. 5414a, effective March 3, 1929), upheld against constitutional challenge in State v. Bradford, 50 S.W.2d 1065 (Tex. 1932), validated patents to lands crossing navigable streams where the patent had been issued at least ten years prior to the enactment of the statute (i.e., on or before March 3, 1919) and passed title to the bed to the patentee to the extent necessary to convey the number of acres contained in the patent. Strayhorn v. Jones, 300 S.W.2d 623 (Tex. 1957) (addressing the Salt Fork of the Brazos River in Kent County). With regard to stream beds, if a resurvey of the patented acreage reveals more acreage than stated in the patent, then any excess land outside the stream bed must first be utilized to satisfy the patented acreage before any portion of the stream bed acreage will be relinquished to the landowner. If the aggregate acreage of the resurveyed land, including the streambed, is greater than the number of patented acres sold and paid for, but the area outside the streambed is less than the patented number of acres, the Small Bill is considered to have relinquished to the adjoining landowner an undivided interest in the bed to the extent necessary to make up the difference. See Heard v. State, 204 S.W.2d 344 (Tex. 1947); Jones v. Springer, 256 S.W.2d 1016 (Tex. App.—Amarillo 1952, no writ). If a resurvey reveals excess acreage outside the stream bed, the landowner may make an application for a Deed of Acquittance to pay for such excess acreage. 31 Tex. Admin. Code § 7.3 (addressing General Land Office, Deeds of Acquittance).

Beginning in 1837, grants by the Republic of Texas and the State of Texas have included title to the beds of non-navigable streams. Thus, if a tract granted on December 14, 1837 or thereafter is bounded by a non-navigable stream, the non-navigable stream bed is owned by the riparian owners to the center or thread of the stream. Muller v. Landa, 31 Tex. 265 (Tex. 1868); City of Victoria v. Schott, 29 S.W. 681 (Tex. App. 1895, no writ). The "thread" is typically defined as the center line of the stream as measured from opposite banks. Border Island Co. v. Cowles Shipyard Co., 94 Misc. 340, 348 (N.Y. Sup. Ct. Eq. 1914).

If a non-navigable water course that serves as a boundary changes its location by the gradual and imperceptible processes of accretion and erosion, the boundary will move with movement of the stream and continue to be the center of the stream. See Sharp v. Womack, 93 S.W.2d 712 (Tex. 1936); Dellana v. Walker, 866 S.W.2d 355, 359 (Tex. App.—Austin 1993, writ denied); Graham v. Knight, 240 S.W. 981, 984 (Tex. App.—Texarkana 1922, no writ). If a non-navigable stream changes location suddenly through avulsion, leaving its old banks to form new ones, the boundary will remain in the middle of the pre-avulsion channel even if the boundary is no longer washed by the waters. See Southwestern Portland Cement Co. v. Kezer, 174 S.W. 661, 670 (Tex. App.—El Paso 1915, writ ref'd).

Calls in a deed contiguous to a non-navigable stream are presumed to pass title to the center of the stream. Muller v. Landa, 31 Tex. 265 (1868); see Strayhorn v. Jones, 300 S.W.2d 623 (Tex. 1957) (applying the "strip-and-gore" doctrine to a stream). This presumption applies even if the land is described by metes and bounds without mention of the stream, or where the description refers to marked corners on the bank that do not correspond to the center of the stream. Muller v. Landa, supra. If boundary descriptions along non-navigable streams incorporate meander lines, the meander lines do not determine the boundary of the property conveyed but generally describe the curvature of the banks of the stream, thereby assisting in locating the general course of the stream. Absent avulsion, the actual course of the stream, not surveyed meander lines, determines the boundary. Strayhorn v. Jones, 300 S.W.2d 623 (Tex. 1957); Stover v. Gilbert, 247 S.W. 841 (Tex. 1923).

For general discussion of streams, see Brainard v. State, 12 S.W.3d 6 (Tex. 1999).

Lakes: A natural lake that is navigable belongs to the state. See State v. Bradford, 50 S.W.2d 1065, 1069 (Tex. 1932). A grant from the sovereign of a natural lake that is non-navigable includes the bed of the lake if the patent shows an unmistakable intention to convey the bed. Taylor Fishing Club v. Hammett, 88 S.W.2d 127 (Tex. App.—Waco 1935, writ dism'd). A lake is navigable if "its natural and ordinary condition affords a channel for useful commerce." The "thirty-foot" statute discussed above has no application in determining navigability of a lake. Id.

Calls in an instrument to the edge of the water, high or low watermark, the shore, or the bank of a lake establish the boundary at the edge of the water and exclude the bed of the lake. Welder v. State, 196 S.W. 868 (Tex. App.—Austin 1917, writ ref'd). A boundary may be established by a call for a contour elevation line. See Ulbricht v. Friedsam, 325 S.W.2d 669 (Tex. 1959).

Caution:

This Standard and related comments refer to severances from the sovereign. For purposes of this Standard, the time of "severance" is measured from the effective date of the segregation of the tract from the public domain. An examiner may consult the General Land Office for further information on severance.

Source:

Citations in the Comment; 3 Aloysius A. Leopold, Land Titles and Title Examination, ch. 6 (Texas Practice 3d ed. 2005).

History:

Adopted June 11, 2010; amended July 17, 2014.

The prior standard provided: "Although examiners do not determine actual water boundaries on the ground or the character of waters, the following general principles govern riparian and littoral boundaries along tidelands, lakes, and streams.

Riparian and littoral boundaries are governed by the applicable law in effect on the date of severance of title from the sovereign.

The boundary of a tract bounded by a non-navigable stream is generally located at the thread of the stream.

Title to the bed of tidelands and to natural navigable lakes is in the State.

Title to the bed of navigable streams is determined by the common law and by the 'thirty-foot' statute. Title to other streams is determined by the law in effect on the date of severance of title from the sovereign. State title to the bed of parts of some streams may be relinquished under the 'Small Bill.'"

Standard 5.40. Roads

Although an examiner does not determine actual land boundaries on the ground, an examiner should consider the possible application of the "strip-and-gore" doctrine. Where applicable, the doctrine generally provides as follows: Unless the instrument expresses a contrary intent, in a conveyance where a road is a boundary of a tract, the conveyance of the tract presumptively conveys the grantor's title to the center of the road and in some cases to the entire road.

Comment:

This standard applies the "strip-and-gore" doctrine in the context of roads. For purposes of this standard, "road" includes highways, streets, alleys, railroad rights-of-way, and other types of roads. The strip-and-gore doctrine is a rule of construction that creates a rebuttable presumption that the grantor of a tract bordering a road intended to convey the grantor's interest in the road—usually to the center of the road—even though apparently excluded or excepted by the terms of the conveyance unless the grantor expressed a clear and unequivocal intent to the contrary. Rio Bravo Oil Co. v. Weed, 50 S.W.2d 1080 (Tex. 1932). The doctrine is justified both as a matter of public policy, Cantley v. Gulf Production Co., 143 S.W.2d 912 (Tex. 1940), and on the theory that a grantor is presumed to convey all appurtenant rights incident to the enjoyment of the tract conveyed. Reagan v. Marathon

Oil Co., 50 S.W.3d 70 (Tex. App.—Waco 2001, no pet.). The court in Reagan discusses the history of the application of the doctrine and applies it to severed minerals.

The doctrine applies even though the calls contained in the metes and bounds description extend only to the edge of the road. Cox v. Campbell, 143 S.W.2d 361 (Tex. 1940). Conveyances with phrases such as "save and except" or "not including the road" are not sufficient to overcome the presumption. Reagan v. Marathon Oil Co., 50 S.W.3d 70 (Tex. App.—Waco 2001, no pet.). Under the strip-and-gore doctrine, a conveyance of a tract adjoining multiple, adjacent road easements will convey to the center of the easements in the same manner as if they constituted a single easement. Haines v. McLean, 276 S.W.2d 777 (Tex. 1955). The doctrine extends to a small tract, even though not a "strip," where the tract is of no further benefit to the grantor. Alkas v. United Savings Ass'n, 672 S.W.2d 852 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.). A reservation of minerals in the streets of a platted subdivision noted in a developer's dedication plat will not overcome the presumption that the developer's subsequent deed of a lot joining the street conveyed the minerals to the center of the street. Lackner v. Bybee, 159 S.W.2d 215 (Tex. App.—Galveston 1942, writ ref'd w.o.m.).

The doctrine may also apply to governmental entities, at least where the road strip is not used or held for use by the public. Joslin v. State, 146 S.W.2d 208 (Tex. App.— Austin 1940, writ ref'd) (the general rule that adjacent owners hold title to minerals to the center of road easements applies to patents). But see Town of Refugio v. Strauch, 29 S.W.2d 1041 (Tex. Comm'n App. 1930, judgm't adopted) (title to minerals under streets described in a municipality's subdivision of its Mexican land grant, although not in use as such when the town conveyed the abutting land to individual purchasers, were vested in the town and not in the lot owners fronting the streets), and Mitchell v. Bass, 33 Tex. 259 (1870) (applying civil law and rejecting strip-and-gore doctrine where the land at issue had been granted by the Mexican government).

For application of the doctrine to streams see Comments to Standard 5.30.

Caution:

The presumption created by the strip-and-gore doctrine may not apply where the land within the easement is relatively "larger and perhaps more valuable" when compared to the adjoining tract specifically conveyed in the instrument. Angelo v. Biscamp, 441 S.W.2d 524, 527 (Tex. 1969). The adjoining tract need not be merely a small strip, however; no exact size ratio must be adhered to for the doctrine to apply, Green v. Chesapeake Exploration, L.L.C., No. 02-17-00405-CV, 2018 WL 6565790 (Tex. App.—Fort Worth 2018, no pet.) (mem. op.).

The presumption will not apply where no road, alley, or easement exists at the time of the grant, and the property description excludes the narrow strip from the acreage being conveyed. Goldsmith v. Humble Oil & Ref'g Co., 199 S.W.2d 773 (Tex. 1947); however, it does apply to a strip of land previously conveyed for highway purposes on which the highway has

not yet been constructed. Escondido Services, LLC v. VKM Holdings, LP, 321 S.W.3d 102 (Tex. App.—Eastland 2010, no pet.).

Nevertheless, the doctrine similarly applies where the roadway is located entirely within the grantor's land, although along a boundary, and the grantor does not own land on the other side of the road. Thus, where the conveyance contained a property description that referred to the edge of the road as the boundary, the instrument was construed to convey the grantor's interest underlying the entire road. Cantley v. Gulf Production Co., 143 S.W.2d 912 (Tex. 1940). Likewise, when a road is adjacent to navigable waters, a deed describing the land bound by a road conveys the fee of the entire tract including the land underlying the marginal roadway. State v. Arnim, 173 S.W.2d 503 (Tex. App.—San Antonio, 1943, writ ref'd w.o.m.) (road was adjacent to Nueces Bay and lots were adjacent to the road). Finally, although this standard is limited to roads, the doctrine has been applied to small strips or parcels of land that do not comprise a road or easement. See, e.g., Alkas v. United Savings Ass'n, 672 S.W.2d 852, 857 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (applying the doctrine to a 2.1467–acre non-road tract out of a 146.584–acre tract). In Alkas, the court stated that, for the doctrine to apply: (1) the tract must be small in comparison to the land conveyed; (2) the tract must be adjacent to or surrounded by the land conveyed; (3) title to the tract and the adjacent or surrounding tract must be in the same grantor at the time of the conveyance; and (4) the tract, by itself, must be of no apparent benefit or importance to the grantor at the time of the conveyance. Id. at 857.

Whether application of the strip-and-gore doctrine grants marketable title to a strip or a gore is uncertain. See Standard 2.10 (discussing marketable title).

Source:

Citations in the Comment.

History:

Adopted June 24, 2011; amended July 17, 2014.

The prior standard provided: "Although examiners do not determine actual land boundaries on the ground, an examiner should consider the possible application of the "strip-and-gore" doctrine. Where applicable, the doctrine generally provides as follows: Unless the instrument expresses a contrary intent, in a conveyance where a road is a boundary of a tract, the conveyance of the tract presumptively conveys the grantor's title to the center of the road and in some cases to the entire road."

Standard 5.50. Easements

An examiner should identify and note as an encumbrance all easements of record affecting the title under examination. Certain title examinations may require the examiner to determine additional information about easements.

Comment:

Customarily, when conducting an examination of surface title, mineral title, or both an examiner does not trace and determine ownership resulting from transfers of an easement or provide detailed information concerning the easement unless such information is material to the transaction prompting the title examination.

Unrecorded easements may encumber the property under examination. The existence of such easements can only be determined by a physical inspection of the property and is not ordinarily the responsibility of the examiner.

An examiner may be retained to examine easement title. In this circumstance, the examiner should ascertain what information the client needs and conduct the examination accordingly. An easement is a non-possessory right to use the property of another. The owner of the burdened property is bound to permit certain acts by another, such as to pass over it (affirmative easement) or to not do certain acts that would otherwise be lawful, such as constructing a building if it would interrupt another's view (negative easement). Miller v. Babb, 263 S.W. 253, 254 (Tex. Comm'n App.1924, judgm't adopted). An easement is an interest in land, distinguishable from a license or permit, which merely confers a personal and generally revocable privilege to do some act on the land and is generally not assignable. Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196, 203 (Tex. 1962).

There are two types of easements: an easement in gross and an easement appurtenant. An easement appurtenant attaches to and runs with the benefitted land. The benefitted land is the dominant estate, and the land burdened by the easement is the servient estate. Pokorny v. Yudin, 188 S.W.2d 185, 193 (Tex. App.—El Paso 1945, no writ). An easement in gross instead runs in favor of a person, natural or legal, rather than a dominant estate. Canova v. Shell Pipeline Co., 290 F.3d 753,757 (5th Cir. 2002). An easement is not presumed to be in gross when it can fairly be construed to be appurtenant. Ginther v. Bammel, 336 S.W.2d 759, 763 (Tex. App.—Waco 1960, no writ). "Whether an easement is in gross or appurtenant must be determined by the fair interpretation of the grant or reservation creating the easement, aided, if necessary, by the situation of the property and the surrounding circumstances." Stuart v. Larrabee, 14 S.W.2d 316, 318 (Tex. App.—Beaumont 1929, writ ref'd), quoting 19 C.J. 868. Generally, easements of passage or of ingress and egress are easements appurtenant. Thompson v. Clayton, 346 S.W.3d 650 (Tex. App.—El Paso 2009, no pet.); Daniel v. Fox, 917 S.W.2d 106 (Tex. App.— San Antonio 1996, writ denied). When a dominant estate is conveyed, the conveyance transfers the benefit of all appurtenant easements even though not expressed in the deed. West v. Giesen, 242 S.W. 312, 319 (Tex. App.—Austin 1922, writ ref'd). Easements in gross benefit a party rather than a dominant estate. Generally, public road, railroad, utility, and pipeline easements are in gross; however, oil and gas gathering lines are typically appurtenant. At common law an easement in gross is not transferable since allowing the transfer of the personal privilege would be an added servitude on the land, Alley v. Carleton, 29 Tex. 74, 77 (1867), unless the instrument creating the easement expressly states that the easement is being transferred to the grantee and its successors and assigns or other language expressing an intent that the easement is assignable. Southtex 66 Pipeline Co. v. Spoor, 238 S.W.3d 538 (Tex. App.—

Houston [14th Dist.] 2007, pet. denied); Cantu v. Central Power & Light Co., 38 S.W.2d 876 (Tex. App.—San Antonio 1931, writ ref'd), and Williams v. Humble Pipe Line Co., 417 S.W.2d 453 (Tex. App.—Houston 1967, no writ). Absent language to the contrary in the instrument or consent of the owner of the burdened land, the owner of an easement in gross cannot transfer part of its easement to another party. Fort Worth & R.G. Ry. Co. v. Jennings, 13 S.W. 270 (Tex. 1890) (addressing the conveyance of part of an easement not in use to another party to build a road). Marcus Cable Associates, L.P. v. Krohn, 90 S.W.3d 697 (Tex. 2002) (holding that an electric company owning an easement for constructing and maintaining transmission or distribution lines could not authorize a cable company to use the easement for installing cable television lines). However, pipeline easements are ordinarily assignable in whole or in part where the resulting use does not burden the underlying land beyond what was contemplated in the original grant. Orange County, Inc. v. Citgo Pipeline Co., 934 S.W.2d 472 (Tex. App.—Beaumont 1996, writ denied).

The Texas Utilities Code provides for use of public roads, streets, alleys, and other public property (with the consent of the governing body if a municipality) by gas companies (§ 181.005 and § 181.022), by electric utilities (§ 181.042), by telephone and telegraph companies (§ 181.082), and by television cable services (§ 181.102). The uses to which public right-of-way easements can be used, once created, have been broadly construed. An easement for a road or street includes the right for the governing body to authorize the laying of utility lines. Hill Farm, Inc. v. Hill County, 436 S.W.2d 320, 321-22 (Tex. 1969).

Private easements may be created by deed, implication, estoppel and prescription. Public easements may be created by deed, dedication, prescription, and condemnation.

An easement is an incorporeal interest in land and may be created by grant, covenant, or agreement, express or implied. Settegast v. Foley Bros. Dry Goods Co., 270 S.W. 1014, 1016 (Tex. 1925). Where an easement is conveyed or transferred by deed it may be recorded. Tex. Prop. Code § 12.001. The Statute of Frauds applies to conveyances of easements. Callan v. Walters, 190 S.W. 829 (Tex. App.—Austin 1916, no writ). Easements must be described with the same certainty in instruments that create them as with land descriptions in other instruments. Compton v. Texas Southeastern Gas Co., 315 S.W.2d 345 (Tex. App.—Houston 1958, writ ref'd n.r.e.). See Standard 5.10 for additional discussion of land descriptions. The exact location of the easement need not be established in the instrument, but the burdened tract must be sufficiently identified. Elias v. Horak, 292 S.W. 288 (Tex. App.—Austin 1927, writ ref'd). A grant in general terms of a right to lay a pipeline across the land of the grantor without specifying the place for laying it or the size of the pipe is made certain by the act of the grantee in laying the pipe. Once the pipe is laid with the acquiescence of the grantor, the grant, which was general and indefinite, becomes fixed and certain, and the grantee cannot change the easement either by relocating the pipe or by increasing its size. Houston Pipe Line Co. v. Dwyer, 374 S.W.2d 662 (Tex. 1964) (holding that the rights created by the easement had become fixed when the 18-inch line had been constructed and that the pipeline company had no right to remove the line and replace it with a 30-inch high pressure line.) In Pioneer Natural Gas Co. v. Russell, 453 S.W.2d 882, 886 (Tex. App.—Amarillo 1970, writ ref'd n.r.e.) the deed at issue granted a right-of-way of sufficient width to permit grantee to lay parallel pipelines. When the grantee laid an eight-inch pipe

the grant became fixed and certain, and the grantee could not, 40 years later, lay a ten-inch pipe parallel to the first. When the plain terms of the grant allow more expansive use, however, the easement is not limited to the grantee's initial use or location. Southwestern Elec. Power Co. v. Lynch, 595 S.W.3d 678 (Tex. 2020).

Implied easements for road access may arise by necessity. Bains v. Parker, 182 S.W.2d 397 (Tex. 1944). Implied easements by way of necessity for road access may be created by implication where a grantor conveys part of a tract in a manner that results in landlocking either the part conveyed or the part retained. Necessity only exists when there is no other way of access. Duff v. Matthews, 311 S.W.2d 637 (Tex. 1958). The necessity must have existed at the time of the severance of the tract. Othen v. Rosier, 226 S.W.2d 622 (Tex. 1950). Implied easements by way of necessity terminate when the necessity terminates. Bains v. Parker, 182 S.W.2d 397, 399 (Tex. 1944).

An implied easement by prior use, sometimes called a quasi-easement, can be established in appropriate circumstances for purposes other than roads. An implied easement for a road cannot be established by prior use in the absence of necessity, Hamrick v. Ward, 446 S.W.3d 377, 384-85 (Tex. 2014); however, other existing uses may give rise to an implied easement by prior use. See, e.g., Westbrook v. Wright, 477 S.W.2d 663 (Tex. App.—Houston [14th Dist.] 1972, no writ) (sewer line), and Seber v. Union Pac. R.R. Co., 350 S.W.3d 640 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (private railroad crossing). A quasi-easement rests upon the principle that an owner who grants part of a tract also grants by implication all those apparent and visible easements that are necessary for the reasonable use of the property granted. Reasonable necessity is sufficient for an implied easement by prior use to arise in favor of the granted land across the retained land even though alternate but inconvenient access may exist. Miles v. Bodenheim, 193 S.W. 693 (Tex. App.—Texarkana 1917, writ ref'd). Strict necessity is generally required for an implied easement by prior use to arise in favor of the retained land across the granted land. Mitchell v. Castellaw, 246 S.W.2d 163, 167-69 (Tex. 1952); Scarborough v. Anderson Bros. Constr. Co., 90 S.W.2d 305 (Tex. App.—El Paso 1936, writ dism'd). Unlike easements by necessity, with the possible exception of a road, easements established by prior use do not terminate when alternative access becomes available. Harrington v. Dawson-Conway Ranch, Ltd., 372 S.W.3d 711 (Tex. App.—Eastland 2012, pet. denied).

An easement by estoppel may arise when a representation recognizing an easement was (1) communicated, (2) believed, and (3) relied upon. Doss v. Blackstock, 466 S.W.2d 59 (Tex. App.—Austin 1971, writ ref'd n.r.e.), citing Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196 (Tex. 1963). For example, the principle of estoppel applies where the grantor has exhibited a map or plat showing the existence of an easement, such as a street or alley, and the grantee has been induced to accept the grant, where the natural inference of those who consulted the map or plat with a view to purchase would be that the street or alley would be available for the benefit of their use. Birnberg v. Sparks, 410 S.W.2d 789 (Tex. App.—Corpus Christi 1966, writ ref'd n.r.e.) An easement by estoppel cannot arise solely from passive acquiescence; where there has been no promise or representation there can be no estoppel. Storms v. Tuck, 579 S.W.2d 447 (Tex. 1979); Stallman v. Newman, 9 S.W.3d 243, 247-48 (Tex. App.—Houston [14th Dist.] 1999, pet denied).

Prescriptive easements arise in much the same manner as title accrues by adverse possession; however, adverse possession ripens into title to the land and a prescriptive right matures into an easement. To burden a party's land with an easement by prescription, the plaintiff must show that his use of the land was: (1) open and notorious; (2) adverse to the owner's claim of right; (3) exclusive; (4) uninterrupted; and (5) continuous for a period of ten years. Brooks v. Jones, 578 S.W.2d 669 (Tex. 1979). Burdening another's property with a prescriptive easement is not well regarded in the law. Wiegand v. Riojas, 547 S.W.2d 287 (Tex. App.—Austin 1977, no writ). A mere use by permission or license never ripens into an easement by prescription, no matter how long it continues. Othen v. Rosier, 226 S.W.2d 622 (Tex. 1950); Dailey v. Alarid, 486 S.W.2d 620 (Tex. App.—Tyler 1972, writ ref'd n.r.e.). Both public and private easements may arise by prescription, but the public easement requires continuous use by the public for ten years, rather than by one or a few individuals. On the other hand, a person may not acquire through adverse possession any right or title to real property dedicated to public use. Tex. Civ. Prac. & Rem. Code § 16.030. In effect the public can acquire a public prescriptive easement over private land, but a private individual cannot acquire a private prescriptive easement across public land.

A public easement may be acquired through condemnation, exercisable through the power of eminent domain by a governmental entity as conferred by statute. Crawford v. Frio County, 153 S.W. 388 (Tex. App.—San Antonio 1913, no writ). The right to take private property for public use through eminent domain has been called an inherent attribute of sovereignty. Texas Highway Dept. v. Weber, 219 S.W.2d 70, 72 (Tex. 1949). The legislature has long conferred the right of eminent domain on pipeline companies and other bodies serving public interests. See, e.g., Imperial Irrigation Co. v. Jayne, 138 S.W. 575 (Tex. 1911); Humble Pipe Line Co. v. State, 2 S.W.2d 1018 (Tex. App.—Austin 1928, writ ref'd). For condemnation procedure, see Tex. Prop. Code §§ 21.011-.016.

Regarding the presumed width of easements acquired by grant or condemnation, see Tex. Nat. Res. Code § 111.0194.

Dedication is the most common means by which a public easement arises. Scott v. Cannon, 959 S.W.2d 712 (Tex. App.—Austin 1998, pet. denied). There are two types of dedication: statutory and common law, but both types require intent on the part of the landowner to dedicate (or set apart) the easement for use by the public and a reciprocal acceptance of the easement by the public. Statutory dedication must be carried out in compliance with all relevant statutes. If land is located in a municipality or its extraterritorial jurisdiction, Chapter 212 of the Texas Local Government Code governs. If the land is located in a rural area (outside of the extra-territorial jurisdiction of a municipality), Chapter 232 of the Texas Local Government Code controls. As for dedications occurring after 1980 in counties having a population of 50,000 or less, Chapter 281 of the Texas Transportation Code addresses the procedure. Chapter 183 of the Texas Natural Resources Code and Chapter 184 of the Texas Parks and Wildlife Code authorize and govern conservation easements that impose restrictions or obligations concerning land use designed to protect natural, environmental, historical, and other specified values.

Common law dedications may be either express or implied. Jezek v. City of Midland, 605 S.W.2d 544, 548-49 (Tex. 1980); however, in 1981 the Legislature abolished, at least prospectively, the common law doctrine of implied dedication as a means of establishing that a particular road running through private property is a public road for counties having a population of less than 50,000. See Act of May 31, 1981, 67th Leg., R.S., ch. 613, §§ 1, 2 & 4, 1981 Tex. Gen. Laws 2412 (current version at Tex. Transp. Code §§ 281.002, 281.003). An express dedication may be declared orally or in writing; however, in a county with a population of less than 50,000 the dedication must be in writing. Tex. Transp. Code § 281.003. For a dedication to the public to occur certain elements must be present: (1) an intention of the landowner to devote his land to public use, (2) a manifestation of the landowner's intention through his words or acts, and a communication to the public or some portion thereof, and (3) an acceptance of the use of the property by the public. Las Vegas Pecan & Cattle Co. v. Zavala County, 682 S.W.2d 254 (Tex. 1984). Acceptance may be implied by the conduct of the public, which binds the dedicator. Viscardi v. Pajestka, 576 S.W.2d 16 (Tex. 1978); Gilder v. City of Brenham, 3 S.W. 309 (Tex. 1887).

The recording of a map or plat, which shows streets or roadways thereon, without more, does not as a matter of law constitute a dedication of such streets as public roadways. Aransas County v. Reif, 532 S.W.2d 131, 134 (Tex. App.—Corpus Christi 1975, writ ref'd n.r.e.), citing County of Calhoun v. Wilson, 425 S.W.2d 846 (Tex. App.—Corpus Christi 1968, writ ref'd n.r.e.). The filing and approval of a plat that undertakes to dedicate streets and roads does not make them public roads since dedication is a mere offer and filing does not constitute an acceptance. Langford v. Kraft, 498 S.W.2d 42, 49 (Tex. App.— Beaumont 1973, writ ref'd n.r.e.).

Easements may terminate through abandonment, cessation of purpose, operation of law, adverse possession, or merger. An easement may be lost by abandonment through a long period of non-use, coupled with intent to abandon. Intent to abandon an easement "must be established by clear and satisfactory evidence." Dallas County v. Miller, 166 S.W.2d 922, 924 (Tex. 1942). Abandonment of an easement will not result from non-use alone; instead, the "'circumstances must disclose some definite act showing an intention to abandon and terminate the right possessed by the easement owner.'" Id. and Milligan v. Niebuhr, 990 S.W.2d 823, 826 (Tex. App.—Austin 1999, no pet.). "Abandonment occurs where the use for which the property is dedicated becomes impossible of execution or the object of the use wholly fails. In general, misuser does not constitute abandonment unless the dedicated use becomes impossible; but an abandonment may be effected by the substitution of new property for the old for a particular use." Adams v. Rowles, 228 S.W.2d 849, 852 (Tex. 1950). An easement may be abandoned by cessation of the defined purpose of the easement or terminated by the completion of the purpose for which it is granted. Woodmen of the World v. Goodman, 193 S.W.2d 739 (Tex. App. – Dallas 1945, no writ). A county road is abandoned when its use has become so infrequent that one or more adjoining property owners have enclosed the road with a fence continuously for at least 20 years. Tex. Transp. Code § 251.057(a); the section does not apply to a road to a cemetery or an access road that is reasonably necessary to reach adjoining real property.

An easement may be extinguished by operation of law, such as by a sale under a deed of trust created prior to the easement. Cousins v. Sperry, 139 S.W.2d 665 (Tex. App.—Beaumont 1940, no writ.). Easements may also be lost by adverse possession; however, continued use of the property subject to the easement by the party granting the easement would not be deemed adverse unless the continued use was inconsistent with and hostile to the grantees and their assigns over the limitation period. Henry v. Roundtree, 354 S.W.2d 604 (Tex. App. – Dallas 1962, writ ref'd n.r.e.).

An easement may also be extinguished by merger. Since the dominant and the servient tenements must be held by different parties for an appurtenant easement to exist, a merger of the two tenements, as in the case of the dominant owner's purchase of the servient tenement, extinguishes the existing easement. Howell v. Estes, 12 S.W. 62 (Tex. 1888).

Land adjacent to the Gulf of Mexico may be encumbered by an easement in favor of the public for the beach area extending from the line of mean low tide to the line of vegetation. Tex. Nat. Res. Code, § 61.011 (Texas Open Beach Act) See also Comment to Standard 5.30, Water Boundaries (discussing Tidelands).

Caution:

An examiner must carefully examine instruments labeled "easements" to determine if the fee to the land is conveyed instead of a mere right of use. Where the instrument conveys the land, and not a "rightof-way" or merely a privilege or easement over the land, it is a conveyance in fee simple, even though such instrument may contain recitals attempting to limit the use of the land for a recited purpose. Texas Elec. Ry. Co. v. Neale, 252 S.W.2d 451 (Tex. 1952). The term "right-of-way" in an instrument is generally construed as describing or denoting only an easement. Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co., 157 S.W. 737 (Tex. 1913). However, in S.H. Oil & Royalty Co. v. Texas & New Orleans RR. Co. 295 S.W.2d 227 (Tex. App. — Beaumont 1956, writ ref'd n.r.e.), the court held that the reservation of "the 100-foot right-of-way" retained in the railroad title in fee to the land and that the term "right-of-way" did not imply the reservation of only an easement.

Source:

Citations in the Comment.

3 Aloysius A. Leopold, Land Titles and Title Examination §§ 331-332, 356, 371-385, 436 (Texas Practice 3d ed. 2005).

History:

Adopted July 17, 2014.

Standard 5.60. Cemeteries

An examiner should identify any cemetery located on the land under search that is evidenced of record or of which the examiner has actual or inquiry notice and advise of third party rights and restrictions on use. The scope of certain title examinations may require the examiner to determine additional information about the cemetery.

Comment:

A "cemetery" is a place used or intended to be used for internment, and includes a graveyard, burial park, mausoleum, or any other area containing one or more graves. Tex. Health & Safety Code § 711.001(4). Implicitly, American Indian historical burial sites would seem to qualify as cemeteries under the Texas Health and Safety Code and will also be protected under the Texas Antiquities Code, Tex. Nat. Res. Code ch. 191. Cemeteries raise two major concerns relevant to title examinations: title and right to access and use.

Title: A cemetery is often owned by a cemetery organization. A "cemetery organization" means: (1) an unincorporated association of plot owners not operated for profit that is authorized by its articles of association to conduct a business for cemetery purposes; or (2) a corporation, as defined by Tex. Health & Safety Code § 712.001(b)(3), that is authorized by its certificate of formation or its registration to conduct a business for cemetery purposes. Tex. Health & Safety Code § 711.001 (7).

An individual, corporation, partnership, firm, trust, or association may not engage in a business for cemetery purposes unless the person is a corporation organized for those purposes. Tex. Health & Safety Code § 711.021(a). Presumably, a lawfully organized and functioning "cemetery organization" has the power to transfer interests in the cemetery, e.g., a deed or lease, in the same manner as the particular entity may do so regarding other land. Plot owners may organize a nonprofit corporation to receive title to land previously dedicated to cemetery purposes. Tex. Health & Safety Code § 711.022(a). See Standard 7.160 for more information on unincorporated associations.

A cemetery organization may acquire by purchase, donation, or devise property consisting of land, a mausoleum, a crematory and columbarium, or other property in which remains may be interred under law and, subject to limitations, adjacent land. Tex. Health & Safety Code § 711.033(a) and (b). A cemetery organization that acquires property may record title to its property with the county clerk of the county in which the property is located if its president and secretary or other authorized officer acknowledge a declaration executed by the cemetery organization that describes the property and declares the cemetery organization's intention to use the property or a part of the property for interment purposes. Tex. Health & Safety Code § 711.033(c). Filing under Subsection (b) is constructive notice as of the date of the filing of the use of the property for interment. Tex. Health & Safety Code § 711.033(d).

A cemetery organization must file the map or plat with the county clerk of each county in which the property or any part of the property is located that complies with Tex. Health & Safety Code § 711.034. Filing a map or plat and a certificate or declaration under this section dedicates the property for cemetery purposes and is constructive notice of the dedication. Id. § 711.034(d).

Property may be dedicated for cemetery purposes. Tex. Health & Safety Code § 711.035(a). Property is considered dedicated cemetery property if: (1) one or more human burials are present on the property; or (2) a dedication of the property for cemetery use is recorded in the deed records of the county where the land is located. Tex. Health & Safety Code § 711.035(g). All property of a dedicated cemetery, including a road, alley, or walk in the cemetery: (1) is exempt from public improvements assessments, fees, and public taxation; and (2) may not be sold on execution or applied in payment of debts due from individual owners and plots. Tex. Health & Safety Code § 711.035(e). Once dedicated, title to the cemetery and the rights of plot owners are not affected by the dissolution of the cemetery organization, nonuse by the cemetery organization, alienation, encumbrance, or forced sale of the property. Tex. Health & Safety Code § 711.035(b).

A cemetery organization may acquire property by eminent domain to intern remains. Tex. Health & Safety Code § 711.033(e). Moreover, a municipality may acquire land by eminent domain "for…providing, enlarging, or improving of a municipally owned cemetery." Tex. Loc. Gov't. Code § 251.001 (1).

One who purchases a lot or plot in a cemetery does not acquire fee simple title. The lot or plot may only be used for burial purposes. Oak Park Cemetery, Inc. v. Donaldson, 148 S.W.2d 994 (Tex. App.— Galveston 1940, writ dism'd); Peterson v. Stolz, 269 S.W. 113 (Tex. App.—Beaumont 1925, writ ref'd).

Access and use: Dedicated cemetery property may only be used for cemetery purposes until the dedication is removed by court order or until the maintenance of the cemetery is enjoined or abated as a nuisance. Tex. Health & Safety Code § 711.035(f).

A railroad, street, road, alley, pipeline, telephone, telegraph, electric line, wind turbine, cellular telephone tower, or other public utility or thoroughfare may be placed through, over, or across a part of a dedicated cemetery only with the consent of: (1) the directors of the cemetery organization that owns or operates the cemetery; or (2) at least two-thirds of the owners of plots in the cemetery. Tex. Health & Safety Code § 711.035(d).

Any person who wishes to visit a cemetery or private burial grounds for which no public ingress or egress is available has the right to reasonable ingress and egress for visitation purposes, subject to reasonable restrictions as established by the landowner. Tex. Health & Safety Code § 711.041(a). Further details are provided in Tex. Health & Safety Code § 711.041(b) and (c). This section does not apply to an unverified cemetery. Tex. Health & Safety Code § 711.041(d).

Although the Texas Transportation Code provides that "a county road is abandoned when its use has become so infrequent that one or more adjoining property owners have enclosed it with a fence for at least 20 years," the statute sets out certain exceptions for roads to cemeteries and where a road is reasonably necessary to access adjoining real property. Tex. Transp. Code § 251.057(b).

Land dedicated for cemetery, church, or other specific purposes may not be used for oil and gas development or for any other purpose that would be considered a desecration or would defeat the use of the land for the dedicated purpose. Any use of land inconsistent with the specific purpose can be enjoined. However, a tract dedicated for a specific purpose can be leased and be a part of a producing unit if there are no surface operations or other activity upon the specially dedicated tract that would impair the dedicated uses of the land. Meadows v. Edwards, 116 S.W.2d 831 (Tex. App.—Texarkana 1938, writ ref'd), and Eternal Cemetery Corp. v. Tammen, 324 S.W.2d 562 (Tex. App.—Fort Worth 1959, writ ref'd n.r.e.).

The Texas Surface Coal Mining and Reclamation Act prohibits surface coal mining operations within 100 feet of a cemetery. Tex. Nat. Res. Code Ann. § 134.022(a)(6).

In general, no remains may be removed from a cemetery without compliance with Tex. Health & Safety Code § 711.004 (f) and (f-1). If the cemetery should become wholly abandoned or unfit as a burial place, or be condemned and all bodies removed, the potential power to sell the underlying plots would again arise free from any restrictions. However, as long as the land is used as a cemetery (bodies are buried, whether it is an active cemetery or not), the rights of the owner(s) therein remain restricted to cemetery purposes. Baker v. Hazel-Fain Oil Co., 219 S.W. 874 (Tex. App.—Fort Worth 1920, writ ref'd).

Caution:

A person who discovers an unknown or abandoned cemetery must file a notice of the discovery of the cemetery as provided in Tex. Health & Safety Code § 711.011(a). "Abandoned cemetery" means a cemetery that is not owned or operated by a cemetery organization, does not have another person legally responsible for its care, and is not maintained by any person. Tex. Health & Safety Code § 711.001(1). "Unknown cemetery" means an abandoned cemetery evidenced by the presence of marked or unmarked graves that does not appear on a map or in deed records. Tex. Health & Safety Code § 711.001(36). A person who discovers an unverified cemetery shall file notice and evidence of the discovery with the Texas Historical Commission as provided in Tex. Health & Safety Code § 711.0111 (a). "Unverified cemetery" means a location having some evidence of interment but in which the presence of one or more unmarked graves has not been verified under § 711.0105(a) or by the Texas Historical Commission. Tex. Health & Safety Code § 711.001(38).

The owner of property on which an unknown cemetery is discovered or on which an abandoned cemetery is located generally may not construct improvements on the property in a manner that would disturb the cemetery until the human remains interred in the cemetery are removed under a written order issued by the state registrar or the state registrar's designee under Tex. Health & Safety Code § 711.004(f) and under an order of a district court.

Source:

Citations in the comment.

History:

Adopted May 4, 2024.

CHAPTER VI

ENTITIES

Standard 6.10. Corporate Existence

Where a corporation is a named party to an instrument in the chain of title, an examiner may presume that the corporation was legally in existence at the time the instrument took effect, if the instrument is executed and acknowledged in the proper form.

Comment:

A corporation may exist in fact without being legally constituted. It is therefore unnecessary, in examining title, to investigate in detail whether all measures have been taken for valid incorporation, so long as the record shows the existence of a corporation de facto. Rufford G. Patton & Carroll G. Patton, Patton on Land Titles § 405 (2d ed. 1957 and Supp. 1997) and Paul E. Basye, Clearing Land Titles §§ 296–301 (2d ed. 1970). See Standard 3.80.

Caution:

This standard conforms to the standard practice of Texas title examiners. However, a deed will not pass title to a grantee not in existence where the contract is for the purchase of land by a corporation not yet in existence, in which case title would vest in those who have subscribed for the stock of the corporation. These subscribers would hold the title in trust for the corporation subsequently formed. William Cameron & Co. v. Truheart, 165 S.W. 58 (Tex. App.—Austin 1914, no writ). In Allday v. Drummond, 280 S.W.2d 381 (Tex. App.—Fort Worth 1955, writ ref'd n.r.e.), the court sustained a conveyance by a foreign corporation at a time when the corporate grantor's charter had been forfeited by the State of Delaware for nonpayment of taxes based, in part, on the fact that the conveyance in question had been of record more than 10 years. Generally, where the subscriber(s) enter into a contract in the name of a corporation that has not yet been formed, that subscriber(s) is personally liable on the contract absent an agreement with the contracting party that the subscriber(s) is not liable. Bibbee v. Root Glass Co. 96 SW 2d 975 (Tex. 1936). See also Davey v. Margarett Jordan Royalties, Inc., 2014 WL 3939669 (Tex. App.—Tyler 2014, pet. denied) (mem. op.).

Source:

Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 12.4 (1960); 43 Aloysius A. Leopold, Land Titles and Title Examination § 22.16 (Texas Practice 3d ed. 2005).

History:

Adopted June 27, 1997.

Standard 6.20. Corporate Authority Presumed

In the absence of actual or constructive notice to the contrary, an examiner may presume that the action of the corporation in acquiring or selling the real property affected by an instrument is within its power.

Comment:

A corporation may convey real property of the corporation as authorized by the board of directors. Tex. Bus. Orgs. Code § 21.462. Acknowledgment by an officer of a corporation that the deed was "executed for the purposes therein expressed" is equivalent to acknowledging that it was the act of the corporation, when the deed purports to be the act of the corporation. Ballard v. Carmichael, 18 S.W. 734 (Tex. 1892). The presumption is rebuttable. Brooks v. Zorn, 24 S.W.2d 742 (Tex. App.—Beaumont 1929, writ dism'd).

Any action taken by a corporation that is beyond the power conferred upon it by its articles of incorporation or by the laws of the state of its incorporation is ultra vires. This may include action contrary to public policy or to some statute expressly prohibiting such action. This excess or abuse of power is ordinarily not within the scope of an examiner to determine or question, without notice of the issue. Tex. Bus. Orgs. Code § 20.002(b).

Source:

Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 12.5 (1960); 4 Aloysius A. Leopold, Land Titles and Title Examination § 22.16 (Texas Practice 3d ed. 2005).

History:

Adopted June 27, 1997.

Standard 6.30. Foreign Corporations

Where a corporation organized and doing business under the laws of another state is a named party to an instrument in the chain of title, an examiner may presume that the corporation was authorized to do business in this state or authorized to acquire and dispose of the real property affected by the instrument, if the instrument is executed and acknowledged in the proper form.

Comment:

At one time, both foreign and domestic corporations were prohibited from owning land in Texas except under certain narrow circumstances. However, those statutory prohibitions were repealed in 1981. See Historical and Statutory Notes at Misc. Corp. Laws Act, Tex. Rev. Civ. Stat. arts. 1302–4.01 to 1302–4.07. Even then a foreign corporation without qualifying to do business in Texas could own and convey title unless its right to do so was challenged by the state. Byerly v. Camey, 161 S.W.2d 1105, 1110 (Tex. App.—Fort Worth 1942, writ ref'd

w.o.m.). Under present law, the holding of title in Texas land by a foreign corporation may constitute the doing of business in Texas, but its failure to register will not "affect the validity of any contract or act" of the corporation. Tex. Bus. Orgs. Code §§ 9.051, 9.202.

Source:

Citations in the Comment. Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 12.6 (1960).

History:

Adopted June 27, 1997.

Standard 6.40. Corporate Seal

An examiner may presume that a corporate seal does not have to appear on an instrument, unless the examiner has actual or constructive notice that the bylaws of the corporation require the seal to have been placed on the instrument.

Comment:

Subject to any approval required by the Texas Business Organizations Code or by the governing documents of the corporation, a corporation may convey land by a deed, with or without the seal of the corporation, that is signed by an officer, authorized attorney-in-fact, or other authorized person. Tex. Bus. Orgs. Code §§ 10.251(a) and (a)(3). A claim for recovery of real property based on the lack of signature of a proper officer, the lack of a corporate seal, failure to show authorization by the board, execution by a dissolved, canceled or forfeited entity, acknowledgment of the instrument in individual capacity, rather than representative capacity, or lack of acknowledgment or jurat that complies with law, is subject to a two-year limitations period. Tex. Civ. Prac. & Rem. Code § 16.033 (a). An instrument affecting real property which contains a defect described in the preceding sentence which has been of record for more than two years in the county where the land is located is considered to have been lawfully recorded and to be notice of its existence on and after the date the instrument is filed. Tex. Civ. Prac. & Rem. Code § 16.033(c). The examiner should consider the Caution in Standard 4.20, relating to this subsection c.

Source:

Citations in the Comment. Tex. Bus. Orgs Code §§ 9.202, 10.253; 4 Aloysius A. Leopold, Land Titles and Title Examination § 22.16 (4.) (Texas Practice 3d ed. 2005).

History:

Adopted June 27, 1997.

Standard 6.50. Authority Of Particular Officers

Where a corporation is a named party to an instrument in the chain of title, an examiner may presume that the persons executing the instrument were the officers they purported to be and that such officers were authorized to execute the instrument on behalf of the corporation, if the instrument is executed and acknowledged in the proper form.

Comment:

A conveyance that is signed and acknowledged by an officer, an authorized attorney-in-fact, or other authorized person of a corporation and recorded is prima facie evidence that the conveyance was duly authorized under the Texas Business Organizations Code and the governing documents of the corporation. Tex. Bus. Orgs. Code § 10.253.

Prior to August 28, 1989, the presumption of corporate authority only extended to conveyances executed by the president or a vice president. Acts 1955, 54th Leg., p. 239, ch. 64. Accordingly, instruments that are executed by another officer prior to the amendments should be accompanied by a showing of the officer's authority. However, if the instrument has been recorded for more than four years (two years, effective September 1, 2007, prospective only), such authority may be presumed. Tex. Civ. Prac. & Rem. Code § 16.033. Act of June 15, 2007, 80th Leg., R.S., ch. 819, § 2, 2007 Tex. Gen. Laws 1695 (nonretroactivity provision).

Caution:

The presumption of corporate authority applies to corporate officers and not to an attorney in fact. The examiner should look to the power of attorney to determine the authority of the attorney in fact. See Standards 8.10 and 8.20.

Source:

Citations in comment; Paul E. Basye, Clearing Land Titles § 293 (2d ed. 1970); Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 12.3 (1960).

History:

Adopted June 27, 1997.

Standard 6.60. Corporate Name or Signer's Representative Capacity Omitted From Signature

Where a corporation appears as a party in the body of the instrument, an examiner may presume that the signature on the instrument by a corporate representative is sufficient notwithstanding the omission of the corporate name or the signer's representative capacity, or both, within the signature block.

Comment:

While Tex. Civ. Prac. & Rem. Code § 16.033 addresses the issue in terms of a limitations period, no reported Texas cases validate corporate deeds where no corporate capacity of the signer is disclosed. However, analogous Texas case law generally holds that a deed executed by an individual acting in an apparent representative capacity passes whatever title the individual has the authority to convey. Regarding the failure of an instrument to reflect the authority of the signer, see generally Hough v. Hill, 47 Tex. 148, 153 (1877); Odell v. Kennedy, 64 S.W. 802 (Tex. App.1901, writ ref'd); Bennett v. Virginia Ranch, Land & Cattle Co., 21 S.W. 126 (Tex. App 1892, no writ); Pride Exploration, Inc. v. Marshall Exploration, Inc., 798 F.2d 864, 866–67 (5th Cir.1986); Sheldon v. Farinacci, 535 S.W.2d 938 (Tex. App.— San Antonio 1976, no writ).

A conveyance by an individual who is an officer of a corporation does not convey the interest of the corporation unless the name of the corporation appears in the instrument as grantor. Rogers v. Ricane Enterprises, Inc., 884 S.W.2d 763 (Tex. 1994). But such a conveyance conveys the individual's interest if the conveyance is not otherwise limited. Aransas Pass Harbor Co. v Manning, 63 S.W. 627 (Tex. 1901). Note that Tex. Civ. Prac. & Rem. Code § 16.033 may cure the problems addressed by this standard.

For further discussion, see comments to Standards 4.10, 4.20, and 6.40.

Source:

Citations in the Comment; 4 Aloysius A. Leopold, Land Titles and Title Examination § 22.16 (Texas Practice 3d ed. 2005; and Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 12.2 (1960).

History:

Adopted June 27, 1997; amended July 17, 2014.

The prior standard provided: "Where a corporation appears as a party in the body of the instrument and the instrument is otherwise properly executed and acknowledged, an examiner may presume that the signature on the instrument by a corporate representative is sufficient notwithstanding the omission of the corporate name over such signature."

Standard 6.70. Name Variances

Although their exact names are not used and variations exist from instrument to instrument, an examiner may presume that a corporation is satisfactorily identified if, from the name(s) used and other circumstances of record, the identity of the corporation can be inferred with reasonable certainty. Variances that an examiner may ordinarily ignore include the addition or omission of the word "the" preceding the name; the use or non-use of the symbol "&" for the word "and"; the use or non-use of abbreviations for "company," "limited," "corporation," "incorporated," "limited liability company," "partnership," and the like; and

the inclusion or omission of all or part of a place or a location. An examiner may exercise a greater degree of liberality with a greater lapse of time and in the absence of circumstances appearing of record that raise reasonable doubt as to the identity of the corporation. An examiner may rely on affidavits and recitals of identity to obviate variances too substantial or too significant to be ignored.

Comment:

The significance of a name variance should be evaluated by ascertaining the actual identity of the corporation, and not on the basis of mechanical perfection. Although Texas courts, in the context of a conveyance, have not addressed the effect of a variance in a corporate name, several cases in which slight name variances were held immaterial amply support this standard. Wandelohr v. Rainey, 100 S.W. 1155, 1157 (Tex. 1907) (holding that an appeal bond was effective despite the omission of the words "of Sherman" from the name of a bank); Texas Electric Service Co. v. Commercial Standard Insurance Co., 592 S.W.2d 677, 683–84 (Tex. App.—Fort Worth 1979, writ ref'd n.r.e.) (holding a suit on a performance bond could be maintained despite the principal's misnomer in the bond as Everman Park Development "Corporation" instead of its true name, Everman Park Development "Co., Inc."); Houston Land & Loan Co. v. Danley, 131 S.W. 1143 (Tex. App. 1910, no writ) (holding that a note executed in the name of "Houston Land & Loan Company" could be enforced against the maker under its true name of "Houston Loan & Land Company"). An entity doing business in Texas is prohibited from using a name that is the same as, deceptively similar to, or similar to, a name of another existing filing entity or that is reserved or registered under the Tex. Bus. Orgs. Code §§ 5.053, 5.102, 5.153, 9.105.

Some examiners choose to rely on information from the Secretary of State that, although not imparting constructive notice, indicates a change in entity name or status, merger, or conversion.

Source:

Citations in comment; Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 12.1 (1960); Oklahoma Title Examination Standards, Std 12.1; Paul E. Basye, Clearing Land Titles § 19 (2d ed. 1970).

History:

Adopted June 27, 1997.

Standard 6.80. Conveyance Of Real Property Held In Name Of Limited Liability Company

If title is held by a limited liability company, an examiner may rely upon a conveyance that is executed by an officer, agent, manager, or member thereof if the conveyance appears to be consistent with the limited liability company's usual way of doing business.

Comment:

The act of an officer, agent, manager, or member of a limited liability company binds the company when that person is apparently conducting in the usual way the business of the company, unless the person lacks authority to act and the purchaser has knowledge of the lack of authority. Tex. Ltd. Liability Co. Act, Tex. Bus. Orgs. Code §§ 101.253, 101.254.

Effective September 1, 2009, a limited liability company agreement may provide for one or more designated series of members, managers, membership interests, or assets to have separate rights, powers, or duties concerning specified property or obligations. Tex. Bus. Orgs. Code § 101.601. The debts, liabilities, obligations, and expenses of a particular series shall be enforceable against the assets of the series only, and none of the debts, liabilities, obligations, and expenses of the limited liability company generally or of any other series shall be enforceable against the assets of a particular series, provided the records, company agreement, and company's certificate of formation conform to applicable requirements. Tex. Bus. Orgs. Code § 101.602. Assets associated with a series may be held directly or indirectly, including being held in the name of the series, in the name of the limited liability company, through a nominee, or otherwise. Tex. Bus. Orgs. Code § 101.603. A series has the power and capacity, in the series' own name, to hold title to assets of the series, including real property and to grant liens and security interests in assets of the series. Tex. Bus. Orgs. Code § 101.605.

Effective September 1, 2019, Tex. Prop. Code § 12.019 authorizes an affidavit of authority to transfer property for transactions involving the transfer of an estate or interest that does not exceed $1 million. A domestic or foreign entity may execute and record an affidavit identifying one or more individuals with authority to transfer on behalf of the entity an estate or interest in real property in the name of the entity if the entity is a limited liability company, a limited partnership, or a professional entity. The affiant may not be identified as the person with authority to transfer, unless the individual executing the affidavit is the sole member of the limited liability company or sole general partner of the limited liability partnership or unless the most recent franchise tax public information report of the entity under Tex. Tax Code § 171.203, available on the date the affidavit is executed, identifies only the affiant and no other person as an officer, director, member, manager, or general partner of the entity. The affidavit must be recorded with the county clerk of the county in which the land is located. A person who in good faith relies on the affidavit without actual knowledge that any material representation in the affidavit is incorrect may enforce the transaction against the entity and the real property. Nothing in this section requires an individual to rely on the affidavit or shall be construed to validate a transfer of an estate or interest that is void by other law. The affidavit expires on the first anniversary of the date on which it was recorded, although an affidavit may be earlier terminated by recording a written termination of the authority.

Source:

Citations in the Comment.

History:

Adopted June 27, 1997; amended October 9, 1999; relocated from Standard 7.50 March 7, 2024. The original standard provided: "If title is held by a limited liability company, an examiner may rely upon the conveyance that is executed by a manager or officer if the conveyance appears to be consistent with the limited liability company's usual way of doing business."

Standard 6.90. Entity Name Change

Unless there is some reason disclosed of record to doubt the truth of the recital regarding a recital of succession by corporate merger or corporate name change (*e.g.,* the corporation was formerly known by another name), an examiner may rely upon a recital addressing a merger or corporate name change contained in a recorded title document properly executed by the surviving or resulting corporation.

Comment:

Both a corporate name change and a merger of two corporations will be evidenced by a certificate of merger or articles of amendment filed with the Secretary of State under Chapter 10 of the Business Organizations Code, or, if a foreign entity, under Business Organizations Code §9.009. If the 9examiner does not rely on a recital of succession as contemplated above, the examiner should secure a certificate of merger or articles of amendment (or if a foreign entity, the Amendment to Registration) and have the same recorded to complete the chain of title.

Caution:

If an examiner encounters a recital regarding a corporate merger or name change in an instrument that has been of record less than four years, then the examiner should consider securing a certificate of merger or articles of amendment (or if a foreign entity, the Amendment to Registration) mentioned in the comment. Cf. Tex. Civ. Prac. & Rem. Code §§16.004, 16.033, and 16.051.

Standard 6.100. Conveyance Of Property Held In Partnership Or Joint Venture Name

When title to real property is held in the name of a partnership or joint venture, an examiner may rely upon a conveyance by a general partner on behalf of the partnership or by a joint venture party on behalf of the joint venture if the conveyance appears to be a transfer in the ordinary course of business of the partnership or joint venture.

Comment:

Each partner is an agent of the partnership for the purpose of its business. The act of a partner performed for the apparent purpose of carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership unless: (1) the partner in fact had no such authority, and (2) the person with whom the partner is dealing had knowledge of the lack of authority. Tex. Bus. Orgs. Code §§ 152.301, 152.302.

The Texas Uniform Partnership Act, effective January 1, 1962, which expired January 1, 1999, applied to all general partnerships formed under its provisions prior to January 1, 1994, except those that timely elected to adopt the Texas Revised Partnership Act. Tex. Rev. Partnership Act, Tex. Rev. Civ. Stat. art. 6132b–11.04. The Texas Revised Partnership Act applies to all partnerships formed on or after January 1, 1994, to all partnerships formed before that date and that, before January 1, 1999, elected to adopt the Act, and to all partnerships formed after December 31, 1998, but before January 1, 2006. The Texas Bus. Orgs. Code, effective January 1, 2006, applies to all partnerships formed on or after January 1, 2006, to all partnerships formed before that date and that elect to adopt the Code, and to all partnerships after December 31, 2009. Tex. Bus. Orgs. Code § 401.001.

A general partner of a limited partnership has the rights and powers of a partner in a partnership without limited partners. Tex. Rev. Ltd. Partnership Act, Tex. Bus. Orgs. Code § 153.152 provides that such rights and powers may be negated by the Code, other limited partnership provisions, or the limited partnership agreement.

Effective September 1, 2019, Tex. Prop. Code § 12.019, subject to certain restrictions and requirements, authorizes certain domestic and foreign entities to identify one or more individuals to transfer an estate or interest of such an entity if the transaction amount does not exceed $1 million. The affidavit must be recorded with the county clerk of the county in which the land is located. A person who in good faith relies on the affidavit without actual knowledge that any material representation in the affidavit is incorrect may enforce the transaction against the entity and the real property. Nothing in this section requires an individual to rely on the affidavit or shall be construed to validate a transfer of an estate or interest that is void by other law. The affidavit expires on the first anniversary of the date on which it was recorded, although an affidavit may be earlier terminated by recording a written termination of the authority.

Source:

Citations in the Comment; 4 Aloysius A. Leopold, Land Titles and Title Examination § 22.17 (Texas Practice 3d ed. 2005).

History:

Adopted June 27, 1997. Formerly Standard 7.10.

Standard 6.110. Authority Of Less Than All Partners Regarding Transactions That Are Not In The Ordinary Course of Business

If a conveyance of a joint venture or a partnership that is executed by less than all of the joint venture parties or partners appears not to be in the ordinary course of business (such as a sale of the sole asset of the partnership), an examiner should review a copy of the partnership or joint venture agreement or other satisfactory evidence to verify the authority of the signing partner or joint venture party to act on behalf of the partnership or joint venture.

Comment:

A partnership is not bound by an act of a partner that is not apparently for the carrying on of the business of the partnership in the usual way, unless that act has been authorized by the partners. Tex. Rev. Partnership Act, Tex. Bus. Orgs. Code § 152.302. Unless authorized by the other partners or unless the other partners have abandoned the business, one or more but less than all the partners have no authority to do any act that is not apparently for carrying on business in the ordinary course. Tex. Bus. Orgs. Code § 152.302. See Comment to Standard 6.100. A general partner of a limited partnership is subject to the restrictions of a partner in a partnership without limited partners. Tex. Rev. Ltd. Partnership Act, Tex. Bus. Orgs. Code § 153.152.

Source:

Citations in the Comment.

History:

Adopted June 27, 1997. Formerly Standard 7.20.

Standard 6.120. Prior Conveyance In Chain By Partnership Or Joint Venture

An examiner may presume the authority of an apparent partner or joint venture party who has executed a prior conveyance in the chain of title on behalf of the partnership or joint venture.

Comment:

See Comment and **Caution** to Standard 6.130, below.

Source:

Citations in the Comment.

History:

Adopted June 27, 1997; amended July 17, 2014. Formerly Standard 7.30.

The prior standard provided: "An examiner may assume the authority of an apparent partner or a joint venture party who has executed a prior conveyance in the chain of title on behalf of the partnership or joint venture."

Standard 6.130. Conveyance Of Partnership Property Held In Name Of Partners

If title to the property is in the name of the partners, the named partners must execute the conveyance.

Comment:

Where title to real property is in the name of one or more of the partners, and without an indication in the instrument transferring title of the person's capacity as a partner or of the existence of the partnership, and without use of partnership property, the property is presumed to be the partner's property under the provisions of Tex. Bus. Orgs. Code § 152.102.

See Comment to Standard 6.100.

Caution:

Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which the partner is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom the partner is dealing has knowledge of the fact that the partner has no such authority.

An act of a partner that is not apparently for the carrying on of the partnership business or business of the kind carried on by the partnership does not bind the partnership unless authorized by the other partners. Tex. Rev. Partnership Act, Tex. Bus. Orgs. Code §§ 152.301, 152.302, 153.152. See Comment to Standard 6.100.

Source:

Citations in the Comment.

History:

Adopted June 27, 1997. Formerly Standard 7.40.

Standard 6.140. Unincorporated Associations

An examiner should investigate how an unincorporated non-profit association has been organized and determine the necessary authority to convey real property of the association.

Comments

Comment:

Unincorporated non-profit associations include societies, clubs, and simple unorganized associations. Prior to September 1, 1995, an unincorporated non-profit association, as distinguished from a corporation, could not acquire title in the associational name but held title to real property either in the names of the members or, more commonly, by elected trustees, O.K.C. Corporation v Allen, 574 S.W.2d 809 (Tex. App.—Texarkana 1978, writ ref'd n.r.e.). On September 1, 1995, the Texas Uniform Unincorporated NonProfit Association Act (TUNA) was adopted. It provides a means for an unincorporated association to hold title to real property. An unincorporated non-profit association of three or more members can file of record a Statement of Authority setting forth the name of the association, its address, and the name or title of the person authorized to hold title and transfer real property rights. Tex. Bus. Orgs. Code § 252.005. The Statement of Authority must be executed by someone other than the person who is authorized to hold title and transfer real property rights. A bona fide purchaser or lender may conclusively rely on a properly executed Statement of Authority. Id. Effective January 1, 2006, TUNA was codified as Tex. Bus. Orgs. Code Chapter 252.

Absent organizational documents that create a legal entity, a document granting authority to trustees, or a Statement of Authority, all members of a unincorporated non-profit association must execute a conveyance or encumbrance. Case law does not provide guidance on how to establish whether all members have been identified and have executed a conveyance or encumbrance, but an examiner may wish to consider whether title has been established by adverse possession. See Standards Ch. 18.

Churches are organized in many ways, from loose associations, to congregation-controlled, to hierarchical organizations for which only one person, or specified persons, have authority to execute documents regarding real property. Title to each piece of real property must be investigated to determine the form of ownership and authority to convey or encumber the real property.

Certain fraternal orders may be organized for charitable benevolent purposes and may be incorporated as special-purpose corporations. Tex. Bus. Orgs. Code Chapter 23. Non-profit institutions, including those devoted to charitable, benevolent, religious, patriotic, civic, cultural, missionary, education, scientific, social, fraternal, athletic, or aesthetic purposes may be organized as non-profit corporations under Tex. Bus. Orgs. Code Chapter 22.

For additional information on cemeteries, see Standard 5.60.

Source:

Citations in the Comment.

History:

Adopted March 6, 2026.

CHAPTER VII

[RESERVED]

CHAPTER VIII

POWERS OF ATTORNEY

Standard 8.10. Validity Of Instrument Executed By An Agent

An examiner should determine that the power of attorney granted sufficient authority to the agent and that the power of attorney was in effect on the date of the agent's act.

Comment:

There are two types of powers of attorney: a "special" power of attorney, and "general" or "universal" power of attorney. In a special power, the principal grants authority to the agent (also called an attorney-in-fact) to perform a specific act or acts, such as selling the principal's residence. In a general or universal power, the principal grants the agent (attorney-in-fact) broad or universal powers, sometimes expressed as authority "to exercise all legal powers possessed by the principal." A power of attorney signed on or after September 1, 1993, that complies with Section 490 of the Durable Power of Attorney Act, Tex. Estates Code §§ 751.001–752.115) (a "statutory power"), provides an abbreviated form for delegating general and special powers. The authority granted to an agent to convey land must be in writing, Tex. Prop. Code § 5.021, and if properly acknowledged, the power of attorney may be recorded.

In examining a document signed by an agent for a principal, an examiner should determine that the power of attorney granted sufficient authority to validate the act of the agent and that it was not revoked prior to the act. Causes of revocation include a specific act of revocation by the principal, the terms of the power-of-attorney document, the death of the principal, or the incapacity of the principal unless the power-of-attorney provides that it survives incapacity. In the absence of information to the contrary, an examiner frequently relies upon an affidavit from a person knowledgeable of the facts that on the date of the agent's act the principal was alive, that the power of attorney had not been revoked, and that the principal was not incapacitated.

The problems of revocation by incapacity were largely eliminated effective January 1, 1972, after which time a power of attorney, whether a special or general power, could be expressly made "durable." The Durable Power of Attorney Act provides that a durable power is one that is in writing, signed by the principal, and acknowledged and that contains the words: "This power of attorney is not affected by subsequent disability or incapacity of the principal," or "This power of attorney becomes effective on the disability or incapacity of the principal," or similar words showing the intent of the principal. Although not affected by

disability, a durable power is revoked: (1) by the appointment of a permanent guardian (and in some instances the appointment of a temporary guardian) of the estate of the principal, Tex. Estates Code § 751.052; (2) by the divorce or annulment of the marriage of the principal and the agent unless otherwise provided by the durable power (Tex. Estates Code § 751.053); or (3) by the death of the principal, Cleveland v. Williams, 29 Tex. 204 (1867).

Effective September 1, 2017, Tex. Estates Code § 751.021 provides that, unless the durable power of attorney provides otherwise, each co-agent may exercise authority independently of the other co-agent. These Sections are retroactively effective as to existing powers of attorney for any acts by taken after September 1, 2017, even though the agents had been appointed prior to this date. See Acts 2017, 85th Leg., 834 (H.B. 1974), § 3, effective September 1, 2017. Tex. Estates Code § 751.023 now expressly authorizes a principal to designate successor agents, in the event the initially identified agent resigns, dies, becomes incapacitated, or is not qualified or declines to serve.

Effective September 1, 2017, a trustee may appoint an agent. Tex. Prop. Code § 113.018. Prior to the effective date, unless the trust agreement expressly grants the power of delegation, a trustee could not delegate the trustee's authority to another. See Comment to Standard 9.10.

The Durable Power of Attorney Act provides that an affidavit executed by an agent under a durable power is conclusive proof as between the agent and a person, other than the principal or the principal's personal representative, that the power had not been revoked or terminated at that time if the affidavit provides that the agent did not, at the time of the exercise of the power, have actual notice of the termination of the power by: (1) revocation; (2) the principal's death; (3) the principal's divorce or annulment of the marriage of the principal in the circumstance where the agent was the spouse of the principal; or (4) the qualification of the guardian of the estate of the principal. Tex. Estates Code § 751.055(a).

Tex. Estates Code § 751.151 requires the recordation of a durable power for a real property transaction in the county where the property is located, not later than the 30th day after the date the transaction instrument is filed for recording. No consequence is provided for failing to comply with this deadline.

Special powers of attorney are strictly construed. The following examples illustrate how Texas courts have applied this rule of strict construction:

(a) A "naked" power to sell does not include the right to execute an oil and gas lease. Bean v. Bean, 79 S.W.2d 652, 654 (Tex. App.—Texarkana 1935, writ ref'd);

(b) The power to sell land does not authorize a conveyance in exchange or a partition of lands. Frost v Erath Cattle Co., 17 S.W. 52, 54 (Tex. 1891); and

(c) The power to sell does not include the power to encumber. First Nat'l Bank v. Blades, 93 F.2d 154, 155 (5th Cir. 1937).

Nevertheless, the Durable Power of Attorney Act provides that a power that grants authority concerning "real estate transactions" would permit the actions involved in the three examples above. Tex. Estates Code §§ 752.051, 752.102.

Courts construe a general power of attorney more liberally than a special power. For example, Dockstader v. Brown, 204 S.W.2d 352, 353 (Tex. App.—Fort Worth 1947, writ ref'd n.r.e.) involved a power of attorney authorizing a party "to do any and every act, and exercise any and every power that [the principal] might, or could do or exercise through any other person." Since there was no reference to any specific acts and since it was not qualified in any manner, the court held that the language quoted authorized any lawful act.

Where the authority of an agent is not documented by any instrument of record, but the deed purportedly executed under the authority has been of record for at least twenty years, the examiner may presume that the recited authority is valid under the "ancient document" rule. See discussion in Comment to Standard 13.40.

An agent cannot delegate its authority without express power to that effect. C. H. McCormick & Bro. v. Bush, 38 Tex. 314 (1873).

Military powers of attorney are exempt from certain formalities that would otherwise be required by state law. 10 U.S.C. § 1044(a)-(b).

Caution:

As originally enacted in 1993, Tex. Estates Code § 752.102 did not include the authority to execute conveyances of oil, gas and other minerals under a statutory power. Thus, the holding in Bean v. Bean (discussed above) may apply to statutory powers created through August 31, 1997. Effective September 1, 1997, the Act was amended to authorize the holder of a statutory power concerning "real estate transactions" to execute oil, gas and mineral leases, along with the other instruments identified in the statute. See Tex. Estates Code § 752.102(a)(9).

A power of attorney coupled with an interest, whether durable or not, cannot be revoked, even by death of the principal. A power coupled with an interest arises when the agent receives an interest in the property that is the subject of the agency contemporaneous with the power of attorney. Superior Oil Co. v. Stanolind Oil & Gas Co., 230 S.W.2d 346 (Tex. App.—Eastland 1950), aff'd, 240 S.W.2d 281 (Tex. 1951). Because powers of attorney coupled with an interest are rare, there is little relevant case law.

Effective September 1, 2015, Tex. Estates Code § 751.151 was amended to provide that a durable power of attorney must be filed not later than 30 days after an instrument executed under the power was filed. The legal effect of this amendment is uncertain.

Effective September 1, 2017, a modified Uniform Power of Attorney Act and a revised Uniform Fiduciary Access to Digital Assets Act became effective. Tex. Estates Code Subtitle P, Ch. 751 through 753. Revisions to the above comments will be made in the future.

Source:

Citations in the Comment; 4 Aloysius A. Leopold, Land Titles and Title Examination §§ 22.19–22.23 (Texas Practice 3d ed. 2005).

History:

The current Standard 8.10 effective June 5, 2012, replaces the prior Standard 8.10 and Standard 8.20, each of which became effective June 27, 1997.

Prior Standard 8.10 provided: An examiner should determine that a power of attorney grants sufficient authority to validate the actions of the agent. Any instrument affecting real estate may be executed by an attorney in fact, duly appointed and empowered, unless: (1) The power of attorney was not executed in writing; (2) The principal has died or an order of a court has appointed a guardian of the principal's person or estate, or both, unless the court order otherwise provides; or (3) The power of attorney has expired or terminated by its own terms or by operation of law. A power of attorney and instruments executed by one having apparent agency power may qualify as "ancient documents."

Standard 8.20. [Repealed]

History:

Standard 8.20 was replaced by new Standard 8.10, which combines previous Standard 8.10 and Standard 8.20, effective June 5, 2012.

Prior Standard 8.20 provided: "An examiner should determine that a power of attorney grants sufficient authority to validate the actions of the agent. Any instrument affecting real estate may be executed by an attorney in fact, duly appointed and empowered, unless the attorney in fact or the third party dealing with the attorney in fact had actual notice that:

(a) The power of attorney was not executed, acknowledged, and recorded as required by law;
(b) A revocation of the power of attorney has been recorded in the same office in which the instrument containing the power of attorney was recorded;
(c) The principal has died or an order of a court has appointed a guardian of the principal's estate, unless the court order otherwise provides;
(d) The principal was not disabled or incapacitated, as defined by the power; or
(e) The power of attorney has expired or terminated by its own terms or by operation of law."

CHAPTER IX

CONVEYANCES INVOLVING TRUSTEES

Standard 9.10. Powers Of Trustee

An examiner should confirm the identity and powers of the trustee and whether the trust was in effect at the time of a trust transaction.

Comment:

Prior to April 19, 1943, the effective date of the Texas Trust Act, a trustee had only those powers granted by or reasonably implied from the trust instrument. Under the current Texas Trust Code, a trustee of an express trust has the powers enumerated in Texas Prop. Code §§ 113.003–.030—including the power to convey, lease, and encumber trust property and any additional powers that are necessary or appropriate to carry out the purposes of the trust—unless limited by the trust instrument, a subsequent court order, or another provision of the Code that conflicts with or limits the power. Tex. Prop. Code §§ 113.001-.002. Although subject to certain limitations, the terms of an express trust prevail over any provision of the Code. Tex. Prop. Code § 111.0035(b). Thus, an examiner should examine both the trust instrument and the Code to confirm that the trustee had the authority to perform the act under consideration.

Where the authority of a trustee is not documented by any instrument of record, but the deed by the trustee has been of record for at least twenty years, the examiner is aided by a presumption of the grantor's recited authority under the "ancient document" rule. See discussion in Comment to Standard 13.40. An examiner may also be aided by the statutory requirement that an action to recover property conveyed by an instrument signed by a trustee without record of the authority of the trustee or proof of the facts recited in the instrument must be brought within four years of the date that the instrument was "recorded," if it was recorded before September 1, 2007, or within two years of the date that the instrument was "filed for record," if it was filed on or after September 1, 2007. Tex. Civ. Prac. & Rem. Code § 16.033(a)(7). Act of June 15, 2007, 80th Leg., R.S., ch. 819, § 2, 2007 Tex. Gen. Laws 1695 (nonretroactivity provision).

If the purpose of an examination concerns dealing with a trustee over an extended period of time (e.g., paying the trust proceeds from oil or gas production), then the examiner may need to review the trust instrument to: (1) identify successor trustees; (2) determine what facts may cause the trust to terminate; and (3) identify the beneficiaries of the trust property at the time of trust termination.

Section 114.081(b) of the Texas Property Code provides that persons dealing with a trustee in good faith may, in lieu of examining the actual trust agreement, rely on a certification of trust containing the information set forth in Section 114.086. See Tex. Prop.

Code § 114.081(b); see also Valentine v. Interactive Brokers LLC, No. 01-15-00943-CV, 2017 Tex. App. LEXIS 8023, 2017 WL 3597735, at *14 n.6 (Tex. App.—Houston [1st Dist.] Aug. 22, 2017, pet. denied) (mem. op.). This certification of trust should be contain the following information: (1) a statement that the trust exists and the date the trust instrument was executed; (2) the identity of the settlor(s); (3) the identity and mailing address of the currently acting trustee; (4) one or more powers of the trustee or a statement that the trustee's powers include at least all the powers granted to a trustee by Subchapter A, Chapter 113 of the Texas Property Code; (5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust; (6) the authority of co-trustees, if any, to sign or otherwise authenticate and whether all or less than all of the co-trustees are required in order to exercise the powers of the trustee; and (7) the manner in which title to trust property should be taken. Additionally, such certification of trust should be signed or otherwise authenticated by the trustee and must indicate that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect. Tex. Prop. Code § 114.086(a)-(c). The certification should be dated and filed for record contemporaneously with the deed signed by the trustee as grantor.

Historically, unless the trust agreement expressly granted the power of delegation to the trustee, Transamerican Leasing Co. v. Three Bears, Inc., 586 S.W.2d 472 (Tex. 1979), the general rule was that a trustee may not delegate the trustee's authority to another. West v. Hapgood, 174 S.W.2d 963 (Tex. 1943). At least for purposes of conveying or encumbering real property, an examiner should not presume that this general rule has been altered by the Texas Trust Code. See, e.g., Tex. Prop. Code §§ 114.081, 114.086, 117.004, 117.011. Accordingly, a examiner encountering a conveyance by a person purporting to act as agent or attorney in fact for a trustee must, in addition to examining the power of attorney or other document granting the power, carefully review the trust agreement to verify that it expressly enables the trustee to delegate the trustee's discretionary authority.

Effective June 1, 2017, except where the trust expressly prohibits it, a trustee may grant an agent powers respecting trust property to act for the trustee in any lawful manner for purposes of real property transactions, including all duties and powers to execute and deliver legal instruments relating to the sale and conveyance of the property. Tex. Prop. Code § 113.018 (b), (c), and (h). The delegation must be documented in a written instrument acknowledged by the trustee and terminates six months after the date of the acknowledgment unless terminated earlier by the death or incapacity of the trustee, the resignation or removal of the trustee, or a date specified in the delegation. Tex. Prop. Code § 113.018 (e) and (f). The changes to the section do not purport to ratify a delegation of the trustee's authority made prior to the effective date.

If property is conveyed to a person identified as "trustee" but the conveyance does not identify the trust or disclose a beneficiary, then the examiner should follow the guidance of Standard 9.20, its Comment, and Caution.

Source:

Citations in the Comment; Oklahoma Title Examination Standards, Std 15.1; 3A Aloysius A. Leopold, Land Titles and Title Examination § 12.36 (Texas Practice 3d ed. 2005).

History:

Adopted June 27, 1997; amended June 27, 2008; amended June 11, 2010.

The prior standard: "An examiner must confirm the identity and powers of the trustee and whether the trust was in effect at the time of a trust transaction.

The amended standard of June 27, 2008, provided: "Unless a trustee's power is restricted by the trust instrument or by law, the trustee of an express trust has the power to convey, lease, and encumber the real property interest that is subject to the trust."

The original standard provided: "Unless a trustee's power is restricted by the trust instrument or by law, the trustee of an express trust has the power to convey, lease, and encumber the real property interest that is subject to the trust. A trustee's act binds the trust and all beneficiaries as against successors who are without actual or constructive notice of restrictions or limitations upon the trustee's powers."

Standard 9.20. Title As "Trustee" Without Further Identification Of Trust

If property is conveyed to a person identified as "trustee," but the conveyance does not identify the trust or disclose the names of the beneficiaries, an examiner may presume the authority of the trustee to convey, transfer or encumber the title to the property.

Comment:

The mere designation of a party as "Trustee," "as Trustee," or "Agent" following the name of a grantee, without additional language identifying a trust, does not in itself create a trust and it does not give notice or put an examiner upon inquiry that a trust exists or that any person other than the present grantee has a beneficial interest. Barker v. Temple Lumber Co., 12 S.W.2d 175 (Tex. Comm'n App.1929, judgm't affirmed), rev'd on rehearing on other grounds, 37 S.W.2d 721 (Tex, 1931), 137 A.L.R. 460, 462–65 (1942); Nolana Dev. Ass'n. v. Corsi, 682 S.W.2d 246, 249 (Tex. 1984). This "blind trustee" concept was first enacted into statutory form as a conveyancing statute. Acts 1925, 39th Leg., ch. 120, p. 305, § 1. This statute was used for many years to avoid filing trust instruments of record and to escape the formality of creating a trust where title was held by a "nominee." For example, when a conveyance is made to "Jack Smith, Trustee" and the creating instrument does not identify a trust or the name of any beneficiary, the trustee may "convey, transfer, or encumber the title of the property without subsequent question by a person who claims to be a beneficiary under a trust or who claims by, through, or under any undisclosed beneficiary or by, through, or under the person designated as trustee in that person's individual capacity." Tex. Prop. Code § 101.001. Moreover, in this situation, "the trust property is not liable to satisfy the personal

obligations of the trustee." Tex. Prop. Code § 101.002. See also Tex. Prop. Code § 114.082 and Gulf Production Co. v. Continental Oil Co., 164 S.W.2d 488 (Tex. 1942).

If there is no subsequent conveyance out of the "blind trust" and no other evidence that a trust exists, record title to the property interest in question is deemed to be in the named trustee or the trustee's successors. Jordan v. Exxon Corp., 802 S.W.2d 880 (Tex. App.—Texarkana 1991, no writ).

Caution:

If a conveyance to a person designated as a trustee identifies the trust or discloses the name of the beneficiary, then an examiner should follow the guidance of Standard 9.10 and its Comment.

A governmental entity (defined as a state agency or political subdivision) may not purchase property held in trust until the governmental entity receives from the trustee a copy of the trust agreement identifying the true owner of the property. Likewise, a governmental entity may not sell property to a trustee until the governmental entity receives from the trustee a copy of the trust agreement identifying the person who will be the true owner of the property. In either case, the trustee must identify the true owner of the property to the governmental entity. Tex. Gov't Code § 2252.092. If a governmental entity fails to comply with this provision, the conveyance is void. Id. § 2252.093.

Source:

Citations in the Comment; Tex. Prop. Code §§ 101.001, 101.002, 114.082, 114.0821; 5 Aloysius A. Leopold, Land Titles and Title Examination § 32.10 (Texas Practice 3d ed. 2005).

History:

Adopted June 27, 1997.

Standard 9.30. Grant to Trustee is Valid

An examiner may presume that a deed conveying land to a trustee passes title to the named trustee in trust even though the character of the trust or the identity of the beneficiaries is not stated in the deed.

An examiner may presume that a deed conveying land to a trust, even though not a legal entity, passes title to the trustee in trust.

Comment:

No notice is imputed by use of the word "trustee" nor is there a question of the rights of undisclosed beneficiaries since the deed as a whole is not evidence of the creation of a

trust. Jordan v. Exxon Corporation, 802 S.W. 2d 880 (Tex. App.—Texarkana 1991, no writ); Barker v. Temple Lumber Co., 12 S.W. 2d 175 (Tex. Comm'n. App. 1929, reversed on other grounds, 37 S.W. 2d 721 (Tex. 1931). A grant to a county judge, as grantee, conveying title to a tract "for school purposes," is effective as a grant in trust in fee simple that designates the beneficiary but does not express conditions. Wilson v. County Trustees of Eastland County, 229 S.W. 669 (Tex. App.—El Paso 1921, writ dism'd w.o.j.).

Frequently, title examiners are confronted with conveyances in which a named "trust" (e.g., the "John Smith Trust") is identified as the grantee or in which a "trust," executed by the trustee, is the grantor. Since a trust is not a legal entity like a corporation or partnership, but is instead a legal relationship, Huie v. DeShazo, 922 S.W.2d 920, 926 (Tex. 1996), the validity of such a conveyance has been subject to question for failure to meet the fundamental requirement that a grantor and grantee be a named legal entity. The court in Fugedi v. Initram, Inc., No. 21-40365, 2022 WL 3716198 (5th Cir. Aug. 29, 2022) (per curiam), rejected a challenge to a deed's validity asserted on that basis. The court held that a deed, in which "CARB Pura Vida Trust" was named as grantee, was not void, but was valid because, although the grantee was a nonentity incapable of holding property itself, it must be inferred that the trustee, as the only entity capable of holding property for the benefit of the trust, was the party to be named as grantee. The court in *Fugedi* also approved the use of a correction instrument to add the trustee when no trustee was named. In 2023, the Texas Legislature passed a statute that amended the property code consistent with *Fugidi*. Tex. Prop. Code § 114.087).

Caution:

If a deed goes further and attempts to identify the beneficiaries or the method of selection of trustee, a failure to adequately describe either may be void for lack of certainty. Nolte. V. Meyer, 15 S.W. 276 (Tex. 1891).

Source:

Citations in the Comment and Caution; Texas Practice Series, V. 5, Land Titles and Title Examination, 3rd, Aloysius A. Leopold, Sections 32.10 and 32.11.

Adopted: July 1, 2026

CHAPTER X

CAPACITY TO CONVEY

Standard 10.10. Minority

In the absence of actual or constructive notice to the contrary, a grantor is presumed to be an adult. If it appears that a person acquired title as a minor, an examiner should first determine that a conveyance from that person occurred after: (1) the person attained the age of majority (18 years of age) as measured at the execution date of the conveyance;

(2) the person had the disability of minority removed by a court of competent jurisdiction; or (3) the person was legally married.

The right of disaffirmance is not lost by a conveyance to an innocent purchaser; however, a conveyance that has not been disaffirmed within a reasonable time after the minor attains the age of majority is valid. Ratification after attaining the age of majority is unnecessary to affirm the conveyance.

Comment:

Texas law presumes that any party to a legal contract has sufficient capacity. Thus, a deed executed by a minor is voidable, not void, and conveys title unless and until set aside. Neill v. Pure Oil Co., 101 S.W.2d 402 (Tex. App.—Dallas 1937, writ ref'd). In order to avoid a conveyance that a minor executed while the minor was under the disability of minority, the minor must disaffirm the conveyance within a reasonable time after attaining the age of majority or after removal of disability or after marriage. Searcy v. Hunter, 17 S.W. 372, 373 (Tex. 1891).

A minor who has been legally married or whose disabilities have been removed by a court has the capacity and power of an adult. Texas Fam. Code §§ 1.104, 31.006.

Caution:

The question of reasonable time is one of fact, not of law. There is no certain period for the minor to disaffirm, but what is a "reasonable time" is determined by all facts and circumstances. Miller v. McAden, 253 S.W. 901 (Tex. App.—Austin 1923, no writ). Examples of attempts to disaffirm that were found not to have occurred within a reasonable time are as follows:

(a) Disaffirmance about one year after reaching majority. Askey v. Williams, 11 S.W. 1101, 1102 (Tex. 1889).
(b) Waiting two years after reaching majority. Ferguson v. Houston, E. & W. T. Ry. Co., 11 S.W. 347, 348 (Tex. 1889).
(c) Minor accepted proceeds of sale and waited nearly three years to disaffirm. Daimwood v. Driscoll, 151 S.W. 621, 623 (Tex. App.—San Antonio 1912, writ ref'd).

A conveyance made by a minor cannot be disaffirmed or repudiated, nor the deed or instrument canceled, by the minor until after the minor attains the age of majority. Any documentation indicating ratification by the minor after the minor has reached majority should satisfy an examiner. An examiner should carefully consider whether further curative action is necessary when documentation indicates a disaffirmance or repudiation by the minor after the minor has reached majority.

In general, if a legally married minor is divorced or if the marriage is annulled, the minor retains capacity under Tex. Fam. Code § 1.104. See generally John J. Sampson, Harry

L. Tindall, et al., Sampson & Tindall's Tex. Family Code Annot., Comment to § 6.306 (2001). The capacity of the minor is uncertain where the marriage of a minor is judicially declared void in a suit to declare the marriage void by reason of a prior existing marriage or of incest. See Texas Fam. Code §§ 6.201—6.203. In these instances, because the marriage is void, the minor may have never obtained capacity by such marriage in the first place; however, the issue of such minor's capacity may turn on whether the minor knew that the marriage was incestuous or bigamous. Id.

Source:

Citations in the Comment; 5 Aloysius A. Leopold, Land Titles and Title Examination § 32.22 (Texas Practice 3d ed. 2005); Oklahoma Title Examination Standards, Std. 4.1.

History:

Adopted June 27, 1997; amended July 17, 2014; amended March 6, 2026. The original standard provided:

"In the absence of actual or constructive notice to the contrary, a grantor is presumed to be an adult. If it appears that a person acquired title as a minor, an examiner must first determine that a conveyance from that person occurred after: (1) the person obtained the age of majority as defined at the time of the conveyance; (2) the person had the disability of minority removed by a court of competent jurisdiction; or (3) the person was legally married. A conveyance that has not been disaffirmed within a reasonable time after the minor attains the age of majority is valid."

Standard 10.20. Mental Capacity

In the absence of actual or constructive notice to the contrary, an examiner may presume that a grantor has the mental capacity to convey.

Comment:

Texas law presumes that a grantor of the deed has sufficient mental capacity at the time of execution to understand the grantor's legal rights. Turner v. Hendon, 269 S.W.3d 243, 247 (Tex. App.—El Paso 2008, no pet.); Lemus v. Aguilar, 491 S.W.3d 51, 59 (Tex. App.—San Antonio 2016, no pet.). The party alleging incapacity has the burden of proof. Bradshaw v. Naumann, 528 S.W.2d 869, 873 (Tex. App.— Austin 1975, writ dism'd). An insane person's deed is voidable, not void, and analogous to a deed by a minor. Williams v. Sapieha, 61 S.W. 115, 116 (Tex. 1901).

Upon the adjudication of incompetency of a spouse, the other spouse acquires full power to manage, control, and dispose of the community property. Tex. Estates Code § 1353.002.

If the lack of capacity has been established, restoration of capacity (and termination of the other spouse's full power of management) may be accomplished under Tex. Estates Code § 1353.103.

Caution:

If capacity is challenged, the legal standards in Texas for determining the existence of mental capacity for purposes of executing a will or a deed are substantially the same as mental capacity for executing a contract. To have the requisite mental capacity, the testator or grantor must appreciate the effect of what is happening and understand the nature and consequences of the act and of the business being transacted. Bach v. Hudson, 596 S.W.2d 673, 675–76 (Tex. App.—Corpus Christi 1980, no writ).

Source:

Citations in the Comment; Oklahoma Title Examination Standards, Std. 4.2; 5 Aloysius A. Leopold, Land Titles and Title Examination § 32.15 (Texas Practice 3d ed. 2005).

History:

Adopted June 27, 1997.

Standard 10.30. Guardians and Related Statutory Alternatives

In reviewing a sale or encumbrance of property by a guardian or other authorized person, an examiner should determine that all statutory requirements have been met.

Comment:

In considering a guardian's sale of property, including leases and mineral leases, or mortgage or other encumbrance of property, the examiner should first review the documents involved in the appointment of the guardian. Among these are: (1) the application for appointment; (2) the citation and return, (3) the order appointing the guardian, and (4) the guardian's oath and bond.

The examiner must also determine that the guardian's appointment was in effect at the time of the sale or lease. Unless otherwise discharged, a guardian remains in office until the estate is closed. Tex. Estates Code §§ 1202.001, 1204.001. A guardianship terminates in any of the following circumstances:

(a) when the ward dies and, if the ward was married, the ward's spouse qualifies as a survivor in community;
(b) when the ward is found by the court to have full capacity, or sufficient capacity with supports and services, to care for himself or herself and to manage the ward's property;

(c) when a minor ward marries, reaches majority (age 18), or has disabilities removed;
(d) when a court issues an order of restoration in the case of an incapacitated ward;
(e) when a court determines the guardianship is no longer necessary; or
(f) when the court determines that the ward no longer must have a guardian appointed to receive funds due to the ward from any governmental source.

Specific requirements relating to sales are found in Tex. Estates Code § 1158.001 et seq. In general, a guardian's sale requires:

(a) an application by a duly appointed and acting guardian for authority to sell,
(b) a citation and return,
(c) an order of sale,
(d) notice as required by the court in the order of sale,
(e) a sale by the guardian, as evidenced by a report of sale,
(f) an additional guardian's bond if the general bond is inadequate,
(g) an order or decree confirming sale, and
(h) a conveyance by the guardian.

The examiner should review each of the above documents. If two years have elapsed from the date of the decree confirming the sale, an examiner may rely on the decree as evidence that the requirements of the order of sale were met unless, on its face, the decree indicates that the sale was not conducted in the manner required. See Tex. Estates Code §§ 55.251, 55.252. If the two-year period has not elapsed, evidence of compliance with the requirements of the order of sale is necessary.

For provisions relating to mineral leases, see Tex. Estates Code §§ 1160.001–1160.254. For provisions relating to mortgages, see Tex. Estates Code §§ 1151.201–1151.203. For provisions relating to gifts, see Tex. Estates Code §§ 1162.001–1162.053. A guardian may be appointed as the guardian of the person of the ward or as guardian of the estate of the ward or both. A temporary/emergency guardian may also be appointed for the duration of a proceeding to appoint a guardian of the person or guardian of the estate.

In general, only the guardian of the estate of the ward may sell or lease the property of the ward. Subject to statutory limitations on the net value of the minor's interest (not exceeding $250,000), a minor's property may be sold by a parent or the managing conservator without the appointment of a guardian. Tex. Estates Code § 1351.001. Similarly, subject to statutory limitations on the net value of the ward's interest (not exceeding $250,000), the property of a ward, not just that of a minor, may be sold by the guardian of the person of the ward without appointment as guardian of the estate of the ward. Tex. Estates Code § 1351.052. Both statutes require that these sales be approved by a court. See also Tex. Estates Code Chapter 1352 (addressing mortgage of minor's interest without guardianship) and Chapter 1353 (addressing management and control of incapacitated spouse's property).

For related standards, see Standard 10.10, Minority, and Standard 10.20, Mental Capacity. The holder of a durable power of attorney may have authority to convey the property of an incapacitated person. See Chapter VIII, Powers of Attorney. However, if a guardian of the estate of the ward has been appointed, the durable power of attorney is no longer effective. Tex. Estates Code § 751.133.

Caution:

An order or decree confirming sale may not be issued until five days after the date the report of sale is filed. Tex. Estates Code §§ 1158.552, 1158.556. The appointment of a guardian in another jurisdiction does not give the guardian any authority over a ward's estate in Texas. American Surety Co. v. Fitzgerald, 36 S.W.2d 1104 (Tex. App.—Dallas 1931, writ ref'd). A nonresident guardian may be appointed by a Texas court, without notice or citation, in the manner prescribed by Tex. Estates Code § 1252.051, and a foreign guardian may apply for an order to sell property having a value not exceeding $250,000 without appointment in Texas. Texas Estates Code § 1351.052.

The statutes governing guardianships were extensively modified effective September 1, 1993. Thus, when reviewing more recent sales by guardians, an examiner should be cautious in relying upon court decisions based upon the law that existed prior to that date. Like the current statutes, prior law required that the guardian be duly appointed and acting and required court orders authorizing and approving the sale. An examiner encountering a guardian's sale made under earlier statutes should verify compliance with those statutes.

Source:

Citations in the comment.

History:

Adopted June 22, 2007; amended July 17, 2014. The prior standard provided: "In reviewing a sale or encumbrance of property by a guardian, an examiner must determine that all statutory requirements have been met."

CHAPTER XI

DECEDENTS' ESTATES

Standard 11.10. Passage Of Title Upon Death

A decedent's property passes to his or her heirs at law or devisees or to the grantee of a transfer on death deed immediately upon death, subject to payment of debts, including federal estate taxes.

Comment:

Notwithstanding the passage of title at death, if letters testamentary or letters of administration are issued, the personal representative of the estate has the right to possession and control of the estate assets for purposes of estate administration. See Tex. Estates Code § 101.003.

Regarding the property of an intestate person, Tex. Estates Code § 201.003 governs the passage of community property, and Tex. Estates Code § 201.002 governs the passage of separate property. A will is not valid to pass title until it has been probated. Tex. Estates Code § 256.001, but the vesting of title relates back to the date of the testator's death. Bruni v. Vidaurri, 166 S.W.2d 81, 93 (Tex. 1942). A statutory "transfer on death deed" under Tex. Estates Code ch. 14 provides a means of passage of title at death other than by intestate succession or by will. Such a deed must have been executed and acknowledged after September 1, 2015, and recorded before the grantor's death, but the deed is revocable and subject to any conveyances or encumbrances on the part of the grantor until the grantor has died. See Standard 11.110.

A decedent's heir or, unless the will provides to the contrary, any devisee who fails to survive the decedent by at least 120 hours is considered as though predeceased. Tex. Estates Code §§ 121.052, 121.101. Similarly, if the right of a beneficiary to succeed to property is conditioned upon the beneficiary's surviving another person, the beneficiary is not considered to have survived the other person unless the beneficiary survives the other person by 120 hours, unless all such alternate beneficiaries die within a period of less than 120 hours. Tex. Estates Code § 121.102.

No right of inheritance accrues to any person unless the person is born before, or is in gestation at, the time of the intestate decedent's death. Tex. Estates Code § 201.056. No person may take as a member of a class under a class gift unless born or in gestation before the decedent's death. Tex. Estates Code § 255.401. If a testator's marriage is dissolved by divorced or annulment or declared void before the testator's death, all provisions of the will are read as though the former spouse and all relatives of the former spouse who are not also relatives of the testator had failed to survive the testator unless the will expressly provides otherwise. Tex. Estates Code § 123.001.

Tex. Prop. Code ch. 240 allows the beneficiary of property passing by various means, including inheritance or devise, to disclaim it. The examiner should be alert to this possibility, which results in the property's passing as though the disclaiming beneficiary had predeceased the decedent.

Source:

Citations in the Comment; Stanley M. Johanson, Johanson's Tex. Estates Code Annot. §§ 101.001, 101.003, 101.051 (2014).

History:

Adopted October 9, 1999, amended June 4, 2021.

The prior standard provided: "A decedent's property passes to his or her heirs at law or devisees immediately upon death, subject in each instance, except for exempt property, to payment of debts, including estate and inheritance taxes."

Standard 11.20. Estate Proceedings

If an owner of property dies, the examiner should determine whether the owner left a will, whether there is a probate proceeding or administration pending, and whether a personal representative is acting.

Comment:

Absent information to the contrary, the affidavit of a person who has knowledge of the facts is usually accepted as satisfactory evidence that no probate proceeding is pending. However, a probate proceeding may be filed and a personal representative appointed at any time within four years of the owner's death. Thus, such an affidavit does not affect any probate proceeding that was commenced within four years of the decedent's death. Texas Estates Code § 256.003.

Source:

Title Standards Joint Editorial Board.

History:

Adopted October 9, 1999; amended June 5, 2012.

The prior standard provided: "If an owner of property dies, the examiner must determine whether the owner left a will, whether there is a probate proceeding or administration pending, and whether a personal representative is acting."

The original standard provided: "If an owner of property dies, the examiner must determine whether the owner left a will, whether there is a probate proceeding or administration pending, and whether a personal representative is acting. If the records of the county where the land is located do not indicate that a will has been filed for probate, and in the absence of information to the contrary, the affidavit of a person who has knowledge of the facts is usually accepted as satisfactory evidence that the owner died intestate."

Standard 11.30. Conveyances By Executor Or Independent Administrator

Before accepting a deed from an executor or an independent administrator, an examiner should be satisfied that all statutory requirements were met in the appointment

of the representative, that the representative is qualified to execute the deed, and that the representative's act is authorized by the will or by law.

Comment:

If a representative (an executor or an independent administrator) executes a deed to the decedent's property, then the examiner should determine the representative's qualifications to have done so. The examiner should examine the will, the order probating the will and appointing the executor, the representative's bond (if required), and recent letters testamentary or of administration or other documentation that the representative's authority had not terminated. In addition, the examiner should examine other relevant documents that may be of record, including the application for the representative's appointment. If the probate proceedings took place in another county, the examiner should require the filing of certified copies of the order appointing the representative and any will and any codicils in the county where the land is located. Tex. Estates Code § 256.201.

A qualified executor, even one under court order, may convey real property belonging to the estate if authorized to do so by the will. Tex. Estates Code § 356.002. If authenticated copies (both attested by the court clerk and including the certification by the court's judge or magistrate that the attestation is in proper form) of a foreign will and the order admitting it to probate in another jurisdiction have been recorded, and if the will gives an executor or trustee the power to sell property in Texas, the foreign executor or trustee may sell the estate's Texas property in accordance with the will without an order of a Texas court. Tex. Estates Code § 505.052. It is questionable whether a purported sale by a foreign executor who has not yet filed the required documentation is effective even if it is filed later. See Mills v. Herndon, 60 Tex. 353 (1883).

If the owner of real property died intestate, or if a will does not give the authority to convey real property, a qualified independent executor or a qualified independent administrator may convey real property with the consent of the decedent's distributees in the application for independent administration or in their consent to the independent administration and if authorized by the order of appointment. Tex. Estates Code § 401.006. Unless limited by the terms of a will, an independent executor or an independent administrator has the power of sale, without court approval, to:(1) pay expenses of administration, funeral expenses and expenses of last illness, and allowances and claims against the estate of a decedent. Tex. Estates Code §§ 356.251(1) and 402.002; and (2) dispose of any interest in real property "if selling the interest is considered in the estate's best interest." Tex. Estates Code § 356.251(2).

Unless the will or court order provides otherwise, an independent executor, in distributing property not specifically devised that the executor is authorized to sell, may make distributions in divided or undivided interests and allocate particular assets in proportionate or disproportionate shares. Tex. Estates Code § 405.0015.

A person who is not a devisee or an heir is not required to look into the power of sale or the propriety of a sale by an independent executor or independent administrator or to

obtain the joinder of the decedent's distributees if the person deals in good faith and: (1) the sale is by an independent executor and a power of sale is granted to the independent executor in the will; (2) effective September 1, 2011, a power of sale is granted under Tex. Estates Code § 401.006 in the order appointing the independent executor or independent administrator; or (3) effective September 1, 2011, the independent executor or independent administrator provides an affidavit, recorded in the deed records of the county where the land is located, stating that the sale is necessary or advisable for any of the purposes described in Tex. Estates Code § 356.251(1). Tex. Estates Code § 402.053.

A sale of estate property by an executor to an innocent purchaser, for a valuable consideration, in good faith, and without notice of any illegality in the sale continues to be valid notwithstanding that the acts or the authority under which the acts were performed is later set aside. Tex. Estates Code § 307.001.

The powers of an independent executor continue until there is no longer any necessity for the executor to act, typically when all debts of the estate have been paid and the assets of the estate have been distributed. Although Tex. Estates Code §§ 405.003–405.009 provide methods of closing an independent administration, the procedures are rarely followed. This practice presents problems for the examiner, because there frequently is no convenient way to determine conclusively that an executor no longer has authority to act. In case of doubt as to whether the executor continues to act, the examiner should require the joinder of the devisees in any conveyance of estate property.

An examiner may rely upon a will that has been duly admitted to probate and that has not been challenged. See Steele v. Renn, 50 Tex. 467 (1878). However, during the two-year period after the date of the order admitting the will to probate, the order is subject to contest by any interested person. Moreover, any interested person may institute suit to cancel a will for forgery or other fraud within two years after the discovery of the forgery or fraud, and persons non compos mentis and minors have two years after the removal of their disabilities within which to commence such a suit. Tex. Estates Code § 256.204.

During the two-year period after an order or judgment of a court in which probate proceedings were held, the order or judgment is subject to revision or correction on a showing of error by bill of review filed in the same court by an interested person. Tex. Estates Code § 55.251.

Caution:

If the order of appointment of an independent administrator did not give authority to sell real property, the examiner should require the joinder of the parties who would have otherwise received the property. A good-faith, third-party purchaser who relies upon an affidavit described in Tex. Estates Code § 402.053 is protected only if the sale was made for the reasons set out in Tex. Estates Code § 356.251(1), that is, for administrative expenses, funeral and last-illness expenses, allowances, and claims. There is no similar protection regarding a sale made because it was deemed by the representative to be in the best interest of the estate.

An examiner should question an apparent delegation of authority by the executor because, while an executor may delegate ministerial duties, an executor may not delegate discretionary authority. Terrell v. McCown, 43 S.W. 2 (Tex. 1897).

If a will does not give an executor the power of sale or if the executor is not given the power of sale in the order of appointment, then the executor must follow the same procedure for a sale as is prescribed for an administrator. See Tex. Estates Code § 356.001.

Source:

Citations in the Comment; Stanley M. Johanson, Johanson's Tex. Estates Code Annot. §§ 356.001, 356.002, 401.001 through .008, 402.001, 402.002, 402.051, 402.053, 405.004 through .009 (2014); 17 M. K. Woodward & Ernest E. Smith, III, Tex. Prac., Prob. & Decedents' Estates §§ 497, 499 (1971).

History:

Adopted October 9, 1999; amended June 5, 2012; amended July 17, 2014.

The prior standard provided: "Before accepting a deed from an executor or an independent administrator, an examiner must be satisfied that all statutory requirements were met in the appointment of the representative, that the representative is qualified to execute the deed, and that the representative's act is authorized by the will or by law."

The original standard provided: "Before accepting an executor's deed, an examiner should be satisfied that all statutory requirements were met in the appointment of the executor and that the executor is qualified to act. A qualified executor, even one under court order, may convey property belonging to the estate if authorized to do so by the will. In addition, a qualified independent executor, even though not authorized by will, may convey if not prohibited by the will and if there are one or more unpaid debts of the estate that are not barred by limitations. In the absence of information to the contrary, the examiner may rely upon an affidavit of an executor or other person who has knowledge of the facts that there are existing debts of the estate."

Standard 11.40. Conveyances By Administrator

Before accepting an administrator's conveyance, an examiner should determine that all statutory requirements have been met in the appointment of the administrator and that the administrator is qualified to act and is authorized to make the sale.

Comment:

An administrator may convey property of a decedent only with authority of the court. Determining the qualification of an administrator requires an examination of the application for appointment, the order appointing the administrator, recent letters of administration, and the administrator's bond. Except where the order appointing the independent

administrator expressly authorizes the sale of estate property, with the consent of the beneficiaries of the estate, under Tex. Estates Code § 401.006, a sale of estate property requires, in addition, an application for sale, order of sale, additional bond (if required by the court), report of sale, and order approving sale.

Unless the examiner determines that an administrator has the authority to convey, all parties who would otherwise take the property must join the administrator in any conveyance. During the two-year period after an order or judgment of a probate court, including an order appointing an administrator, the order or judgment is subject to revision or correction on a showing of error by bill of review filed in the same court. Tex. Estates Code § 55.251.

A sale of estate property by an administrator to an innocent purchaser, for a valuable consideration, in good faith, and without notice of any illegality in the sale continues to be valid notwithstanding that the acts or the authority under which the acts were performed is later set aside. Tex. Estates Code Ann. § 307.001. A deed by a personal representative that refers to and identifies the court order approving sale is prima facie evidence that the sale met all applicable requirements of the law. Tex. Estates Code § 356.557.

Source:

Citations in the Comment; Tex. Estates Code Ann. § 356.001.

History:

Adopted October 9, 1999; amended June 5, 2012; amended July 17, 2014.

The prior standard provided: "Before accepting an administrator's conveyance, an examiner must determine that all statutory requirements have been met in the appointment of the administrator and that the administrator is qualified to act and is authorized to make the sale."

The original standard provided: "An administrator may convey property only with authority of the court. Therefore, before accepting an administrator's conveyance, an examiner should determine that all statutory requirements have been met in the appointment of the administrator and that the administrator is qualified to act and is authorized to make the sale."

Standard 11.50. Conveyances By Heirs

If the property owner died intestate, or if the owner died testate but the will is not probated, the examiner should, in the absence of administration, identify the heirs of the decedent, along with the devisees in any unprobated will, and require that all of them join in a conveyance of the property of the decedent.

Comment:

Beneficiaries of a will frequently agree not to probate the will, in some instances because the estate is small and does not justify the cost. A commonly accepted procedure is to attach a copy of the will, if available, to an affidavit of heirship and to file the documents in the county records. In those cases, the examiner should require the joinder in the conveyance of each party who would take by intestacy and each party who would take under the will. If the will was not attached to the affidavit, but is available, the examiner should obtain a copy of the will in order to confirm the identity of the devisees under the will.

Regarding the property of an intestate decedent, Tex. Estates Code § 201.003 states the manner in which community property passes, and Tex. Estates Code § 201.002 governs the passage of separate property. For estates of decedents dying intestate after September 1, 1993, Tex. Estates Code § 201.003 provides that title to community property passes to the surviving spouse if all the decedent's descendants are also the surviving spouse's descendants. If a decedent died intestate before September 1, 1993, or if the decedent's descendants are not all also the surviving spouse's descendants, that decedent's half of community property held with a surviving spouse passes to his or her children and the descendants of any deceased children. Tex. Prob. Code § 45 (repealed); Tex. Estates Code § 201.003(c). If a husband or wife dies intestate and the community property passes to the surviving spouse, no administration on the community property generally is necessary. See Tex. Estates Code § 453.002.

A purchaser who buys real property from an heir, for value, in good faith, and without knowledge of a will, more than four years after the death of the decedent is protected from the claims of any devisees under a will that is later offered for probate. Tex. Estates Code § 256.003.

Caution:

If a purchaser from a decedent's intestate heirs has knowledge of, or is on notice of, the existence of a foreign will, the interest acquired from the heirs may be divested by the subsequent probate of the will if the devisees are persons other than the heirs. If the proponent of the will is not in default in admitting the will for probate in Texas or if the will is lawfully admitted to probate in another jurisdiction, then divestment may occur even when the will is probated more than four years after the death of the decedent. See Patch Energy LLC v. Indio Minerals LLC, 702 S.W.3d 911 (Tex. App.—Eastland 2024, no pet.) (purchaser who accepted quitclaims was found to be on notice of a foreign will that was offered for probate in another state more than 40 years after the death of the decedent). See also Tex. Estates Code Subtitle K. Foreign Wills, Other Testamentary Instruments, and Fiduciaries. For further discussion of foreign wills, see Standard 11.100.

Source:

Citations in the Comment; Stanley M. Johanson, Johanson's Texas Estates Code Annot. §§ 201.003, 453.001, 453.002 (2014).

History:

Adopted October 9, 1999; amended July 17, 2014.

The prior standard provided: "If the property owner died intestate, or if the owner died testate but the will is not probated, the examiner must, in the absence of administration, identify the heirs of the decedent, along with the devisees in any unprobated will, and require that all of them join in a conveyance of the property of the decedent."

Standard 11.60. Liens For Debts And Taxes

An examiner should determine whether an estate of an owner owes taxes or debts that are not barred by limitations.

Comment:

Property of a decedent passes subject to unpaid debts and taxes of the estate, and the examiner should determine whether any exist.

Absent information to the contrary, an examiner may rely upon the affidavit of an executor, administrator, or other person who has knowledge of the facts that all debts of the estate have been paid. As evidence that an estate is not large enough to incur federal estate taxes, an examiner may rely upon a court-approved inventory or, in the absence of an inventory, the affidavit of a person who has knowledge of the facts. An examiner may accept an order of the court probating a will as a muniment of title as evidence that the real property under examination is free of all obligations of the estate other than debts secured by liens on the real property and as evidence that administration is not otherwise necessary. Tex. Estates Code § 257.054. In the latter case, the examiner should determine that the liens do not affect the property under examination.

An examiner may accept, as proof that debts and taxes have been paid, an order closing a court-supervised administration or an affidavit closing an independent administration. If federal estate taxes are due, satisfaction of the taxes may be proven by a Federal Estate and Generation–Skipping Transfer Tax Closing Letter together with proof of payment of the taxes shown by the letter to be due to the United States.

Tex. Estates Code § 101.051 creates a statutory lien on the decedent's estate in favor of the decedent's creditors. Blinn v. McDonald, 46 S.W. 787 (Tex. 1898). The statutory lien is not a lien in the usual sense and is not upon specific property but is a general lien upon all property that is subject to payment of debts. Moore v. Moore, 33 S.W. 217 (Tex. 1895). Because a personal representative can sell property to pay debts, it follows that property sold by a personal representative in an authorized sale passes free of the statutory lien. Debts for which an estate is obligated, and which are secured by the statutory lien, include court ordered child support payments that were delinquent at the date of death. Delinquent payments may also be secured by a child support lien as provided in Tex. Fam. Code §§ 157.311 and 157.326. As liens of the latter type must be recorded in the county judgment records, they will be apparent from a customary search for abstracts of judgment.

While an inventory, appraisement, and list of claims may contain information that is useful concerning the size and composition of the estate, the examiner should be aware that the information may be erroneous or incomplete. For example, the personal representative must list only property that is considered part of the probate estate with the result that there may be additional property that is part of the estate for estate tax purposes but which is not listed. Moreover, debts of the estate are not required to be listed on the inventory. A United States Estate (and Generation–Skipping Transfer) Tax Return (Form 706), if available, is a more reliable source of information of the character and extent of a decedent's property. Effective September 1, 2011, an independent executor or independent administrator may, in lieu of filing an inventory, file an affidavit stating that there are no unpaid debts, other than secured debts, taxes, and administration expenses. Tex. Estates Code § 309.056. In the latter situation, the examiner should determine that any secured debts do not affect the land under examination. A lien for federal estate taxes attaches to the gross estate of a decedent as of the date of death and, in general, exists for a period of ten years. 26 U.S.C. § 6324. There is no requirement for filing notice in the county records. The State of Texas does not impose an estate or inheritance tax.

Federal estate taxes may be payable for taxable estates exceeding certain thresholds ($5,000,000 for decedents dying in or after 2010, adjusted upward annually for inflation for decedents dying after 2011, except that no estate tax was levied against the estates of decedents who died in 2010 if the estate opted out of a stepped-up basis). Any unused estate tax exemption of a married person who died in 2011 or later can be transferred to the surviving spouse under a concept commonly called "portability." 26 U.S.C. § 2010(c).

If estate taxes are due and have not been paid, the District Director of the Internal Revenue Service has the authority to release the lien upon being furnished a bond conditioned on the payment of the tax. U.S. Treas. Reg. 301.6325–1(a)(2). Similarly, the District Director may release the lien if the fair market value of the remaining property is at least double the amount of the outstanding tax plus all prior liens against the property. U.S. Treas. Reg. 301.6325–1(b)(1). Other release authority is set out in U.S. Treas. Reg. 301.6325–1. An estate tax lien is divested regarding property sold under court order to pay debts and administration expenses. 26 U.S.C. § 6324(a)(1).

In some instances, upon satisfaction that adequate liquid assets are available, an examiner frequently relies upon an affidavit of the personal representative that the taxes will be paid.

Caution:

An examiner should check for updated information regarding possible estate-tax liability.

Source:

Citations in the Comment; Tex. Estates Code § 101.051; Stanley M. Johanson, Johanson's Texas Estates Code Annot. §§ 101.001, 101.051 (2014).

History:

Adopted October 9, 1999; amended June 5, 2012; amended July 17, 2014.

The prior standard provided: "An examiner must determine whether an estate of an owner owes taxes or debts that are not barred by limitations."

The original standard provided: "Property of a decedent passes subject to unpaid debts and taxes of the estate. Therefore, the examiner must determine whether these are unpaid. In the absence of information to the contrary, an examiner may rely upon the affidavit of an executor, administrator, or other person who has knowledge of the facts that all debts of the estate have been paid. As evidence that an estate is not large enough to incur federal estate and Texas inheritance taxes, an examiner may rely upon a court approved inventory, or in the absence of an inventory, the affidavit of a person who has knowledge of the facts. An order of the court probating a will as a muniment of title may be accepted as evidence that all obligations of the estate have been paid other than debts secured by liens on real property. In the latter case, the examiner must determine that the liens do not affect the property under examination.

An examiner may accept, as proof that debts and taxes have been paid, an order closing a court supervised administration or an affidavit closing an independent administration. If federal estate and Texas inheritance taxes are due, satisfaction of the taxes may be proven by a Federal Estate and Generation–Skipping Transfer Tax Closing Letter together with proof of payment of the taxes shown by the letter to be due to the United States and to the State of Texas."

Standard 11.70. Heirship Affidavits

In the absence of information to the contrary, an examiner may rely upon an affidavit of heirship with respect to the family history and the identity of heirs of a decedent.

Comment:

An examiner commonly relies upon affidavits of heirship when the family history and the identity of the heirs of a decedent are not otherwise known. Heirs can also be determined in an action to declare heirship as provided in Tex. Estates Code §§ 202.001–202.206.

In addition, Tex. Estates Code § 203.001 provides that, subject to rebuttal, a statement of facts concerning family history shall be received as prima facie evidence in any proceeding to declare heirship or suit involving title if contained in a document legally executed and acknowledged or sworn to and if the document has been of record five years in the county where the land is located or the county where the decedent had his domicile or residence at the time of his death.

Recent affidavits are also commonly accepted. In obtaining an affidavit of heirship, it is desirable for the affiant to be a person related to the decedent but who does not inherit

from the decedent. If none is available, a person possessing personal knowledge of the decedent is the next choice. If neither is available, an interested heir can be used. In the latter case, it is also desirable to obtain a supporting affidavit from a person who has no interest in the estate. Tex. Estates Code § 203.002 sets out a suggested form for an affidavit of heirship.

The Texas Rules of Evidence provide exceptions to the hearsay rule that permit hearsay evidence of family history. Tex. R. Evid. 803, 804. See also Standard 3.40 and Chapter XIII.

See also, comments to Standard 11.20, addressing affidavits of intestacy, and Standard 13.20, addressing reliance on affidavits.

Source:

Citations in the Comment; 5A Aloysius A. Leopold, Land Titles and Title Examination § 41.23 (Texas Practice 3d ed. 2005); Stanley M. Johanson, Johanson's Texas Estates Code Annot. §§ 203.001, 203.002 (2014); 17 M. K. Woodward & Ernest E. Smith, III, Tex. Prac., Prob. & Decedents' Estates § 208 (1971); J.Howard Hayden, Affidavits of Heirship, 31 Tex. B. J. 741 (1968).

History:

Adopted October 9, 1999; title changed and comment modified by Board, May 22, 2000.

Standard 11.80. Community Survivor

If no one has qualified as executor or administrator of the estate of a decedent who was married, the examiner may rely upon a conveyance of community property from the surviving spouse, acting as community survivor under Tex. Estates Code § 453.003, made for the purpose of paying community debts.

Comment:

A surviving spouse who acts as community survivor under the authority of Tex. Estates Code § 453.003 is commonly called an "unqualified survivor" as opposed to a surviving spouse who "qualified" under Tex. Prob. Code § 161 [repealed in 2007].

The doctrine embodied by Tex. Estates Code § 453.003, that the surviving spouse may sell community property to pay community debts, is based on analogy to a surviving partner's authority in discharging the debts of a partnership and long predates the legislation. See Jones's Adm'r v. Jones, 15 Tex. 143, 148 (1855). Although the burden is on the purchaser under an unqualified community survivor's deed to prove the property was sold to pay community debts, Moody v. Butler, 63 Tex. 210 (1885), it is discharged upon proof of the existence of some community debt. Jones v. Harris, 139 S.W. 69, 78 (Tex. App.—San Antonio 1911, writ ref'd), and it is presumed that a debt existing at the date of death continued to exist at the time of

the conveyance. Wilson v. Meredith, Clegg & Hunt, 268 S.W.2d 511 (Tex. App.—Beaumont 1954, writ ref'd n.r.e.). The purchaser need not inquire into the community survivor's application of the sale proceeds to the community debt. Griffin v. Stanolind Oil & Gas Co., 125 S.W.2d 545 (Tex. 1939); Kinard v. Sims, 53 S.W.2d 803 (Tex. App.—Amarillo 1932, writ ref'd). In any event, the burden of proof is on a party asserting that an unqualified community survivor had no authority to sell the community property to show that the purchaser was not an innocent purchaser for value. Johnson v. Masterson Irr. Co., 217S.W. 407 (Tex. App.—Beaumont 1919, writ ref'd). It follows that in the absence of anything in the record indicating that an unqualified community survivor lacked authority to sell and convey community property, the examiner may presume that he or she did have the requisite authority. See Kinard v. Sims, 53 S.W.2d 803, 806 (Tex. App.—Amarillo 1932, writ ref'd).

A conveyance by a community survivor that purports to convey the entire interest owned by the community passes the deceased spouse's interest notwithstanding that the grantor purports to convey only on behalf of the grantor, without any indication of his or her capacity as community survivor. Davis v. Magnolia Petroleum Co., 134 S.W.2d 1042 (Tex. 1940; Griffin v. Stanolind Oil & Gas, 125 S W.2d 545 (Tex. 1939).

For estates of decedents dying intestate after September 1, 1993, title to community property passes to the surviving spouse if all the decedent's descendants are also the surviving spouse's descendants, in which case no administration on the community property is necessary. Tex. Estates Code §§ 201.003, 453.002.

Source:

Citations in the Comment; Tex. Estates Code § 453.003; 4 Aloysius A. Leopold, Land Titles and Title Examination § 20.12 (Texas Practice 3d ed. 2005); Stanley M. Johanson, Johanson's Texas Estates Code Annot. § 453.003 (2014); 17 M. K. Woodward & Ernest E. Smith, III, Tex. Prac., Prob. & Decedents' Estates § 544 (1971).

History:

Adopted October 9, 1999.

Standard 11.90. Community Administration

If a surviving spouse of a decedent who died before September 1, 2007, has qualified as a statutory community administrator, an examiner may rely upon a deed of community property from the administrator without further court order.

Comment:

Tex. Prob. Code Ann. §§ 161 through 167, prior to September 1, 2007, governed the appointment and activities of a community administrator. Those sections were repealed as of that date, but the law in effect at the date of death of a decedent who died before that date governs a community administration of the estate of the decedent.

A community administrator who qualified concerning a decedent who died before September 1, 2007, had broader powers than those of an unqualified community survivor. For example, a community administrator could sell community property without regard to the existence of community debts. For estates of decedents dying intestate after September 1, 1993, title to community property passes to the surviving spouse if all the decedent's descendants are also the surviving spouse's descendants, in which case no administration on the community property is necessary. Tex. Estates Code Ann. §§ 201.003, 453.002.

Source:

Citations in the Comment; 4 Aloysius A. Leopold, Land Titles and Title Examination § 20.12 (Texas Practice 3d ed. 2005); Stanley M. Johanson, Johanson's Texas Probate Code Annot. §§ 161–177 (2011) (prior codification); 17 M. K. Woodward & Ernest E. Smith, III, Tex. Prac., Prob. & Decedents' Estates § 574 (1971).

History:

Adopted October 9, 1999; amended June 27, 2008. The original standard provided: "If a surviving spouse has qualified as community administrator in the manner prescribed in Tex. Prob. Code Ann. §§ 161–167, an examiner may rely upon a deed of community property from the administrator without further court order."

Standard 11.100. Foreign Wills

An examiner may rely upon an exemplified copy of a will probated outside of Texas, as being effective to pass title to property in Texas owned by a decedent, if the will and the order admitting the will to probate are probated in Texas under Tex. Estates Code §§ 501.001–501.008 or are filed in the deed records under Tex. Estates Code § 503.001.

Comment:

A foreign will is one probated outside of Texas in any of the United States, its territories, the District of Columbia, or any foreign nation. In cases where the appointment of a personal representative in Texas is unnecessary, Tex. Estates Code § 503.001 permits an authenticated copy of the foreign will and of the order admitting the will to probate to be filed in the records of the county where the land is located. If a personal representative is needed, Tex. Estates Code §§ 501.001–501.008 provide a simplified procedure for the probate in Texas of the foreign will.

This procedure is rarely used, however, as the recording of the will in the deed records is usually sufficient for most purposes.

If a foreign will that is recorded in the deed records gives an executor a power of sale, that power may be exercised in Texas without court order. Tex. Estates Code § 505.052.

Although only the will and the order probating the will are necessary, a complete copy of the foreign probate, including the application to probate and the order closing the estate, is desirable as it may contain important information, such as the date of the decedent's death and the names and addresses of surviving heirs.

Effective September 1, 2021, Tex. Estates Code § 503.002(a) provides:

> An authenticated copy of a will or other testamentary instrument described by Section 503.001(a), along with a copy of the judgment, order, or decree by which the instrument was admitted to probate that has the attestation and certificate required by Section 501.002(c), that is written in whole or in part in a language other than English may be filed for recording in the deed records in any county in this state in which the land conveyed or disposed of in the instrument is located if:
>
> (1) a correct English translation is recorded with the authenticated copies of the will or other testamentary instrument and judgment, order, or decree by which the instrument was admitted to probate; and
> (2) the accuracy of the translation is sworn to before an officer authorized to administer oaths.

Caution:

An exemplified copy is not a mere certified copy. To be exemplified, the foreign will and the order admitting it to probate must be authenticated in the manner prescribed in Tex. Estates Code §§ 501.002, 503.002. The required documentation is commonly called a "three-way certificate."

Although there is scant authority, it appears that a foreign executor's power to convey Texas real property, if granted by the foreign will, may not be relied upon unless the foreign will has been probated or authenticated copies of the foreign will and its probate filed for record in at least one Texas county before the time of the executor's deed. Unfortunately, the court in Mills v. Herndon, 60 Tex. 353, 355-56 (1883), stated unequivocally, albeit as dictum, that a foreign executor has no authority to convey Texas property until the statutory filing has been accomplished and that subsequent compliance would not relate back and give validity to prior acts done without authority. See also Coy v. Gaye, 84 S.W. 441 (Tex. App.—San Antonio 1904, no writ); 17 M. K. Woodward and Ernest E. Smith, III, Tex. Prac., Prob. & Decedents' Estates § 434 (1971).

Source:

Citations in the Comment; Tex. Estates Code §§ 501.001–501.008, 503.001, 505.052; 17 M. K. Woodward & Ernest E. Smith, III, Tex. Prac., Prob. & Decedents' Estates § 421 (1971).

History:

Adopted October 9, 1999.

Standard 11.110. Transfer On Death Deed

An examiner should determine whether a Transfer on Death Deed has become effective and is not subject to outstanding claims against the estate of the deceased grantor of the deed.

Comment:

A growing number of states have enacted statutes creating an asset-specific procedure for the nonprobate transfer of real property. Texas has adopted the "Texas Real Property Transfer on Death Act," Tex. Estates Code Chapter 114. This chapter creates the Transfer on Death Deed (TODD) that was not recognized under prior law and applies to a TODD that is executed and acknowledged on or after September 1, 2015. Tex. Estates Code § 114.003. A TODD is a deed authorized under Chapter 114, and this chapter does not apply to any other deed that transfers an interest in real property on the death of an individual—e.g., a deed that transfers title but reserves a life estate. Tex. Estates Code § 114.002(a)(6). A TODD must state that the transfer of an interest in real property to the designated beneficiary is to occur on the transferor's death and must be recorded before the transferor's death in the deed records of the county clerk's office in the county in which the real property is located. Tex. Estates Code § 114.055.

An examiner must determine whether a grantor of a TODD is deceased. An examiner may wish to recommend evidence of the death be recorded, such as an affidavit of heirship or death.

To the extent the estate of the transferor is insufficient to satisfy a claim against the estate, estate tax, expenses of administration, or allowance, the personal representative may enforce that liability against the real property transferred at the transferor's death by a TODD. A proceeding to enforce such liability must be commenced no later than the second anniversary of the transferor's death, except for a mortgage or other lien treated as a matured secured claim. Tex. Estates Code § 114.106(a), (e).

Real property transferred at the transferor's death by a TODD is not considered property of the probate estate for any purpose, including for purposes of Tex. Gov't Code § 531.077. Tex. Estates Code § 114.106(b).

During a transferor's life, a TODD does not: (1) affect the interest or right of the transferor or any other owner, including the right to transfer or encumber the real property, homestead rights in the real property, and ad valorem tax exemptions; (2) affect an interest or right of a transferee of the real property that is the subject of the deed, even if the transferee has actual or constructive notice of the deed; (3) affect an interest or right of a secured or unsecured creditor or future creditor of the transferor, even if the creditor has actual or constructive notice of the deed; (4) create a legal or equitable interest in favor of the

designated beneficiary; or (5) subject the real property to claims or process of a creditor of the designated beneficiary. Tex. Estates Code § 114.101.

A TODD is void as to a subsequent grantee of an interest in real property that is conveyed by the transferor during the transferor's lifetime after the TODD is executed and recorded if (1) a valid instrument conveying the interest or a memorandum sufficient to give notice of the conveyance of the interest is recorded in the deed records of the county clerk's office in the county in which the TODD is recorded; and (2) the recording of the instrument or memorandum occurs before the transferor's death. Tex. Estates Code § 114.102. The capacity to make or revoke a TODD is the same as the capacity required to make a contract, but a TODD may not be created through use of a power of attorney. Tex. Estates Code § 114.054. A beneficiary of a TODD takes the real property subject to all conveyances, encumbrances, mortgages, liens, and other interests to which the real property is subject at the transferor's deed. Tex. Estates Code § 114.104. The beneficiary of a TODD may disclaim all or part of the designated beneficiary's interest. Tex. Estates Code § 114.105. If a designated beneficiary predeceases or does not survive the transferor by 120 hours, the share of that beneficiary lapses, unless the anti-lapse provisions of Tex. Estates Code §§ 255.151 255.154 apply or unless the transferor makes an anti-lapse election or surviving beneficiary election in the Transfer on Death Deed, as provided in the optional statutory form for Transfer on Death Deed. Tex. Estates Code § 114.103(a), § 114.151.

An instrument is effective to revoke a recorded TODD, or any part of it, if the instrument: (1) is a subsequent TODD that revokes the preceding TODD expressly or by inconsistency, or an instrument of revocation that expressly revokes the TODD or part of the deed; (2) is acknowledged by the transferor after the acknowledgment of the deed being revoked; and (3) is recorded before the transferor's death in the deed records in the county clerk's office in the county where the TODD being revoked is recorded. A will may not revoke or supersede a TODD. A final judgment of the court dissolving the marriage of the transferor and the beneficiary after the transfer on death deed is recorded operates to revoke the transfer on death deed as to that beneficiary if notice of the judgment is recorded before the transferor's death in the deed records in the county clerk's office in the county where the TODD is recorded. If a TODD is made by more than one transferor, revocation by one transferor does not affect the deed as to another transferor who does not make a revocation. A TODD made by joint owners with right of survivorship is revoked only if revoked by all living joint owners. Tex. Estates Code § 114.057.

Source:

Citations in the Comment:

History:

Adopted June 4, 2021.

CHAPTER XII

BANKRUPTCIES

Standard 12.10. Relevance Of Bankruptcy Cases To Real Estate Transactions

The examiner should consider whether a person in the chain of title or in a proposed transaction is or was a debtor in a bankruptcy proceeding. If the person in the chain of title has been or is a debtor in a bankruptcy proceeding, the land may have been or may be property of the estate, subject to the jurisdiction and control of the bankruptcy proceeding.

Comment:

A "debtor" is a person or municipality concerning which a bankruptcy case has been commenced since October 1, 1979, the effective date of the Bankruptcy Code. 11 U.S.C. § 101(13). Formerly, the person subject to a bankruptcy case was commonly known as a "bankrupt."

The bankruptcy code contains four common types of bankruptcy cases and two rare types: a Chapter 7 "liquidation"; a Chapter 11 "reorganization" (including the Small Business Debtor Reorganization applicable to cases filed on or after Feb. 19, 2020 under Sections 1181, et seq.); a Chapter 12 "adjustment of debts of a family farmer or fisherman with regular annual income"; and a Chapter 13 "adjustment of debts of an individual with regular income." A Chapter 9 case applies only to a municipality (defined by Section 101(4) as a political subdivision or public agency or instrumentality of a state). A Chapter 15 case concerns ancillary and other cross-border cases.

The commencement of a voluntary case (filed by the debtor alone or jointly with a spouse) or an involuntary case (filed by another person, such as a creditor) creates an estate. The estate includes all legal and equitable interests of the debtor in property as of the commencement of the case. The estate also includes property that the debtor acquires or becomes entitled to acquire within 180 days after the commencement of the case by bequest, devise or inheritance, by property settlement agreement with the debtor's spouse or in an interlocutory or final divorce decree, or as a beneficiary of a life insurance policy or death benefit plan. 11 U.S.C. § 541.

The trustee may avoid post-petition transactions (transactions occurring after the commencement of the bankruptcy case of the debtor), unless protected under 11 U.S.C. § 549 (b) and (c) of Title 11 or unless the transaction is authorized by the bankruptcy court or the Bankruptcy Code. 11 U.S.C. § 549(a). The trustee may not avoid a transfer made by the debtor in an involuntary bankruptcy case before the order for relief, to the extent any value is given in exchange for the transfer, notwithstanding any notice or knowledge of the bankruptcy case that the transferee has. 11 U.S.C. § 549(b).

The trustee may not avoid a transfer of an interest in real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed in the real property records before the transfer was perfected. 11 U.S.C. § 549(c). A "purchaser" is a transferee of a voluntary transfer and includes the immediate or mediate transferee of such transferee. 11 U.S.C. § 101(43). A "transfer" includes the creation of a lien, the retention of title as a security interest, a foreclosure, and each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing or parting with property or an interest in property. 11 U.S.C. § 101(54). The automatic stay does not apply to a transfer that is not avoidable under 11 U.S.C. § 544 and under Section 549. 11 U.S.C. § 362(b)(24). An action or proceeding under 11 U.S.C. § 549 to set aside a post-petition transaction must be commenced no later than the earlier of (1) two years after the date of the transfer or (2) the time the case is closed or dismissed. 11 U.S.C. § 549(d).

Source:

Citations in the Comment; 5 Collier on Bankruptcy, Chapters 541, 549 (Alan N. Resnick & Henry J. Sommer eds, 16th Revised 2022).

History:

Adopted October 9, 1999.

Standard 12.20. Authority For Prior Transfer

If the examiner has knowledge that the owner or transferor in a prior real estate transaction recorded within two years prior to the current examination was then a debtor in a bankruptcy case, the examiner should determine that the prior transfer was authorized in that case. If the chain of title discloses that the owner or transferor in a prior real estate transaction in the chain of title was then a debtor in a bankruptcy case, the examiner should determine that the prior transfer was authorized in that case.

Comment:

If a prior real estate transaction in the chain of title was recorded more than two years prior to the current examination and if a bankruptcy case filed by or against the transferor or owner in that prior transaction is not disclosed in the chain of title, the examiner is not required to determine whether the prior real estate transaction was authorized in a bankruptcy proceeding, regardless of whether the examiner has knowledge that the owner or transferor in the prior transaction was then a debtor in a bankruptcy case. Notice is commonly given by a copy or notice of the bankruptcy petition filed by or against the owner or transferor. 11 U.S.C. § 549(c).

The trustee in a bankruptcy case may not avoid a transfer of an interest in real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed in the real

property records before the transfer was perfected. 11 U.S.C. § 549 (c). An action or proceeding under 11 U.S.C. § 549 to set aside a post-petition transaction must be commenced no later than the earlier of (1) two years after the date of the transfer or (2) the time the case is closed or dismissed. 11 U.S.C. § 549 (d).

Caution:

A mortgagee purchasing at a foreclosure of its mortgage encumbering an interest owned by the debtor may not be protected under 11 U.S.C. § 549(c) (absent lift or annulment of the automatic stay) because it has not paid present consideration. In re Penfil, 40 B.R. 474 (Bankr. E.D.Mich.1984); In re Major, 218 B.R. 501 (Bankr. W.D. Mo. 1998). A third-party bona fide purchaser without knowledge buying at a foreclosure may not be protected—at least unless the third party establishes that it paid fair present equivalent value, which is more exacting than reasonably equivalent value and which may not be established solely by the amount bid at the foreclosure sale. In re Miller, 454 F.3d 899 (8th Cir. 2006). Although Section 362(b)(24) provides that the automatic stay does not apply to a transfer that is not avoidable under § 549, the purchaser may not be treated as a protected purchaser because the definition of "purchaser" means "transferee of a voluntary transfer." 11 U.S.C. § 101 (43).

Prior to the 2005 amendments to the Bankruptcy Code, a beneficiary of a deed of trust from the debtor was not protected under 11 U.S.C. § 549 (c). In re McConville, 110 F.3d 47 (9th Cir.1997). The postpetition bona fide mortgagee will now be protected if a copy or notice of the bankruptcy petition is not filed before the mortgage is filed, provided that the mortgagee acquired the mortgage in good faith without knowledge of the bankruptcy and the lender provided present fair equivalent value (or fair market value). Hopkins v. Suntrust Mortg., Inc., 441 B.R. 656 (Bankr. D. Idaho 2010). An amendment to § 549(c) protects a post-petition transfer of "an interest in" real property, the addition of § 362(b)(24) provides that the stay does not apply to a transfer that is not avoidable under § 549, and the expansion of the definition of "transfer" in § 101(54) includes the creation of a lien. 11 U.S.C. §§ 101(54), 362(b)(24), 549(c). However, this protection is contingent upon the lender's being a "bona fide" lender without knowledge of the bankruptcy.

An assignee of a deed of trust from a debtor apparently will not be protected by 11 U.S.C. § 549(c) because the assignment involves a sale of a promissory note secured by a deed of trust, and the note "retains its identity as personal property" which is not protected by § 549 (c). In re Rice, 83 B.R. 8, 11 (9th Cir.1987).

Although the Bankruptcy Code permits sales free and clear of disputed interests, it does not permit the sale free and clear when there is a dispute regarding the ownership. The estate must actually have an interest in the property to be sold. "By its very structure, the Bankruptcy Code requires a determination of whether property is property of the estate (and thus may be sold) prior to any analysis as to whether a particular interest in property is in bona fide dispute under subsection (f)(4)." In re Worcester Country Club Acres, LLC, 655 B.R. 41 (Bankr..D. Mass. 2023).

The Supreme Court case of *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 143 S.Ct. 927, 215 L.Ed.2d 262, 2023 U.S. LEXIS 1666, 29 Fla. L. Weekly Fed. S. 744 (U.S. 2023), held that Section 363(m) is not jurisdictional but simply limits the remedies of the parties (and is subject to waiver and forfeiture). In writing the *MOAC* opinion, Justice Jackson explained that a "'case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" "The case remains live," she stated, "'[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation.'"

Source:

Standard 1.20; Citations in the Comment; 5 Collier on Bankruptcy, Chapter 549 (Alan N. Resnick & Henry J. Sommer eds. 16th Ed. Revised 2022).

History:

Adopted October 9, 1999.

Standard 12.30. Reliance Upon Recitals Of Authority For Prior Transfer

If a copy of an order in the bankruptcy case authorizing a prior real estate transaction in the chain of title has been recorded, the examiner may rely upon the order to determine that the transaction was authorized in the bankruptcy case. If the instrument evidencing the transaction was recorded more than two years prior to the examination, the examiner may rely upon any recitals in the chain of title that the transaction was authorized in bankruptcy case. Recitals may include a statement in the instrument in the chain of title that the grantor was acting as trustee or debtor in possession, that the property had been exempted or abandoned, that the automatic stay had been lifted or annulled to authorize a foreclosure, or that the transaction evidenced by the instrument had been otherwise authorized in the bankruptcy case.

Comment:

Although the Bankruptcy Code does not explicitly authorize reliance upon recitals in an instrument executed by the debtor or trustee, numerous legal principles justify reliance upon the apparent authority set forth in an instrument in the chain of title.

An action or proceeding by the trustee to set aside a transfer of property of the estate made after the commencement of the bankruptcy case and that is not properly authorized may not be commenced after the earlier of (1) two years after the date of the transfer sought to be avoided or (2) the time the case is closed or dismissed. 11 U.S.C. § 549 (d).

A motion to set aside a judgment or order must be made within one year if for (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial; or (3) fraud,

misrepresentation, or other misconduct of an adverse party. This time limit to file a motion to set aside a judgment or order does not apply if the judgment is void. Fed. R. Civ. P. 60(b).

The Bankruptcy Code also favors reliance upon court orders, notwithstanding appeals from those orders. The reversal or modification of an authorization of sale or lease under 11 U.S.C. § 363 (b) or (c) does not affect the validity of the sale or lease to an entity that purchased or leased in good faith, whether or not the entity knew of the pendency of an appeal, unless the sale or lease was stayed pending appeal. 11 U.S.C. § 363 (m). The reversal or modification on appeal of an authorization to obtain credit and grant a lien does not affect the validity or priority of the lien to an entity that extended such credit in good faith, irrespective of whether the entity knew of the pendency of the appeal, unless the granting of the lien was stayed pending appeal. 11 U.S.C. § 364(e).

A motion to revoke a confirmation of a plan must be filed before 180 days after entry of the order of confirmation. 11 U.S.C. §§ 1144, 1230, 1330.

Equitable mootness is a doctrine of equity that moots an appeal because of the effects of a reversal on a third party who has relied on the bankruptcy court order so that the appeal should be dismissed if effective relief could be rendered but the bankruptcy plan has been substantially consummated. KK PB Fin., LLC v 160 Royal Palm, LLC (In re KK PB Fin., LLC), 2023 WL 5193506 (11th Cir. Nov. 30, 2023) (per curiam).

Caution:

If the examiner has knowledge that the transaction was not properly authorized or is in dispute, the examiner may make additional requirements. For example, if the taxing authority has refused to remove delinquent taxes from the tax rolls based upon a sale free and clear of liens, the examiner may require an additional court order or except to the taxes. Note that Section 106, which waives sovereign immunity of certain governmental units, may be unconstitutional, at least in part as to Section 106(a), because of the limitations of U. S. Const. amend XI. See In re Mitchell, 209 F.3d 1111 (9th Cir. 2000) (filing of adversary proceeding against non-consenting state violates sovereign immunity). However, Section 106(b), which provides that the filing of a claim may be a valid partial waiver of sovereign immunity regarding the same transaction or occurrence, may be constitutional. Arecibo Community Health Care, Inc. v. Commonwealth of Puerto Rico, 270 F.3d 17 (1st Cir. 2001) (citing cases considering whether Section 106(b), which waives immunity based on filing of claim, is constitutional). In addition, states are not immune from preference avoidance or other in rem proceedings. Central Virginia Comm. College v. Katz, 546, U.S. 356 (2006). A sale free and clear of a state lien will not violate sovereign immunity.

> [I]n *Van Huffel v. Harkelrode*, 284 U.S. 225, 228–229 (1931), we held that the Bankruptcy Court had the authority to sell a debtor's property "free and clear" of a State's tax lien. At least when the bankruptcy court's jurisdiction over the res is unquestioned, our cases indicate that the exercise of its in rem jurisdiction to discharge a debt does not infringe state sovereignty.

Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 448 (2004).

In Purdue Pharmacy, the Supreme Court held that a plan cannot generally relieve third parties of liability. The Supreme Court held that Section 1123(b) permits a plan to address claims and property belonging to a debtor or its estate and permits a plan to modify the rights of creditors who hold claims against the debtor or its estate. §§1123(b)(1), (5). Nothing in those paragraphs authorizes a plan to extinguish claims against third parties without the consent of the affected claimants. As the plan proponents see it, paragraph (6) allows a debtor to include in its plan, and a court to order, *any* term not "expressly forbid[den]" by the bankruptcy code as long as a bankruptcy judge deems it "appropriate" and consistent with the broad "purpose[s]" of bankruptcy. Because the code does not expressly forbid a nonconsensual nondebtor discharge, the reasoning goes, the bankruptcy court was free to authorize one here after finding it an "appropriate" provision. Paragraph (6) is a catchall phrase tacked on at the end of a long and detailed list of specific directions. When faced with a catchall phrase like that, courts do not necessarily afford it the broadest possible construction it can bear. Instead, we generally appreciate that the catchall must be interpreted in light of its surrounding context and read to "embrace only objects similar in nature" to the specific examples preceding it. So, for example, when a statute sets out a list discussing "cars, trucks, motorcycles, or any other vehicles," we appreciate that the catchall phrase may reach similar landbound vehicles (perhaps including buses and camper vans), but it does not reach dissimilar "vehicles" (such as airplanes and submarines). This ancient interpretive principle, sometimes called the *ejusdem generis* canon, seeks to afford a statute the scope a reasonable reader would attribute to it. Viewed with that much in mind, we do not think paragraph (6) affords a bankruptcy court the authority the plan proponents suppose. Harrington v.Purdue Pharma, L. P., 144 S.Ct. 2071 (2024).

Source:

Citations in the Comment; Standard 3.40; 3 Collier on Bankruptcy, ¶¶ 363.11, 364.06; 5 Collier on Bankruptcy, ¶ 549.07; 8 Collier on Bankruptcy, Chapters 1144, 1230, 1330 (Alan N. Resnick & Henry J. Sommer eds. 16th Ed. Revised 2022).

History:

Adopted October 9, 1999.

Standard 12.40. Authority For Proposed Transfer By Debtor Or Trustee

If the examiner has knowledge that the owner is the debtor in a bankruptcy case or if the bankruptcy is disclosed in the chain of title in the real property records, the examiner should determine whether the proposed transaction is authorized in that case and should require

that a certified copy of the order or other evidence of authority be recorded in the real property records.

Comment:

The commencement of a bankruptcy case creates an estate, which includes legal or equitable interests of the debtor in property as of the commencement of the case, and in property the debtor acquires within 180 days after the commencement of the case by bequest, devise or inheritance, or as a result of a property settlement agreement with the debtor's spouse. 11 U.S.C. § 541(a). The estate does not include certain interests in liquid or gaseous hydrocarbons to the extent the debtor has transferred or agreed to transfer the interests under a farmout agreement or any written agreement directly related to a farmout agreement, or to the extent the debtor has transferred such interest under a written conveyance of a production payment to an entity that does not participate in the operation of the property. 11 U.S.C. §§ 541(b)(4), 101(21A), 101(42A).

A bankruptcy petition creates an automatic stay, which includes a stay against enforcement against the debtor or property of the debtor of a claim that arose before the commencement of the case. 11 U.S.C. § 362.

The debtor or trustee may not sell or mortgage property of the estate, except as authorized by 11 U.S.C. §§ 363, 364. The trustee in a bankruptcy proceeding may not avoid a transfer of an interest in real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed in the real property records before the transfer was perfected. 11 U.S.C. § 549 (c).

An action or proceeding under 11 U.S.C. § 549 to set aside a post-petition transaction must be commenced no later than the earlier of (1) two years after the date of the transfer or (2) the time the case is closed or dismissed. 11 U.S.C. § 549 (d).

If the examiner has knowledge that the current owner is a debtor in a bankruptcy case, the examiner should require satisfactory evidence that the current transaction is authorized.

Caution:

See Standard 12.20.

Source:

Citations in the Comment; 3 Collier on Bankruptcy, Chapters 362, 363, 364; 5 Collier on Bankruptcy, Chapters 541, 549 (Alan N. Resnick & Henry J. Sommer eds. 16th Ed. Revised 2022).

History:

Adopted October 9, 1999.

Standard 12.50. Authority To Convey Exempted Land In Proposed Transaction

If the examiner has knowledge that the current owner is the debtor in a bankruptcy case and the property is to be sold by the debtor based on the debtor's claim of exemptions in the bankruptcy case, the examiner should require evidence that (1) the land was claimed in the Schedule of Exempt Property as exempt under state law and (2) no objections were made within 30 days after the conclusion of the "first" meeting of creditors or the filing of any amendment to the list or supplemental schedules or such longer time for objection as was granted by the court. The examiner should require that evidence that the property has been exempted be recorded in the real property records.

Comment:

An individual debtor may exempt from property of the estate that property claimed as exempt under state law or under the applicable federal exemptions. In a joint case, both spouses must choose the same exemptions. 11 U.S.C. § 522 (b)(1). Fed. R. Bankr. P. 4003 (b) provides that the trustee or any creditor may file objection to the claimed exemptions within 30 days after the conclusion of the meeting of creditors or the filing of any amendment to the list or supplemental schedules, unless the court grants additional time for objection within that period. If objection has been filed, the examiner should also be furnished for review any order by the bankruptcy court overruling or otherwise resolving such objection.

The exemptions are scheduled in the Schedule of Real Property (Schedule "B–1" for cases filed prior to August 1, 1991, or Schedule "A" for cases filed on or after August 1, 1991) and the Schedule of Exempt Property (Schedule "B–4" for cases filed prior to August 1, 1991, or Schedule "C" for cases filed on or after August 1, 1991). The Schedules should be reviewed to verify whether the exemptions under state law (under 11 U.S.C. § 522(b)(3)) are chosen or whether the federal exemptions (under 11 U.S.C. §§ 522(b)(2), 522(d)) are chosen. If the federal exemptions are chosen, only an equity interest is exempted (subject to indexing of the allowed amount under 11 U.S.C. § 104) and the remaining value of the land remains part of the estate until abandoned. If the state exemptions are chosen, the exemptions are subject to the limitations set forth in 11 U.S.C. § 522.

An examiner should be aware that even though property is exempt, a mortgagee or other lien creditor may not commence or continue a foreclosure action against the debtor or obtain a conveyance from the debtor, so long as the automatic stay continues in effect. Unless relief from the automatic stay has been obtained (by final order of the bankruptcy court to permit the action) or an exception to the stay applies under § 362(b), the stay continues until the earliest of (a) the closing of the bankruptcy case, (b) the dismissal of the bankruptcy case, or (c) in a Chapter 7 case concerning an individual or in a case under Chapters 9, 11, 12 or 13, the grant or denial of discharge. 11 U.S.C. § 362; Fed. R. Bankr. P. 4001.

Caution:

An examiner should not rely upon evidence that the land has been exempted in a Chapter 12 or Chapter 13 bankruptcy case prior to the court's discharge after completion of the plan, unless the court authorizes the conveyance or encumbrance by the debtor in the plan or a separate order. In re Turek, 346 B.R. 350 (Bankr. M.D. Pa. 2006). The sale or encumbrance by the debtor may require a modification of the plan or may require court approval because of local rules or provisions of the plan.

Source:

Citations in the Comment; Fed R. Bankr. P. 1007 (c); 4 Collier on Bankruptcy, Chapter 522, ¶ 522.05 (Alan N. Resnick & Henry J. Sommer eds. 16th Ed. Revised 2022).

History:

Adopted October 9, 1999.

Standard 12.60. Authority To Convey Abandoned Land In Proposed Transaction

If the examiner has knowledge that the current owner is the debtor in a bankruptcy case and the property is to be sold by the debtor based on abandonment of the property in the bankruptcy case, the examiner should require evidence that (1) the trustee in the bankruptcy case or the debtor in possession gave notice of intent to abandon the property and that no objections were filed within 14 days after the mailing of the notice or such other time fixed by the court, (2) the bankruptcy court ordered the property abandoned, by a final nonappealable court order, or (3) the property is scheduled in the bankruptcy case and is not dealt with prior to the closing of the case. The examiner should require that a certified copy of the order of abandonment or other evidence of authority to abandon be recorded in the real property records.

Comment:

After notice and a hearing, the trustee (or debtor in possession) may abandon property of the bankruptcy estate. On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon property of the estate. A party in interest must file and serve an objection to the notice of proposed abandonment by the trustee or debtor in possession within 14 days of the mailing of the notice, or within the time fixed by the court. 11 U.S.C. §§ 554, 1107; Fed. R. Bankr. P. 6007. Upon abandonment, control of the property abandoned reverts to and revests in the debtor. In such event, unless the automatic stay has terminated, a mortgagee or other lien creditor must obtain relief from the automatic stay as to the debtor by final order of the bankruptcy court before foreclosing the debtor's interest. 11 U.S.C. § 362; Fed. R. Bankr. P. 4001.

An order of abandonment is not final and nonappealable until 14 days after the entry of the order. Fed. R. Bankr. P. 8002. Unless the court orders otherwise, property scheduled

and not otherwise administered at the time of the closing of the estate is abandoned to the debtor. Property that is not abandoned and that is not administered (such as property never scheduled or dealt with) remains property of the estate. 11 U.S.C. § 554.

Caution:

The examiner should not rely upon the final report of the trustee as constituting a closing of the estate. The final report and final account constitute a presumption of full administration if no objections are filed within 30 days but are not equivalent to an order closing the estate. Fed. R. Bankr. P. 5009; In re East, 2016 WL 6952471 (Bankr. E.D. Tenn. Nov. 23, 2016); In re Reed, 89 B.R. 100 (Bankr. C.D.Cal.1988), aff'd 940 F.2d 1317 (9th Cir.1991) (discussing "no asset" report); In re Ginsberg, 164 B.R. 870 (Bankr. S.D.N.Y.1994); In re Schoenewerk, 304 B.R. 59 (Bankr. E.D. N.Y. 2003).

Title to unscheduled property will not revest or revert to the debtor when the case is closed; thus, a case could be reopened after seven decades to administer unscheduled property that had not been sold in the interim period; clear and insurable title cannot otherwise be conveyed and title remains in *custodia legis*. *In re Dunning Bros. Co.,* 410 B.R. 877 (Bankr. E.D. Cal. 2009).

Source:

Citations in the Comment; 5 Collier on Bankruptcy, Chapter 554 (Alan N. Resnick & Henry J. Sommer eds. 16th Ed. Revised 2022).

History:

Adopted October 9, 1999.

Standard 12.70. Authority To Foreclose Land In Proposed Transaction

If a deed of trust encumbering property of the estate or property of the debtor is to be foreclosed and the automatic stay has not otherwise terminated, the examiner should require satisfactory evidence that the mortgagee filed a motion to lift stay, that notice of the motion for relief from the automatic stay was served in accordance with the Bankruptcy Rules and applicable local rules, and that the bankruptcy court granted the motion prior to commencement of the foreclosure. The examiner should require that a certified copy of the order lifting stay or other evidence of lift of stay be recorded in the real property records.

Comment:

The filing of a bankruptcy petition operates as an automatic stay that prevents enforcement of any lien against property of the estate and that prevents enforcement of a lien that secured a claim that arose before the commencement of the case. 11 U.S.C. § 362. A motion for relief from the automatic stay must be served in accordance with Fed. R. Bankr. P.

4001 and 9014. The motion must be served on the official committees or on scheduled creditors if no committees are appointed. The motion also must be served on such other entities as the court may order and as provided by local rules. Fed. R. Bankr. P. 4001(a)(1). For example, Local Rule 4001-1(a)(4) of the Bankruptcy Rules for the Southern District of Texas requires that, in addition to service required by Fed. R. Bankr. P. 4001(a)(1), the motion must be served on the debtor, debtor's attorney, parties requesting notice, parties with an interest in collateral that is the subject of the requested relief (e.g., other lienholders), co-debtors under 11 U.S.C. § 1301, parties who are identified as a party against whom relief is sought in the motion, and the trustee.

An agreement for relief from the stay may be granted after notice, unless objections are filed within 14 days after mailing of notice (or such other time fixed by the court). Fed. R. Bankr. P. 4001(d). A bankruptcy court may terminate, lift, or annul a stay. The automatic stay may be lifted or, for a variety of reasons, may not exist, such as (1) without court order after passage of 30 days after motion for relief, unless the court continues the stay (or after 60 days, if the debtor is an individual in a Chapter 7, 11, or 13 proceeding under § 362(e)(2)), 11 U.S.C. § 362(e), Advisory Committee Note to R4001; (2) by court order recorded in the real property records and effective for two years that finds the petition was part of a scheme to delay, hinder, and defraud creditors involving multiple filings or transfers without lender consent, 11 U.S.C. §§ 362(b), 362(d)(4); (3) where a case is filed in violation of a bankruptcy court order in a prior case, 11 U.S.C. § 362(b)(21)(B); or (4) by court order confirming that the stay has been terminated because of certain frequent filings, 11 U.S.C. § 362(j). The court may annul a stay after a foreclosure has been commenced or conducted. 11 U.S.C. § 362(d). The stay does not otherwise terminate until the case is closed, until the case is dismissed, or, if the case is under Chapter 7 concerning an individual or under Chapter 9, 11, 12, or 13, until the time the discharge is granted or denied. The discharge is granted or denied in a case under Chapter 11 upon confirmation of the plan, unless the debtor is an individual. 11 U.S.C. § 1141(d). The discharge is granted or denied in a case under Chapter 12 or 13, or in a case of an individual under Chapter 11, after completion of the plan. 11 U.S.C. §§ 1141(d), 1228, 1328. An order granting a lift or annulment of stay is not final and nonappealable until 14 days after the entry of the order. Fed. R. Bankr. P. 8002. An order granting a motion for relief from the automatic stay is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise. Fed. R. Bankr. P. 4001(a)(3).

Source:

Citations in the Comment; 3 Collier on Bankruptcy, Chapter 362 (Alan N. Resnick & Henry J. Sommer eds. 16th Ed. Revised 2022).

History:

Adopted October 9, 1999; amended June 16, 2006; amended June 27, 2008. The amended standard of June 16, 2006 provided: "If a deed of trust encumbering property of the estate or property of the debtor is to be foreclosed and the automatic stay has not otherwise terminated, the examiner should require satisfactory evidence that (1) the mortgagee filed

a motion to lift stay; (2) notice of the motion for relief from the automatic stay was served in accordance with the Bankruptcy Rules and applicable local rules; and (3) the bankruptcy court granted the motion prior to commencement of the foreclosure; or, if no order grants or denies relief or continues the stay more than 60 days from the date of the request for relief from the stay prior to commencement of the foreclosure if the debtor is an individual in a Chapter 7, 11 or 13 case or otherwise more than 30 days from the date of the request for relief from the stay prior to commencement of the foreclosure. The examiner should require that a certified copy of the order lifting stay or other evidence of lift of stay be recorded in the real property records."

The original standard provided: "If a deed of trust encumbering property of the estate or property of the debtor is to be foreclosed and the automatic stay has not otherwise terminated, the examiner should require satisfactory evidence that (1) the mortgagee filed a motion to lift stay; (2) notice of the motion for relief from the automatic stay was served in accordance with the Bankruptcy Rules and applicable local rules; and (3) the bankruptcy court granted the motion prior to commencement of the foreclosure; or, if no order grants or denies relief or continues the stay, more than 30 days passed from the date of the request for relief from the stay prior to commencement of the foreclosure. The examiner should require that a certified copy of the order lifting stay or other evidence of lift of stay be recorded in the real property records."

Standard 12.80. Authority To Convey Or Lease Property Of Bankruptcy Estate Not In Ordinary Course Of Business In Proposed Transaction

If property will be sold or leased by the bankruptcy trustee or debtor in possession, other than in the ordinary course of business, the examiner should require evidence of the following: (1) 21 days' notice of sale to the debtor, the trustee, all creditors and indenture trustees by mail, unless the court orders the time shortened; (2) no objections to the sale were made or the court by order overruled the objections and authorized the sale; and (3) the order of sale, if any, is nonappealable or is not stayed pending appeal. The examiner should require that a certified copy of the order or other evidence of authority to sell or lease be recorded in the real property records.

Comment:

The trustee or debtor in possession, after notice and a hearing, may sell property of the estate other than in the ordinary course of business. 11 U.S.C. §§ 363, 1107. The clerk or some other person as the court may direct must give the debtor, the trustee, all creditors, and indenture trustees at least 21 days' notice by mail of a proposed sale of property of the estate other in the ordinary course of business, unless the court for cause shortens the time or directs another method of notice. Fed. R. Bankr. P. 2002 (a), 6004. The reversal or modification on appeal of an order of sale does not affect the finality or validity of a sale to an entity that bought the property in good faith, whether or not the entity knew of the appeal, unless the sale was stayed pending appeal. 11 U.S.C. § 363 (m). An order authorizing a sale is not final and nonappealable until 14 days after the entry of the order. Fed. R. Bankr. P. 8002. An order authorizing the use, sale, or lease of property other than cash collateral is stayed

until the expiration of 14 days after entry of the order, unless the court orders otherwise. Fed. R. Bankr. P. 6004(h).

An objection to a proposed sale must be filed and served no less than seven days before the date set for the proposed action or in the time set by the court. Fed. R. Bankr. P. 6004(b). If timely objection is made, the date for the hearing thereon may be set in the notice given under Fed. R. Bank. P. 6004(a). Fed. R. Bankr. P. 6004(e); 11 U.S.C. §§ 102(1), 363(b).

A grant or transfer of rights under an oil and gas lease would be governed by the requirements for a sale of property of the estate and would not be controlled by the provisions relating to rejection, assumption, and assignment of executory contracts and unexpired leases. In re Topco, Inc., 894 F.2d 727, 739 (5th Cir.1990) reh'g denied, en banc; River Production Co. v. Webb, 902 F.2d 955 (5th Cir.1990) (dictum at footnote 17 asserts that state law determines whether oil and gas leases are subject to § 365 as unexpired leases, and that such oil and gas "leases" in Texas are conveyances of determinable fee interests subject to the provisions of § 363 regarding sales, rather than subject to § 365 as unexpired "leases"); K & D Energy v. KY USA Energy, Inc. (In re KY USA Energy, Inc.), 444 B.R. 734 (Bankr. W.D. Ky. 2011) (holding that, because a farmout assignment assigns interests in oil and gas leases, it is not an executory contract because the rights assigned were interests in real estate and not a true lease); In re WRT Energy Corp., 202 B.R. 579 (Bankr. W.D.La.1996) (Louisiana mineral lease was not an unexpired lease or executory contract subject to assumption or rejection under 11 U.S.C. § 365).

Caution:

In certain circumstances, an examiner should not rely upon a court order authorizing a sale from the time that the order is signed or entered on the docket. For example, the issue of the good faith of the purchaser may be considered on appeal, even though no stay was granted. In re Paolo Gucci, 105 F.3d 837 (2d Cir.1997); In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143 (3d Cir.1986). The appellant has the heavy burden to establish that any finding by the bankruptcy court of good faith was clearly erroneous. In re Lehman Bros. Holdings, Inc., 415 B.R. 774 (S.D. N.Y. 2009). An order authorizing a sale is automatically "stayed" for 14 days after entry of the order, unless the court orders otherwise. Fed. R. Bank. P. 6004(h).

Source:

Citations in the Comment; 3 Collier on Bankruptcy, Chapter 363 (Alan N. Resnick & Henry J. Sommer eds. 16th Ed. Revised 2022).

History:

Adopted October 9, 1999.

Standard 12.90. Authority To Convey Property OfBankruptcy Estate In Ordinary Course Of Business In Proposed Transaction

If property will be sold or leased by the bankruptcy trustee or debtor in possession, in the ordinary course of business, the examiner should require evidence of the following: (1) if the trustee is acting in a Chapter 7 case, the court must authorize the trustee to operate the business and should authorize real estate sales in the ordinary course of business; or (2) if the debtor in possession or trustee is acting in a Chapter 11 case, the authority of the debtor or trustee has not been limited by court order (and no plan has been confirmed). The examiner also should require evidence that the sale will be made in the ordinary course of business be recorded in the real property records.

Comment:

The trustee or debtor in possession may sell or lease property of the estate in the ordinary course of business if authorized to operate the business under 11 U.S.C. §§ 721, 1108, 1203, 1204 or 1304. 11 U.S.C. § 363(c)(1). The court may authorize the trustee to operate the business of the debtor for a limited period in a Chapter 7 case. 11 U.S.C. § 721. Unless the court orders otherwise, the trustee may operate the debtor's business in a Chapter 11 case. 11 U.S.C. § 1108. A debtor in possession in a Chapter 12 case has the rights of a trustee serving in a Chapter 11 case, unless the court orders otherwise. 11 U.S.C. § 1203. Unless the court orders otherwise, a debtor engaged in business may operate the business of the debtor and has the powers of a trustee under § 363 (c). 11 U.S.C. § 1303.

To accomplish an ordinary course of business sale or lease, some examiners will require (1) an order authorizing the trustee or debtor in possession to sell or lease in the ordinary course of business, (2) a specific order authorizing the sale or lease, or (3) notice of a proposed sale or lease and evidence that no objection to the sale or lease was filed. However, many examiners do not believe that a sale or lease of real property in the ordinary course of business may be made in a Chapter 12 or Chapter 13 proceeding. If the sale or lease is not made in the ordinary course of business and is not otherwise authorized, it may be avoidable as a post-petition transaction. 11 U.S.C. § 549.

Source:

Citations in the Comment; 3 Collier on Bankruptcy, Chapter 363 (Alan N. Resnick & Henry J. Sommer eds. 16th Ed. Revised 2022).

History:

Adopted October 9, 1999.

Standard 12.100. Authority To Convey Property Of Bankruptcy Estate Free And Clear Of Liens In Proposed Transaction

If property will be sold by the bankruptcy trustee or debtor in possession free and clear of liens, the examiner should require evidence that: (1) 21 days' notice of sale disclosing that the sale would be made free and clear of liens was given to the debtor, the trustee, all creditors, including the creditors secured by liens on the land, and indenture trustees by mail, unless the court orders the time shortened; (2) the court by order authorized the sale free and clear of liens; and (3) the order of sale is nonappealable or is not stayed pending appeal. The examiner should require that a certified copy of the order be recorded in the real property records.

Comment:

The trustee or debtor in possession, after notice and a hearing, may sell property of the estate free and clear of liens. 11 U.S.C. §§ 363 (f), 1107. The clerk or some other person as the court may direct must give the debtor, the trustee, all creditors and indenture trustees at least 21 days' notice by mail of a proposed sale of property of the estate, unless the court for cause shortens the time or directs another method of notice. Fed. R. Bankr. P. 2002 (a), 6004.

A motion for authority to sell free and clear of liens must be served on the parties who have liens or other interests in the property. The notice shall include the date of the hearing on the motion and the time within which objections may be filed and served. Fed. R. Bankr. P. 6004 (c).

The reversal or modification on appeal of an order of sale does not affect the finality or validity of a sale to an entity that bought the property in good faith, irrespective of whether the entity knew of the appeal, unless the sale was stayed pending appeal. 11 U.S.C. § 363 (m). An order authorizing a sale is not final and nonappealable until 14 days after the entry of the order. Fed. R. Bankr. P. 8002. The date of "entry" of an order is the date that the order is noted on the docket; the date of signature of an order is not determinative of the date of entry. Fed. R. Bankr. P. 5003(a). An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise. Fed. R. Bankr. P. 6004(h).

Caution:

In certain circumstances, an examiner should not rely upon a court order authorizing a sale from the time that the order is signed or entered on the docket. For example, the issue of the good faith of the purchaser may be considered on appeal, even though no stay was granted. In re Paolo Gucci, 105 F.3d 837 (2d Cir.1997); In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143 (3d Cir.1986). The appellant has the heavy burden to establish that any finding by the bankruptcy court of good faith was clearly erroneous. In re Lehman Bros. Holdings, Inc., 415 B.R. 774 (S.D. N.Y. 2009).

The Bankruptcy Code § 363(f) provides several bases to sell free and clear of liens, including a sale if the price is greater than the aggregate "value" of all liens, or a sale if the lien is in bona fide dispute. Many orders free and clear of liens provide that the liens attach to the proceeds, and an examiner may wish to include such requirement. Given the reluctance of taxing authorities to recognize such sales, the examiner may require payment of taxes, absent approval of the order by the taxing authority. For the sale to be made free and clear of an IRS lien, notice must have been given to (1) the IRS, (2) the United States attorney for the district in which the action is brought, and (3) the Attorney General. Fed. R. Bankr. P. 6004(c), 7004 (b)(4), 9014; In re J.B. Winchells, Inc., 106 B.R. 384 (Bankr. E.D.Pa. 1989). Notice to an insured depository institution must include notice by certified mail to an officer, unless the institution has appeared by its attorney in the bankruptcy case or unless the court orders otherwise after certified mail notice of an application to authorize service by first class mail, or the institution has waived its right to service by certified mail. Fed. R. Bankr. P. 7004(h) [amended by 2014 US Order 0011 (C.O. 0011)]. The 2005 amendments to the Bankruptcy Code changed the requirements for various notices, 11 USC § 342 (notice to the current account number and address at which the creditor requests notice under Section 342(c)(2)(A)); however, an examiner reasonably and customarily relies on certificates confirming notice as evidence of compliance with the notice requirements.

A sale may be made free and clear of the interest of a co-owner under § 363(h). However, the sale must be made under an adversary proceeding. Fed. R. Bankr. P. 7001(3).

The bankruptcy estate does not include PACA (Perishable Agricultural Commodities Act, 7 U.S.C.§ 499a, et seq.) and P&SA (Packers and Stockyards Act, 7 U.S.C. § 181, et seq.) trust assets. Thus, a sale cannot be made free and clear of such rights. See re Kornblum & Co., 81 F.3d 280 (2d Cir. 1996) (holding that a single PACA trust exists for the benefit of all sellers to a produce dealer and that a PACA trust is entitled to claim trust property ahead of creditors holding security interests); In re Panache Cuisine, 2013 WL 5350613, 58 Bankr. Ct. Dec. (LRP) 129 (Bankr. D. Md. Sept. 23, 2013) (holding that disputed claims under PACA should be resolved by adversary proceedings and not by claims objections); and In re Delta Produce, L.P., 845 F.3d 609 (5th Cir. 2016) (the right is a nonsegregated floating superpriority trust).

Various decisions conclude that a sale cannot be made free and clear of certain third party interests in real property that are not in dispute, including easements (In re Pintlar Corp., 187 B.R. 680 (Bankr. D. Idaho 1995), restrictions of record that run with the land (In re Oyster Bay Cove, 196 B.R. 251 (E.D. N.Y. 1996), and certain leases (In re MMH Auto Group, LLC, 385 B.R. 47 (Bankr. S.D. 2008). However, a contrary case has approved a sale free and clear of an easement. In re Sherwin Alumina Co., LLC, 952 F.3d 229 (5th Cir. 2020). See also Precision Industries, Inc. v. Qualitech Steel SBQ, LLC, 327 F. 3d 537 (7th Cir. 2003)(which allowed such a sale free and clear of a lease) and also In re Spanish Peaks Holdings II LLC, 862 F.3d 1148 (9th Cir. 2017) (which also authorizes a sale free and clear of leases between insiders that were unrecorded and below market).

The *Clear Channel* case concerned a particular type of sale free and clear of liens: "This appeal presents a simple issue: outside a plan of reorganization, does Section 363(f)

of the Bankruptcy Code permit a secured creditor to credit bid its debt and purchase estate property, taking title free and clear of valid, nonconsenting junior liens? We hold that it does not." In re PW, LLC (Clear Channel Outdoor, Inc. v. Knupfer), 391 B.R. 25, 29 (9th Cir. BAP 2008). This case has been "widely criticized," see, e.g., Kevin J. Walsh & Ella Shenhav, "Are Bankruptcy Sales Finally Final," http://www.mintz.com/newsletter/2011/Advisories/ 1229-0611-NAT-BRC/web.htm (July 8, 2011), and viewed as overly broad, see In re Royal Street Bistro L.L.C., 26 F.4th 326 (5th Cir. 2022).

Whether gas gathering, transportation, and processing agreements are executory contracts that can be rejected pursuant to Section 365 is uncertain due to the fact-specific nature of the agreements and conflicting case law. According to Occidental Petroleum Corp. v. Sanchez Energy Corp. (In re Sanchez Energy Corp.), 631 B.R. 847 (Bankr. S.D. Tex. 2021), oil and gas gathering and transportation agreements form real property covenants under Texas law so that the dedication of wells and leases survives a bankrupt debtor's rejection of those agreements. Under Sabine Oil & Gas Corp. v. HPIP Gonzales Holdings, LLC (In re Sabine Oil & Gas Corp.), 550 B.R. 59 (Bankr. S.D.N.Y. 2016), to the contrary, such agreements do not constitute covenants running with the land and are subject to rejection by a bankrupt oil and gas producer. Cf. In re Hilltop SPV, LLC, 667 B.R. 110 (Bankr. W.D. Tex. 2025) (upholding a partial rejection).

A sale could not be made free and clear of water rights. In re Sugarloaf Holdings, LLC, 640 B.R. 270 (Bankr. D. Utah 2022).

The Supreme Court has cast doubt on reliance on numerous bankruptcy court decisions, absent a district court order, because the issues were not within core bankruptcy jurisdiction under 28 U.S.C. Section 157 and thus could only be finally adjudicated by a U.S. Const. Article III (district) judge. In Stern v. Marshall., 564 U.S. 462, 505 (2011), the Supreme Court held that "Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article. We conclude today that Congress, in one isolated respect, exceeded that limitation in the Bankruptcy Act of 1984. The Bankruptcy Court [whose judge is now appointed by federal courts of appeals under 28 U.S.C. Section 152] below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." Subsequently, the Supreme Court held in Executive Benefits Ins. Agency v. Arkison, 573 U.S. 25 (June 9, 2014) that the bankruptcy court should have entered findings of fact and conclusions of law in a fraudulent conveyance action (which is not core), and should not have granted summary judgment; however, the district court's de novo review of the bankruptcy court order cured possible error in the bankruptcy court order. As suggested by In re Teleservices Group, Inc. (Meoli v. Huntington Nat'l Bank), 456 B.R. 318, 332-334 (Bankr. W.D. Mich. 2011), numerous actions approved by a bankruptcy court, without district court review, may be called into question. Those may include an avoidance action under Section 544 (incorporating state law for avoidance), Section 547 (preference), Section 548 (fraudulent transfer), or Section 363(h) (sale free and clear of the rights of a co-owner).

A divisional merger (or "Texas Two Step") may result in a fraudulent transfer. DBMP LLC v. Those Parties Listed on Appendix A to Complaint, 2021 WL 5579990 (Bankr. W.D.N.C. Aug. 10, 2021); In re Aldrich Pump LLC, 2021 WL 3729335 (Bankr. W.D.N.C. Aug. 20, 2021).

A savings clause seeking to prevent insolvency by amending liabilities and liens to make them enforceable to the "maximum extent permitted by law" may not be enforceable at all. *In re Tousa*, 444 B.R. 613 (S.D. Fla. 2011).

In Tyler v. Hennepin County, Minnesota, et al.,, 598 U.S. 631, 143 S.Ct. 1369, 215 L.Ed.2d 564 (May 25, 2023), the U.S. Supreme Court held that the county may seize the private property to pay taxes but violates the takings clause if it keeps proceeds above what it is due. It has also been held that a New Jersey tax foreclosure sale was a fraudent transfer under Section 548 as no notice was required to be given to third parties, there were no auction procedures, and no other exposure to the market. Thus, the tax foreclosure did not constitute reasonably equivalent value. Heidt v. BV001 Reeo Blocker LLC (in re Heidt), 656 B.R. 10 (Bankr. D. N. J. 2023).(discusssing various tax sale foreclosures as fraudulent transfers).

Bankruptcy Rule 8018.1, as adopted effective December 1 2018, states that, if on appeal, a district court determines that the bankruptcy court did not have the power under Article III of the Constitution to enter the judgment, order, or decree appealed from, the district court may treat it as proposed findings of fact and conclusions of law.

The examiner also should be aware that there is an automatic stay for 14 days after entry of the order of sale, unless the court orders otherwise. Fed. R. Bankr. P. 6004(h). See Standard 12.30.

Source:

Citations in the Comment; 3 Collier on Bankruptcy, Chapters 342, 363 (Alan N. Resnick & Henry J. Sommer eds. 16th Ed. Revised 2022).

History:

Adopted October 9, 1999.

Standard 12.110. Authority To Convey Property After Confirmation Of Plan

If the debtor is selling land and the debtor's bankruptcy plan has been confirmed, the examiner should (1) review the confirmed plan and order confirming plan to determine that the land is revested in the debtor and to determine that the plan and order do not limit the authority of the debtor to convey and (2) determine that the order is final and nonappealable. The examiner should require that a certified copy of the order confirming the plan be recorded in the real property records.

Comment:

Except as provided in the plan or order confirming the plan, the confirmation of the plan vests all property of the estate in the debtor. 11 U.S.C. §§ 1141 (b), 1227 (b), 1327 (b). A notice of appeal must be filed with the clerk within 14 days of the date of the entry (on the docket) of the order of confirmation. A timely motion to amend or make additional findings of fact, to alter or amend the judgment, for a new trial, or for relief from a judgment because of mistakes, inadvertence, excusable neglect, newly discovered evidence, or fraud, must be filed within 14 days of the entry of the order of confirmation; in the event of such motion, the time for appeal runs from the entry of the order disposing of the motion. Fed. R. Bankr. P. 8002. An order confirming a Chapter 9 (Municipality) or a Chapter 11 (Reorganization) plan is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise. Fed. R. Bankr. P. 3020(e).

Caution:

If the sale involves substantially all of the assets of the debtor or nonexempt assets in a Chapter 12 or 13 case, then the sale may be viewed as a modification of the plan. The sale or encumbrance by the debtor after confirmation of a Chapter 12 or 13 plan may require court approval because of local rules or provisions of the plan. A cautious examiner may require an order authorizing the sale. Although an appeal from a confirmation order may be equitably moot if no stay is secured, based upon established case law, this doctrine may not be as clearly reliable as the statutorily based mootness provisions of §§ 363 (sale) and 364 (mortgage). In re Seidler, 44 F.3d 945 (11th Cir.1995) (because effective judicial relief remains available to appellants, the appeal is not moot). The examiner also should be aware that there is an automatic stay for 14 days after entry of the order confirming the plan, unless the court orders otherwise. Fed. R. Bankr. P. 3020(e).

Source:

Citations in the Comment; 8 Collier on Bankruptcy, Chapters 1141, 1227, 1327 (Alan N. Resnick & Henry J. Sommer eds. 16th Ed. Revised 2022).

History:

Adopted October 9, 1999.

Standard 12.120. Authority To Mortgage In Proposed Transaction

If property will be mortgaged by the bankruptcy trustee or debtor in possession, the examiner should require evidence of the following: (1) notice of the proposed mortgage to interested parties, including the debtor, all creditors and indenture trustees, by mail; (2) no objections to the mortgage were made or the court by order overruled the objections and authorized the mortgage; and (3) the mortgage is nonappealable or is not stayed pending appeal. The examiner should require that a certified copy of the order be recorded in the real property records.

Comment:

The debtor in possession, or the trustee if the trustee is authorized to operate the business, may, after notice and a hearing, be authorized by the bankruptcy court to incur debt secured by a lien on the land. 11 U.S.C. § 364 (c). The reversal or modification on appeal of the authorization does not affect the priority or lien granted to an entity that extended the credit in good faith, unless the authority was stayed pending appeal. 11 U.S.C. § 364(e).

The court may, after notice and a hearing, and as a last resort, be authorized to obtain a senior or equal lien on property of the estate, but only if the trustee is unable to obtain credit otherwise and there is adequate protection afforded to the existing creditors. 11 U.S.C. § 364(d). Adequate protection can be considered uncertain but might consist of a guaranty, equity, periodic cash payments, additional or replacement liens, or other indubitable equivalent of the creditor's interest.

Caution:

If the loan has not been fully disbursed, the appeal may not be moot due to failure to obtain a stay because meaningful relief could be granted. In re Swedeland Develop. Group, Inc., 16 F.3d 552 (3d Cir.1994) (involving obtaining postpetition loans on a superpriority basis). The cautious examiner may require proof that the order is final and nonappealable. Unless the order provides otherwise, the grant of a mortgage may remain subject to the automatic stay until later lifted. Gibraltar Savings v. Commonwealth Land Title Insurance Co., 905 F.2d 1203 (8th Cir.1990).

The Supreme Court case of *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 143 S.Ct. 927, 215 L.Ed.2d 262, 2023 U.S. LEXIS 1666, 29 Fla. L. Weekly Fed. S. 744 (U.S. 2023), held that Section 363(m) is not jurisdictional but simply limits the remedies of the parties (and is subject to waiver and forfeiture). In writing the *MOAC* opinion, Justice Jackson explained that a "'case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" "The case remains live," she stated, "'[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation.'"

Source:

Citations in the Comment; 3 Collier on Bankruptcy, ¶ 364.01, et seq. (Alan N. Resnick & Henry J. Sommer eds. 16th Ed. Revised 2022).

History:

Adopted October 9, 1999.

Standard 12.130. Filings In Violation Of Automatic Stay

The examiner should not disregard a judgment lien, tax lien notice, or other instrument filed after the commencement of a bankruptcy case and in apparent violation of the automatic stay, because the filing of the instrument may be treated as voidable and may not be considered void, absent action in the bankruptcy case to avoid the instrument.

Comment:

The automatic stay prevents any act to create or perfect any lien against property of the estate or any act to create or perfect against property of the debtor any lien to the extent the claim arose prior to the commencement of the case. 11 U.S.C. § 362 (a)(4), (a)(5). However, there are different opinions as to whether the violation of a stay is automatically void or is simply voidable. Bronson v. United States, 46 F.3d 1573 (Fed.Cir.1995); In re Soares, 107 F.3d 969 (1st Cir. 1997); York v. State, 373 S.W.3d 32, 39 (Tex. 2012) (The Texas Supreme Court, in agreeing with Soares that a violation of the automatic stay should be treated as void, said "We agree, as do most of the federal circuit courts that have considered the issue, and would add only that the automatic stay protects not only the debtor but other creditors of the estate as well.").

Source:

Citations in the Comment; 3 Collier on Bankruptcy, ¶ 362.11 (Alan N. Resnick & Henry J. Sommer eds. 16th Ed. Revised 2022).

History:

Adopted October 9, 1999.

Standard 12.140. The Discharge And Judgment Liens

An examiner may presume that an abstract of judgment filed against a person who was a debtor in a bankruptcy case is extinguished as a lien against property of the debtor if: (1) the debtor files a motion in the bankruptcy case under 11 U.S.C. § 522(f) to extinguish the lien as to homestead, notifies the creditor in accordance with the applicable Bankruptcy Rules and local rules, and secures a final order of the bankruptcy court removing the lien; (2) the debtor acquires the property after receiving a discharge from the debt evidenced by the abstract of judgment; or, (3) the property is exempt or is not abandoned in the bankruptcy proceeding, and the debtor receives a discharge from the debt.

Comment:

A proceeding under 11 U.S.C. § 522(f) by the debtor to avoid a judicial lien must be treated as a contested matter, and notice must be served in accordance with Fed. R. Bankr. P. 7004. Fed. R. Bankr. P. 4003(d), 9014. An order will not be final until 14 days after the entry of the order (or after a timely motion to amend, or alter a judgment, or for mistake or

fraud). Fed. R. Bankr. P. 8002(c)(2). A dismissal of the bankruptcy case will reinstate a judgment lien, unless the court orders otherwise. 11 U.S.C. § 349. The judgment lien may not be extinguished under 11 U.S.C. § 522(f) if the lien secures a domestic support obligation. 11 U.S.C. §§ 101(14A), 522(f)(1)(A). If the judgment debtor receives a discharge from the debt of the judgment, property acquired by the debtor after the bankruptcy discharge will not be encumbered by the abstract of judgment. In re Fuller, 134 B.R. 945 (B.A.P. 9th Cir.1992) (relating to tax lien); Tex. Prop. Code § 52.025 (prior to September 1, 1993). A judgment lien is discharged and any abstract of judgment or judgment lien is canceled and released without further action and may not be enforced if (1) the lien is against real property owned by the debtor before a petition for debtor relief was filed under federal bankruptcy law, and (2) the debt or obligation evidenced by the judgment is discharged in the bankruptcy. A judgment evidencing a debt or obligation discharged in bankruptcy does not have force or validity and may not be a lien on real property acquired by the debtor after petition for debtor relief was filed. Tex. Prop. Code § 52.042 (effective September 1, 1993). The examiner should review the bankruptcy docket and abstract of judgment to verify that the debt was discharged.

Source:

Citations in the Comment.

History:

Adopted October 9, 1999; amended June 16, 2006; amended June 27, 2008; amended July 17, 2014.

The prior standard, amended June 27, 2008, provided: "An examiner may assume that an abstract of judgment filed against a person who was a debtor in a bankruptcy case is extinguished as a lien against property of the debtor if: (1) the debtor files a motion in the bankruptcy case under 11 U.S.C. § 522(f) to extinguish the lien as to homestead, notifies the creditor in accordance with the applicable Bankruptcy Rules and local rules, and secures a final order of the bankruptcy court removing the lien; (2) the debtor acquires the property after receiving a discharge from the debt evidenced by the abstract of judgment; or, (3) the property is exempt or is not abandoned in the bankruptcy proceeding, and the debtor receives a discharge from the debt.

The amended June 16, 2006 standard provided: "An examiner may assume that an abstract of judgment filed against a person who was a debtor in a bankruptcy case is extinguished as a lien against property of the debtor if: (1) the debtor files a motion in the bankruptcy case under 11 U.S.C. 522(f) to extinguish the lien as to homestead, notifies the creditor in accordance with the applicable Bankruptcy Rules and local rules, and secures a final order of the bankruptcy court removing the lien; (2) the debtor acquires the property after receiving a discharge from the debt evidenced by the abstract of judgment; or, (3) the property is exempt or is not abandoned in the bankruptcy proceeding, and the debtor receives a discharge from the debt."

The original standard provided: "An examiner may assume that an abstract of judgment filed against a person who was a debtor in a bankruptcy case is extinguished as a lien against property of the debtor if: (1) the debtor files a motion in the bankruptcy case under 11 U.S.C. 522(f) to extinguish the lien as to homestead, notifies the creditor in accordance with the applicable Bankruptcy Rules and local rules, and secures a final order of the bankruptcy court removing the lien; (2) the debtor acquires the property after receiving a discharge from the debt evidenced by the abstract of judgment; (3) the abstract of judgment is recorded before September 1, 1993, and the property is exempt or is not abandoned in the bankruptcy case, and the debt is discharged, and the court which granted the judgment reflected by the abstract of judgment removes the judgment lien by court order more than one year after the bankruptcy discharge is granted, and a copy of the order is recorded; or, (4) the abstract of judgment is recorded on or after September 1, 1993, and the property is exempt or is not abandoned in the bankruptcy proceeding, and the debtor receives a discharge from the debt."

Standard 12.150. Extension Of Time

An examiner should be aware that the filing of the bankruptcy case tolls the limitation period in which the trustee may commence an action, if the limitation period had not expired at the time of the filing of the case, until the later of (1) the end of the period under other law or (2) two years after the order for relief (filing of voluntary bankruptcy). The filing of the bankruptcy case tolls the period in which the trustee may file a pleading or cure a default until the later of (a) the end of the period under other law or (2) 60 days after the order for relief. If applicable nonbankruptcy law or an agreement fixes a period for commencing an action on a claim against the debtor, then the limitation period does not expire until the later of (1) the end of the period under other law or (2) 30 days after the notice of termination or expiration of the stay as to the claim.

Comment:

The Bankruptcy Code tolls the time for enforcement of contracts, options, deeds of trust, mechanic's liens and other claims by or against the debtor and debtor's property if they have not expired at the time of the filing of the bankruptcy case. 11 U.S.C. § 108.

Caution:

Some cases indicate that the provisions requiring delay rentals or production will not be tolled by the automatic stay (or otherwise), because of the filing of a bankruptcy by a lessee. Champlin Petroleum Co. v. Mingo Oil Producers, 628 F.Supp. 557 (D.Wyo.1986) (force majeure clause did not extend the lease because of bankruptcy proceedings), aff'd without op., Champlin Petroleum Co. v. Mingo Oil Producers, 841 F.2d 1131 (10th Cir.1987); Good Hope Refineries, Inc. v. Benavides, 602 F.2d 998 (1st Cir.1979) (rejecting the argument that § 108 extended time for performance); In re Anne Cara Oil Co, 32 B.R. 643 (Bankr. D. Mass. 1983) (Section 108 is not applicable and does not extend the time for performance).

Source:

Citations in the Comment; 2 Collier on Bankruptcy, ch. 108 (Alan N. Resnick & Henry J. Sommer eds. 16th Ed. Revised 2022).

History:

Adopted October 9, 1999.

Standard 12.160. Effect Of Dismissal Of Case

The examiner should be aware that the dismissal of a bankruptcy case reinstates any transfer or lien avoided in the bankruptcy, vacates orders, and revests the property of the estate in the debtor.

Comment:

Unless the court, for cause, orders otherwise, the dismissal of the bankruptcy case will revest title in the debtor and vacates orders entered in the bankruptcy case. The goal is to undo the bankruptcy case and restore property rights as they were vested before the case. 11 U.S.C. § 349. However, the bankruptcy court has discretion to protect rights acquired in reliance on the case (such as the rights of a purchaser from the estate).

Source:

Citations in the Comment; 3 Collier on Bankruptcy, chapter 349 (Alan N. Resnick & Henry J. Sommer eds. 16th Ed. Revised 2022).

History:

Adopted October 9, 1999.

CHAPTER XIII

AFFIDAVITS AND RECITALS

Standard 13.10. Affidavit Defined

An affidavit is a written statement, under oath, signed by the affiant and evidenced by a jurat.

Comment:

A jurat is a certificate signed by an officer authorized to administer oaths before whom an instrument was executed, stating that the instrument was subscribed and sworn to before the officer by the person executing the instrument. An affidavit must contain a jurat to be effective. A form of a jurat is as follows:

Subscribed and sworn to this …day of …by ….

…, Notary Public, State of Texas

My commission expires:…

For a listing of officers who may administer oaths and supply a jurat, see Tex. Gov't Code §§ 602.002– 602.005.

In the past, it was typical for an affidavit to contain both a jurat and an acknowledgment. An acknowledgment merely requires that the signing party acknowledge that he or she executed the instrument. Prior to September 1, 1989, an acknowledgment was required in order for an affidavit to be recorded. As of that date, an affidavit need only contain a jurat to be recorded.

The admissibility of affidavits in a court proceeding is governed by Tex. R. Evid. 803, 804 and Tex. Estates Code § 203.001. See also Albright v. Bouldin, 394 S.W.2d 681 (Tex. App.—Eastland 1965, writ ref'd) and Compton v. WWV Enterprises, 679 S.W.2d 668 (Tex. App.—Eastland 1984, no writ). See Standard 4.20 for a further discussion of the use of the jurat and acknowledgment and Standard 11.70 concerning affidavits of heirship.

Caution:

An instrument containing an acknowledgment, but not a jurat, is not an affidavit since the facts stated therein are not sworn to by the affiant. However, no specific form of jurat is required. In Ford Motor Co. v. Leggat, 904 S.W.2d 643 (Tex. 1995), the court found an objection to a defective jurat unpersuasive, holding:

While Burmeister's affidavit contains an acknowledgement, it also states that Burmeister appeared before the notary, was "first duly sworn," and "on his oath" stated what followed. It thus meets Texas' statutory requirements for affidavits: "'Affidavit' means a statement in writing of a fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths, and officially certified to by the officer under the seal of his office." Tex. Gov't. Code Ann. § 312.011. Burmeister also swore that the facts he attested to were based on personal knowledge.

Id. at 645-46.

Source:

Citations in the Comment; 3A Aloysius A. Leopold, Land Titles and Title Examination §§ 10.18, 10.19 (Texas Practice 3d ed. 2005); Tex. Gov't Code §§ 312.011(1); 602.002–602.005; Tex. Prop. Code § 12.001(a); Tex. Estates Code §§ 205.001–205.003; 2 Tex. Jur. 3d Affidavits §§ 1–30 (1995).

History:

Adopted June 15, 2001.

Standard 13.20. Reliance Upon Affidavits

An examiner may rely upon an affidavit unless the examiner has a reasonable basis to question its reliability.

Comment:

Unlike the other standards, there is little legal authority for the use of affidavits. Nevertheless, the employment of affidavits in determining title to real property is based upon long established custom and practice.

During the course of a title examination, an examiner may encounter many types of affidavits, such as affidavits relating to heirship, family history, identity, marital status, use and possession of property, adverse possession, payment of debts, non-production of oil and gas, lack of drilling operations, and boundaries.

The examiner may find it necessary to rely upon affidavits in the interpretation of title documents, clarification of title ownership, or establishment of title. In deciding whether to rely upon an affidavit, the title examiner may consider relevant factors, such as: the date on which the affidavit was made and, if recorded, the length of time it has been recorded; whether the party or parties making the affidavit were interested or disinterested; the completeness of the affidavit, whether it recites facts or merely draws conclusions, and whether it discloses the basis of the maker's knowledge; the value of the interest in the property under examination; whether more reliable and readily obtainable proof is available; and the cost and feasibility of alternative procedures to establish title.

On many occasions, the examiner has no practical alternative but to rely upon an affidavit. However, in relying upon an affidavit, an examiner does not become a guarantor of the truth of the affidavit. An affidavit may qualify as an ancient document. See Comment to Standard 13.40.

See also, Standard 11.20, addressing affidavits of intestacy, and Standard 11.70, addressing affidavits of heirship.

Caution:

Title based upon an affidavit may not be marketable. See Standard 2.10.

An examiner should be very hesitant to rely upon an affidavit in lieu of more reliable and readily obtainable proof, such as a conveyance or the existing proceedings of a court of record.

Source:

Title Standards Joint Editorial Board. History:

Adopted June 15, 2001.

Standard 13.30. Affidavits Of Non–Production

Concerning an instrument creating an interest that depends upon production (e.g., an oil and gas lease, a mineral or royalty deed, or an assignment), an examiner may rely upon an affidavit which includes facts sufficient to show that the interest has expired by its own terms, although it is preferable to obtain a release from the owner of the interest.

Comment:

The affidavit of non-production is a curative device of necessity. The form and content of these affidavits vary widely. Because it is often not feasible to obtain a release, the examiner may rely upon an affidavit of non-production to show that a term interest has expired. The affidavit should be carefully examined, however, to ascertain that the stated facts are sufficient to show that the interest has expired by its own terms. See Comment to Standard 13.20.

Caution:

There is no statutory authority for this procedure; however, the use of the affidavit of non-production is a long-established custom and practice. The affidavit itself does not terminate the interest. The affidavit only contains facts that the examiner may consider in forming an opinion as to the status of the terminable interest.

The examiner should carefully review the instrument creating the interest to determine whether the term continues for reasons other than actual production (e.g., operations, payment of shut-in royalties, pooling, force majeure, etc.).

Additionally, the examiner may suggest that the client consult the records of the Texas Railroad Commission as another source of information regarding expiration of the interest; however, such records are subject to amendment and may be self-serving since they are prepared by, or at the direction of, the leasehold operator.

Source:

Title Standards Joint Editorial Board. History:

Adopted June 15, 2001.

Standard 13.40. Reliance Upon Recitals

Recitals are statements of fact made in deeds, leases, mortgages and other documents. Because documents containing recitals are not typically sworn statements, recitals should generally be regarded as having less probative force than affidavits; however, an examiner having no reasonable basis for doubt or suspicion may rely upon recitals as establishing the recited facts.

Comment:

Recitals, as distinguished from affidavits, occur within deeds, mortgages, leases and other instruments affecting real property. Compton v. WWV Enterprises, 679 S.W.2d 668 (Tex. App.—Eastland 1984, no writ). Like affidavits, recitals encountered during the course of title examination often remove doubt or explain apparent gaps in the chain of title. Recitals are not sworn statements, however, and are often much less thorough than affidavits intended to establish similar facts. They should therefore be appraised somewhat more critically than affidavits, although the indicia of reliability the examiner should consider are much the same as those mentioned for affidavits in the Comment to Standard 13.20. Reliance on a recital is particularly warranted if it occurs in an ancient document (one in existence at least twenty years, in a condition that arouses no suspicion, and in a place where it would likely be if authentic). See Tex. R. Evid. 803(16) & 901(b)(8). Recitals in an ancient document are prima facie evidence of the facts recited. Zobel v. Slim, 576 S.W.2d 362, 365 (Tex. 1978); Moses v. Chapman, 280 S.W. 911, 913–14 (Tex. App.—Texarkana 1926, no writ).

A particularly useful application of the "ancient document" rule is that it permits an examiner to presume the authority of a fiduciary, such as an attorney-in-fact or a trustee, whose capacity is recited in the deed but does not otherwise appear in the record. For example, in West v. Hapgood, 174 S.W.2d 963, 967–71 (Tex. 1943), the court pointed out that, while not conclusive and subject to rebuttal, the power and authority of a grantor in an ancient deed may be presumed from a bare recital. If an instrument has been recorded for the requisite period, the record itself ordinarily will qualify as an ancient document. See, e.g.,

Holmes v. Coryell, 58 Tex. 680, 688–89 (1883). See also Wickes, Ancient Documents and Hearsay, 8 Tex. L. Rev. 451 (1930) (discussing the necessity for such a rule and its rationale).

If an instrument legally executed and acknowledged or sworn to has been of record for five years or more in the county where the land is located or where the decedent resided at the time of his death, the facts contained therein concerning the family history, genealogy, marital status, or the identity of the heirs of a decedent are admissible as prima facie evidence of the stated facts in suits to declare heirship or to determine title to property. Tex. Estates Code § 203.001. Such recitals, if not controverted by other facts, will support a determination of heirship against any claimant, whether or not in privity with a party to the deed. Gramm v. Coffield, 116 S.W.2d 1089 (Tex. App.—Austin 1938, writ dism'd). See Standard 3.40 concerning recitals of identity.

Caution:

This standard is intended to recognize the examiner's latitude in accepting the truth of a recital where the source appears to be reliable; nevertheless, some degree of subjective judgment is required to appraise the likelihood that a person in the declarant's position would misstate the pertinent facts, either from lack of knowledge or from self-interest. The value of recitals is certainly tempered by the traditional rule that they are only binding on parties to the instrument and their privies and are inadmissible as evidence against the claims of others. See, e.g., Watkins v. Smith, 45 S.W. 560 (Tex. 1898). Although Tex R. Evid. 803(15) may have relaxed this rule by allowing the admission into evidence of any statement contained in a deed if the matter stated is relevant to the purpose of the document, apparently without regard to privity, a prudent examiner will not treat recitals, although admissible into evidence, as established facts against all the world without sufficient indicia of their reliability.

The examiner should bear in mind that the special legislative endorsement of reliance on recitals represented by Tex. Estates Code § 203.001 is limited to matters of family history, genealogy, marital status and heirship. Further, the existence and contents of necessary written documents may not rest on a mere recital. For example, see Standards 8.10, regarding the necessity for examination of powers of attorney, and the Comment to Standard 9.10, indicating that an examiner's assessment of a trustee's authority must be based on the provisions of the trust instrument.

It should go without saying that a recital of the existence of an essential deed should not take the place of the deed itself. For example, a recital identifying a grantor as "John Smith, successor by conveyance to the interest of William Jones" may not be accepted in lieu of the recorded deed from Jones to Smith.

Reliance on recitals is misplaced where any circumstances appear to cast suspicion on their accuracy. Recitals even in ancient documents should not be relied upon if they consist of mere conclusions that are uncorroborated and self-serving, such as a grantor's bare recital of heirship in a deed. See, e.g., Slattery v. Adams, 279 S.W.2d 445, 451–52 (Tex. App.—Beaumont 1954), aff'd on other grounds, 295 S.W.2d 859 (Tex. 1956). And a grantor's

power will not be presumed where it emanates from a court whose proceedings are required by law to be entered of record unless it is shown that the court records have been lost or destroyed. Baumgarten v. Frost, 186 S.W.2d 982, 985 (Tex. 1945).

Where the primary source of the grantor's recited authority is presumably readily available, as from court records, the primary source must be examined. Jobe v. Osborne, 97 S.W.2d 939, 940 (Tex. 1936); Tucker v. Murphy, 1 S.W. 76 (Tex. 1886). While recitals in ancient documents are admissible as evidence of the facts recited, they are not conclusive proof. Bruni v. Vidaurri, 166 S.W.2d 81, 90–91 (Tex. 1942). A purchaser is bound by every recital or reference to other documents contained in or fairly disclosed by any instrument that forms an essential link in his chain of title. Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903, 908 (Tex. 1982). Therefore, no material recital can be safely ignored.

Source:

Citations in the Comment; 4 Aloysius A. Leopold, Land Titles and Title Examination §§ 21.10, 21.10A (Texas Practice 3d ed. 2005); 5 Id. § 35.18.

History:

Adopted June 15, 2001.

CHAPTER XIV

MARITAL INTERESTS

Standard 14.10. Community Property Presumption

Except as otherwise provided in this Chapter, an examiner should presume that real property acquired during marriage is community property, whether acquired in the name of one or both spouses.

Comment:

On June 26, 2015, the United States Supreme Court held that a lawful marriage of a same-sex couple must be recognized by all states and held that marriages between pahrties of the same sex are valid and that states must recognize lawful same-sex marriage performed in another state notwithstanding state law to the contrary. Obergefell v. Hodges, 576 U.S. 644, 675-676, 681 (2015).

Tex. Fam. Code § 3.002 defines community property as all property, other than separate property, acquired by either spouse during marriage. This definition applies regardless of whether the marriage is ceremonial or at common law. See In re Glasco, 619 S.W.2d 567, 571 (Tex. App.—San Antonio 1981, no writ). Since the constitutional amendment of 1999, effective January 1, 2000, community property may also include property converted from separate property by the spouses' agreement. Tex. Fam. Code §§ 4.202–4.206. Under Tex. Fam. Code § 3.001, separate property consists only of that acquired before marriage and that acquired during marriage by gift, devise, or descent or as recovery for personal injuries. The character of property as separate or community is determined and becomes fixed at the time of acquisition. Smith v. Buss, 144 S.W.2d 529, 532 (Tex. 1940); Welder v. Lambert, 44 S.W. 281 (Tex. 1898). It is not changed from one to the other by subsequent events; for example, use of community funds to pay installments on the purchase price for property acquired by one spouse before marriage does not vest a community property interest in the other spouse. Colden v. Alexander, 171 S.W.2d 328 (Tex. 1943). The community property presumption has long been a settled rule of property in Texas, see, e.g., Stiles v. Japhet, 19 S.W. 450 (Tex. 1892), and is codified as Tex. Fam. Code § 3.003. The presumption is rebuttable by clear and convincing evidence that the property is separate property. Tex. Fam. Code § 3.003; e.g., Janes v. Gulf Production Co., 15 S.W.2d 1102 (Tex. App.—Beaumont 1929, writ ref'd). It is conclusive, however, in favor of purchasers for value without notice. Houston Oil Co. v. Choate, 232 S.W. 285, 287 (Tex. Comm'n App. 1921, judgm't adopted). For further reference and guidance concerning the community property presumption, see the comments and citations in John J. Sampson, Harry L. Tindall, et al., Sampson & Tindall's Texas Family Code, Family §§ 3.002–3.003.

See Standards 14.20, 14.30, 14.40 and 14.50, which describe circumstances in which an examiner may instead presume property acquired by conveyance to be separate property.

Source:

Citations in the Comment.

History:

Adopted June 15, 2001; amended July 17, 2014.

The prior standard provided: "Except as otherwise provided in this Chapter, an examiner must presume that real property acquired during marriage is community property, whether acquired in the name of one or both spouses."

Standard 14.20. Gift, Devise, And Descent

An examiner should consider property acquired during marriage by gift, devise or descent to be the acquiring spouse's separate property. Where the grantor's donative intent is clearly demonstrated on the face of the deed, an examiner may presume the property conveyed to be the grantee's separate property.

Comment:

Property acquired during marriage by gift, devise or descent is separate property. Tex. Fam. Code § 3.001(2). If the deed to a married person states that the conveyance is being made as a gift or otherwise clearly expresses donative intent, such as by stating the consideration to be love and affection, such a statement may be relied upon as establishing the separate character of the property conveyed. Janes v. Gulf Production Co., 15 S.W.2d 1102 (Tex. App.—Beaumont 1929, writ ref'd). Even where the gift is made to both spouses, it vests one-half in each of them, as separate property and not community. Bradley v. Love, 60 Tex. 472, 477–78 (1883); McLemore v. McLemore, 641 S.W.2d 395, 397 (Tex. App.—Tyler 1982, no writ).

One occasionally encounters deeds recited to be for love and affection and a nominal sum paid or "other good and valuable consideration." Where a deed recites love and affection as consideration or otherwise clearly demonstrates on its face donative intent, an examiner should accept these expressions as ample evidence that the property conveyed was a gift and therefore the grantee's separate property, notwithstanding further recitals of nominal or unspecified other consideration. Hall v. Barrett, 126 S.W.2d 1045 (Tex. App.—Fort Worth 1939, no writ); see also Banks v. Banks, 229 S.W.2d 99 (Tex. App.—Austin 1950, writ ref'd n.r.e.); Williams v. Nettles, 56 S.W.2d 321 (Tex. App.—Waco 1932, writ dism'd).

Caution:

The community property presumption can be overcome by a showing that no consideration actually was paid. See, e.g., Lowe v. Ragland, 297 S.W.2d 668 (Tex. 1957). In such cases an examiner may rely on an affidavit or other extrinsic evidence to show that no

valuable consideration changed hands in the transaction. See Chapter XIII of these standards concerning the use of and reliance upon affidavits generally.

Conversely, the presumption of a gift that may arise from recitals in a deed may be overcome by contrary evidence as well. See Hall v. Barrett, 126 S.W.2d 1045 (Tex. App.—Fort Worth 1939, no writ); see also Somer v. Bogart, 749 S.W.2d 202 (Tex. App.—Dallas 1988, writ denied) (presumption of gift resulting from parents' placing title in son-in-law's name was rebuttable).

Source:

Citations in the Comment.

History:

Adopted June 15, 2001; amended July 17, 2014.

The prior standard provided: "An examiner must consider property acquired during marriage by gift, devise or descent to be the acquiring spouse's separate property. Where the grantor's donative intent is clearly demonstrated on the face of the deed, an examiner may presume the property conveyed to be the grantee's separate property."

Standard 14.30. Conveyances Between Spouses

An examiner should consider property conveyed by one spouse to another to have become the grantee's separate property regardless of whether consideration is recited. However, effective January 1, 2000, a conveyance or agreement signed by both spouses may convert separate property to community property if such intention is specified.

Comment:

Texas courts have always held that a deed from husband to wife, absent evidence of any contrary intention, vests the estate in the wife as her separate property. See, e.g., Taylor v. Hollingsworth, 176 S.W.2d 733, 736 (Tex. 1943); Story v. Marshall, 24 Tex. 305 (1859). This is true whether the property is the husband's separate property or community property, and whether or not consideration is given. Dalton v. Pruett, 483 S.W.2d 926, 928–29 (Tex. App.—Texarkana 1972, no writ). Although the principal cases deal with conveyances from husband to wife, there seems no reason that the same law would not be applied to deeds from either spouse to the other after the statutory equalization of the rights of spouses regarding marital property. See In re Marriage of Morrison, 913 S.W.2d 689 (Tex. App.—Texarkana 1995, writ denied).

Tex. Const. art. XVI, § 15, effective January 1, 2000, now permits the conversion of separate property to community property by the spouses' agreement. However, the mere transfer of separate property by one spouse to the other spouse or to both spouses is not

sufficient to accomplish the conversion. Tex. Fam. Code § 4.203(b). A conveyance signed by both spouses clearly stating their intention may be relied upon.

Caution:

Prior to its repeal, effective August 23, 1963, Tex. Rev. Civ. Stat. art. 1299 (1925) (repealed by Acts 1963, 58th Leg., p. 1189, ch. 473, § 1) required the joinder of the husband in any conveyance of his wife's separate property, as well as her privy acknowledgment. See Caution to Standard 4.20. Further, before January 1, 1968, the husband was statutorily the sole manager of the community estate. Tex. Rev. Civ. Stat. art. 4619 (1925) (amended 1967, repealed 1969). Before either of these changes in the law, therefore, a wife could not convey her separate property or her community property interest directly to her husband. See, e.g., Graham v. Struwe, 13 S.W. 381 (Tex. 1890). However, a conveyance by wife to husband could be accomplished, if desired, by conveyance from husband and wife to a nominee, who would then convey to the husband. Kellett v. Trice, 66 S.W. 51 (Tex. 1902). Although Article 1299 was held unconstitutional in Wessely Energy Co. v. Jennings, 736 S.W.2d 624 (Tex. 1987), on the basis of its disparate treatment of husbands and wives, the ruling was prospective only. 736 S.W.2d at 629. Thus, an examiner may not presume that a pre-repeal deed from wife to husband can be given effect.

Source:

Citations in the Comment.

History:

Adopted June 15, 2001; amended July 17, 2014.

The prior standard provided: "An examiner must consider property conveyed by one spouse to another to have become the grantee's separate property regardless of whether consideration is recited. However, effective January 1, 2000, a conveyance or agreement signed by both spouses may convert separate property to community property if such intention is specified."

Standard 14.40. Separate Property Consideration

If an examiner determines that the consideration for a conveyance came from a married grantee's separate estate, the community property presumption is rebutted, and the examiner should consider the property to be the grantee's separate property. For example, an examiner without knowledge of contrary evidence may rely on a recital in the deed (1) that the consideration was paid out of the grantee's separate property, or (2) that the property is conveyed to the grantee as separate property.

Comment:

All property acquired during marriage for consideration is presumed to be community property, and this presumption is conclusive in the absence of contrary evidence. Lockhart v. Garner, 298 S.W.2d 108, 110 (Tex. 1957). The presumption obtains even where the parties are closely related so that a gift otherwise might be inferred. See, e.g., Kitchens v. Kitchens, 372 S.W.2d 249, 255 (Tex. App.—Waco 1963, writ dism'd). The presumption is overcome, however, by proof that the property was acquired with one spouse's separate funds or separate credit. See, e.g., Huston v. Curl, 8 Tex. 239, 242 (1852); Whorrall v. Whorrall, 691 S.W.2d 32, 35 (Tex. App.—Austin 1985, writ dism'd); Coggin v. Coggin, 204 S.W.2d 47, 51– 52 (Tex. App.—Amarillo 1947, no writ). Property purchased with one spouse's separate property is itself separate property (a concept commonly called "mutation"). Lewis v. Lewis, 944 S.W.2d 630 (Tex. 1997); Love v. Robertson, 7 Tex. 6 (1851).

Property may be partly separate and partly community in character, in a kind of tenancy in common between the two estates, if acquired partly with one spouse's separate funds and partly with community funds or credit. Gleich v. Bongio, 99 S.W.2d 881 (Tex. 1937). Under such circumstances the interest of each estate is established proportionately to the fractional share of the purchase consideration furnished out of each. Gleich, 99 S.W.2d at 884.

Recitals in a deed that the consideration was paid out of the grantee's separate property or that the conveyance is to the grantee as his or her separate property displace the usual community property presumption and establish in its place a contrary presumption that the property is the grantee's separate property. See, e.g., Henry S. Miller Co. v. Evans, 452 S.W.2d 426 (Tex. 1970); Smith v. Buss, 144 S.W.2d 529 (Tex. 1940); McCutchen v. Purinton, 19 S.W. 710 (Tex. 1892). Even if only community funds were in fact used in the purchase, a spouse who participated in the transaction is deemed to have intended a gift to the grantee. Hodge v. Ellis, 277 S.W.2d 900, 905 (Tex. 1955). Accordingly, an innocent purchaser for value relying on such a separate property recital would take free of the claim of one asserting a community property interest in the other spouse. See generally 4 Aloysius A. Leopold, Land Titles and Title Examination § 20.6 (Texas Practice 3d ed. 2005) and 5 Id. §§ 28.4, 28.8, 33.22.

Caution:

The presumption that arises from separate property recitals is rebuttable. If a spouse can show no participation in or knowledge of the transaction, that spouse will be allowed to show that the consideration was not the grantee's separate property and that no gift to the grantee was intended, so that the property is community property. Hodge v. Ellis, 277 S.W.2d 900, 905–07 (Tex. 1955); Kearse v. Kearse, 276 S.W. 690 (Tex. Comm'n App. 1925, judgm't adopted); Morris v. Neie, 212 S.W.2d 981 (Tex. App.— Eastland 1948, writ ref'd n.r.e.). The examiner should be watchful for any evidence that might be construed to place a purchaser on notice of the unreliability of separate property recitals. The separate property presumption arising from deed recitals seems particularly vulnerable given that it has been applied almost exclusively for the benefit of wives and was developed during an era in which courts felt justified in providing special protection to wives (as indicated, for example, by the court's remarks in McCutchen v. Purinton, 19 S.W. 710, 711 (Tex. 1892), noting the husband's authority over the wife's property, both separate and community). The

Constitution and statutes, of course (not to mention political and cultural reality), no longer allow courts to indulge in the protection of wives while not affording similar protection to husbands.

Source:

Citations in the Comment.

History:

Adopted June 15, 2001.

Standard 14.50. Community Property Presumption Rebutted By Domicile In Common Law Jurisdiction

An examiner may consider the community property presumption to be rebutted if it is shown the acquiring spouse was domiciled in a common law jurisdiction at the time of acquisition and if there is no indication that community funds or credit were used in the purchase.

Comment:

Under the common law as generally applied in non-community property states, a spouse's funds are his or her separate estate. See Oliver v. Robertson, 41 Tex. 422, 425 (1874). It follows that if money earned in a common law state, being separate property, is paid for Texas real property, the real property takes on the same separate character. Huston v. Colonial Trust Co., 266 S.W.2d 231, 233 (Tex. App.—El Paso 1954, writ ref'd n.r.e.). Citing that case and others, the court in Orr v. Pope, 400 S.W.2d 614, 616–17 (Tex. App.—Amarillo 1966, no writ), declared it to be the law of this state that where a spouse acquires Texas real property while residing in a common law state, the real property is separate property.

Community property laws now prevail in Texas, Louisiana, New Mexico, Arizona, California, Washington, Idaho and Nevada, as well as in many foreign countries. 7 Richard R. Powell & Patrick J. Rohan, Powell on Real Property § 53.01(3), at 53–6 (1997). Wisconsin's Uniform Marital Property Act, enacted in 1983, establishes a system analogous to community property. Id. at 53–7. The Alaska Community Property Act, Alaska Stat. §§ 34.77.010–34.77.995, in 1998 established a community property system applicable only to spouses who have chosen it by written agreement. The examiner may not apply a separate property presumption on the basis of residency outside Texas if it appears the owner was domiciled in another community property jurisdiction.

Caution:

This standard should be applied narrowly and cautiously. The fact of domicile in a common law jurisdiction should be clear, and the separate character of property should not be presumed if there are any indications that community property consideration could have

been paid, such as past residence in Texas or another community property state. The examiner may apply the standard more liberally as time passes without any apparent spousal claim.

Establishment of the fact of the grantee's domicile to a sufficient certainty will often require inquiry outside the record. The laws of any jurisdiction are, of course, subject to change and interpretation. Prudence may require verification that the common law has not been altered in the foreign jurisdiction in question in a manner that might render the acquiring spouse's consideration community property in the analysis of a Texas court. See Huston v. Colonial Trust Co., 266 S.W.2d 231, 233–34 (Tex. App.—El Paso 1954, writ ref'd n.r.e.), in which the court complains of being almost worn down with citation of Pennsylvania authorities in an unsuccessful effort to convince it that the wife had some interest akin to community property. During the 1940s several states, including Hawaii, Michigan, Nebraska, Oklahoma and Oregon, enacted community property systems to take advantage of federal tax laws then effective. Those states repealed their community property laws after legislation removed the tax advantages of community property in 1948. 7 Richard R. Powell & Patrick J. Rohan, Powell on Real Property § 53.08(1), at 53–108 (1997).

Tex. Fam. Code § 7.002 authorizes the court, in a decree of divorce or annulment, to order a division of property acquired by either spouse while domiciled in another state that would have been community property if the acquiring spouse had been domiciled in Texas. Although Tex. Const. art. I, § 19 prohibits the divestiture of separate property acquired as such by a Texas resident, Eggemeyer v. Eggemeyer, 554 S.W.2d 137 (Tex. 1977), the constitutionality of the divorce court's authority over "quasicommunity" property under Family Code § 7.002 has been upheld. Cameron v. Cameron, 641 S.W.2d 210 (Tex. 1982); Ismail v. Ismail, 702 S.W.2d 216 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). An examiner who is aware of a divorce involving a person who acquired Texas real property for consideration while residing in a common law jurisdiction should investigate the court's division of the property, if any, in the same manner as for the spouses' community property. (Note, however, that § 7.002 only empowers the court to order division of this kind of property in a decree of divorce or annulment. If the spouses' divorce was granted outside Texas, it appears the statute has no application.)

Source:

Citations in the Comment.

History:

Adopted June 15, 2001.

Standard 14.60. Necessity For Joinder When Community Property Is In Name Of Both Spouses

If property is acquired during marriage by a deed naming both spouses as grantees, an examiner should not give effect to a subsequent conveyance of the property unless (1) it

is joined by both spouses or (2) it was made by the husband before January 1, 1968, and did not convey homestead property.

Comment:

Community property not subject to the sole management of one of the spouses is subject to their joint management, control, and disposition. Tex. Fam. Code § 3.102(c). Tex. Fam. Code § 3.104(a) establishes the presumption that property held in one spouse's name is subject to his or her sole management, leaving property acquired in both spouses' names subject to joint management. It seems to follow that if property is held in the names of both spouses, a deed from one spouse alone is ineffective as to either the entire community interest or the granting spouse's share, Dalton v. Don J. Jackson, Inc., 691 S.W.2d 765 (Tex. App.—Austin 1985, no writ), except where it is from one spouse to the other. In re Marriage of Morrison, 913 S.W.2d 689 (Tex. App.—Texarkana 1995, writ denied). Although there is authority that a conveyance by one of the spouses may be given effect as to that spouse's half of the property, Williams v. Portland State Bank, 514 S.W.2d 124 (Tex. App.—Beaumont 1974, writ dism'd); see Vallone v. Miller, 663 S.W.2d 97, 98 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.), the Dalton court points out that this would, in effect, permit one spouse unilaterally to partition joint management community property. Since community property may only be partitioned upon strict compliance with Tex. Const. art. XVI, § 15, one spouse's purported conveyance of only his or her interest is ineffective. 691 S.W.2d at 768. Before January 1, 1968, the Texas statutes vested the management of the entire community estate in the husband. Tex. Rev. Civ. Stat. art. 4619 (1925) (amended 1967, repealed 1969). During the period of the husband's management, a deed from him alone was considered sufficient to convey the community's interest in all property except homestead, regardless of how legal title was held.

There are unusual circumstances under which property subject to joint management may be conveyed by one spouse alone. Tex. Fam. Code §§ 3.301 and 3.302 expressly authorize the remaining spouse to petition the court for sole management if the other spouse has disappeared, has permanently abandoned the petitioning spouse, or the spouses are permanently separated, and case law supports the remaining spouse's authority to convey when the other has disappeared or has become incapacitated or incarcerated. See, e.g., Reed v. Beheler, 198 S.W.2d 625, 628 (Tex. App.—Fort Worth 1946, no writ). When one spouse has been judicially declared incapacitated, Tex. Estates Code § 1353.002 gives sole management of the community estate to the other spouse.

Caution:

If the examiner encounters a deed of joint management community property executed by only one spouse, it may not be ignored as being invalid. The grantee may be able to argue, for example, that the non-signing spouse consented to the conveyance. At the very least, such a deed casts a cloud on title that should be investigated.

Source:

Citations in the Comment.

History:

Adopted June 15, 2001; amended July 17, 2014.

The prior standard provided: "If property is acquired during marriage by a deed naming both spouses as grantees, an examiner may not give effect to a subsequent conveyance of the property unless (1) it is joined by both spouses or (2) it was made by the husband before January 1, 1968, and did not convey homestead property."

Standard 14.70. Necessity For Joinder When Community Property Is In Name Of One Spouse

Subject to Standard 14.90, where community property has been acquired in the name of only one spouse, an examiner may rely on the grantee's authority to execute a subsequent conveyance as grantor, without joinder of the other spouse; however, the examiner should not pass a conveyance of community property held in the name of the wife made before January 1, 1968, without the husband's joinder or consent.

Comment:

During marriage each spouse has the sole management, control and disposition of the community property that the spouse would have owned if single. Tex. Fam. Code § 3.102(a). (Exceptions involving unusual circumstances such as the permanent abandonment of the petitioning spouse, permanent separation or disappearance of the managing spouse are allowed, with court approval, by Tex. Fam. Code §§ 3.301 and 3.302; and these kinds of circumstances may validate a conveyance by the nonmanaging spouse regardless of judicial action. See, e.g., Reed v. Beheler, 198 S.W.2d 625, 628 (Tex. App.—Fort Worth 1946, no writ). To the same effect are Tex. Estates Code §§ 1353.002, 1353.003 regarding a spouse judicially declared to be incapacitated.) Property is presumed subject to a spouse's sole management, control, and disposition if it is held in that spouse's name, and a third party may rely on the presumption. Tex. Fam. Code § 3.104. The sale of homestead, however, whether it consists of separate or community property, generally requires the joinder of both spouses. Tex. Fam. Code § 5.001; see Standard 14.90.

Caution:

On termination of the marriage by death or divorce, the community having been dissolved, the spouse in whose name community property was acquired no longer has any authority to convey the other's community share, Burnham v. Hardy Oil Co., 195 S.W. 1139 (Tex. 1917), except as may be authorized by the laws concerning community survivorship. See Standards 11.80 and 11.90. Therefore, if the record discloses the marriage's dissolution or facts that would, on inquiry, lead a prudent person to discover it, the examiner may not

rely on the power of the holder of legal title over the entire interest of the community. See, e.g., Myers v. Crenshaw, 116 S.W.2d 1125, 1130 (Tex. App.—Texarkana 1938), aff'd, 137 S.W.2d 7 (Tex. 1940).

The Texas statutes formerly vested the entire management of community property in the husband. Tex. Rev. Civ. Stat. art. 4619 (1925) (amended 1967, repealed 1969). Before the effective date of the amendment, January 1, 1968, therefore, the general rule expressed in this standard would not apply to a conveyance of community property acquired in a married woman's name. Such property could instead be conveyed only by the husband, or at least with his consent. Lockhart v. Garner, 298 S.W.2d 108 (Tex. 1957). The constitutionality of the former statute may be subject to challenge on the basis of its disparate treatment of husbands and wives. See Wessely Energy Co. v. Jennings, 736 S.W.2d 624 (Tex. 1987), which held unconstitutional the long-repealed statute requiring the husband's joinder in his wife's conveyance of her separate property. The ruling in Wessely Energy was prospective only, however, and the examiner should presume that the exception noted in this **Caution** still governs pre–1968 conveyances. Wessely Energy, 736 S.W.2d at 629.

Source:

Citations in the Comment.

History:

Adopted June 15, 2001.

Standard 14.80. No Presumption Of Marriage

Where the examiner is not aware that the grantor was married at the time of acquisition, the examiner need not inquire into the possible existence of a spouse's community property interest. The examiner should not infer that the grantor was married at the time of acquisition merely from a recital that the grantor is a widow or a widower.

Comment:

A purchaser without actual knowledge or constructive notice that the grantor was married at the time of acquisition will take free of any claim by the former spouse or the spouse's heirs or devisees. Hill v. Moore, 62 Tex. 610 (1884); McClenny v. Humble Oil & Refining Co., 179 S.W.2d 798 (Tex. App.— Texarkana 1944, writ ref'd w.o.m.). For example, a purchaser without notice of a former spouse's interest under a prior marriage will take free of it unless a certified copy of the divorce decree or other evidence of the dissolution has been recorded in the real property records of the county where the land is located. Benn v. Security Realty & Development Co., 54 S.W.2d 146, 150 (Tex. App.—Beaumont 1932, writ ref'd). Even if the purchaser is put on notice that the grantor was formerly married and that the marriage has terminated, for example by a recital that the grantor is a widow or widower, the purchaser will still take free of claims under the spouse, as a bona fide purchaser for value, where the purchaser has no knowledge that the grantor had a spouse living at the time the

property was acquired. Gilmer's Estate v. Veatch, 117 S.W. 430 (Tex. 1909); Griggs v. Houston Oil Co., 213 S.W. 261 (Tex. Comm'n App. 1919, judgm't adopted); Strong v. Strong, 66 S.W.2d 751 (Tex. App.—Texarkana 1933), aff'd on other grounds, 98 S.W.2d 346 (Tex. 1936).

Caution:

If the record discloses that the grantor was married at the time of acquisition or discloses facts that would lead a prudent person to inquire and thereupon discover the marriage, a purchaser will be subject to claims by or under the former spouse. For example, the court in Hill v. Moore, 19 S.W. 162 (Tex. 1892), held that where a Republic of Texas land grant, although in the name of the husband only, was of a type available only to the head of a family, a purchaser was on notice to inquire into the identity of the man's family members and would have discovered that he had been married at the time of the grant. In Myers v. Crenshaw, 116 S.W.2d 1125, 1130 (Tex. App.—Texarkana 1938), aff'd, 137 S.W.2d 7 (Tex. 1940), the joinder of several of a deceased wife's children with their father in the execution of a deed, where there was no question of the reason for their joinder, was held to put a purchaser on notice of the wife's interest.

If the spouses (whether in a formal or common law marriage) actually occupy the property and use it as a home, a purchaser is on notice of its probable homestead character. First State Bank v. Zeanon, 169 S.W.2d 735, 739 (Tex. App.—Waco 1943, writ ref'd w.o.m.). Accordingly, an examiner should, when appropriate, require inquiry into the possibility that the property is homestead, which would require joinder of both spouses in any conveyance. In case of any doubt, both spouses should be required to join in the conveyance. See Standard 14.90 regarding conveyances of homestead generally.

This standard is meant to apply to the examiner's consideration of a conveyance made by a grantor who acquired title by deed, not necessarily by passage of title through a decedent's estate. Because a purchaser of an interest that has passed through a decedent's estate is charged with notice of the beneficiaries' identity, Sanburn v. Schuler, 23 S.W. 641 (Tex. 1893), an examiner should consider the possibility that a community property or homestead interest may exist or have existed in a surviving or predeceased spouse. An examiner considering a decedent's estate will rarely, if ever, encounter circumstances in which available information reveals the identity of the decedent's heirs or devisees with sufficient certainty but does not somehow disclose, or at least lead to inquiry concerning, the decedent's marital status and history. See Ross v. Morrow, 19 S.W. 1090 (Tex. 1892).

Source:

Citations in the Comment.

History:

Adopted June 15, 2001.

Standard 14.90. Homestead

If the property conveyed is or may be the homestead of married persons, whether community property or separate property, an examiner should require the joinder of both spouses, unless it is conclusively shown that the property is not, or is no longer, homestead.

Comment:

Homestead is defined by Tex. Const. art. XVI, § 51 as not more than 200 acres not in a town or city, which may be one or more parcels, or not more than ten contiguous acres in a city, town or village, including improvements. For a single person, a rural homestead is limited by Tex. Prop. Code § 41.002(b)(2) to 100 acres. An urban homestead must be used for purposes of a home, or as both a home and place of business, on one contiguous tract. Tex. Const. art. XVI, § 51; Tex. Prop. Code § 41.002(a). The constitution makes no provision for business use of a rural homestead, but the rural acreage need not all be contiguous to the tract used as a home. Tex. Const. art. XVI, § 51; Tex. Prop. Code § 41.002(b); Riley v. Riley, 972 S.W.2d 149 (Tex. App.—Texarkana 1998, no pet.). The establishment of a tract's character as homestead requires physical occupancy, or at least overt acts of preparation, with the intent to reside on the land as a home. Gilmore v. Dennison, 115 S.W.2d 902 (Tex. 1938); 39 Aloysius A. Leopold, Marital Property and Homesteads § 25.3 (Texas Practice 1993).

A homestead claimant need not actually reside on the land for it to become impressed with homestead character. See, e.g., Bartels v. Huff, 67 S.W.2d 411 (Tex. App.—San Antonio 1933, writ ref'd). Mere intent to reside on the land, however, without some overt act in preparation for physical occupancy, is insufficient. Cheswick v. Freeman, 287 S.W.2d 171 (Tex. 1956). The homestead character extends to the unsevered minerals underlying the homestead, so that, for example, both spouses must join in oil and gas leases. Gulf Production Co. v. Continental Oil Co., 164 S.W.2d 488 (Tex. 1939). Because the requirement for occupancy as a home necessarily implies surface ownership, however, no homestead character attaches to a severed mineral interest in a tract where the owner holds no right to occupy the surface other than for mineral development.Whether homestead is separate property of one spouse or community property, Tex. Fam. Code § 5.001 provides that neither spouse may convey it, except under certain unusual circumstances, without the other's joinder. The unusual circumstances, which now require judicial authorization, are generally set out in Tex. Fam. Code §§ 5.002 (spouse's incapacity) and 5.101–102 (spouse's disappearance or abandonment). The current statute carries forward a policy long a feature of Texas law, embodied in Tex. Const. art. XVI, § 50, and formerly in Tex. Rev. Civ. Stat. art. 1300 (1925) (repealed 1967), requiring the joinder of both spouses and formerly requiring adherence to strict requirements concerning the wife's acknowledgment.

A tract's homestead character, however, does not make a conveyance of the land (other than a mortgage or a deed of trust) by one spouse alone void. If the record title is in the name of the executing spouse, such a deed is merely inoperative while the property remains the non-signing spouse's homestead. Grissom v. Anderson, 79 S.W.2d 619, 621 (Tex. 1935); Zable v. Henry, 649 S.W.2d 136, 137 (Tex. App.— Dallas 1983, no writ). Obviously, factors such as the passage of time should be taken into consideration in assessing whether it is necessary

that inquiry be made into whether a tract of land conveyed by one spouse alone was homestead.

Unlike a deed, a mortgage or deed of trust granting a lien on homestead property is absolutely void unless joined by both spouses. Inge v. Cain, 65 Tex. 75 (1885). This is because the Texas Constitution provides that no mortgage, trust deed, or other lien "shall ever be valid" except as authorized thereby. Tex. Const. art. XVI, § 50(c). (Joinder by both spouses is only one of many strict requirements and limitations the constitution places on the mortgaging of homestead.) Thus, the failure of one of the spouses to join in a deed of trust or other mortgage is not cured even though the property ceases to be homestead. Toler v. Fertitta, 67 S.W.2d 229 (Tex. Comm'n App. 1934, judgm't adopted). However, effective June 17, 2011, the occupying co-owner of residential homestead property may, upon proof of certain conditions, act as agent and attorney-in-fact for the other co-owner in encumbering the property for purposes of preserving or improving the property. Tex. Prop. Code §§ 65.001-65.004. Nonetheless, a deed of trust or other mortgage to secure the purchase money for property that is to be acquired by one spouse and is to become homestead need only be executed by the acquiring spouse. Skelton v. Washington Mut. Bank, F.A., 61 S.W.3d 56 (Tex. App.—Amarillo 2001, no pet.) (at least if the deed retains an express vendor's lien); Minnehoma Financial Co. v. Ditto, 566 S.W.2d 354 (Tex. App.—Fort Worth 1978, writ ref'd n.r.e.); Farmer v. Simpson, 6 Tex. 303, 310 (1851).

For a discussion of judgment liens clouding homesteads, see Standard 15.30. For discussion of trusts that include homestead property, see Caution to Standard 9.10.

Caution:

The examiner should always begin with the assumption that a tract of land that includes surface ownership is homestead and, before relying on a conveyance by one spouse alone, require a definite showing that it is not. An examiner should exercise a great deal of care in relying on extrinsic evidence to confirm that the property is not homestead. A purchaser or lender may be charged with the fact that a tract is homestead if it is occupied by the owner as a home, Texas Land & Loan Co. v. Blalock, 13 S.W.12 (Tex. 1890); Gibraltar Savings & Building Ass'n v. Harper, 41 S.W.2d 130 (Tex. App.—Austin 1931, writ ref'd); and the public records seldom reveal sufficiently definite and complete evidence of a tract's homestead character. In case of any reasonable doubt, an affidavit of the owners designating other property as homestead and stating that the property to be conveyed or encumbered is not homestead is now conclusive in favor of a purchaser or lender without contrary knowledge and should be required. Tex. Const. art. XVI, § 50. If any question remains after investigation, an examiner should require that both spouses join in the conveyance. Where the property is separate property of one of the spouses or is community property held in the name of only one of them, the other spouse may be recited to be joining "pro forma." Because a spouse may have homestead rights arising from a common law marriage the same as from a formal one, a cautious examiner might consider requiring joinder of any two persons who occupy the same residence absent conclusive evidence that they are not married. Of course, both spouses should be required to join in a deed for any property that is not clearly non-homestead in character. See Standard 14.60.

Source:

Citations in the Comment.

History:

Adopted June 15, 2001; amended July 17, 2014.

The prior standard provided: "If the property conveyed is or may be the homestead of married persons, whether community property or separate property, an examiner must require the joinder of both spouses, unless it is conclusively shown that the property is not, or is no longer, homestead."

Standard 14.100. Divorce Or Annulment

Absent a conveyance or agreement between the parties providing otherwise or a judicial decree imposing an equitable lien, the examiner should treat the separate property of each spouse as unaffected by a divorce or annulment. The examiner should examine the judgment of dissolution and any accompanying property settlement agreement for their effect on community property. Community property not divided by the court or by the spouses is owned equally by the former spouses as tenants in common.

Comment:

In a decree of divorce or annulment, the court divides the marital estate in a manner it deems just and right, having due regard for the rights of each party and any children of the marriage. Tex. Fam. Code § 7.001. The division need not be equal, Williams v. Williams, 325 S.W.2d 682 (Tex. 1959), and the court may even award all of the community property to just one of the spouses. Reardon v. Reardon, 359 S.W.2d 329 (Tex. 1962). The court may incorporate the parties' agreement for division of their property in its decree. Tex. Fam. Code § 7.006. The court is not empowered, however, to divest one spouse of his or her separate real property and award it to the other, Eggemeyer v. Eggemeyer, 554 S.W.2d 137 (Tex. 1977); however, a court may impose an equitable lien to secure reimbursement for improvements made with community funds. Heggen v. Pemelton, 836 S.W.2d 145, 146 (Tex. 1992). Subject to homestead restrictions, an equitable lien may be imposed by a court on property of a marital estate to secure a claim for economic contribution by another marital estate. Tex. Fam. Code § 3.406. If the court and the parties fail to make a division of their community property, the former spouses become equal tenants in common, the same as if they had never been married. Kirkwood v. Domnau, 16 S.W. 428 (Tex. 1891).

Following a divorce or annulment affecting community property, a certified copy of the divorce decree, any property settlement agreement that it incorporates, and any conveyance between the spouses should be recorded in the real property records of the county where the property is located to provide constructive notice of the new status of the spouses and their property. Myers v. Crenshaw, 116 S.W.2d 1125, 1131 (Tex. App.—Texarkana 1938), aff'd, 137 S.W.2d 7 (Tex. 1940); Benn v. Security Realty & Development Co., 54 S.W.2d 146, 150

(Tex. App.—Beaumont 1932, writ ref'd); Prewitt v. United States, 792 F.2d 1353 (5th Cir. 1986).

The court's division of community property amounts to a partition, and its judgment vests title to the real property in the spouse to whom it is awarded. Hailey v. Hailey, 331 S.W.2d 299 (Tex. 1960). The recordation of a certified copy of the divorce decree in the real property records of the county where the land is located, Tex. Prop. Code § 12.013, is sufficient to evidence record title in the spouse to whom the tract has been allotted, without a conveyance from the other spouse or other formality, so long as the decree adequately describes the property in question, either in specific terms or generally (e.g., "all real property held in the name of Wife") and is clear in its intent to vest title in the spouse to whom the property is awarded. See Brinkley v. Brinkley, 381 S.W.2d 725 (Tex. App.—Houston 1964, no writ). In the case of a trust executed by two married individuals whose marriage is subsequently dissolved where the trust contains provisions in favor of the other spouse, on the death of one of the divorced individuals, the trustee is to divide the trust into two trusts, each composed of property attributable to the contributions of only one of the divorced individuals. Tex. Estates Code § 123.056.

Caution:

The courts of one state have no jurisdiction to divide marital real property in another state. See Fall v. Eastin, 215 U.S. 1 (1909); McElreath v. McElreath, 345 S.W.2d 722 (Tex. 1961); Morris v. Hand, 8 S.W. 210 (Tex. 1888); Keith v. Keith, 763 S.W.2d 950, 954 (Tex. App.—Fort Worth 1989, no writ). Thus, although presumptively effective to have dissolved the marriage, a judgment of divorce or annulment from a jurisdiction other than Texas cannot be given effect to the extent it purports to divide the spouses' real property in Texas. Unless a conveyance or other self-executing agreement between the spouses provides for a different division, community property of spouses divorcing outside Texas must be considered to be owned by each of them equally after the divorce.

Source:

Citations in the Comment.

History:

Adopted June 15, 2001; amended July 17, 2014.

The prior standard provided: "Absent a conveyance or agreement between the parties providing otherwise or a judicial decree imposing an equitable lien, the examiner must treat the separate property of each spouse as unaffected by a divorce or annulment. The examiner must examine the judgment of dissolution and any accompanying property settlement agreement for their effect on community property. Community property not divided by the court or by the spouses is owned equally by the former spouses as tenants in common."

CHAPTER XV

LIENS AND LIS PENDENS

Standard 15.10. Liens Generally

An examiner should identify all liens, both contractual and statutory, relevant to the interests under examination and advise the client regarding any actions that are appropriate to the purpose of the examination. An examiner need not identify a lien that is barred by limitations or is otherwise unenforceable.

Comment:

Determining the significance of a lien or encumbrance and drafting appropriate requirements for a particular situation requires careful and skillful analysis by the examiner. The examiner ordinarily disclaims coverage of liens that might not appear of record or ripen until after the closing date of the opinion (such as involuntary mechanic's contractor's, and materialman's liens). An examiner should caution the client about the possible existence of unrecorded liens, however, especially if the purpose of the examination is to determine the validity and priority of liens.

Mortgage or Deed of Trust: A mortgage or deed of trust is an interest in real property providing security for the performance of an obligation, usually evidenced by a promissory note. On default, the mortgage or deed of trust may be foreclosed, the property may be sold, and the proceeds applied for the mortgagee's benefit. While a mortgage is a two-party instrument between a mortgagor and mortgagee, a deed of trust is a conveyance to a trustee for the benefit of the mortgagee and, in Texas, gives the trustee the power of nonjudicial foreclosure and sale. Johnson v. Snell, 504 S.W.2d 397, 399 (Tex. 1973). The general practice in Texas is to use a deed of trust; however, lenders and attorneys commonly use the terms "mortgage" and "deed of trust" interchangeably. The secured creditor under a deed of trust is often identified as the "beneficiary" or "mortgagee," the debtor is often identified as the "borrower," "grantor," or "mortgagor," and the party having the power of nonjudicial foreclosure and sale in the event of default is identified as the "trustee."

Mortgaged Property: Absent some statutory or other legal inhibition, any alienable interest in real property may be mortgaged. Cadle Co. v. Caamano, 930 S.W.2d 917, 920 (Tex. App.–Houston [14th Dist.] 1996, no writ). Appurtenances are rights and interests in related real property that are essential to the full enjoyment of the subject property. A security interest in real property automatically extends to appurtenances. Pine v. Gibraltar Savings Assoc., 519 S.W.2d 238, 242 (Tex. App.–Houston [1st Dist.] 1974, writ ref'd n.r.e.). Fixtures can also be included in a mortgage or deed of trust. See, e.g., H. O. Wooten Grocer Co. v. Wade Meat Co., 37 S.W.2d 1090, 1091 (Tex. App.–Eastland, 1930). See also Tex. Bus. & Com. Code § 9.334(h). Rights and interests in other property that are useful but not essential for the full enjoyment of the described property are not considered appurtenances. Thus, a

security interest in the described property does not automatically extend to those rights and interests. Balcar v. Lee County Cotton Oil Co., 193 S.W. 1094, 1095 (Tex. App.–Austin 1917, no writ).

Lien Theory: Texas follows the "lien theory" of mortgages and deeds of trust, under which the creditor or the trustee, despite granting language in the instrument, is not regarded as the owner of the property securing the debt. Taylor v. Brennan, 621 S.W.2d 592, 593 (Tex. 1981); NCNB Tex. Nat'l Bank v. Sterling Projects, Inc., 789 S.W.2d 358, 359 (Tex. App.–Dallas 1990, writ dism'd w.o.j.). Legal title does not pass from the mortgagor, and the mortgagee receives only a lien or equitable title. Flag–Redfern Oil Co. v. Humble Exploration Co., 744 S.W.2d 6, 8 (Tex. 1987); First Baptist Church v. Baptist Bible Seminary, 347 S.W.2d 587, 590–591 (Tex. 1961). A mortgagee ordinarily has no right of possession. The mortgagor remains entitled to possession of the land and is entitled to use the land without being accountable to the mortgagee, except for waste. State v. First Interstate Bank, 880 S.W.2d 427, 429–430 (Tex. App.–Austin 1994, writ denied); NCNB Tex. Nat'l Bank v. Sterling Projects, Inc., 789 S.W.2d 358, 359 (Tex. App.–Dallas 1990, writ dism'd w.o.j.).

Vendor's Lien: A vendor's lien is a lien in favor of the seller of real property to secure payment of the unpaid purchase price. The usual practice in Texas is to expressly reserve a vendor's lien in the deed so that, when the deed is recorded, third parties will have notice of the lien. Even if the lien is not reserved in the deed, however, an express vendor's lien may be created by acknowledging the lien in the purchase money note. Simms v. Espindola, 310 S.W.2d 364, 366 (Tex. App.–San Antonio 1958, writ ref'd n.r.e.). An express vendor's lien makes the deed an executory sales contract and gives the seller superior title to the real property until the purchase price is paid. Under an express vendor's lien, the seller has an election of remedies on the buyer's default: (1) sue for the balance of the purchase money and foreclose the lien; (2) rescind the contract and take possession; or (3) sue to recover title and possession. Hampton v. Minton, 785 S.W.2d 854 (Tex. App.–Austin 1990, writ denied); Lusk v. Mintz, 625 S.W.2d 774 (Tex. App.–Houston [14th Dist.] 1981, no writ). A vendor's lien is an assignable interest. Cadle Co. v. Caamano, 930 S.W.2d 917, 919–920 (Tex. App.–Houston [14th Dist.] 1996, no writ). For a discussion of implied vendor's liens, see Standard 15.40. Even if an express lien is not reserved in the deed, the seller still has, by operation of law, an implied or equitable vendor's lien to secure payment of any unpaid portion of the purchase money. However, when there is no express vendor's lien in the deed, the buyer receives full title to the property, and the seller's only remedy under an equitable vendor's lien is a judicial foreclosure. Zapata v. Torres, 464 S.W.2d 926, 928 (Tex. App.–Dallas 1971, no writ). When a seller takes a security, such as a deed of trust, to secure the loan of the purchase price of the property, there is a presumption, in the absence of affirmative evidence, that the seller intended to waive the equitable vendor's lien. Id. at 930. See Standard 15.40; Texas Const. Art. 16 § 50(a)(5).

Other Contractual Liens: A lien may be created by contract to secure practically any obligation. Commonly encountered voluntary liens include:

Mechanic's and Materialman's Contract Lien. A contract granting a lien for improvements on real property is commonly made separately from a mortgage or deed

of trust in order to address special requirements relating to the placement of liens on homesteads. For a lien contract validly to impose a lien on homestead property, it must be executed before any labor is performed or material furnished, must be filed for record in the county clerk's office, and must meet certain other requirements. Tex. Prop. Code § 53.254.

Oil and Gas Operating Agreement Lien. Commonly, oil and gas joint operating agreements impose a lien upon the interest of a party to the agreement who defaults in the performance of its obligations under the agreement. Record notice of the lien may be shown by a memorandum of the operating agreement filed in the records of the county clerk. However, even without recording, a third party may be on notice of the lien for other reasons, including a reference to the operating agreement in the chain of title. Mbank Abilene, N.A. v. Westwood Energy, Inc., 723 S.W.2d 246 (Tex. App.—Eastland 1986, no writ). See also Enduro Oil Co. v. Parish & Ellison, 834 S.W.2d 547 (Tex. App.—Houston [14th Dist.] 1992, writ denied). See generally 3 Ernest E. Smith and Jacqueline Lang Weaver, Texas Law of Oil and Gas § 17.3(C)(2) (2d ed. 2006).

Homeowners' Association Lien for Assessments. Unless there is a subordination, a homeowners' association assessment lien provided for in the declaration of restrictions has priority over subsequent rights (such as homestead rights) and transfers that occurred before the assessment was due. Inwood North Homeowners' Association v. Harris, 736 S.W.2d 632 (Tex. 1987). Regarding condominiums, however, the unit owners' association lien for unpaid assessments is given statutory priority over any other lien except those listed in Tex. Prop. Code. § 82.113(b). Except as provided in Tex. Prop. Code §§ 5.201-5.207, a deed restriction or other covenant running with the land applicable to residential real estate that requires payment of a fee for a future transfer of the property (including any lien in support thereof) by a transferee is void and unenforceable. However, this invalidity does not apply to a restriction or covenant in favor of a residential "property owners' association" (as defined in Tex. Prop. Code § 209.002), a tax exempt entity (26 U.S.C. § 501(c)(3)), or a governmental entity. Tex. Prop. Code § 5.017, repealed by Acts 2011, 82nd Leg., ch. 211 (H.B. 8), § 2, eff. June 17, 2011. Tex. Prop. Code §§ 5.201-5.207. Transfer fees effective for subdivisions in existence prior June 17, 2011 may be preserved by a "Notice of Private Transfer Fee Obligation" notice of transfer fee obligation" as set forth in the statute. Tex. Prop. Code § 5.203.

Formalities: Generally applicable conveyancing rules govern mortgages and deeds of trust. A mortgage, deed of trust, or other contractual lien on real estate falls within the statute of frauds. Tex. Bus. & Com. Code § 26.01(a), (b)(4); West v. First Baptist Church, 71 S.W.2d 1090, 1100 (Tex. 1934); Edward Scharf Assocs., Inc. v. Skiba, 538 S.W.2d 501, 502–503 (Tex. App.–Waco 1976, no writ). Recordation of a mortgage or a deed of trust is not essential to make it a valid and binding obligation between the immediate parties. Denson v. First Bank & Trust, 728 S.W.2d 876, 877 (Tex. App.– Beaumont 1987, no writ). An unrecorded deed of trust is effective between the parties and against any other person who

has notice of it. Tex. Prop. Code § 13.001(b); Biggs & Co. v. Caldwell, 115 S.W.2d 461, 463 (Tex. App.–Fort Worth 1938, writ dism'd). If after the execution of a mortgage or a deed of trust, the mortgagor subsequently acquires title to property described in the mortgage or deed of trust, the title is automatically encumbered by the lien by virtue of the doctrine of after-acquired title (estoppel by deed). Clark v. Gauntt, 161 S.W.2d 270, 271 (Tex. 1942); Shield v. Donald, 253 S.W.2d 710, 712 (Tex. App.–Fort Worth 1952, writ ref'd n.r.e.). The doctrine of estoppel by deed does not apply to quitclaim instruments.

Judgments or documents purporting to create a lien from a purported court not expressly created or established under the Texas or U.S. constitution or not consented to by the debtor are presumed fraudulent. For example, a document purporting to establish or assert a lien against real property and filed by a prison inmate is presumed fraudulent. Tex. Civ. Prac. & Rem. Code A§§ 12.001, 12.002; Tex. Gov't Code §§ 51.901(e) and (f).

Rents, Issues and Profits: Unless the mortgage or deed of trust provides otherwise, the property owner generally retains the right to rents, issues, and profits while the property is subject to the lien. However, the deed of trust or a separate instrument commonly includes a provision assigning to the mortgagee the mortgagor's interest in rents or other income accruing after the date of the mortgage as additional security. NCNB Tex. Nat'l Bank v. Sterling Projects, Inc., 789 S.W.2d 358, 360 (Tex. App.–Dallas 1990, writ dism'd w.o.j.); McGeorge v. Henrie, 94 S.W.2d 761, 762 (Tex. App.–Texarkana 1936, no writ).

If an assignment of rents is given as additional security for the debt, the assignment does not become operative until the creditor takes affirmative action, such as obtaining possession of the property, impounding the rents, or securing the appointment of a receiver. Summers v. Consol. Capital Special Trust, 783 S.W.2d 580, 583 (Tex. 1989). On the other hand, if the assignment of rentals is an "absolute assignment," it does not create a security interest, but instead automatically gives the creditor title to the rent on the occurrence of a specified condition, such as default. NCNB Tex. Nat'l Bank v. Sterling Projects, Inc., 789 S.W.2d 358, 360 (Tex. App.–Dallas 1990, writ dism'd w.o.j.). Whether the assignment is an absolute assignment or is given as additional security depends on the intent of the parties, as determined by examining both the assignment of rents clause and the security agreement executed contemporaneously with it. Oryx Energy Co. v. Union Nat'l Bank of Tex., 895 S.W.2d 409, 415 (Tex. App.–San Antonio 1995, writ denied). Absolute assignments are not favored by the courts. If the assignment agreement or deed of trust states that the assignment of rents is given as "further" security for the debt and permits the creditor on default to enter the premises and collect the rents, the assignment will be construed to be a security, which must be foreclosed, not an absolute assignment. Taylor v. Brennan, 621 S.W.2d 592 (Tex. 1981).

Unless the security instrument provides otherwise, every deed of trust, mortgage, or other lien instrument signed and delivered on or after June 17, 2011, creates an assignment of rents arising from real property securing an obligation under the security instrument. Tex. Prop. Code § 64.051. A security instrument signed and delivered before June 17, 2011, is governed by the law that applied to the instrument immediately before that date, as discussed above; however, Tex. Prop. Code § 64.100 et seq. govern the

enforcement of an assignment of rents, the perfection and priority of a security interest in rents, and the attachment and perfection of a security interest in proceeds even if signed and delivered prior to June 17, 2011. "Rents" are defined in Tex. Prop. Code § 64.001.

Landlord-Tenant: By statute, a tenant's leasehold interest is not a transferable interest and will not be subject to a security interest unless the landlord consents to subletting by the tenant. Tex. Prop. Code § 91.005; Am. Nat'l Bank & Trust v. First Wis. Mtg. Trust, 577 S.W.2d 312, 316 (Tex. App.–Beaumont 1979, writ ref'd n.r.e.). A lease provision allowing the tenant to sublet without further consent by the landlord empowers the tenant to create a security interest in the leasehold. Menger v. Ward, 30 S.W. 853, 854 (Tex. 1895). Unless the parties provide otherwise in the lease, a landlord may create a security interest in the reversion, because the landlord's reversionary interest is alienable. Wilson v. Beck, 286 S.W. 315, 321–322 (Tex. App.–Dallas 1926, writ ref'd). A security interest in the reversion is subject to any existing lease unless the lease provides for a subordination of interests. F. Groos & Co. v. Chittim, 100 S.W. 1006, 1010–1011 (Tex. App. 1907, no writ).

Future Advance Clause: A future advance clause in a mortgage or deed of trust creates an inchoate security interest in the subject property. If and when a debt arises that is covered by the instrument, the inchoate security interest immediately and automatically ripens into a lien. Robinson v. Nat'l Bank of Commerce, 515 S.W.2d 166, 168 (Tex. App.–Dallas 1974, no writ). The future advance clause in a recorded deed of trust has the same priority over subsequent conveyances and encumbrances as the deed of trust because the clause is sufficient to put third parties on notice of the possibility of future indebtedness, and the duty to inquire is on the third party. Regold Mfg. Co. v. Maccabees, 348 S.W.2d 864, 865 (Tex. App.–Fort Worth 1961, writ ref'd n.r.e.); Coke Lumber & Mfg. Co. v. First Nat'l Bank, 529 S.W.2d 612, 615 (Tex. App.–Dallas 1975, writ ref'd).

Dragnet Clause: A dragnet clause provides that the deed of trust secures payment of not only a specific debt, but all obligations of any kind that the debtor owes or may owe to the creditor, past, present or future. A dragnet clause may read "all other indebtedness, obligations, and liabilities of any kind or character of grantor to lender, now or hereafter existing, absolute or contingent, arising by operation of law or otherwise, or direct or indirect, primary or secondary, joint, several, fixed or contingent, and whether incurred by grantor as principal, surety, endorser, guarantor, or otherwise." The dragnet clause applies only to indebtedness which was reasonably within the contemplation of the parties to the mortgage or deed of trust at the time of execution. Moss v. Hipp, 387 S.W.2d 656, 658 (Tex. 1965); FDIC v. Bodin Concrete Co., 869 S.W.2d 372, 377 (Tex. App.–Dallas 1993, writ denied). If, due to the dragnet clause, other debt is owed at the time the specific debt is paid, the borrower will not be entitled to a release.

For discussion of involuntary or constitutional or statutory liens, including constitutional and statutory mechanic's and materialman's liens, see Standards 15.20, 15.50, and 15.60. For judgment liens, see Standard 15.30. For implied vendor's liens, see Standard 15.40. For ad valorem tax liens, see Standards 15.70 and 15.80. For lien priority and subordination, see Standard 15.90. For removal of liens, see Standard 15.100. For lis pendens, see Standard 15.110. For nonjudicial foreclosures, see Standard 16.10. For judicial

foreclosures and execution sales, see Standard 16.20. For foreclosure of home equity loans and reverse mortgages, see Standard 16.30. For deeds in lieu of foreclosure, see Standard 16.40. Bankruptcy issues are addressed in Chapter XII. Financing statements, fixtures, and crops are not within the scope of this chapter. For mortgages or deeds of trust on homestead property, see Standard 14.90.

Caution:

Once perfected, many involuntary liens, including judgment liens and federal and state tax liens but excluding liens securing ad valorem taxes, encumber all of the debtor's nonexempt property located in the county where notice of the lien is recorded. The lien attaches to nonexempt property owned at the time of perfection as well as to nonexempt property acquired thereafter until the debt is discharged or enforcement is barred by limitations. Thus, an examiner should not rely on a search of the relevant indices only from the time of the party's acquisition forward. Rather, the search for liens concerning each party in the chain of title should also extend back from the time that a party acquires an interest for the longest possible period of limitation. In this regard, for child support liens filed on or after September 1, 1997, and prior to May 26, 2009, the duration of the Texas lien for unpaid child support is indefinite, Tex. Fam. Code § 157.318, and federal judgment liens and federal tax liens may be renewed multiple times, see Standards 15.30 and 15.60. Child support liens filed on or after May 26, 2009, were effective regarding real property until the tenth anniversary of the date on which the lien notice was filed and may be renewed for subsequent 10-year periods if a renewed lien notice is filed before the applicable tenth anniversary. A lien for child support is effective until all current support and child support arrearages have been paid or the lien is otherwise released. A lien for child support for which the tenth anniversary of the date of the last lien notice filing with the county clerk has passed before Sept. 1, 2023 may be renewed on or after Sept. 1, 2023, in the same manner as existed before. Once renewed, the lien continues in effect. Tex. Fam. Code § 157.318. Nevertheless, a title examiner reasonably relies exclusively on materials furnished to the examiner, such as an abstract of title or a landman's run sheets. When doing a stand-up examination, the practice of examiners regarding the scope of search for involuntary liens varies. To avoid an unreasonably expansive scope of search, many examiners reasonably limit their stand-up examination for involuntary liens back twenty years from the date of examination under the names of current interest owners and parties who disposed of their interest within twenty years of the date of examination. See Standard 1.20 and accompanying Comment.

Cover-all and Mother Hubbard Clauses: A mortgage or deed of trust typically includes general language that purports to cover lands or interests that are not specifically described. This language is often called, but seldom labeled in the instrument, a "cover-all" clause or "Mother Hubbard" clause. An examiner should examine any mortgage or deed of trust within the chain of title in a grantor index that does not specifically cover the lands under examination to determine whether that instrument, by reason of the scope of any "cover-all" clause or "Mother Hubbard" clause, may encumber the lands under examination. The typical cover-all or Mother Hubbard clause includes real property interests appurtenant to the land described, such as easements, strips and gores, etc.; however, the clause may be much broader by also referring to all of the mortgagor's land in the county or all of the grantor's

land, as described in another document. Compare Jones v. Colle, 727 S.W.2d 262 (Tex. 1987); Smith v. Allison, 301 S.W.2d 608 (Tex. 1957); Broaddus v. Grout, 258 S.W.2d 308 (Tex. 1953); Sun Oil Co. v. Bennett, 84 S.W.2d 447 (Tex. 1935); Sun Oil Co. v. Burns, 84 S.W.2d 442 (Tex. 1935); Smith v. Westall, 13 S.W. 540 (Tex. 1890); Witt v. Harlan, 2 S.W. 41 (Tex. 1886); Holloway's Unknown Heirs v. Whatley, 131 S.W.2d 89 (Tex. 1939); Sanderson v. Sanderson, 109 S.W.2d 744 (Tex. 1937); J. Hiram Moore, Ltd. v. Greer, 172 S.W.3d 609 (Tex. 2005); and Lauchheimer v. Saunders, 65 S.W. 500 (Tex. App. 1901, no writ).

Claim for conveyance of residential property encumbered by a lien: Effective January 1, 2008, a person may not contract to sell or convey an interest in residential real property that will remain encumbered by a recorded lien unless, before the conveyance, the seller provides a detailed disclosure of the lien and of any insurance relating to the property to the buyer and each lienholder. Numerous requirements and exceptions affect the duty of disclosure. A violation of the duty to disclose allows the buyer to terminate a contract for sale but does not invalidate a conveyance; however, the transferee, in certain circumstances, may have a cause of action for damages. Tex. Prop. Code § 5.016. Although it appears to have been passed to address sales of residences, the law is broadly worded to apply to a contract of sale or conveyance of any interest in "residential real property" (undefined), including easements and oil and gas leases, but is also subject to numerous exceptions—e.g., the law does not apply to a transfer where the purchaser obtains a title insurance policy or to a person "who has purchased, conveyed, or entered into contracts to purchase or convey an interest in real property four or more times in the preceding 12 months." Id. at 5.016(c).

Wrap Mortgage Loan Financing: Tex. Fin. Code ch. 159, effective Jan. 1, 2022, governs certain residential mortgage loans made to finance the purchase of residential real estate that will continue to be subject to a prior unreleased lien securing a debt incurred by a person other than the borrower. The wrap lender governed by this chapter must hold the payments received in trust and owes a fiduciary duty to the wrap borrower. Tex. Fin. Code §§ 159.151, 159.152. A wrap borrower has the right to deduct from amounts owed to the wrap lender the amount of any payment made by the wrap borrower to the obligee of the prior lien, Tex. Fin. Code § 159.202. Remedies of the wrap borrower may include avoidance of the wrap mortgage loan (if not closed by an attorney or title company), Tex. Fin. Code § 159.105, and a right to rescind the wrap mortgage loan agreement, Tex. Fin. Code § 159.105. This chapter does not apply to most lenders, including institutional lenders and state or governmental agencies, as provided in Tex. Fin. Code § 159.003.

Source:

Citations in the Comment.

History:

Adopted June 13, 2003.

Standard 15.20. Involuntary Mechanic's Contractor's And Materialman's Liens.

The examiner should identify recorded mechanic's and materialman's lien affidavits affecting the title under examination.

Comment:

The Texas constitution provides that "[m]echanics, artisans and materialmen, of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefor; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens." Tex. Const. art. XVI, § 37. The constitutional lien attaches not only to the building for which the work was done or material furnished but to so much of the land on which it stands as is necessary for its enjoyment, which is a question of fact. Ferrell v. Ertel, 100 S.W.2d 1084 (Tex. App.—Fort Worth 1936, writ dism'd). What constitutes a "building" has been construed broadly. See Ambrose & Co. v. Hutchison, 356 S.W.2d 215 (Tex. App.—Fort Worth 1962, no writ) (holding that a pier is a building); Moore v. Carey Bros. Oil Co., 269 S.W. 75 (Tex. Comm'n App. 1925, judgm't adopted) (holding that oil well casing is a building). The constitutional lien is self-executing as between the property owner and original contractors, and one providing labor or materials directly to the owner is not subject to statutory conditions to enforcement such as the timely filing of an affidavit claiming the lien. Hayek v. Western Steel Co., 478 S.W.2d 786, 790 (Tex. 1972); Strang v. Pray, 35 S.W. 1054 (Tex. 1896). While, generally, the constitutional lien may be either oral or written, for it to be a valid construction or improvement lien on homestead, the contract must be in writing. Cavazos v. Munoz, 305 B.R. 661, 680 (S.D. Tex 2004). The constitutional lien is not binding on third parties without notice or unless the contractor has followed the statutory lien provisions. Strang v. Pray, 35 S.W. at 1056. Only original contractors may claim the constitutional lien; subcontractors face the more onerous burden of perfecting a statutory lien. Da-Col Paint Mfg. Co. v. American Indemnity Co., 517 S.W.2d 270, 273 (Tex. 1974); First National Bank v. Lyon-Gray Lumber Co., 217 S.W. 133 (Tex. 1919). Special rules apply to renovation and repair on existing improvements on a homestead. Tex Const. art. XVI, § 50(a)(5)(A)–(D). For mechanic's and materialman's liens affecting homestead property, see Standard 14.90.

In addition to the constitutional lien, a statutory lien is available to one who provides labor or materials, either as an original contractor or as a subcontractor: (1) for a house, building or improvement, a levee or embankment, a railroad, or landscaping, Tex. Prop. Code § 53.021; or (2) for an oil, gas or water well, an oil or gas pipeline, or a mine or quarry, Tex. Prop. Code §§ 56.001–56.002. The existence and enforceability of the statutory lien is entirely dependent on the contractor's or subcontractor's compliance with specified prerequisites, though substantial compliance is sufficient. First National Bank v. Sledge, 653 S.W.2d 283 (Tex. 1983).

The following comments relative to Texas Property Code Chapter 53 are generally applicable to the law as it existed prior to January 1, 2022, and apply to original contracts made before that date. That discussion is followed by comments on changes to Chapter 53

commencing January 1, 2022, for original contracts made on or after January 1, 2022. Of primary importance to the title examiner are the statutes' requirements for the recording of an affidavit claiming the lien. The pertinent requirements are generally as follows:

General Mechanic's Lien: The affidavit claiming a lien for labor or materials furnished to a house, building, or improvements, a levee or embankment, or a railroad must be filed in the office of the county clerk of the county in which the property is located not later than the 15th day of the fourth calendar month after the day on which the indebtedness accrues, except that for a lien arising from a residential construction project, it must be filed not later than the 15th day of the third calendar month after such accrual. Tex. Prop. Code § 53.052(a) & (b). The indebtedness generally accrues on the last day of the month the contract was completed or terminated for an original contractor and on the last day of the last month labor was performed or material furnished by a subcontractor or material supplier. Tex. Prop. Code § 53.053. The affidavit must be signed and sworn to by the person claiming the lien or another person on the claimant's behalf and contain the items specified in Tex. Prop. Code § 53.054, including the amount of the claim; the name and last known address of the owner, the person who employed the claimant, and the original contractor; the kind of work done and material furnished (and, for a subcontractor, each month in which the work was done or material furnished); a legal description of the property; and, for subcontractors, the date and method of notice to the owner.

The inception of a mechanic's lien is the commencement of visible construction, Tex. Prop. Code § 53.124(a) and (b). However, the inception of an architect's, engineer's, surveyor's, landscaper's, or demolition contractor's lien is the date of recording of the lien, provided that the underlying contract for work is in writing. Id. § 53.124(e).

Mineral Contractor's or Subcontractor's Lien: One who furnishes labor or material for an oil, gas or water well, an oil or gas pipeline, or a mine or quarry must file an affidavit in the office of the county clerk of the county where the property is located not later than six months after the day the indebtedness accrues. Tex. Prop. Code § 56.021(a).

A mineral subcontractor must have served notice of the claim on the property owner at least ten days before filing the affidavit. Tex. Prop. Code § 56.021(b).

The indebtedness for labor performed by the day or week accrues at the end of each week during which the labor is performed. Tex. Prop. Code § 56.005(a). The indebtedness for material or services otherwise accrues on the date they were last furnished; all material or services furnished by the same person to the same property are considered furnished under a single contract unless more than six months elapse between the dates the material or services are furnished. Tex. Prop. Code § 56.005(b).

The statute does not provide a specific form of lien statement that must be filed, but the lien statement must be verified by affidavit and must contain the items specified in Tex. Prop. Code § 56.022, including the name and mailing address of the claimant; the name of the mineral property owner, if known; an itemized list of the amounts claimed and the dates of performance or furnishing; a description of the land, leasehold interest, pipeline or pipeline

right-of-way involved; and, if the claimant is a subcontractor, the name of the person for whom the labor was performed or material furnished and a statement that the claimant served timely notice on the owner or the owner's representative.

The lien attaches to leasehold interests and is not limited to the wells or to the proration units around the wells. Thus, the lien claimant for a well will acquire a lien in other wells on the same lease and in nonproductive acreage covered by the lease. Mercantile Nat'l Bank v. McCullough Tool Co., 259 S.W.2d 724 (Tex. 1953). The lien attaches only to the leasehold interest of the owner who contracts with the lien claimant. If labor, supplies, machinery, or materials are furnished to a leaseholder, the lien does not attach to the underlying fee title to the land. Bethlehem Supply Corp. v. Wotola Royalty Corp., 165 S.W.2d 443, 445 (Tex. 1942). The lien does not attach to the undivided interest of co-owners who did not contract with the lien claimant unless the lien claimant can establish that the co-owners are mining partners or joint venture parties or that an agency relationship exists. Youngstown Sheet and Tube Co. v. Penn, 357 S.W.2d 239 (Tex. App.—Austin 1962), modified on other grounds, 363 S.W.2d 230 (Tex. 1962).

Typically, the co-owners of the leasehold will designate an operator as an independent contractor under a joint operating agreement, and so long as the parties' conduct is not inconsistent with that characterization, they will not be mining partners or joint venture parties and the operator will not be regarded as an agent of the nonoperators. Ayco Devel. Corp. v. G.E.T. Service Co., 616 S.W.2d 184 (Tex. 1981); Tex. Prop. Code §§ 56.001–56.006. In such instances as where the property to be encumbered is sold or assigned between the time of inception and the filing of the affidavit, it is important to remember that lien priority is typically determined on the basis of the inception date and not upon the date the work ended or the date the affidavit was filed. See Longhart Supply Co. v. Keystone Pipe Supply Co., 26 S.W.2d 389. 390 (Tex. App.—Fort Worth 1930, writ ref'd). Where competing liens are encountered encumbering the same tract, the liens are of equal priority. See Lane-Wells Co. v. Continental-Emsco Co., 397 S.W.2d 217, 220 (Tex. 1966). See also Tex. Prop. Code § 53.122(a).

Enforcement of an original contractor's constitutional lien, unlike a statutory lien, is not barred if the contractor fails to meet the statutory requirements for, among other things, filing an affidavit. Farmers' & Mechanics' National Bank v. Taylor, 40 S.W. 876 (Tex. App.—Fort Worth 1897), aff'd, 40 S.W. 966 (Tex. 1897); Texas Builders' Supply Co. v. Beaumont Construction Co., 150 S.W. 770 (Tex. App.—Galveston 1912, writ dism'd). The statutory requirements must be satisfied, however, for a constitutional lien to be enforceable against a bona fide purchaser. Black, Sivalls & Bryson, Inc. v. Operators' Oil & Gas Co., 37 S.W.2d 313, 315 (Tex. App.—Eastland 1931, writ dism'd). Thus, where a bona fide purchaser is involved, any inquiry regarding the existence of unfiled liens ordinarily does not need to extend further for constitutional liens than for statutory liens. However, a purchaser who knows or should have known of facts and circumstances giving rise to a constitutional lien or a donee acquires the property subject to it. See Apex Financial Corp. v. Brown, 7 S.W.3d 820, 831 (Tex. App.—Texarkana 1999, no pet.).

A suit to foreclose a statutory lien must generally be filed within one year after the last day the claimant may file the lien affidavit. Tex. Prop. Code §§ 53.158, 56.041(a).

The time for providing any notice or taking any action required under Chapter 53, including filing an affidavit claiming a lien, is extended to the next business day if the time limit falls on a Saturday, Sunday or legal holiday. (Tex Prop Code 53.003 (e) . The limitations period for bringing suit to foreclose a lien may also be extended to not later than an additional second year after the affidavit was filed pursuant to a written agreement between the claimant and the record property owner entered into before the one-year period runs. The agreement must be recorded with the clerk of the same county where the lien was recorded. Tex. Prop. Code §§ 53.158(a-2) and 56.041(a). Note that the second-year extension runs from the time the affidavit claiming the lien was filed. After the passage of that period, the title examiner may presume that the lien is no longer effective unless a foreclosure suit has been filed, or unless the lien being claimed is or may be a constitutional one. In the latter event the general four-year statute of limitations for debt actions, Tex. Civ. Prac. & Rem. Code § 16.004(a), would apply.

The right to enforce a lien for performance of labor or furnishing material may be waived by express agreement or by acts inconsistent with the lien's continued existence, but waiver will not be inferred unless the lienholder's intention to do so is clear. See Jones v. White, 12 S.W. 179 (Tex. 1888); McBride v. Beakley, 203 S.W. 1137 (Tex. App.—Amarillo 1918, no writ). A statutory mechanic's and materialman's lien may be avoided by the filing of a bond for payment in compliance with Tex. Prop. Code §§ 53.171–53.175 or §§ 53.201–53.211.

For contracts executed on or after January 1, 2012: Any waiver and release of a lien or payment bond claim is unenforceable unless it complies with Tex. Prop. Code § 53.281 et seq., including being signed and delivered using a waiver and release form substantially in compliance with prescribed statutory forms.

For contracts entered into on or after January 1, 2022: Effective January 1. 2022, Texas Property Code Chapter 53, Mechanic's, Contractor's, or Materialman's Lien, was substantially modified by Act of May 31, 2021, 87th Leg., R.S., ch. 690. The primary focus was to expand the definitions of "improvements" and "labor" and thus expand the rights to assert a lien claim. The procedures to perfect a lien claim were also simplified, but the effect on title examination is minimal. The changes only apply to an original contract made on or after January 1, 2022, and notably, the period to file suit to enforce a recorded lien claim was shortened to not later than the first anniversary of the last day a claimant may file the lien affidavit unless the limitation is extended to not later than the second anniversary of the date the claimant filed the lien affidavit under § 53.052 if, before the expiration of the limitations period established under § 53.158 (a), the claimant enters into a written agreement with the then-current record owner of the property to extend the limitations period. Tex. Prop. Code § 53.158(a-2). The agreement must be recorded with the clerk of the same county where the lien was recorded and is considered to be notice of the extension to any subsequent purchaser.

See Caution, below, regarding purported original contractors.

Regarding calculating deadlines under Chapter 53, if the last day for notice or any other action falls on a weekend or a legal holiday, the computation of days extends to the following

business day. Tex. Prop. Code § 53.003(e). The "date the indebtedness accrued" was eliminated as a trigger to filing a lien claim. The times to file a claim are as follows:

- An original contractor's mechanic lien affidavit filing is now based upon the date the original contractor's work was completed, terminated, or abandoned. The lien affidavit must be filed not later that the 15th day of the fourth month following completion, termination, or abandonment for a commercial project and not later than the 15th day of the third month for a residential project. See Tex. Prop. Code § 53.052.
- The lien claim deadline for specially fabricated materials is the 15th day of the third month after the month in which the material would normally have been delivered. See Tex. Prop. Code § 53.052. Determining this date may be difficult.
- Second month notices by subcontractors to the original contractor are optional and not required for non-residential projects. Tex. Prop. Code § 53.056.
- Lien claims for unpaid retainage must be filed not later than the 15th day of the third month after the original contractor's work is completed, terminated, or abandoned. Tex. Prop. Code §§ 52.052, 53.057.

Importantly, the inception time for a lien created under Tex. Prop. Code § 53.021(3), (4), or (5)—being primarily architects, engineers, surveyors, landscapers, and demolition contractors—is the date of recording of the affidavit claiming the lien. This protects a grantee or purchaser who acquires an interest in the real property before the lien claim is recorded. Tex. Prop. Code § 53.124(e).

Note that lien waivers are not required to be notarized and recorded, and statutory forms of the required notice were adopted. See Tex. Prop. Code §§ 53.056, 52.057, 53.281.

For a discussion of voluntary mechanic's and materialman's liens, see Standard 15.10.

Caution:

A mechanic's and materialman's lien relates back to the beginning of the work or the furnishing of materials. Tex. Prop. Code § 53.124; Denny v. White House Lumber Co., 54 S.W.2d 86 (Tex. Comm'n App. 1932, holding approved). The lien of a contractor or subcontractor who complies with the statutory filing and other requirements will be superior to the title of a subsequent purchaser, regardless of notice of the lien. Accordingly, prospective purchasers and lenders must make some inquiry outside the public records into activity on the property at least as far back as the length of the filing periods and seek to assure themselves that any potential claimants have been paid.

Examiners should be aware of Tex. Prop. Code § 53.026 (concerning sham contracts), which provides that a subcontractor under a direct contractual relationship with a purported original contractor might be able to assert original contractor status and thereby

claim a constitutional lien, discussed above, and have the benefit of a four-year limitations period to foreclose the lien.

Source:

Citations in the Comment.

History:

Adopted June 16, 2006.

Standard 15.30. Judgment Liens

An examiner should identify potentially enforceable liens evidenced by recorded abstracts of judgment and advise the client as appropriate to the circumstances of the examination. Typically, an examiner will require that any lien evidenced by a recorded abstract of judgment be released.

Comment:

If a court-certified "abstract of judgment" is properly prepared, recorded, and indexed, a judgment lien attaches to the judgment debtor's non-homestead real property, then owned or thereafter acquired, located in the county or counties where the abstract of judgment is of record. Tex. Prop. Code §§ 52.001, 52.002. The term "real property" includes any interest in land including any undivided interest. Robertson v. Scott, 172 S.W.2d 478 (Tex. 1943); Stroble v. Tearl, 221 S.W.2d 556 (Tex. 1949).

In general, neither the entry of a money judgment nor the recordation of a judgment creates a lien. White v. FDIC, 19 F.3d 249, 251 n.5 (5th Cir. 1994). Although a judgment may create a separate judicial lien by its express language, a certified copy of a judgment does not qualify as an abstract of judgment and does not create a lien by recordation. Citicorp Real Estate, Inc. v. Banque Arabe Internationale D'Investissement, 747 S.W.2d 926, 929 (Tex. App.—Dallas 1988, writ denied). An examiner may usually presume that a recorded document appearing to be an abstract of judgment creates an enforceable lien. However, occasionally an examiner may have to consider the validity of a recorded abstract of judgment, as for example where a title examination is being conducted for a judgment creditor. To create an enforceable judgment lien, the abstract of judgment must contain all of the mandatory items required by Tex. Prop. Code § 52.003(a):

- The names of the plaintiff and defendant;
- The birth date of the defendant, if available;
- The last three numbers of the driver's license number of the defendant, if available;
- The last three numbers of the social security number of the defendant, if available;
- The number of the suit in which the judgment was rendered;

- The defendant's address, or if the address is not shown in the suit, the nature of citation (i.e., service of process) and the date and place of service of citation;
- The date on which the judgment was rendered;
- The amount for which the judgment was rendered and the balance due;
- The amount of the balance due, if any, for child support arrearage; and
- The rate of interest specified in the judgment.

The abstract may include the address for each plaintiff or judgment creditor, but this is not required. Tex. Prop. Code § 52.003(b). While each and every statutory element must be met to establish a lien, the standard for establishing a lien is substantial compliance with the statute. Apostolic Church v. American Honda Motor Co., 833 S.W.2d 553, 554 (Tex. App.—Tyler 1992, writ denied). While older cases suggest strict compliance with the statutory elements, more recent cases suggest that the abstract of judgment must contain sufficient facts to put a subsequent purchaser on notice of a lien. See Thompson v. Clay, 367 S.W.2d 917, 920 (Tex. App.—Amarillo 1963, writ ref'd n.r.e.).

The lien comes into existence only when the abstract of judgment has been recorded and indexed as to each plaintiff and each defendant. J. M. Radford Grocery Co. v. Speck, 152 S.W.2d 787, 789 (Tex. App.— Amarillo 1941, writ ref'd). All names must be indexed to create a valid lien. Shirey v. Trust Co. of Texas, 69 S.W.2d 835 (Tex. App.—Texarkana 1934, writ ref'd) (holding that abstract of judgment was fatally defective where it was indexed in the names of all defendants against whom a personal judgment was rendered but not in the name of one additional defendant against whom only costs had been awarded); McGlothlin v. Coody, 59 S.W.2d 819 (Tex. Comm'n App. 1922, judgm't adopted) (holding that abstract of judgment failed to create a judgment lien where it was indexed under the name of the defendant against whom a money judgment was rendered but not in the name of an additional defendant against whom a foreclosure was ordered); Reynolds v. Kessler, 669 S.W.2d 801, 805 (Tex. App.—El Paso 1984, no writ) ("The names of all the parties to the judgment must appear alphabetically in the index, direct and reverse"). An abstract of judgment may not be enforced if it is indexed under an incorrect name. For example, in Wicker v. Jenkins, 108 S.W. 188 (Tex. App. 1908, no writ), the court held that the abstract of judgment was invalid where record title was in W. F. B. Wicker, but the abstract of judgment was indexed against the Plaintiff as "W. B. F. Wicker." Likewise, in Anthony v. Taylor, 4 S.W. 531 (Tex. 1887), the court held that the abstract of judgment was invalid where a judgment recovered by "Joan and William Bankhead" was abstracted as a judgment recovered by "Joan and William Burkhead". The cases dealing with the validity of abstracts of judgment do not seem to apply idem sonans. See Standard 3.10.

The names of defendants must correctly appear in the direct index, and names of the plaintiffs must appear in the indirect index. Guaranty State Bank v. Marion County Nat'l Bank, 293 S.W. 248 (Tex. App.—San Antonio 1927, no writ.) (holding that no lien was created where the abstract was correctly indexed as to all defendants but not indexed for any of the plaintiffs).

The judgment creditor has the burden to prove that the abstract of judgment complied with the statute and that it was properly recorded and indexed. Alkas v. United Sav. Ass'n of Texas, Inc., 672 S.W.2d 852, 859 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.). The judgment creditor cannot use as a defense the fact that the error was caused by the clerk. Caruso v. Shropshire, 954 S.W.2d 115, 116 (Tex. App.—San Antonio 1997, no pet.).

An examiner may presume that a judgment lien has ceased to exist ten years after recording and indexing. A judgment lien continues for a period of ten years following the date of recording and indexing the abstract of judgment; however, if the underlying judgment becomes dormant during this time period, then the judgment lien ceases to exist unless it has been timely revived. Tex. Prop. Code § 52.006. To determine whether a judgment has become dormant, see Tex. Civ. Prac. & Rem. Code § 34.001. A dormant judgment may be revived within two years after the date of dormancy by filing a scire facias proceeding. Tex. Civ. Prac. & Rem. Code § 31.006. In addition, dormancy may be prevented by filing suit to foreclose the judgment lien, which is regarded as an action for debt sufficient to preserve the judgment. Churchill v. Russey, 692 S.W.2d 596, 597–98 (Tex. App.—Fort Worth 1985, no writ).

If a judgment is not dormant, an abstract of judgment can be re-recorded and re-indexed. Each recording and indexing of an abstract of judgment seems to create a new lien with a new priority date. Burton Lingo Co. v. Warren, 45 S.W.2d 750 (Tex. App.—Eastland 1931, writ ref'd).

There are three exceptions to the general rule that a judgment lien lasts for ten years: (1) Judgment liens in favor of the United States are effective for twenty years and may be extended with the same priority another twenty years. 28 U.S.C. § 3201; (2) Child support liens filed on or after September 1, 1997, and prior to May 26, 2009, are effective indefinitely, Tex. Fam. Code § 157.318(a) (see Standard 15.10); and (3) Judgment liens in favor of the state or a state agency are effective for twenty years and may be renewed for an additional twenty years. Tex. Prop. Code § 52.006(b).

A judgment is not itself a lien. An abstract of judgment creates a judgment lien only if issued by a Texas state court under Tex. Prop. Code §§ 52.001, 52.002, or by a United States district court located in Texas, as authorized by Tex. Prop. Code § 52.007. See Reynolds v. Kessler, 669 S.W.2d 801, 806 (Tex. App.—El Paso 1984, no writ); 28 U.S.C. § 1962. A foreign judgment must first be recognized as provided in Tex. Civ. Prac. & Rem. Code ch. 35 and ch. 36A, whereupon an abstract of judgment may be issued and recorded in the same manner as any other Texas judgment. Hennessy v. Marshall, 682 S.W.2d 340, 343 (Tex. App.—Dallas 1984, no writ).

An abstract of judgment lien cannot attach to a homestead; however, whether particular property constitutes a homestead is not always clear in the record. Thus, an abstract of judgment lien clouds a homestead title. For abstract of judgment liens recorded and indexed on or after September 1, 2007, Tex. Prop. Code § 52.0012 creates a nonjudicial procedure for clearing such cloud by filing an affidavit that operates to release the abstract of judgment regarding the homestead unless the creditor files a contradicting affidavit

within the time provided by the statute. Texas Property Code § 52.0012 was amended effective September 1, 2021, to modify the nonjudicial procedure for clearing an abstract of judgment from a homestead. The process beginning September 1, 2021, provides for filing an affidavit and certificate of mailing to initiate the clearing process. If a contradicting affidavit is not filed within 30 days after the certificate of mailing is filed, a 90-day period beginning on the 31st day permits a bona fide purchaser or mortgagee for value to rely conclusively on the affidavit. For abstracts of judgment liens recorded and indexed prior to September 1, 2007, the cloud on the homestead could be released by a declaratory judgment action.

An obligor who believes that a child support lien has attached to the homestead of the obligor may file an affidavit to release the lien against the homestead in the same manner as a judgment debtor may file an affidavit to release a judgment lien against the homestead, provided the obligor complies with the requirements of the statute. Tex. Prop. Code § 52.0012. The obligor is required to send the letter and affidavit to the claimant under the child support lien at the claimant's last known address. The affidavit filed by the obligor has the same effect regarding a child support lien as an affidavit filed regarding a judgment lien. The claimant may file a contradicting affidavit in the same manner as provided by Id. § 52.0012(e). See Tex. Fam. Code § 157.3171. The process under Texas Family Code § 157.3171, which incorporates Texas Property Code § 52.0012, was similarly changed to adopt a new process for filing an affidavit and certificate of mailing.

For the effect of bankruptcy upon judgment liens, see Standard 12.140.

Caution:

The above comments only briefly identify the issues inherent in proving up an abstract of judgment. Many cases, particularly older cases, have found that an abstract of judgment lien was not created based upon what today might appear to be very technical and rigid mistakes. An examiner asked to opine on the enforceability of a particular judgment should carefully research this issue.

Source:

Citations in the Comment; Steven C. Haley, Texas Abstracts of Judgment and Judgment Liens, State Bar of Tex. Prof. Dev. Prog., Advanced Real Estate Law Course (2000); C. M. (Hank) Hudspeth, Judgment Liens and Abstracts of Judgment in Texas, 32 Tex. B. J. 520 (1969); S. Bradley Todes and Rosa S. Silbert, Judgment Liens in Texas, Houston Lawyer, May/June, 1994, at 28.

History:

Adopted June 16, 2006; amended March 6, 2026. The original standard provided:

"An examiner should identify recorded abstracts of judgment affecting the title under examination."

Standard 15.40. Implied Vendor's Liens

Absent an express vendor's lien, if the record indicates, or the examiner otherwise knows, that purchase money remains unpaid, the examiner should consider the possible existence of an implied vendor's lien.

Comment:

Although liens are most commonly created by express contract or by statute, certain liens may arise by implication. Williams v. Greer, 122 S.W.2d 247 (Tex. App.—Dallas 1938, no writ). For example, where no express lien is reserved in the deed and the purchase money is not paid, an implied lien arises in favor of the vendor to secure payment of the purchase money. McGoodwin v. McGoodwin, 671 S.W.2d 880 (Tex. 1984). If the purchase price is not paid, a vendor may sue for the debt and enforce an implied lien, although the vendor is not entitled to rescind the sale and recover the property. Rhiddlehoover v. Boren, 260 S.W.2d 431 (Tex. App.—Texarkana 1953, no writ). Thus, for example, if the examiner encounters a deed reciting that part of the consideration is an obligation not yet paid, such as a promissory note, the examiner should consider an implied vendor's lien to exist notwithstanding that no express vendor's lien is reserved and no deed of trust or mortgage appears.

An equitable or implied vendor's lien is not recordable. It is good against all except subsequent bona fide purchasers and encumbrancers. United States v. Morrison, 247 F.2d 285 (5th Cir. 1957); Scull v. Davis, 434 S.W.2d 391 (Tex. App.—El Paso 1968, writ ref'd n.r.e.).

If an express lien is retained affirmatively showing the party's intention to rely solely upon the security provided within the written agreement, any implied or equitable lien is presumptively waived. GXG, Inc. v. Texacal Oil & Gas, 977 S.W.2d 403 (Tex. App.—Corpus Christi 1998, pet. denied). Similarly, where a note was secured by a deed of trust and the parties struck out of the deed the printed language concerning the reservation of a vendor's lien, the deletion affirmatively showed the seller's intention to rely solely on the deed of trust. Zapata v. Torres, 464 S.W.2d 926 (Tex. App.—Dallas 1971, no writ).

Where part of the consideration for a conveyance is the purchaser's assumption of the seller's indebtedness to a third party, the third-party creditor thereby becomes entitled to an implied vendor's lien against the property. Delley v. Unknown Stockholders of Brotherly and Sisterly Club of Christ, Inc., 509 S.W.2d 709 (Tex. App.—Tyler 1974, writ ref'd n.r.e.). An implied vendor's lien will also be created under the terms of a divorce judgment, where a promissory note is executed by one party in consideration of a conveyance of the other party's interest in real property, though no express lien was created in the divorce decree to secure the note. Colquette v. Forbes, 680 S.W.2d 536 (Tex. App.— Austin 1984, no writ).

An implied lien may arise in cotenancy situations. For example, where a cotenant pays expenses and advances taxes on behalf of another cotenant, the advancing cotenant may enforce an implied lien for recovery of the advancements. Cox v. Davison, 397 S.W.2d 200 (Tex. 1965). In partition, a court may divide the property into shares of unequal value

and impose a payment obligation, commonly called owelty. The owelty is secured by an implied vendor's lien. Sayers v. Pyland, 161 S.W.2d 769 (Tex. 1942).

Any implied vendor's lien is lost when the debt is barred by the statute of limitations. See comments to Standard 15.100, "Removal of Lien." Where the wording of the stated consideration in an instrument "may or might create an implied lien in favor of the grantor," an action for the recovery of the property conveyed by that instrument must be brought within four years of the date that the instrument was "recorded," if it was recorded before September 1, 2007, or within two years of the date that the instrument was "filed for record," if it was filed on or after September 1, 2007. Tex. Civ. Prac. & Rem. Code § 16.033(a)(9). Act of June 15, 2007, 80th Leg., R.S. ch. 819, § 2, 2007 Gen. Laws 1695 (nonretroactivity provision).

Upon encountering an outstanding implied vendor's lien, the examiner should ordinarily require a release of the vendor's lien, a quitclaim from the holder of the obligation, or a subordination of the vendor's lien to the interest being examined.

An implied vendee's lien may arise where the vendee advances consideration for property without receiving valid title from the seller; however, a bona fide purchaser without notice of the vendee's lien would take the property free of the lien. See Morris v. Holland, 31 S.W. 690 (Tex. App. 1895, no writ); Stockwell v. Melbern, 185 S.W. 399 (Tex. App.—Galveston 1916, writ ref'd); Martin v. Bell–Woods Co., 57 S.W.2d 271 (Tex. App.—San Antonio 1932, no writ).

For a further discussion of vendor's liens, see comments to Standard 15.10.

Source:

Citations in the Comment.

History:

Adopted June 16, 2006.

Standard 15.50. Other Involuntary Statutory Liens

The examiner should identify other recorded statutory liens affecting the title under examination.

Comment:

A host of specialized involuntary statutory liens may affect Texas real property. Among them are the following:

- Appraisers and Broker's Lien, Tex. Prop. Code ch. 62.

- Child Support Lien, Tex. Fam. Code §§ 157.311–.331.
- Cotton Pests (Texas Department of Agriculture), Tex. Agric. Code § 74.004(e)–(g).
- County Assessments For Road Improvements,* Tex. Transp. Code § 253.009.
- County Litter Lien, Tex. Health & Safety Code § 365.034(c).
- County Weed and Sanitary Lien, Tex. Health & Safety Code § 343.023.
- Federal Lien Securing a Judgment Imposing a Criminal Fine, 18 U.S.C. § 3613.
- Miscellaneous State Tax Liens, Tex. Tax Code ch. 113.
- Municipal Assessments for Street Improvements,* Tex. Transp. Code §§ 312.002, 312.064, 313.042, 313.051, 313.054.
- Municipal Assessments for Water/Sewer Systems,* Tex. Loc. Gov't Code §§ 214.013(b), 214.014, 522.065, 522.067.
- Municipal Demolition Lien,* Tex. Loc. Gov't Code § 214.0015–.004.
- Municipal Floodplain Management Lien,* Tex. Loc. Gov't Code § 54.020.
- Municipal Utility Services Lien,* Tex. Loc. Gov't Code § 402.0025(d)–(h).
- Municipal Weed and Sanitary Lien,* Tex. Health & Safety Code § 342.007.
- Solid Waste Facility Remedial Lien, Tex. Health & Safety Code § 361.194.
- State Hospital Lien (for support, maintenance, and treatment of a patient with mental illness or intellectual disability), Tex. Health & Safety Code §§ 533.004, 533A.004.
- Surface Coal Mining Reclamation,* Tex. Nat. Res. Code § 134.150.
- Texas Workforce Lien,* Tex. Lab. Code §§ 61.081–.085.
- Unemployment Taxes, Tex. Lab. Code §§ 213.057–.058.
- Water District Standby Fees,* Tex. Water Code § 49.231.
- Water District Taxes,* Tex. Water Code § 55.604, Texas Tax Code § 32.01.

* See caution, below.

Chapter 68 of the Property Code provides for a RICO lien notice to be filed pursuant to Tex. Prop. Code § 68.051 in one or more counties. For the state's criminal RICO statutes and criminal forfeiture, see Texas Penal Code ch. 72. For the state's civil RICO statutes and civil forfeiture, see Tex. Civ. Prac. & Rem. Code ch. 140B.

Tex. Fam. Code § 3.402 relates to claims for reimbursement between marital estates. On dissolution of marriage a court may impose an equitable lien on the benefited estate to secure a claim for reimbursement as provided in Tex. Fam. Code § 3.406.

For a discussion of mechanic's and materialman's liens generally, see Standard 15.20. For a discussion of state ad valorem taxes and the lien securing them, see Standards 15.70 and 15.80.

Caution:

In most instances, a statutory lien is not perfected until a notice has been filed for record in the pertinent county clerk's office, and the lien's priority is determined according

to the time of filing. However, the liens marked with an asterisk (*) in the above listing may have special priority independent of the time or fact of filing over other titles and encumbrances.

Source:

Citations in the Comment.

History:

Adopted June 22, 2007.

Standard 15.60. Federal Tax Liens

The examiner should determine whether the land under examination is subject to a federal tax lien.

Comment:

Various federal tax liens may constitute a claim against a taxpayer's property. These include a general tax lien (26 U.S.C. § 6321), a gift tax lien (26 U.S.C. § 6324(b)), an estate tax lien (26 U.S.C. § 6324(a)), a generation-skipping transfer tax lien (26 U.S.C. § 2661), and special liens relating to recapture of deferred or reduced taxes such as special use valuation of a farm or closely held business (26 U.S.C. §§ 6324A and 6324B).

Most federal tax liens attach to the taxpayer's property following certain statutory notice from the Internal Revenue Service and other procedures involving the taxpayer (26 U.S.C. § 6320). No filing is required for perfection of the estate tax lien or gift tax lien. Except for the federal estate tax lien, a lien is not perfected against a purchaser, a holder of a security interest, a holder of a mechanic's lien, or a judgment creditor until a notice is filed in the records of the county where the land is located (26 U.S.C. § 6323).

Procedures relating to release of liens and discharge of property from liens are set out in 26 U.S.C. § 6325.

Subject to renewal (26 U.S.C. § 6323(g)), a notice of federal tax lien is valid for ten years and thirty days from date of assessment (26 U.S.C. §§ 6322, 6502, and 6503). Although rarely done, a notice of federal tax lien may be filed for estate and gift taxes; if a notice is not filed, a federal estate tax lien is valid for ten years from the taxpayer's date of death (26 U.S.C. § 6324(a)(1)), and a gift tax lien is valid for ten years from the date of the gift (26 U.S.C. § 6324(b)). For more information concerning liens against a decedent's estate, see Standard 11.60.

A federal tax lien may be extended by agreement of the taxpayer and the government, as well as for other reasons. Unless an examiner has record notice or actual notice of an extension, an examiner may presume that a federal tax lien has lapsed if the

limitation periods in the prior paragraph have expired. An examiner should require a release of any lien held by the United States, any agency of the United States, or any assignee of such a lien unless the lien is no longer enforceable under federal law.

Caution:

See first paragraph of Caution to Standard 15.10.

Source:

Citations in the Comment.

History:

Adopted June 22, 2007.

Standard 15.70. Payment Of Ad Valorem Taxes

The examiner should ordinarily determine the status of payment of ad valorem taxes.

Comment:

Ad valorem taxes are assessed as of January 1 of each year. They are due and payable on the following October 1 but are not delinquent if paid before February 1 of the following year (or, in the case of a residence homestead and certain classes of individuals, including disabled veterans and persons over 65, if paid in four bimonthly installments beginning on February 1). A tax lien attaches on January 1 of each year to secure payment of taxes, penalties, and interest ultimately imposed for that year. Tex. Tax Code §§ 32.01, 32.02, 32.031, 32.032. In determining the status of payment of ad valorem taxes, an examiner customarily relies upon a tax certificate issued by a collector for a taxing unit. The methods of assessment and collection are not uniform. The collection of taxes may be consolidated in one collector of taxes or may be separately maintained by separate tax units. Tex. Tax Code §§ 6.23, 6.26. Any person may request a tax certificate, which must be issued by the collector for the taxing unit. The certificate shows the amount of delinquent taxes, penalties, and interest due according to the unit's current records. The effect of a tax certificate is as follows: "[I]f a person transfers property accompanied by a tax certificate erroneously showing that no delinquent taxes, penalties, or interest are due a taxing unit on the property, the unit's tax lien on the property is extinguished and the purchaser of the property is absolved of liability to the unit for delinquent taxes, penalties, or interest on the property. The person who was liable for the tax for the year it was imposed remains personally liable for the delinquent tax, penalties, and interest." Tex. Tax Code § 31.08. However, a tax certificate issued through fraud or collusion is void.

Although examiners frequently rely on a tax receipt to indicate the payment of taxes for the specified year, a tax receipt is only prima facie evidence that the tax has been paid. Tex. Tax Code § 31.075. The assessor is required to mail the tax bill by October 1 of each

year, or as soon thereafter as practicable. The tax bill, or a separate statement accompanying the tax bill, shall include: (1) the appraised value, assessed value and taxable value of the land (including improvements); (2) the market value and taxable value of the land, as provided in § 23.46 (agricultural assessment), § 23.55 (qualified open-space land), § 23.76 (qualified timber land), and § 23.9807 (restricted-use timber land); and (3) the amount and type of any partial exemption. Tex. Tax Code § 31.01.

If there is a sale or change in use of land qualified for special valuation as agricultural land or if there is a change in the use of land qualified for special valuation as open space or timber land, an additional rollback tax may be imposed. Tex. Tax Code §§ 23.46, 23.55, 23.76, and 23.9807. As to when a rollback tax lien attaches, see Compass Bank v. Bent Creek Investments, Inc., 52 S.W.3d 419 (Tex. App.—Fort Worth 2001, no pet.) (addressing agricultural rollback tax liens).

Land is subject to foreclosure for nonpayment of delinquent taxes; however, if there has been no foreclosure or if there is no pending foreclosure for delinquent taxes, the collector for a taxing unit must cancel and remove from the delinquent tax rolls a tax that has been delinquent for more than twenty years. Tex. Tax Code § 33.05. For further information on foreclosure, see Standard 16.20.

If the examiner does not determine the status of payment of ad valorem taxes, the examiner should advise the client to make this determination.

Caution:

As previously indicated, the most reliable protection for a purchaser is a current tax certificate; however, the examiner should verify that the certificate covers all of the relevant land and improvements and encompasses all taxing units. Tex. Tax Code § 31.08. Moreover, a tax certificate procured by fraud or collusion is void. Id. In addition, an erroneous tax certificate does not protect a non-purchaser. Id.

Ad valorem taxes are subject to reassessment. For example, the property may no longer qualify for the over-65 homestead tax exemption (e.g., the over-65 owner has died or is no longer domiciled on the subject property), or there may have been a failure to include the land in a taxing unit or a failure to assess improvements. In general, ad valorem property taxes may be reassessed for up to five years. See, e.g., Tex. Tax Code §§ 25.21, 1.04(2). Harris County Appraisal District v. Reynolds/Texas, J.V., 884 S.W.2d 526 (Tex. App.—El Paso 1994, no writ) (improvements had not been assessed).

Source:

Citations in the Comment.

History:

Adopted June 24, 2005; amended July 17, 2014.

The prior standard provided: "The examiner ordinarily determines the status of payment of ad valorem taxes."

Standard 15.80. Priority Of Ad Valorem Tax Lien

The examiner should ordinarily assume that an ad valorem tax lien is superior to any mortgage, judgment, other lien, or homestead right.

Comment:

All ad valorem tax liens have equal priority. "Whether or not a [property] tax lien…takes priority over a tax lien of the United States is determined by federal law. In the absence of federal law, a [property] tax lien… takes priority over a tax lien of the United States." Tex. Tax Code § 32.04. The priority of a federal tax lien is determined by the date a notice of the tax lien is recorded. 26 U S.C. § 6323(b)(6). Except as hereafter discussed, an ad valorem tax lien takes priority over the claim of any holder of a lien on the land encumbered by the tax lien, even when the debt or lien existed before the tax lien. Tex. Tax Code § 32.05(b). Tex. Prop. Code § 32.01 spells out the effective date of tax lien.

This standard is subject to the following qualifications:

- The ad valorem tax lien is subordinate to survivor's allowance, funeral expenses, or expenses of last illness of a decedent made against the estate, Tex. Tax Code § 32.05 (c).
- The ad valorem tax lien is subordinate to a restrictive covenant running with the land or to an easement recorded before January 1 of the year the tax lien arose. Tex. Tax Code § 32.05.
- An option to purchase, even though recorded and "running with the land," is an affirmative covenant, in contrast with a restrictive covenant that would have been protected by the Texas Tax Code § 32.05. Thus, the option was eliminated by an ad valorem tax suit and sheriff's foreclosure sale. Target Corp. v. D&H Props., LLC, 637 S.W.3d 816 (Tex. App.—Houston [14th Dist.] 2021, pet. denied).
- Tex. Tax Code § 32.06 provides a procedure whereby a taxpayer may authorize a third party to pay ad valorem taxes and to obtain a transfer of the taxing unit's lien. Effective September 1, 2007, changes were made in this procedure that are prospective only.
- Amendments in 2013 tightened the statute by, for example, preventing nonjudicial foreclosure and prohibiting waivers and certain transfers, and made related changes to Tex. Fin. Code, Chapter 351, Subchapter A. The examiner should be aware of this statute if the title chain contains a foreclosure of an ad valorem tax lien by other than a taxing authority.

Source:

Citations in the Comments.

History:

Adopted June 24, 2005.

Standard 15.90. Lien Priority And Subordination

Subject to exceptions, an examiner may presume that a lien created and filed for record has priority over a subsequently created competing lien or interest in the same property unless the priority has been altered by a subordination agreement.

Comment:

After a senior lien is validly foreclosed, junior liens and junior interests in the same property are extinguished. Arnold v. Eaton, 910 S.W.2d 181 (Tex. App.—Eastland 1995, no writ). Under common law, the lienholder whose lien first attaches to the property has the right to satisfy the lien against the property before the holders of subsequently attached liens. Windham v. Citizens Nat'l Bank, 105 S.W.2d 348 (Tex. App.—Austin 1937, writ dism'd). However, recording statutes have modified the common law rules of lien priority. Generally, the first lien filed for recordation is superior to a lien or other interest created subsequently to the first lien's filing because subsequent creditors and owners of junior interests are charged with constructive notice of the earlier recorded lien. Regold Mfg. Co. v. Maccabees, 348 S.W.2d 864 (Tex. App.—Fort Worth 1961, writ ref'd n.r.e.); Tex. Prop. Code § 13.002. A deed of trust or mortgage that has not been recorded is void as to a creditor or subsequent purchaser for valuable consideration without notice of the unrecorded encumbrance. Tex. Prop. Code § 13.001(a).

A subordination agreement is a contractual modification of lien priorities which establishes different lien priorities than those provided under the statutory or common law rules. In agreeing to subordinate a superior lien secured by real property to a subsequent lien or other interest in the same property, the superior lienholder voluntarily contracts to be paid after a junior lienholder if the liens are foreclosed or agrees that foreclosure will not extinguish a previously junior interest. Vahlsing Christina Corp. v. First Nat'l Bank of Hobbs, 491 S.W.2d 954 (Tex. App.—El Paso 1973, writ ref'd n.r.e.).

If there are more than two liens against a real property interest at the time of subordination, the subordinated lien is placed directly after the lien to which it is subordinated. Any liens not participating in the subordination agreement that have a priority ranking between the liens participating in the subordination move up in priority, becoming superior to the liens involved in the subordination. Liens that have a lower priority ranking than the liens involved in the subordination do not move up in priority. For example, if four liens against a parcel of real property are ranked A, B, C, and D, and lien A is contractually subordinated to lien C, the ranking after subordination would be B, C, A, and D. McConnell v. Mortgage Inv. Co. of El Paso, 292 S.W.2d 636 (Tex. App.—El Paso 1955), aff'd, 305 S.W.2d 280 (Tex. 1957). Note, however, different rules apply to a subordination agreement in a non-real estate situation. See ITT Diversified Credit Corp. v. First City Capital Corporation, 737 S.W.2d 803 (Tex. 1987).

If a landlord-tenant lease is executed before a lien is created, the lease is superior to the lien and continues in effect after the foreclosure unless the mortgagee is a bona fide mortgagee without notice of the lease (i.e., the mortgagee does not have actual or constructive notice of the lease and the tenant is not in possession at the time the lien is created). Groos v. Chittim, 100 S.W. 1006 (Tex. App. 1907, no writ); Gill v. First Nat'l Bank of Harlingen, 114 S.W.2d 428 (Tex. App.—San Antonio 1938, no writ); Boyd v. United Bank, N.A., 794 S.W.2d 839 (Tex. App.—El Paso 1990, writ denied); United General Ins. v. American Nat. Ins., 740 S.W.2d 885 (Tex. App.—El Paso 1987, no writ), disapproved in part, ICM Mortgage Corp. v. Jacob, 902 S.W.2d 527 (Tex. App.—El Paso 1994, writ denied).

If the landlord-tenant lease is subordinate to a mortgage, then the foreclosure of the mortgage will extinguish the lease. Heron Lakes 2005 HQ-7, LLC v. Cadence Bank, 681 F.Supp.3d 697 (S.D. Tex. 2023).

Some confusion exists over the effect of a foreclosure of an existing lien on a subsequent landlord-tenant lease. The basic rule appears to be that the junior lease terminates on foreclosure. However, the parties are free to enter a new lease (as opposed to "continuing" the old one). The post-foreclosure conduct of the parties determines whether a new lease, with terms supplied by the previous lease, is created by implication. Twelve Oaks Tower I v. Premier Allergy, 938 S.W.2d 102 (Tex. App.—Houston [14th Dist.] 1996, no writ); Peterson v. NCNB Texas Nat'l Bank, 838 S.W.2d 263 (Tex. App.—Dallas 1992, no writ).

Under Tex. Prop. Code § 66.001, the foreclosure of a mortgage on a surface tract that includes minerals underlying the land does not extinguish an oil and gas lease that is subsequent to the mortgage if the lease was recorded before the foreclosure sale. The foreclosure sale does extinguish the oil and gas lessee's right to use the surface to the extent that the security instrument under which the real property was foreclosed had priority over the rights of the lessee under the oil or gas lease, and any royalty and other lease benefits accruing to the mortgagor pass to the purchaser at the foreclosure sale. Cautious examiners should consider whether this legislation applies to mortgages in effect before the enactment of the legislation, which was effective January 1, 2016.

Caution:

A recorded lien may be inferior to a subsequent lien created under an instrument actually recorded before the first lien, such as a deed of trust with a future advance clause, because the first lienholder is charged with constructive notice of the lien that may arise in the future. Coke Lbr. & Mfg. Co. v. First Nat'l Bank, 529 S.W.2d 612 (Tex. App.—Dallas 1975, writ ref'd).

Several exceptions exist to the general rule under recording statutes that the first lien recorded is the first in priority. If a creditor has actual or constructive notice of a prior unrecorded lien, the general priority rules under the recording statute may not apply. For instance, a lender's deed of trust is inferior to a contractor's lien if construction or construction materials are visible from an inspection of the land before the deed of trust is executed, because the lender is charged with notice of the possible existence of an unrecorded prior lien.

Hagler v. Continental Nat'l Bank, 549 S.W.2d 250 (Tex. App.—Texarkana, 1977, writ ref'd n.r.e.). Texas has a notice system of recording, in contrast with race notice or race recording systems. Under a notice system of recording, a prior mortgage not filed for record at the time of delivery of a subsequent mortgage to a good faith lender for valuable consideration may not have priority over that subsequent mortgage, even if the prior mortgage is filed for record first. Tex. Prop. Code § 13.001. However, a vendor's lien retained in a deed will be prior to a previously recorded judgment lien against a purchaser. Donie State Bank v. Parker, 554 S.W.2d 858 (Tex. App.—Waco 1977, writ ref'd n.r.e.).

Mechanic's Liens: An involuntary mechanic's lien may attach to the building or improvement and take priority over a previously recorded lien or interest on the land on which the building or improvement is located if the previously recorded lien encumbers the property after the inception of the involuntary mechanic's lien. Tex. Prop. Code § 53.124. The involuntary mechanic's lien does not affect any lien on the land or improvement at the inception of the mechanic's lien, and the lienholder does not need to be made a party to a suit to foreclose the mechanic's lien. Tex. Prop. Code § 53.123. An involuntary mechanic's lien against improvements to real property may be superior to an earlier recorded deed of trust secured by the real property if the improvements are removable without injury to the land, preexisting improvements, or improvements removed. First National Bank in Dallas v. Whirlpool Corp., 517 S.W.2d 262 (Tex. 1974). See also Standard 15.20.

Fixture Filing: A purchase-money security interest in a fixture may have priority over a prior, recorded real property lien provided the purchase-money security interest is filed as a fixture filing in the real property records before the goods become fixtures or within twenty days thereafter. Tex. Bus. & Com. Code § 9.334(d).

Federal Tax Liens: Special seniority rules govern federal tax liens. 26 U.S.C. §§ 6321–6323. In general, if the notice of a federal lien is filed prior to the time that the debtor acquires the property, the federal tax lien has priority over any subsequently created lien or other interest. United States v. McDermott, 507 U.S. 447, 455 (1993). However, a federal tax lien does not have priority over a purchase money mortgage—at least if secured by an express vendor's lien. Slodov v. United States, 436 U.S. 238 (1978) (recognizing priority of purchase money lien); Minix v. Maggard, 652 S.W.2d 93 (Ky. Ct. App. 1983); Belland v. OK Lumber Company, Inc., 797 P.2d 638 (Alas. 1990); Rev. Rul. 68–57 (1977). See also Standard 15.60.

Possession: Similarly, a creditor may be put on notice of the equitable interest or adverse claim of a person in prior possession of property. The creditor's lien will be inferior to the possessor's interest or estate if the possession is such that the creditor has a duty to ask the possessor about the nature of the possessor's claim. Boyd v. United Bank, N.A., 794 S.W.2d 839 (Tex. App.—El Paso 1990, writ denied).

Source:

Citations in the Comment.

History:

Adopted June 13, 2003.

Standard 15.100. Removal of Lien

Subject to exceptions, an examiner may presume that a lien on real property is extinguished upon establishing that the secured debt (1) has been paid or (2) has become unenforceable upon expiration of the applicable limitations period.

Comment:

Whether or not a written release is delivered, the lien ceases to exist when the underlying debt is paid; however, the lienholder has a duty to issue a written release. Knox v. Farmers' State Bank, 7 S.W.2d 918 (Tex. App.—Eastland 1928, writ ref'd); Spencer-Sauer Lumber Co. v. Ballard, 98 S.W.2d 1054 (Tex. App.—San Antonio 1936, no writ) (full release); Cook v. Leslie, 59 S.W.2d 302 (Tex. App.—San Antonio 1933, no writ) (partial release). Preferably a written release should be obtained whenever reasonably possible. To give notice to third parties dealing with the property, a written release must be recorded in the county in which the lien was recorded. Tex. Prop. Code §§ 11.001, 13.002.

A title insurance company or its expressly authorized title insurance agent may file an affidavit releasing a mortgage that exclusively encumbers (1) a one-to-four family residence or (2) other property if the face amount of the secured indebtedness is less than $1.5 million. Tex. Prop. Code § 12.017.

Commonly, a release of a mortgage or deed of trust may fail to expressly release a related assignment of rents or leases or a separate financing statement that may have been given to the same lender as additional security. If a deed of trust or other mortgage was filed for record at or about the same time as the filing of a financing statement or the recordation of an assignment of rents, leases, production, or other collateral to the same lender and appears to be part of the same transaction evidenced by the deed of trust or other mortgage, it is common practice for an examiner to presume that a full release of the deed of trust or other mortgage without specific reference to the financing statement or assignment is sufficient as a release of the financing statement or assignment.

A sale of real property under a power of sale in a mortgage or deed of trust must be made not later than four years after the date the cause of action accrues. Generally, the cause of action accrues on the maturity date of the debt. Upon expiration of the four-year limitations period, the real property lien and any power of sale to enforce the lien are void. The running of the statute of limitations is not suspended against a bona fide purchaser. An examiner who does not have notice or knowledge of the suspension of the limitations period (e.g., unrecorded extension agreement) may presume that the lien is unenforceable when a cause of action on an outstanding real property lien has accrued for more than four years, except as provided by the provisions governing suspension in the event of death. Tex. Civ. Prac. & Rem. Code §§ 16.035, 16.036, 16.062.

If a series of notes or obligations or a note or obligation payable in installments is secured by a real property lien, the four-year limitations period does not begin to run until the maturity date of the last note, obligation, or installment. The limitations period in the preceding paragraph is not affected by the Uniform Commercial Code provision containing limitations periods applying to negotiable instruments. Cf., Tex. Civ. Prac. & Rem. Code § 16.035 and Tex. Bus. & Com. Code § 3.118.

If a promissory note is payable on demand, there are two limitations periods. A promissory note is "payable on demand" if it states that it is payable on demand, payable at sight, or otherwise indicates that it is payable at the will of the holder, or does not state any time for payment. Tex. Bus. & Com. Code § 3.108. If demand for payment is made to the maker, an action to enforce payment must be commenced within six years after the demand. However, if no demand for payment is made, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of ten years. See Tex. Bus. & Com. Code § 3.118(b). Note, however, that prior to the amendment of § 3.118, effective May 22, 2001, Texas case law held that the limitations period for a demand note began to run on the date the note was made. See, e.g., G & R Inv. v. Nance, 683 S.W.2d 727 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). Although enforcement of a lien may be barred by the four-year limitations period (under Tex. Civ. Prac. & Rem. Code § 16.035), payment of the debt may continue to be enforceable as an unsecured debt provided an action to enforce payment is commenced within the limitations periods set forth in Tex. Bus. & Com. Code § 3.118; Aguero v. Ramirez, 70 S.W.3d 372 (Tex. App.—Corpus Christi 2002, pet. denied).

A party primarily liable for an obligation secured by a real property lien may suspend the running of the four-year limitations period through a written extension agreement. Regarding that party's interest, the limitations period is suspended, and the lien remains in effect for four years after the extended maturity date of the obligation if the extension agreement is signed, acknowledged, and filed for record in the county clerk's office of the county where the real property is located. A lien may be further extended by additional extension agreements. The maturity date stated in the original instrument or in the recorded renewal and extension is conclusive evidence of the maturity date of the debt or obligation. This limitation period is not affected by the Uniform Commercial Code limitations provisions governing notes and other negotiable instruments. Tex. Civ. Prac. & Rem. Code §§ 16.035-36; Tex. Bus. & Com. Code § 3.118.

Although valid between the parties, an oral extension of a note is not effective against a third party. An extension agreement is invalid as to a bona fide purchaser for value, a lienholder, or a lessee who deals with real property affected by an extended real property lien without actual notice of the extension agreement and before the agreement is filed for recordation. Tex. Civ. Prac. & Rem. Code § 16.037. If the maturity date of the debt is omitted from a deed of trust, the deed of trust is read together with the underlying note as if the two constituted one instrument. Cadle Co. v. Butler, 951 S.W.2d 901 (Tex. App.—Corpus Christi 1997, no writ). An omission of the date of maturity does not toll the statute of limitations for the payment of the debt. The limitations period begins to run on the date the last

installment payment is due, even if not stated in the deed of trust. Swedlund v. Banner, 970 S.W.2d 107 (Tex. App.—Corpus Christi 1998, pet. denied).

For the removal of abstract of judgment liens clouding homesteads, see Standard 15.30. For a waiver and release of a mechanic's, contractor's, or materialman's lien or payment bond claim arising under a contract executed on or after January 1, 2012, see Standard 15.20 and Tex. Prop. Code § 53.281.

Where the title company has paid the Mortgagee's payoff statement, an authorized officer of a title insurance company or an authorized title insurance agent may, on behalf of the mortgagor or a transferee of the mortgagor who acquired title to the property described, file an Affidavit As Release of Lien under TEX. PROP. CODE § 12.017 to release liens on property whose original face amount of debt secured is less than $1.5 million or on property consisting exclusively of a one-to-four family residence. Per Tex. Prop. Code § 12.017(f), however, on or after the date of the payment to which the affidavit relates, the title insurance company or authorized title insurance agent must notify the mortgagee at the location to which the payment is sent that the title insurance company or authorized title insurance agent may file for record at any time such affidavit. If notice required by Tex. Prop. Code § 12.017(f) is not provided to the mortgagee, the title insurance company or authorized title insurance agent may not file for record the affidavit.

Tex. Fin. Code § 343.108 requires that no later than the 60th day after the mortgage servicer or mortgagee receives the correct mortgage payoff on a home loan from a mortgagor, the mortgage servicer or mortgagee must deliver to the mortgagor a release of lien or file the release of lien with the appropriate county clerk. This Act took effect September 1, 2023. However, Tex. Fin. Code § 343.108(c) requires that, if the mortgagor delivers a written request to the mortgagee or mortgage servicer for the release of lien to be delivered to the mortgagor or filed with the county clerk on or before the 20th day after the date of the payoff of the home loan, the mortgagee or mortgage servicer shall deliver or file the release of lien not later than the 30th day after the date the mortgagee or mortgage servicer receives the written request from the mortgagor. Id.

Caution:

Payment of lien by creditor: If payment of the existing indebtedness is not made by the debtor, but by another creditor as a part of a legitimate business transaction, the lien is not extinguished. Instead, the lien is transferred to the new creditor. Baccus v. Westgate Management Corp., 981 S.W.2d 383 (Tex. App.—San Antonio 1998, pet. denied); Chicago Title Ins. v. Lawrence Invest., 782 S.W.2d 332 (Tex. App.—Fort Worth 1989, writ ref'd).

Federal agencies: If a lien is held by the United States or any agency of the United States, Texas statutes prescribing limitations periods generally do not apply to foreclosure of the lien. Farmers Home Administration v. Muirhead, 42 F.3d 964 (5th Cir. 1995). See 12 U.S.C. § 1821(d)(14), enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), and 28 U.S.C. § 2415(a); Jackson v. Thweatt, 883 S.W.2d 171 (Tex. 1994); Cadle Co. v. Estate of Weaver, 883 S.W.2d 179 (Tex. 1994); Jon Luce Builder,

Inc. v. First Gibraltar Bank, 849 S.W.2d 451 (Tex. App.—Austin 1993, writ denied). Unless the lien is no longer enforceable under federal law, an examiner should require a release of any lien held by the United States, any agency of the United States, or any assignee of such a lien.

Property Acquired By Farm Credit System: After January 6, 1988, agricultural real estate acquired by an institution of the Farm Credit System (a Federal Land Bank, a Farm Credit Bank or a Production Credit Association) as a result of a loan foreclosure or a voluntary conveyance from a borrower is subject to a right of first refusal vested in the "previous owner" to repurchase or lease the property. A "previous owner" is the person or entity from which or from whom the Farm Credit System lender acquired title. If the previous owner waived his right of first refusal, the original or an authentic copy of the executed waiver should be furnished and recorded. See 12 U.S.C. § 2219a.

Property Acquired By Farmers Home Administration: After January 6, 1988, agricultural real estate acquired by the Farmers Home Administration as a result of a loan foreclosure or a voluntary conveyance from a borrower is subject to a number of rights and preferences in favor of the borrower and certain other entities (e.g., the party from which or from whom the Farmers Home Administration acquired title) to repurchase or lease the property. The examiner should be furnished satisfactory evidence that, in compliance with the applicable statutes, regulations and cases, the Farmers Home Administration has either obtained waivers from the borrower and other protected entities or has complied with the appropriate notice procedures, and that all administrative appeal rights, if any, have been exhausted. See 7 U.S.C. § 1985.

Source:

Citations in the Comment.

History:

Adopted June 13, 2003.

Standard 15.110. Lis Pendens

The examiner should inquire as to the nature of the cause of action giving rise to a notice of lis pendens, should evaluate whether the pending litigation may be relevant to the interests under examination, and should advise the client regarding any actions that are appropriate to the purpose of the examination.

Comment:

The filing of a lis pendens notice gives notice of a pending cause of action involving eminent domain, title to real property, establishment of an interest in real property, or enforcement of an encumbrance against real property. The party filing a lis pendens, or the party's agent or attorney, must sign the lis pendens, stating: (1) the style and number, if any,

of the proceeding; (2) the court in which the proceeding is pending; (3) the names of parties; (4) the kind of proceeding; and (5) a description of the property affected. Tex. Prop. Code § 12.007; Prappas v. Meyerland Community Improvement Assoc., 795 S.W.2d 794 (Tex. App.—Houston [14th Dist.] 1990, writ denied); King v. Tubb, 551 S.W.2d 436 (Tex. App.—Corpus Christi 1977, no writ). Tex. Prop. Code § 12.007(c) provides that the county clerk shall record the notice in a lis pendens record and shall index the record in a direct and reverse index under the name of each party to the proceeding.

Effective September 1, 2009, a person who files a notice of lis pendens must serve a copy of the notice on each party to the action who has an interest in the real property affected by the notice. The notice must be served not later than the third day after the person files the notice. Tex. Prop. Code § 12.007(d). Effective September 1, 2009, a court may expunge a notice of lis pendens if the lis pendens claimant cannot establish a real property claim or has not given the required notice. Tex. Prop. Code § 12.0071.

Under Tex. Prop. Code § 12.0071(f):

> After a certified copy of an order expunging a notice of lis pendens has been recorded:
>
> (1) the notice of lis pendens and any information derived or that could be derived from the notice:
>
> (A) does not:
>
> (i) constitute constructive or actual notice of any matter contained in the notice or of any matter relating to the action in connection with which the notice was filed;
>
> (ii) create any duty of inquiry in a person with respect to the property described in the notice; or
>
> (iii) affect the validity of a conveyance to a purchaser for value or of a mortgage to a lender for value; and
>
> (B) is not enforceable against a purchaser or lender described by Paragraph (A)(iii) of § 12.0071(f), regardless of whether the purchaser or lender knew of the lis pendens action; and
>
> (2) an interest in the real property may be transferred or encumbered free of all matters asserted or disclosed in the notice and all claims or other matters asserted or disclosed in the action in connection with which the notice was filed.

Tex. Prop. Code § 12.008 contains provisions regarding cancellation of a lis pendens. A properly filed lis pendens notice effectively prevents a grantee from being an innocent purchaser. Specifically, Tex. Prop. Code § 13.004(a) provides: "A recorded lis pendens is notice to the world of its contents. The notice is effective from the time it is filed for record and indexed, as provided by Tex. Prop. Code § 12.007(c), regardless of whether service has been made on the parties to the proceeding."

A transfer or encumbrance of real property involved in a proceeding by a party to the proceeding to a third party who has paid a valuable consideration and who does not have actual or constructive notice of the proceeding is effective, even though the judgment is against the party transferring or encumbering the property, unless a notice of the pendency of the proceeding has been recorded and indexed under that party's name, as provided by Tex. Prop. Code § 12.007(c), in each county in which the property is located. See Tex.Prop Code §13.004(b).

The doctrine of lis pendens does not void a conveyance during the pendency of a suit, but the interest of the grantor merely passes subject to the results of the cause. Cherokee Water Co. v. Advance Oil & Gas Co., 843 S.W.2d 132 (Tex. App.—Texarkana 1992, writ den.). The lis pendens notice is considered part of the judicial process, and the resulting absolute privilege bars a suit for damages arising from the filing of the lis pendens except as provided for in Tex. Civ. Prac. & Rem Code § 12.002(a), concerning fraudulent use of documents, which disallows a person to make, present, or use a document or record with knowledge that the document or other record is a fraudulent court record or a fraudulent lien or claim against real or personal property or an interest in real or personal property. Diogu v. Ratan-Aporn, No. 01-14-00694-CV, 2015 WL 3982531, at *7 (Tex. App.—Houston [1st Dist.] June 30, 2015, pet. denied) (mem. op.).

Caution:

A lis pendens gives continuing constructive notice of the lawsuit while it is pending but has no existence separate and apart from the litigation of which it gives notice. Taliaferro v. Smith, 804 S.W.2d 548 (Tex. App.—Houston [14th Dist.] 1991, no writ); Wagner v. Oliver, 256 S.W. 302 (Tex. App.—Amarillo 1923, writ dism'd). See also Hartel v. Dishman, 145 S.W.2d 865, 869 (Tex. 1940) ("Lis Pendens continues not only until the judgment has been recovered, but in a case where the judgment directs the sale of property, until such sale has been effected").

A lis pendens notice is rarely released and may remain on record many years after the litigation is terminated. Thus, unless the underlying litigation has been finally dismissed or resolved, an unreleased lis pendens continues to cloud title, regardless of its age.

Source:

Citations in the Comment.

History:

Adopted June 13, 2003; amended July 17, 2014.

The prior standard provided: "The existence of a lis pendens notice requires the examiner to inquire as to the nature of the cause of action, evaluate whether the pending litigation may be relevant to the interests under examination, and advise the client regarding any actions that are appropriate to the purpose of the examination."

CHAPTER XVI

FORECLOSURES

Standard 16.10. Nonjudicial Foreclosure

An examiner should determine that all statutory and contractual requirements for a nonjudicial foreclosure sale have been satisfied. Specifically, an examiner should determine:

(1) that the security instrument confers the power of sale;
(2) that there has been a default under the terms of the security instrument;
(3) that the trustee or substitute trustee was properly appointed;
(4) that all statutory requirements in effect at the time of sale have been met;
(5) that all additional requirements, if any, contained in the security instrument have been met; and
(6) that a trustee's deed has been delivered.

Comment:

The first determination should be made from an examination of the security instrument. The other determinations may be made by examining the trustee's deed and other related instruments that may be available or of record. These may include an affidavit by the trustee, a copy of the notice of the trustee's sale, and an appointment of substitute trustee. Ordinarily, the examiner may determine default from the recitals in affidavits accompanying or incorporated in the trustee's deed. If not, the examiner should search for other evidence or take into consideration other factors, such as the passage of time since the foreclosure. The trustee or trustees are customarily appointed in the security instrument.

The provisions for the appointment of a substitute trustee are usually set out in the security instrument, and the beneficiary must strictly comply with these provisions. Slaughter v. Qualls, 162 S.W.2d 671 (Tex. 1942); Michael v. Crawford, 193 S.W. 1070 (Tex. 1917). If the instrument makes no provision for appointment of a substitute trustee, the district court is authorized to appoint one, in which case the examiner should review the proceedings for the appointment.

In addition to the statutory requirements, there must be strict compliance with any other requirements the security instrument may contain pertaining to foreclosure. See, e.g., Ogden v. Gibraltar Sav. Ass'n, 640 S.W.2d 232 (Tex. 1982); Houston First American Sav. v. Musick, 650 S.W.2d 764 (Tex. 1983). The trustee's deed must contain all of the formalities of a deed, disclose the status of the grantor as a trustee, and be delivered. Delivery may be presumed from recordation. Austin v. Bice, S.W.2d 931 (Tex. App. – Waco 1979, no writ). Once the foreclosure sale is complete, the trustee may not rescind the foreclosure nor cancel the trustee's deed. Bonilla v. Roberson,918 S.W.2d 17 (Tex. App.—Corpus Christi 1996,

no writ).; provided however, effective September 1, 2015, under certain conditions, a mortgagee, trustee, or substitute trustee may rescind a foreclosure sale of "residential property" within 15 calendar days after the date of the foreclosure sale. Tex. Prop. Code 51.016.

An examiner may rely on recitals in appropriate circumstances. See Standard 13.40, pertaining to recitals. Where the security instrument expressly provides that the recitals in the trustee's deed are evidence of the facts therein stated, a presumption arises that the recitals are true. Adams v. Zellner, 183 S.W. 1143 (Tex. 1916); Birdwell v. Kidd, 240 S.W.2d 488 (Tex. App.—Texarkana 1951, no writ). An examiner may also be aided by the statutory requirement that an action to recover property conveyed by an instrument signed by a trustee without record of the authority of the trustee or proof of the facts recited in the instrument must be brought within four years of the date that the instrument was "recorded," if it was recorded before September 1, 2007, or within two years of the date that the instrument was "filed for record," if it was filed on or after September 1, 2007. Tex. Civ. Prac. & Rem. Code 16.033(a)(7). Act of June 15, 2007, 80th Leg., R.S., ch. 819, 2, 2007 Tex. Gen. Laws 1695 (nonretroactivity provision).

Statutory History: Tex. Prop. Code 51.002 (formerly codified as Tex. Rev. Civ. Stat. art. 3810) sets out the current procedures that must be followed for the sale of real estate under a power of sale conferred by a deed of trust or other contract lien. Texas law pertaining to nonjudicial foreclosure as initially enacted did not change substantially until 1976.

The basic statutory requirements for sales prior to January 1, 1976, are as follows: A Notice of Sale must be posted for three consecutive weeks prior to the day of sale in three public places in the county or counties where the sale is to be made, but one notice must be posted at the courthouse door of each county where any part of the land is located. If the property is located in more than one county, then the Notice of Sale must be given in all counties and must designate the county where the sale will be made. The sale must be public and held between the hours of 10:00 A.M. and 4:00 P.M. on the first Tuesday in any month. Upon written application, the owner may require that the land be sold as provided in the security instrument.

For sales held on or after January 1, 1976, and prior to January 1, 1984: The basic requirements remain the same except as follows. The Notice of Sale requirement was changed to require posting for at least 21 days preceding the date of sale at the courthouse door of the county where the property is located. If the property is located in more than one county, the Notice of Sale must be posted in each county in which the property is located. The provisions allowing the owner to demand sale in accordance with the security instrument were not carried forward; however, as previously established, to the extent that the provisions of the security instrument do not conflict with the statutory requirements, the provisions of the security instrument must also be met.

For sales held on or after January 1, 1984, and prior to January 1, 1988: The basic requirements remain the same except as follows. In addition to the requirements prior to January 1, 1984, the Notice of Sale must also be filed in the office of the county clerk of each county where the subject property is located 21 days preceding the sale. (On or after January

1, 1984, and prior to October 2, 1984, the Notice of Sale had to be filed only with the county clerk of the county where the sale was to be held.) In addition, the holder of the debt must give Notice of Sale to the debtor 21 days preceding the sale by certified mail, which is accomplished when sent to the debtor's most recent address as shown by the records of the holder and deposited in the mail, postage paid. An affidavit of mailing stating the date of mailing, debtors, and addresses is prima facie evidence that this notice requirement was met.

For sales held on or after January 1, 1988, and prior to September 1, 1993: The basic requirements remain the same except as follows. In addition to the requirements prior to January 1, 1988, the county commissioners shall designate the area at the courthouse where foreclosure sales are to take place and shall record this designation in the real property records. All sales must occur in this area. The sale must not begin prior to the time stated in the Notice of Sale nor later than three hours thereafter. If the subject property is the residence of the debtor, notice of default must be given to the debtor by certified mail to the debtor's last known address giving the debtor at least 20 days to cure the default before Notice of Sale can be given. Prima facie evidence of notice of default may be established by affidavit of mailing showing the date of mailing, debtors, and addresses.

For sales held on or after September 1, 1993, and prior to January 1, 2004: The basic requirements remain the same except as follows. The following statutory clarifications were made, effective September 1, 1993. Regarding the Notice of Sale, the entire calendar day on which the Notice of Sale is given is included in computing the 21-day notice period and the entire calendar day of the foreclosure sale is excluded. In the case of a debtor's residence, the entire calendar day on which notice of default is given is included in computing the 20-day notice period and the entire calendar day on which notice of sale is given is excluded in computing the 20-day notice period and the entire calendar day on which notice of sale is given is excluded in computing the 20 day notice period.

For sales held on or after January 1, 2004, and prior to June 17, 2005: The basic requirements remain the same except that: (1) a "mortgage servicer" is given authority to perform certain prerequisites to foreclose on behalf of a holder of the debt; and (2) a trustee may set reasonable conditions for conducting a nonjudicial foreclosure sale if the conditions are announced before bidding is opened for the first sale of the day held by the trustee.

For sales held on or after June 17, 2005, and prior to September 1, 2005: The basic requirements remain the same, except that: (1) by a recorded designation of the commissioners court the location of the place of sale may be a public place other than an area at the courthouse; and (2) the name and street address for the trustee must be disclosed in the notice of foreclosure sale.

For sales held on or after September 1, 2005, and prior to June 15, 2007: The basic requirements remain the same except as to the appointment of substitute trustees and the notices required under Tex. Prop. Code §§ 51.002, 51.0025.

For sales held on or after June 15, 2007, and prior to September 1, 2009: The basic requirements remain the same except: (1) if the courthouse or county clerk's office is closed

because of inclement weather, natural disaster, or other act of God, a notice required to be posted or filed may be posted or filed up to 48 hours after the courthouse or county clerk's office reopens, Tex. Prop. Code § 51.002(b–1); and (2) a sale may not be held at an area designated by the county commissioners other than an area at the courthouse before the 90th day after the date the designation is recorded, Tex. Prop. Code § 51.002(h); (3) one or more persons may be authorized to execute the power of sale under a security agreement, Tex. Prop. Code § 51.0074; and (4) the purchase price is payable immediately upon acceptance of the bid, Tex. Prop. Code § 51.0075(f).

For sales held on or after September 1, 2009: The basic requirements remain the same except: (1) the purchase price in a sale by a trustee or substitute trustee is due and payable "without delay" on acceptance of the bid; or (2) "within such reasonable time as may be agreed upon by the purchaser and the trustee or substitute trustee if the purchaser makes such request for additional time to deliver the purchase price." Payment is no longer required to be paid "immediately" upon acceptance of the bid. Tex. Prop. Code § 51.0075(f).

The foreclosure sale of a dwelling owned by a military servicemember, foreclosing a lien that originated before the servicemember's active duty began, is prohibited without a court order or the servicemember's written waiver during the servicemember's active duty and for nine months thereafter, if the creditor's notice of default was sent on or after June 19, 2009. Tex. Prop. Code § 51.015. For notices of default or sale on or after September 1, 2011, the notice to the debtor must include a boldface or underlined notice that if the debtor or the debtor's spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or another state's National Guard or as a member of a reserve component of the United States armed forces, the debtor should send notice of the active duty to the sender of the notice immediately. Tex. Prop. Code § 51.002(i).

For sales held on or after September 1, 2013, the basic requirements remain the same except:

- Effective September 1, 2013, a new Section 51.002(f-1) is added to the Property Code, providing that if a county maintains an internet website, the county must post a notice of sale filed with the county clerk under Section 51.000 (b)(2) on the website on a page that is publicly available for viewing without charge or registration, the website was clarified to be the same website where the county posts other auction information, and the county clerk must post the date, time, and location of the sale on the same website where the notice is posted; and
- Effective October 1, 2013, Section 51.002(h) of the Property Code is amended to provide that a commissioners court of a county may designate an area other than an area of the county courthouse where public sales of land will take place that is in a public place within a reasonable proximity of the county courthouse as determined by the commissioners court and in a location as accessible to the public as the courthouse door. The designation shall be recorded in the real property records. Any sale held on or after the 90th day after the recording of the designation shall be held at the location

> so designated. For sales held on or after September 1, 2015, the basic requirements remain the same except that (1) the appointment of a trustee or substitute trustee, a notice of sale, a notice of default, documentation that the debtor was not on active military duty at the time of the sale, and an attorney's statement of proof of notice of the sale are expressly authorized to be recorded as exhibits to a trustee's recordable foreclosure deed or affidavit, Tex. Prop. Code § 12.0012; and (2) the appointment or authorization of a trustee or substitute trustee made in a notice of sale otherwise in compliance with the statutes is expressly made effective on the date of the notice if signed by an attorney as agent for the mortgagee or mortgage servicer and if it contains specific statutory wording in all capital, boldface letters. Tex. Prop. Code § 51.0076.

For sales held on or after September 1, 2015, the basic requirements remain the same except that (1) the appointment of a trustee or substitute trustee, a notice of sale, a notice of default, documentation that the debtor was not on active military duty at the time of the sale, and an attorney's statement of proof of notice of the sale are expressly authorized to be recorded as exhibits to a trustee's recordable foreclosure deed or affidavit, Tex. Prop. Code § 12.0012; and (2) the appointment or authorization of a trustee or substitute trustee made in a notice of sale otherwise in compliance with the statutes is expressly made effective on the date of the notice if signed by an attorney as agent for the mortgagee or mortgage servicer and if it contains specific statutory wording in all capital letters, boldface type. Tex. Prop. Code§ 51.0076.

For sales for which notice is given on or after September 1, 2017, if the first Tuesday occurs on January 1 or July 4, the public sale must be held between 10 a.m. and 4 p.m. on the first Wednesday. Tex. Prop. Code § 51.002(a–1).

For sales of residential real property after September 1, 2017. Employing the same definition for "residential real property" as was used in Section 51.016 added to Chapter 51 in 2015 (to establish a qualified right for mortgagees and trustees to rescind foreclosure sales of residential real property), Chapter 22 was added to the Tex. Bus. & Com. Code. Respecting "a public sale of residential real property conducted under a power of sale in a security instrument," Chapter 22 (i) allows a trustee or substitute trustee conducting such a sale to contract with an auction company "to arrange, manage, sponsor, or advertise a public sale;" (ii) requires a winning bidder at a sale (other than the foreclosing mortgagee or mortgage servicer) to provide to the trustee or substitute trustee upon completion of the sale certain specified information reasonably needed to allow either to complete his or her duties and functions concerning the sale; (iii) requires the trustee or substitute trustee to provide the winning bidder with a receipt for the sales proceeds tendered and deliver to the winning bidder or record a foreclosure deed within a reasonable time; and (iv) establishes requirements for disposition by the trustee or substitute trustee of sale proceeds to the person(s) entitled thereto and the means by which the trustee or substitute trustee may receive reimbursement of related costs (including attorney's fees) and a reasonable fee. Tex. Bus. & Com. Code §§ 22.001-.006.

Either a mortgagee or a mortgage servicer may invoke the power of sale conferred by a deed of trust. Tex. Prop. Code Ann. §§ 51.002, 51.0025. The Property Code defines a mortgagee as: "(A) the grantee, beneficiary, owner, or holder of a security instrument; (B) a book entry system; or (C) if the security interest has been assigned of record, the last person to whom the security interest has been assigned of record." Tex. Prop. Code Ann. § 51.0001(4). A mortgage servicer is "the last person to whom a mortgagor has been instructed by the current mortgagee to send payments for the debt secured by a security instrument." "A mortgagee may be the mortgage servicer." Tex. Prop. Code Ann. § 51.0001(3). Montoya v. AmCap Mortg., Ltd., No. 01-20-00799-CV, 2022 Tex. App. LEXIS 5781 (Tex. App. Houston 1st Dist., 2022). Tex. Prop. Code § 51.0025

Home Equity and Reverse Mortgage Foreclosures: Not all of the above provisions apply to home equity and reverse mortgage foreclosures, and there are additional requirements. See Standard 16.30.

Condominiums: A power of sale conferred by statute or contained in a recorded condominium declaration is sufficient to foreclose by sale an assessment lien, unless the assessment consists solely of fines. There is a right of redemption within 90 days for residential property. Tex. Prop. Code § 82.113.

Property Owners' Association: A dedicatory instrument or restrictions of a residential property owners' association may provide for nonjudicial foreclosure of a lien for assessments, but unless the property owner executes a written waiver at the time foreclosure is sought, a court order authorizing the foreclosure is required for foreclosure on or after September 1, 2011. Tex. Prop. Code § 209.0092. Moreover, without exception, a master mixed-use property owner's association, governing a large subdivision that includes both single-family residential properties and commercial properties within the criteria described in Tex. Prop. Code § 215.002, is prohibited from foreclosing an assessment lien without a judicial order of sale. Tex. Prop. Code § 215.015. Notice to junior lienholders and an opportunity to cure is a prerequisite to foreclosure, Tex. Prop. Code § 209.0091, and the association may not foreclose a lien solely for fines or attorney's fees relating to fines or for assessments based on unpaid costs for information requests under Tex. Prop. Code § 209.005(i) or for unpaid costs for voting recounts under Tex. Prop Code § 209.0057(b-4). Tex. Prop. Code A§ 209.009. The association must send the owner written notice not later than 30 days after the foreclosure sale informing the owner of the right of redemption. Tex. Prop. Code 209.010. A residential debtor and lienholders of record have a right of redemption within 180 days after the association has mailed a written notice to the owner informing the owner of the sale and right of redemption; however, a lienholder of record may not redeem within the first 90 days after the association has mailed the notice Tex. Prop. Code § 209.011.

Limitations: The statute of limitations for foreclosure of a lien runs four years from date of maturity of the obligation, unless otherwise tolled. Tex. Civ. Prac. & Rem. Code § 16.035. The trustee's authority expires when the debt is barred; therefore, a sale subsequent to the running of the statute of limitations is void. Stubbs v. Lowrey's Heirs, 253 S.W.2d 312 (Tex. App.—Eastland 1952, writ ref'd n.r.e.). Moreover, the statute of limitations begins to run when a note is accelerated, Curtis v. Speck, 130 S.W.2d 348 (Tex. App.—Galveston 1939, writ

ref'd) or, for lien foreclosure purposes, when the note is executed if it is a demand note, Seaman v. Seaman, 425 S.W.2d 339 (Tex. 1968), unless demand is specifically required in the instrument. Loomis v. Republic Nat'l Bank, 653 S.W.2d 75 (Tex. App.—Dallas 1983, writ ref'd n.r.e.). If the deed of trust itself does not state the maturity date of the note, then the note itself must be examined. An extension of the maturity date of the note extends the period for foreclosure. Southland Life Ins. Co. v. Egan, 86 S.W.2d 722 (Tex. 1935). Tex. Civ. Prac. & Rem. Code § 16.036 prescribes the requirements for a valid extension. To be effective as to a bona fide purchaser, a lienholder, or lessee without actual notice, the extension must be recorded. Id. § 16.037.

Rescission: Respecting a foreclosure sale of residential real property only, a mortgagee or trustee may rescind a foreclosure sale within 15 days after its occurrence if the statutory requirements for the sale were not met, the debtor's default was cured before the sale, or other specified circumstances existed. For the rescission to be effective against anyone other than parties to the foreclosure sale and purchasers with notice or without valuable consideration, evidence of notice to the purchaser, if not the mortgagee, and return of the purchase price must be recorded. Bona fide purchasers for value without actual or constructive notice of the rescission are not affected by it. Tex. Prop. Code § 51.016. The examiner should consult the statutory requirements and verify that their fulfillment appears of record.

Caution:

Even though a federal tax lien may be subordinate to the lien of the security instrument being foreclosed, a federal tax lien is not cut off by the foreclosure unless there has been compliance with I.R.C. § 7425. Thus, where an unreleased subordinate federal tax lien has been filed or recorded more than 30 days prior to the date of the foreclosure sale, the examiner should determine either that the notice of lien has expired (I.R.C. § 6323) or that the Internal Revenue Service was notified in compliance with I.R.C. § 7425. If the examiner determines that this notice was given by mail, the examiner should confirm that the mailing complied with I.R.C. § 7502 and the applicable regulations, 26 C.F.R. § 301.7502-1.

If notified, the Internal Revenue Service has the right to redeem foreclosed property for a period of 120 days after the date of sale. I.R.C. § 7425(d). If the required notice is not given any transfer remains subject to the federal tax lien. Id. § 7425(b)(1). In making a determination, an examiner should review: (a) a copy of the notice, (b) an affidavit of mailing, (c) recitals in the trustee's deed, and (d) a receipt from the United States Postal Service indicating that the notice was timely sent to the Internal Revenue Service or other evidence that the Service received timely notice. However, the Service is not bound by affidavits of mailing and recitals

The filing of a petition in bankruptcy generally results in an automatic stay against the enforcement of a lien and any action to obtain possession of property of the bankrupt estate. 11 U.S.C. §§ 362, 922. An examiner who becomes aware of a bankruptcy filing should require evidence that the stay was lifted.

The Servicemembers Civil Relief Act of 2003, formerly the Soldiers' and Sailors' Civil Relief Act of 1940, as amended by the Housing and Economic Recovery Act of 2008, prohibits foreclosure of property against an owner who acquired the property before military service and who is currently in the military service of the United States or has been in the military service within a specified number of days (e.g., 90 days effective January 1, 2015) prior to the attempted foreclosure. These limitations do not apply to obligations that were incurred during military service. 50 U.S.C. App. §§ 511, 517, 527, 533.

Source:

Citations in the Comment; Tex. Prop. Code § 51.002; John M. Nolan & Michael F. Alessio, Texas Annot. Deed of Trust in Univ. Tex. 38th Annual Mortgage Lending Inst. (2004).

History:

Adopted June 25, 2004; amended July 17, 2014.

The prior standard provided: "An examiner must determine that all statutory and contractual requirements for a nonjudicial foreclosure sale have been satisfied. Specifically, an examiner must determine (1) that the security instrument confers the power of sale; (2) that there has been a default under the terms of the instrument; (3) that the trustee or substitute trustee was properly appointed; (4) that all statutory requirements in effect at the time of sale have been met; (5) that all additional requirements, if any, contained in the security instrument have been met; and (6) that a trustee's deed has been delivered."

Standard 16.20. Judicial Foreclosure and Execution Sales

When title is based on a court's foreclosure of a lien or an execution sale, an examiner may rely on the deed of the officer who conducted the sale only after verifying the existence and apparent validity of the judgment conferring authority to make the sale and of the order of sale or writ of execution and levy.

Comment:

A deed by an officer, typically a sheriff or constable, purporting to convey a judgment defendant's interest in real property may form an essential link in the chain of title under examination. Sheriffs' deeds are commonly encountered in two situations: those involving the judicial foreclosure of liens and those resulting from execution on money judgments. A foreclosure judgment describes the specific property upon which the plaintiff's lien is being foreclosed and orders it sold, whereupon the court clerk issues an order to any sheriff or constable within the State of Texas, directing the officer to seize and sell the property described in the judgment, first giving public notice of the time and place of sale. Tex. R. Civ. P. 309 and 631. An execution sale requires the clerk's issuance of a writ of execution, likewise directed to any sheriff or constable, specifying the sum recovered and due and the interest rate, and requiring the officer to satisfy the judgment and costs out of the

defendant's property. Tex. R. Civ. P. 622 and 630. The officer indorses the levy on the writ, using a sufficient legal description. Tex. R. Civ. P. 639; see Riordan v. Britton, 7 S.W. 50 (Tex. 1887). The manner in which the officer effects the sale of the defendant's property is essentially the same in either case. The defendant's property is sold at public auction, after advertisement by newspaper publication, at the courthouse door of the county where situated, on the first Tuesday of any month between the hours of 10:00 A.M. and 4:00 P.M, except that the sale must be on the first Wednesday if the first Tuesday is January 1 or July 4. Tex. R. Civ. P. §§ 646a, 647, and 34.041(c). Once the sale has been made and its terms complied with, the officer must execute and deliver to the purchaser a conveyance of all the right, title, and interest the defendant had in the property sold. Tex. Civ. Prac. & Rem. Code § 34.045. The death of the defendant stays the execution proceedings while the death of the plaintiff does not. Tex. Civ. Prac. & Rem. Code §§ 34.002 and 34.003.

Three documents should be represented in the record under examination: (1) the court's judgment, (2) the clerk's order of sale or writ of execution and levy, and (3) the sheriff's or constable's deed resulting from the sale. Unless the sale is conducted under the court's authority, a sheriff's or constable's deed conveys no title. Mills v. Pitts, 48 S.W.2d 941 (Tex. 1932). For this reason it is essential to the establishment of title that the court's judgment and the order of sale or writ of execution and levy be examined. See Tudor v. Hodges, 9 S.W. 443 (Tex. 1888); Atkinson v. Dailey, 238 S.W.2d 584, 587 (Tex. App.–Amarillo 1951, no writ). The only exception is where the requisite court records are unavailable and the sheriff's deed qualifies as an ancient document, in which case the examiner may rely on recitals in the deed. W. T. Carter & Bro. v. Bendy, 251 S.W. 265 (Tex. App.–Beaumont 1923), aff'd, 269 S.W. 1037 (Tex. Comm'n App. 1925, judgm't adopted); Sledge v. Craven, 254 S.W.2d 888 (Tex. App.–Galveston 1953, no writ). If necessary, the authority for the deed may be established by secondary evidence. Richards v. Rule, 207 S.W. 912 (Tex. Comm'n App. 1919, judgm't adopted). See the Comment to Standard 13.40 regarding recitals and ancient documents generally.

Moreover, the judgment upon which the sale is based must be a valid one. A sale based on a void judgment is likewise a nullity. For example, where a judgment of foreclosure describes the land too indefinitely to identify it, the sheriff's deed made under it conveys no title even if the deed contains an adequate description. Adams v. Duncan, 215 S.W.2d 599, 603–604 (Tex. 1948). A title examiner should therefore be satisfied that the court had jurisdiction to enter the judgment and that the sale complied with the court's order. Because recitals in a judgment are conclusive against anything else in the record on collateral attack, they ordinarily may be regarded as sufficient without further inquiry into the record. Levy v. Roper, 256 S.W. 251 (Tex. 1923); see Pure Oil Co. v. Reece, 78 S.W.2d 932 (Tex. 1935); Crawford v. McDonald, 33 S.W. 325, 327–328 (Tex. 1895). If the judgment does not include such recitals, so that reference to the rest of the record in the underlying proceeding becomes necessary, the judgment is still presumed valid unless lack of jurisdiction or some other fatal defect affirmatively appears. Fitch v. Boyer, 51 Tex. 336, 344 (1879); Cox v. Campbell, 257 S.W.2d 462 (Tex. App.–Dallas 1953, writ ref'd). The presumption that a judgment is valid is rebutted only if the record itself, uncontradicted by recitals in the judgment, discloses facts showing the judgment void. Fowler v. Simpson, 15 S.W. 682 (Tex. 1891).

Although the officer's sale must comply with a valid judgment and order of sale or execution, mere irregularities in the conduct of the sale will not invalidate it. Coffee v. Silvan, 15 Tex. 354 (1855); Hendron v. Yount–Lee Oil Co., 119 S.W.2d 171 (Tex. App.–Texarkana 1938, writ ref'd); see Howard v. North, 5 Tex. 290 (1849). For example, a return by the sheriff or constable following the sale is not essential. It will be presumed from the judgment and the sheriff's deed that the officer did his duty unless this is rebutted by proof to the contrary. Harris v. Mayfield, 260 S.W. 835 (Tex. Comm'n App. 1924, holding approved). For this reason a sheriff's deed may be regarded as reliable if regular on its face. But if the record discloses that the officer acted beyond his authority, the sale cannot be given effect. Mills v. Pitts, 48 S.W.2d 941 (Tex. 1932); Howard v. North, 5 Tex. 290 (1849). A heightened standard does not apply when gauging the sufficiency of property descriptions contained in constables' or sheriffs' deeds made by virtue of execution sales for property for which a lien is foreclosed. AIC Management v. Crews, 246 S.W.3d 640 (Tex. 2008).

Unlike some other varieties of judicial sales, foreclosure and execution sales do not require an order of confirmation after the sale. In the case of judicial foreclosures, the order of sale itself authorizes the executing officer to place the purchaser in possession. See Tex. R. Civ. P. 309 and 310; Efficient Energy Systems, Inc. v. J. Hoyt Kniveton, Inc., 631 S.W.2d 538, 542 (Tex. App.–El Paso 1982, no writ); Darlington v. Allison, 12 S.W.2d 839 (Tex. App.–Amarillo 1928, writ dism'd). Following an execution sale the officer is required to file a return of the sale with the clerk of the court, Tex. R. Civ. P. 654, but it is well established that irregularities in the return, or even the complete absence of a return, do not void the sale. See Willis v. Smith, 17 S.W. 247 (Tex. 1886); Donald v. Davis, 208 S.W.2d 571, 573 (Tex. App.–Fort Worth 1948, writ ref'd); Tyler v. Henderson, 162 S.W.2d 170, 174–175 (Tex. App.–Fort Worth 1942, writ ref'd w.o.m.); Jones v. Wells Fargo Bank, N.A. (In re Jones), 573 B.R. 665 (Bankr. N.D. Tex. 2017).

A foreclosure sale may not go beyond the property foreclosed in the underlying proceeding. For example, a sheriff's deed issued pursuant to a foreclosure notice and a tax judgment that referenced only the decimal royalty interest, covered the separately assessed lessor's royalty interest in an oil & gas lease, and not the lessor's possibility of reverter in the lease when the lease expired even though the sheriff's deed purported to convey "mineral interests" it was limited by "as foreclosed." The foreclosure judgment explicitly referred to the lease and to a decimal interest that correlated to the reserved royalty, indicating that only the royalty under the then current lease, now expired, had been sold for taxes. Ridgefield Permian, LLC v. Diamondback E & P LLC, 626 S.W.3d 357 (Tex. App.—El Paso 2021, pet. denied).

Tax sales are also subject to additional requirements including a prohibition on delivering the deed to any person other than the successful bidder and a prohibition on the delivery of a deed to the purchaser unless the purchaser exhibits to the officer an unexpired written statement from the county tax assessor-collector that the person has no delinquent ad valorem taxes owed to the county or to any municipality or school district in that county. Tex. Tax Code § 34.015(b). The tax assessor-collector is required to provide such a statement to such person based on a sworn statement by that person identifying all property owned, currently or previously, by that person. Tex. Tax Code § 34.015(c). That person then provides

the statement to the officer conducting the sale, and the deed by the officer conducting the sale must contain recitals affirming the receipt of such statement. A deed with those recitals creates a conclusive presumption that the requirement was met. Tex. Tax Code §§ 34.015(l) and (m).

For a sale under a deed of trust to be valid, the terms set out in the deed of trust must be strictly followed. Failure to properly foreclose on property gives rise to a cause of action for either the return of the property or damages. The elements of a wrongful foreclosure claim are a defect in the foreclosure sale proceedings, a grossly inadequate selling price and a causal connection between the defect and the grossly inadequate selling price. Minor defects in an otherwise valid deed of trust foreclosure sale do not void the sale. 5A Aloysius A. Leopold, Land Titles and Title Examination § 38.8 (Texas Practice 3d ed. 2005) citing Kourosh Hemyari v. Stephens, 355 S.W.3d 623 (Tex. 2011), UMLIC VP LLC v. T & M Sales and Environmental Systems, Inc., 176 S.W.3d 595 (Tex. App.—Corpus Christi 2005, pet. denied), and Montenegro v. Ocwen Loan Servicing, LLC, 419 S.W.3d 561 (Tex. App.—Amarillo 2013, pet. denied).

Caution:

On collateral attack, the rule that recitals in judgments control the rest of the record does not apply to judgments against nonresidents of Texas. Pellow v. Cade, 990 S.W.2d 307 (Tex. App.–Texarkana 1999, no pet.); Hicks v. Sias, 102 S.W.2d 460 (Tex. App.–Beaumont 1937, writ ref'd). Accordingly, if the defendant sought to be bound by a proceeding was not a Texas resident, an examiner should review the entire record in the underlying proceeding.

In addition, notwithstanding contrary recitals in the judgment, an examiner should be wary of any indications in "the county's public records, including the deeds records" that notice of a foreclosure action was in fact deficient. The court, in Mitchell v. MAP Resources, Inc., 649 S.W.3d 180, 190 (Tex. 2022), set aside an over 20-year-old tax lien foreclosure based on service by publication, where the mineral interest holder's contact information was available in the deed records and the county tax records.

After foreclosure of a real estate tax lien, the prior owner has the right to redeem the property within 180 days; however, if the land is the residence homestead, is designated for agricultural use, or is a mineral interest, the redemption period is two years. The redemption period runs from the date the purchaser's deed is filed for record. Tex. Tax Code § 34.21. Note, however, that the Texas Constitution provides that the former owner has a right to redeem within six months, which may not be synonymous with 180 days, upon payment of the amount of money paid for the property at foreclosure, including the tax deed recording fee and all taxes, penalties, interest, and costs paid plus an amount not exceeding 25% of aggregate total. Tex. Const. art. VIII, § 13. Effective June 14, 2019, the right to redeem property from a tax sale became unassignable. Tex. Tax Code § 34.21.

The owner of property sold on foreclosure of a federal tax lien may redeem it within 180 days after the sale. 26 U.S.C. § 6337(b)(1).

The owner of property and each lienholder of record in a residential subdivision may redeem property sold on foreclosure of a property owners' association's assessment lien within 180 days for the owner (but not before ninety days for a lienholder of record if the owner has not redeemed) after the association's mailing of notice of the sale to the owner and to each such lienholder. Tex. Prop. Code § 209.011(b). The purchaser at foreclosure shall immediately execute and deliver to a redeeming lot owner or lienholder a deed transferring the property to the "lot owner." Id. § 209.011(f). If, before the expiration of such redemption period, the redeeming owner or lienholder fails to record the deed from the foreclosing purchaser or fails to record an affidavit stating that the owner or lienholder has redeemed the property, the owner's or lienholder's right of redemption as against a bona fide purchaser or lender for value expires after the redemption period. Id. § 209.011(g).

If a residential condominium unit is purchased by the unit owners' association on foreclosure of the association's lien for assessments, the owner may redeem the unit within 90 days after the foreclosure sale. Tex. Prop. Code § 82.113(g).

Other types of lien foreclosures are not subject to redemption after the sale has taken place.

An action to set aside a tax sale is subject to the limitations periods in Tex. Tax Code §§ 33.54, 34.08, but see MAP Resources, supra, in which a tax sale was set aside based on a lack of procedural due process, well after the limitations period.

Federal law protects residential tenants from eviction following foreclosure for the term of their existing lease provided the tenant is not in breach unless the purchaser is moving into the property, in which case, the tenant must be given 90 days after notice before being required to vacate the property. 12 U.S.C. § 5201 et seq. (Protecting Tenants at Foreclosure Act).

Source:

Citations in the Comment; 4 Aloysius A. Leopold, Land Titles and Title Examination § 22.25–22.29 (Texas Practice 3d ed. 2005); and 5 Id. § 28.14; Gus M. Hodges, Collateral Attacks on Judgments, 41 Tex. L. Rev. 499 (1963).

History:

Adopted June 13, 2003.

Standard 16.30. Foreclosure of Home Equity Loans and Reverse Mortgages

An examiner should verify the judicial authority for foreclosures of home equity loans. An examiner should verify the judicial authority for foreclosure of a reverse mortgage unless, before the foreclosure, (1) all borrowers have died or have ceased to occupy the property for more than twelve consecutive months, or (2) the property has been sold or otherwise transferred.

Comment:

Upon strictly limited terms, the Texas Constitution authorizes the mortgage of homestead property to secure loans for purposes other than payment of purchase money; taxes due thereon; owelty of partition; refinance of a lien against the homestead, including a federal tax lien; the cost of improvements; or the conversion and refinance of an attached manufactured home. "Cash out" mortgages are denominated as home equity loans, subject to Tex. Const. art. XVI, § 50(a)(6), and reverse mortgages, subject to Tex. Const. art. XVI, §§ 50(a)(7) and 50(k). Home equity loans and reverse mortgages are similar in that the purpose of both is to allow homestead mortgages without restriction on the use of the loan proceeds. The principal distinction between the two types of loans, as defined in the constitution, is that in the case of reverse mortgage, the borrower or the borrower's spouse must be at least 62 years old, and no payment of principal or interest is generally required until the borrowers have died, the property is sold or otherwise transferred, or the borrowers have ceased to occupy it for twelve months. Except in the case of reverse mortgages that are foreclosed after all borrowers have died or have ceased to occupy the property for twelve consecutive months, or after the homestead property has been sold or otherwise transferred, both types of liens may be foreclosed only after a court order. Tex. Const. art. XVI, §§ 50(a)(6)(D), 50(k)(11).

Under Tex. R. Civ. P. 735 a party seeking an order to foreclose such a lien may either (1) seek judicial foreclosure, (2) pursue a suit for an order allowing foreclosure under the security instrument, or (3) apply for an order allowing foreclosure under the security instrument using the expedited procedure prescribed by Tex. R. Civ. P. 736. See Standard 16.20 concerning judicial foreclosure. If the property has been sold by a trustee appointed in the deed of trust securing the loan, the examiner should examine the court proceeding and verify the validity of the order authorizing the lender to proceed with foreclosure, unless one of the above-mentioned exceptions relevant to reverse mortgages applies.

Tex. R. Civ. P. 735 and 736 both contemplate that any sale will be conducted in compliance with Tex. Prop. Code § 51.002. For guidance, see Standard 16.10 concerning nonjudicial foreclosure. Both home equity loans and reverse mortgages are subject to a host of restrictions and conditions. In particular, the validity of a lien securing a home equity loan depends on circumstances that may not be easily verifiable from recorded documents. However, if the mortgage document discloses that the loan is the type defined by Section 50(a)(6) of Article XVI of the Texas Constitution, a purchaser for value without actual knowledge, other than the lender or its assignee, may conclusively presume the validity of a home equity mortgage lien. Tex. Const. art. XVI, § 50(I).

A reverse mortgage that permits nonjudicial foreclosure may be foreclosed without a court order only if the borrowers have all died or if the property has been sold or otherwise transferred–facts that may not appear affirmatively from examination of the record. The examiner may verify the requisite circumstances through death certificates, affidavits or other means. See Standard 13.20 regarding reliance on affidavits generally.

Caution:

For guidance regarding the customs and practices of home equity mortgage loans, see the Joint Financial Regulatory Agencies Home Equity Lending Rules. Tex. Admin. Code, Title 7, Part 8, Chapters 151, 153. See also Tex. Const. art. XVI, § 50(u); Tex. Fin. Code §§ 11.308, 15.413.

There is scant reported authority construing the constitutional provisions allowing home equity loans and reverse mortgages and the rules for their foreclosure. The examiner should be extremely cautious in passing on any deviation from the rules. See LaSalle Bank v. White, 246 S.W.3d 616 (Tex. 2007) (applying the doctrine of equitable subrogation even though the loan violated a constitutional provision then in effect).

An order obtained in an "expedited" foreclosure proceeding under Tex. R. Civ. P. 736, authorizing a mortgagee to proceed with sale on foreclosure of a home equity loan or reverse mortgage, is not res judicata and does not constitute collateral estoppel or estoppel by judgment in any other proceeding. Tex. R. Civ. P. 736 (9). Such an order, it would seem, is therefore not entitled to the presumptions usually accorded judgments rendered in judicial foreclosures. See the Comment to Standard 16.20.

Source:

Citations in the Comment; 15 Mike Baggett, Texas Foreclosure: Law and Practice §§ 2.176, 2.191 (Texas Practice 2014).

History:

Adopted June 13, 2003; amended July 17, 2014; amended January 1, 2018.

The prior standard provided: "An examiner must verify the judicial authority for foreclosures of home equity loans. An examiner must verify the judicial authority for foreclosure of a reverse mortgage unless, before the foreclosure, (1) all borrowers have died or have ceased to occupy the property for more than twelve consecutive months, or (2) the property has been sold or otherwise transferred."

Standard 16.40. Deeds in Lieu of Foreclosure

When examining a deed taken by a lienholder in satisfaction of its secured debt, the examiner should consider the possible right of redemption of a junior lienholder and the validity of a subordinate interest created during the existence of the extinguished debt.

Comment:

Frequently a mortgagor will convey mortgaged land to a mortgagee in satisfaction of the debt. These conveyances, commonly called deeds in lieu of foreclosure, are sometimes taken, not only to avoid the problems inherent in foreclosures, but in the belief that they extinguish all subordinate liens and interests. The intended result does not always follow. Indeed, if the mortgagee grantee does not foreclose its lien, one should be very careful to

assure there are no intervening liens or encumbrances before releasing its lien in connection with a subsequent transfer.

"A deed in lieu of foreclosure is not a specific type of deed, such as a special warranty deed or a quitclaim; there is no such deed as a deed-in-lieu of foreclosure," Morrison v. Christie, 266 S.W.3d 89, 92 (Tex. App.—Fort Worth 2008, no pet.) But "[a] deed given in satisfaction of a debt may serve as a convenient, efficient transfer of title upon default of a debt." Flag-Redfern Oil Co. v. Humble Exploration, Inc. 744 S.W.2d 6, 8 (Tex. 1987). No specific statutory scheme governs the format of this type of transaction, although the Texas Legislature provides some protections against undisclosed liens or encumbrances on the property to a holder of a debt secured by a deed of trust who accepts such a conveyance as payment. Tex. Prop. Code § 51.006.

If the property conveyed by the deed in lieu of foreclosure is burdened with junior liens or encumbrances that were not disclosed by the debtor or personally known by the senior lienholder at the time of the deed is executed, then Tex. Prop. Code § 51.006(b), which became effective on August 28, 1995, allows the senior lienholder to void the deed by foreclosing the original lien within four years of the date of the deed and thereby extinguish such junior liens and encumbrances. A third party may rely conclusively upon an affidavit of the holder stating that the holder has voided the deed, § 51.006(c). Voiding a deed in lieu of foreclosure does not affect the priority of the deed of trust, § 51.006(d), The holder may also foreclose as provided in the deed of trust without voiding the deed in lieu of foreclosure, § 51.006(e).

Because of the judicial presumption that no merger has occurred, a provision in a deed that none is intended is not necessary; however, practitioners commonly insert language to that effect. A lienholder accepting a deed in lieu of foreclosure retains the right to enforce the priority of the deed of trust by foreclosure. Tex. Prop. Code § 51.006(e). If the mortgagee grantee does not foreclose its lien but releases it, then a subordinate lien would be rendered superior to the released lien if the party who released the lien had notice of the subordinate lien.

Effective August 28, 1995, the Texas Property Code provides some additional protections against unknown and undisclosed junior liens or encumbrances, by allowing the lienholder to void the deed by foreclosing the original lien within four years of the date the deed is executed, thereby extinguishing such junior liens and encumbrances. Tex. Prop. Code § 51.006(b). To utilize § 51.006, the debtor must have failed to disclose to the holder of the debt the existence of a junior lien, and the holder of the debt must have no "personal knowledge" of such junior lien, § 51.006(b). In Cameron Life Ins. Co. v. Pactiv Corp., No. 13-05-760-CV, 2007 Tex. App. LEXIS 6773, 2007 WL 2388906 (Tex. App.—Corpus Christi Aug. 23, 2007, pet. denied) (mem op.), the court concluded "that record notice satisfied the requirement of personal knowledge under the statute." This conclusion seems contrary to Standard 4.50 (Chain of Title) and to Dorsaneo, Texas Litigation Guide, § 344.08 (in the context of an insured misrepresentations to the insurer).

A third party may rely conclusively upon an affidavit of the holder stating that the holder has voided the deed, § 51.006(c). Voiding a deed in lieu of foreclosure does not affect the priority of the deed of trust, § 51.006(d).

Subordinate interests other than junior liens present additional concerns. If a mortgagor conveys the land or an interest in land subject to an existing lien to a third party prior to a deed in lieu of foreclosure, the effect upon the third-party's interest depends upon whether the lien is a vendor's lien. In a sale that retains a vendor's lien, title remains in the vendor until the purchase price is paid. Among other remedies, the vendor may rescind the sale upon default in the payment of the purchase price. Accordingly, before satisfaction of the vendor's lien, if the vendee transfers an interest in the land to a third party and subsequently reconveys to the vendor, the third party is left only with the vendee's right to redeem. The result is different where the security instrument secures an obligation other than a vendor's lien. In that case, the debtor can convey the land or an interest in the land to a third party, and the interest conveyed to the third party will not be affected by a deed in lieu of foreclosure; however, the land or interest will remain subject to the original lien. See Flag-Redfern Oil Co. v. Humble Exploration Co., 744 S.W.2d 6 (Tex. 1987) (mineral deed); Yett v. Houston Farms Development Co., 41 S.W.2d 305 (Tex. App.-Galveston 1931, writ ref'd) (mineral deed).

A potentially abusive practice, no longer frequently encountered, is for a lender or credit seller to require a purchaser or borrower to execute a deed conveying fee title to real property, to be delivered to the lender or seller and held as security for the debt. If the debt is not paid, the seller or lender files the deed for record to recover title to the property and avoid ordinary foreclosure procedures. Such deeds are prohibited when they involve residential real estate and are voidable within four years after being recorded unless a subsequent purchaser without notice of the violation has acquired an interest in the property. Tex. Bus. & Com. Code § 21.002.

Source:

Citations in the Comment; 5A Aloysius A. Leopold, Land Titles and Title Examination § 38.7 (Texas Practice 3d ed. 2005); Sara E. Dysart, The Continued Existence of Deeds in Lieu of Foreclosure in State Bar of Tex. Prof. Dev. Prog., Advanced Real Estate Law Course (1989).

History:

Adopted June 25, 2004; amended March 6, 2026.

CHAPTER XVII

TITLE FROM SOVEREIGN

Standard 17.10. Title From Sovereign

A title examiner should determine whether title to the land under examination has been severed from the sovereign. Title that has not been severed from the sovereign belongs to the State of Texas.

Comment:

Introduction. A "grant" severs title from the Crown of Spain or the Republic of Mexico. A "patent" confirms the severance of title from the Republic of Texas or the State of Texas by a survey, application for title, fulfillment of any applicable conditions or requirements, and, if applicable, payment. The commonly accepted practice is for the title examiner to rely on the grant or patent filed in the county clerk's office in the county where the land is located as evidence that the land under examination has been segregated from the sovereign. However, the official grant or patent filed in the Archives of the General Land Office controls over any inconsistencies in the grant or patent recorded in the deed records of a county.

A patent is an administrative act that confirms that all requirements for passage of title from the sovereign have occurred. Thus, a patent is not essential to the passage of title from the sovereign, but it is confirmation of passage. While a patent is customarily recorded in the county where the land is located, and recordation is now required by General Land Office regulations, recordation has historically been neither universal nor mandatory, Arrowood v Blount, 41 S.W.2d 412 (Tex. 1931), 57 – 58 ("[w]hile patents are admitted to record, there is no law that requires them to be recorded in the county where the land is situated … A patent is notice to the world, the record of it is in the general land office.")

If the record title reveals no patent, the examiner should contact the General Land Office to determine the status of the land. An examiner should require that a patent be obtained for examination to eliminate any question of marketability. Where no patent has been issued and it is impractical to obtain one due to time constraints or cost, the examiner should require a certificate of facts from the General Land Office showing that title has passed from the sovereign. Although such a certificate may not be binding on the State of Texas, the certificate of facts will ordinarily confirm that the land was surveyed and that all requirements for severance of title from the sovereign have been met. See generally 31 Tex. Admin. Code § 3.31b(2).

Four sovereigns have issued grants and patents in Texas. Prior to Mexico's independence from Spain in 1821, grants were from the Spanish monarchy. From 1821 until March 2, 1836, grants were from the Republic of Mexico. All titles for lands within Texas

issued by the Republic of Mexico after November 13, 1835, are void. Donaldson v. Dodd, 12 Tex. 381 (1854). From March 2, 1836 to December 29, 1845, patents were from the Republic of Texas and thereafter from the State of Texas. Upon entry into the United States, the State of Texas retained all vacant and unappropriated public lands lying within its borders. S.J. Res. 8, 28th Cong. (2d Sess.), 5 Stat. 797 (1845); Tex. Nat. Res. Code Ann. § 11.011.

Except for grants issued by Mexico after November 13, 1835, the State of Texas recognizes all validly issued grants and patents under the laws of each preceding sovereign. Kilpatrick v. Sisneros, 23 Tex. 113 (1859). The law of the granting sovereign at the time of the grant determines the validity of the grant. Harris v. O'Connor, 185 S.W.2d 993 (Tex. App.–El Paso 1944, writ ref'd w.o.m.). Texas law presumes that the public officers of a former government, acting in their official capacity, had authority to sever title from the sovereign. Atchley v. Superior Oil Co., 482 S.W.2d 883 (Tex. App.—Beaumont 1972, writ ref'd n.r.e.).

Spanish and Mexican Grants. Spanish and Mexican land grants may consist of a petition, an order, and a grant (sometimes the order of survey) along with a directive to issue title and put the grantee in possession. Customarily, an examiner should confirm that the date of the grant correlates with the sovereign's authority, that the grant identifies the grantee, that the grant includes a valid legal description, and that the document is a grant of the land under examination. See Dittmar v. Dignowity, 14 S.W. 268 (Tex. 1890). An examiner may contact the General Land Office for assistance in resolving any doubts about these grants.

In Spanish and Mexican grants, the lands were described using varas, labors, and leagues. In Texas a vara is 33 1/3 inches. United States v. Perot, 98 U.S. 428 (1878). A labor is approximately 177.1 acres. A league or a sitio is 4428.4 acres. Examiners should bear in mind, however, that while measurements eventually became standardized, there were some variations in them over time and some units of measurement—e.g., the vara—may not conform to the standard unit of measurement. As a result, these variances may explain conflicts between adjoining surveys or survey discrepancies.

Under Spanish rule, grants were made to towns. Town lands were divided into town lots for home and cultivation, which could be sold, kept as common areas, or perhaps rented to pay municipal expenses. Under Mexican rule, towns were authorized to develop without a formal grant in designated areas covering up to four square leagues because the organization of the municipal corporation operated as a grant. Generally, roads in Spanish and Mexican town grants belonged to the sovereign and, upon abandonment, became vacant public land, rather than passing to the adjoining landowners as ordinarily would be the case for road easements in Texas. See Standard 5.40 Roads.

Under Spanish law, deeds, contracts, and powers of attorney, including assignments of grants, were executed before a regidor, a public officer, similar to a notary or alderman, exercising quasi-judicial power. The parties would appear before him accompanied by "instrumental witnesses" and state the matter between them. The officer would then make a minute of the terms stated and enter in a book the formal agreement—the protocol. He then furnished to the party in interest a similar document—the testimonio. The protocol

remained with the notary while the testimonio was delivered to the party in interest. McPhaul v. Lapsley, 87 U.S. 264 (1874). The testimonio serves as a second original, not secondary evidence. Titus v. Kimbro, 8 Tex. 210 (1852).

Republic of Texas and State of Texas. The Republic of Texas and the State of Texas issued instruments known as warrants, scrips, or land certificates, which included headright certificates, donation and bounty warrants, land scrips, railroad grants, and land certificates, which were negotiable and considered personal property. These instruments vested a right to obtain unappropriated land in the holder upon the satisfaction of certain statutory requirements, including location and survey, which vested a legal right to the surveyed lands in the holder of the certificate. Legal title remained in the State of Texas until a patent issued, but a valid certificate, location and survey gave the claimant the right to maintain an action at law for its recovery by proof of such title, good against all but the State of Texas. Duren v. Houston & T.C. Ry. Co., 24 S.W. 258 (Tex. 1893). Valid certificates and other evidence of rights to located and surveyed land constitute sufficient evidence of title to the land to support an action for trespass to title or any other legal proceeding, Atlantic Ref'g. Co. v. Noel, 443 S.W.2d 35, 39 (Tex. 1968), citing Tex. Rev. Civ. Stat. art. 7375, now Tex. Prop. Code § 22.002, and the rights of parties are determined by the priority of valid location, not by the mere issuance of the patent. "A survey under a valid location, although unpatented, will prevail over a patent issued under a location subsequently made upon the same land." Whitman v. Rhomberg, 25 S.W. 451 (Tex. App. 1894, no writ). The acceptance of a resurvey cannot authorize the inclusion of lands not included in the original survey. Watts v. Alco Oil & Gas Corp., 540 S.W.2d 557 (Tex. App.—El Paso 1976, writ ref'd n.r.e.).

Donation and bounty warrants were issued to those who rendered military service to the Republic and to the heirs of those who died in battle. Bounty warrants were usually given to those who served in the army with the period of service determining the amount of acreage allotted. Generally, if the recipient was deceased, a bounty warrant vested in the decedent's estate, subject to devise by will and to creditors' claims in administration, whereas a donation warrant vested in the recipient's heirs. Todd v. Masterson, 61 Tex. 618 (1884); see also 3 Aloysius A. Leopold, Land Titles and Title Examination § 2.23, n. 1 (Texas Practice 3d ed. 2005).

From 1836 to 1876, the Republic of Texas or the State of Texas, as applicable, sold land scrips to pay the State's debt. A purchaser of scrip could then locate and survey state-owned acreage and thereby become entitled to a patent. 3 Aloysius A. Leopold, Land Titles and Title Examination § 2.30 (Texas Practice 3d ed. 2005).

From January 30, 1854 until 1882, the State of Texas issued land scrip to companies in return for constructing railroads. Early Laws of Texas art. 2365, § 6. Typically, a block of land was surveyed into regular 640-acre square sections and thereby segregated from the public domain. The even-numbered sections within a block were usually reserved to the State of Texas, and the odd-numbered sections were patented to the railroad companies upon completion of the survey. By Act dated March 18, 1873, the even-numbered sections within the railway surveys were set apart to be sold for the benefit of the publicschool fund. 3 Aloysius

A. Leopold, Land Titles and Title Examination § 2.47 (Texas Practice 3d ed. 2005). The State also issued land scrip for other public works.

For land to be transferred from the sovereign, the land must first be surveyed. The date of the survey, as indicated by the records of the General Land Office, serves as the date that segregates the land from the sovereign so long as the other required steps are taken. Until the land is located and surveyed by a statutorily authorized surveyor, title does not pass and a patent cannot be lawfully issued. Atlantic Ref'g Co. v. Noel, 443 S.W.2d 35 (Tex. 1968); see 3 Aloysius A. Leopold, Land Titles and Title Examination § 3.30 (Texas Practice 3d ed. 2005).

By Act of January 29, 1840, the Commissioner of the General Land Office was authorized to issue a patent upon the return of a "survey and location" and fulfillment of the other legal requirements. See Stubblefield v. Hanson, 94 S.W. 406 (Tex. App. 1906, writ ref'd). The issuance of the patent confirms that the survey was correctly made upon unsegregated acreage and that other legal requirements were satisfied. Regardless of the date of the patent, the date of passage of title relates back to the date of the survey and location. Early Laws of Texas Art. 398, § 36; Atlantic Ref'g Co. v. Noel, 443 S.W.2d 35 (Tex. 1968).

Problems pertaining to the location and surveying of land for segregation from the sovereign are relatively rare, but an examiner should be alert to them, especially where a patent has not been issued. Where a patent has not been issued, the examiner should request that the owner of an interest in the land apply for the issuance of a patent or obtain a certificate of facts from the General Land Office confirming that the land was surveyed.

Occasionally, more than one party may have a claim to title directly from the State of Texas. A junior patent is valid to the extent it does not conflict with the senior patent. The conflicting portion of the junior patent is not void but voidable and may serve as title or color of title under the three-year limitations period, Tex. Civ. Prac. & Rem. Code § 16.024. League v. Rogan, 59 Tex. 427 (1883).

If written evidence of title has been filed with the General Land Office, a copy of that written evidence may be recorded if the original was properly executed and if the copy is certified. However:

> A court may not admit a title to land that was filed in the General Land Office as evidence of superior title against a location or survey of the same land that was made under a valid land warrant or certificate prior to the filing of the title in the General Land Office unless prior to the location or survey:
>
> (1) the older title had been recorded with the county clerk of the county in which the land is located; or
> (2) the person who had the location or survey made had actual notice of the older title.

Tex. Prop. Code § 12.003

Section 12.003 and its precursors provide a means by which a title granted by an earlier sovereign can be filed with the GLO or in the county and would then constitute good title in Texas. This statute also resolves the conflicts between duplicative grants of the same land by giving priority to the subsequent claimant who locates and files a survey with the GLO before the prior claimant does so unless the subsequent claimant had actual or constructive notice of the prior claim. Likewise, it provides for the situation in which the Republic or State of Texas had patented the same lands to a third party and resolved the conflict by subjecting the later title to a notice condition. Airhart v. Massieu, 98 U.S. 491, 506 (1878) (citing Paschal's Digest, an unofficial compilation of Texas laws). A survey filed in the district (county) surveyor's office imparts constructive notice. Timon v. Whitehead, 58 Tex. 290 (1883). Evidence of earlier title can be in the form of a testimonio or a protocol, discussed above. can be filed under Tex. Prop. Code § 12.003.

Patents issued without an actual survey on the ground have been found valid where field notes had been prepared through protraction calculations and where the failure to conduct a survey on the ground was the fault of the government officer and not the owner. Stafford v. King, 30 Tex. 257 (1867).

Where the examiner is aware of duplicate or overlapping surveys that affect the land under examination, the examiner should investigate General Land Office records to determine which survey is senior. In general, the survey first filed and accepted by the General Land Office is senior and controlling. See also Standard 5.10, Land Descriptions Generally.

Texas divided some of its public lands according to the beneficiary of the sale as Public Free School Lands, University Lands, Asylum Lands and unsurveyed or public lands. While an examiner may encounter references to the beneficiary of the sale, such as Public Free School Lands and Asylum Lands, except for purposes of mineral reservations by the State of Texas, discussed below, such references are not relevant to title.

Mineral Title

Prior to September 1, 1895 – minerals released. Prior to Texas independence, the laws of Spain and Mexico retained all minerals in all public or private lands to the Crown of Spain or the Republic of Mexico. The Republic of Texas and State of Texas succeeded to the sovereign claims of Spain and Mexico. When Texas adopted the common law in 1840, the reservation of minerals in the sovereign was continued until the Constitution of 1866, which contained provisions releasing the minerals owned by the State of Texas into private ownership. Private ownership was continued in the Constitutions of 1869 and 1876. Tex. Const. of 1866, Art. VII, Sec. 39; Tex. Const. of 1869, Art. IX, Sec. 9; Tex. Const. of 1876, Art. XIV, Sec. 7 (repealed 1969). Although various release statutes were enacted to implement these constitutional provisions, the Land Sales Act of 1895, which released the minerals previously claimed by the State of Texas in earlier patents or grants to the owners of the soil, was held to be constitutional but not prospective so that the "Legislature [was not] denied the power to provide for the reservation of minerals in future grants." Cox v. Robison, 150 S.W. 1149, 1156 (Tex. 1912).

September 1, 1895 to May 29, 1931 – mineral classification and relinquishment. Under the Mining Act of 1895, Act of Apr. 30, 1895, 24th Leg., R. S. ch. 127, § 1, 1895 Tex. Gen. Laws 197 (effective September 1, 1895), the Commissioner of the General Land Office was required to examine all public land available for sale and to formally classify or designate all apparently mineral-bearing land as "mineral." If the land in question was not classified as mineral, a purchaser under the Land Sales Act of 1895, such as a settler, acquired any minerals that might thereafter be discovered. Schendell v. Rogan, 63 S.W. 1001, 1005 (Tex. 1901) ("[I]t cannot be said that there was an intention to have a secret reservation of that which was not known."). The State of Texas reserved minerals in any land classified as "mineral." See generally H. Philip (Flip) Whitworth, Leasing and Operating State-Owned Lands for Oil and Gas Development, 16 Tex. Tech L. Rev. 673, 680-81 (1985). Under the Sales Act of 1907, land could be classified as mineral and also carry other classifications. Law of May 16, 1907, ch. 20, 1907 Tex. Gen. Laws 490, § 6f. Where lands are classified for one purpose *and also* for minerals, the State of Texas reserved minerals. In other words, a patentee did not acquire minerals to acreage characterized as "grazing and mineral" or "agricultural and mineral."

The mineral reservation is not always expressly stated in the patent. Up until about 1911 it was the practice of the Texas General Land Office to issue patents containing no reference to the minerals even though the land patented had been classified "mineral." 3 Aloysius A. Leopold, Land Titles and Title Examination § 5.10 (Texas Practice 3d ed. 2005). Because the date and circumstances of sale may not be ascertainable, an examiner should require a statement of classification from the General Land Office indicating "mineral" or other classification from September 1, 1895 through May 29, 1931. This statement consists of a letter, which is routinely available upon request for a fee.

Under the Repurchase Act enacted in 1913, the State of Texas had the authority to reclassify school land that had been forfeited to the State of Texas between January 1, 1907 and December 31, 1912. Acts 1913, 33rd R.S., ch. 160, General Laws of Texas, Tex. Nat. Res. Code Ann. § 51.071. Thus, upon resale by the State, land that had not been classified mineral at the time of the initial sale might be classified as mineral in a subsequent sale. For purposes of determining mineral classification the effective date of title generally relates back to the date of the sale. This relation back is important where the law regarding reservations of minerals in the State of Texas changed after the sale.

Mineral classified lands are also referred to as Relinquishment Act lands under the Relinquishment Act of 1919, now Tex. Nat. Res. Code §§ 52.171 – 52.190. The Relinquishment Act of 1919, which was held to be retroactive to September 1, 1895, governed the sale of lands dedicated as Public Free School Lands and Asylum Lands with a mineral classification or reservation until May 29, 1931. Under the language of the Relinquishment Act of 1919, the owner of the soil was purportedly vested with an undivided 15/16ths of the oil and gas in mineral-classified lands that had not yet been developed, while the 1931 Sales Act granted a royalty interest. The Texas Supreme Court later construed the Relinquishment Act as conferring no mineral ownership on the surface owner. Rather the surface owner was found to serve as the agent for the State of Texas to lease the acreage for mineral purposes in exchange for receiving onehalf of all benefits as compensation for surface damage. Greene v. Robison, 8 S.W.2d 655 (Tex. 1928); Wintermann v. McDonald, 102 S.W.2d 167 (1937). The

owner of the surface cannot assign a royalty interest in future leases as such a contract violates public policy, Lewis v. Oates, 195 S.W.2d 123, at 12627 (Tex. 1946), but may assign or reserve the lease benefits under an existing lease for the duration of that lease. Lemar v. Garner, 50 S.W.2d 769 (Tex. 1932). For many years, the General Land Office has required the agent (owner of the soil) to use the lease form provided by the General Land Office and submit the lease to the General Land Office for approval. The lease is not effective until a certified copy of the recorded lease has been filed in the General Land Office. Tex. Nat. Res. Code § 51.054(e). Lands sold under the Relinquishment Act which were later forfeited and then repurchased under the Relief Act of 1925 remain subject to the Relinquishment Act. Magnolia Petroleum Co. v. Walker, 83 S.W.2d 929 (Tex. 1935). After November 27, 1912, until May 29, 1931, the Commissioner of the General Land Office typically classified all lands sold as mineral bearing. A. W. Walker, Jr., The Texas Relinquishment Act, 1 Inst. on Oil & Gas Law & Tax'n 245, 253 (SW Legal Fdn. 1949).

After May 29, 1931 – minerals reserved by patent. The Sales Act of 1931, Tex. Nat. Res. Code § 51.011, et seq., applies to all public lands sold or contracted to be sold after May 29, 1931 and, unlike the Relinquishment Act which covered only oil and gas, it covered other minerals. Wintermann v. McDonald, 102 S.W.2d 167, at 172 (Tex. 1937). Under the Sales Act of 1931, the State of Texas reserved a "free royalty" of 1/8th on sulphur and 1/16th on oil and gas (or 1/8th on oil and gas for land within five miles of a producing well). The Sales Act was amended on September 1, 1983, permitting the School Land Board to set the mineral reservation in favor of the State of Texas at not less than 1/16th on oil and gas and not less than 1/8th on sulphur for lands sold thereafter. Tex. Nat. Res. Code § 51.054(a). Since then, the policy of the General Land Office has been to reserve all minerals, not merely a royalty.

Other than the Relinquishment Act, statutes under which the State of Texas has reserved mineral rights have generally referred broadly to "minerals." Oil and gas are embraced within a reservation of the "minerals," even if the statute calling for mineral reservation does not specifically refer to those substances, Texas Co. v. Daugherty, 176 S.W. 717, at 719-22 (Tex. 1915); see Luse v. Boatman, 217 S.W. 1096 (Tex. App.—Fort Worth 1919, writ ref'd) (holding, in a private reservation, that "all the coal and mineral" included oil and gas). What specific minerals have been reserved by the State is a question of statutory interpretation. Legislative grants are construed strictly in favor of the State on grounds of public policy. Thus, whatever is not unequivocally granted in clear and explicit terms is withheld. Empire Gas & Fuel Co. v. State, 47 S.W.2d 265, 272 (Tex. 1932). When the State has reserved minerals, the State owns the coal and lignite, even where those substances must be strip mined. Schwarz v. State, 703 S.W.2d 187, 191 (Tex. 1986). The General Land Office takes the position that mineral reservations by the State are broader than "mineral" conveyances and reservations between private parties and include such deposits as granite, limestone, gravel, and sand that might otherwise be deemed part of the surface estate. See State v. Cemex Construction Materials South, L.L.C., 350 S.W.3d 396 (Tex. App.—El Paso 2011, pet. granted, jdgm't vacated by agreement).

Boundaries. See Chapter 5.

Patented Excess Acreage. An excess of acreage is property that has been patented by the State of Texas but not paid for by the patentee. An excess occurs when a tract contains a greater quantity of land than set out in its patent. Excess acreage within a survey is distinguishable from a "vacancy," discussed below, which is unsurveyed land. Although the State of Texas has divested itself of title to all acreage described in the patent, including the excess acreage. Foster v. Duval County Ranch Co., 260 S.W.2d 103, 107 (Tex. App.—San Antonio 1953, writ ref'd n.r.e.), any person owning an interest in a titled or patented survey may pay for the excess at a price fixed by the School Land Board. Tex. Nat. Res. Code § 51.246. If it appears that excess acreage actually exists and that the applicant is entitled to obtain it under the law, the commissioner shall execute a deed of acquittance covering the land in the name of the original patentee or his assignees with a mineral reservation or with no mineral reservation accordingly as may have been the case when the survey was titled or patented. Tex. Nat. Res. Code § 51.246(c); see also Standard 5.20. Owners of interests in the excess acreage at the time of the deed of acquittance succeed to the interests of the original patentee.

Note that the existence of excess acreage will generally not be apparent from an examination of record title in the absence of a resurvey. While the lien set out in Tex. Nat. Res. Code § 51.077 might apply to excess acreage, the historical practice of the GLO has been not to assert a lien; however, there is one case that describes the excess acreage as a "cloud on patentee's title." Wofford v. Miller, 381 S.W.2d 640, 647 (Tex. App.—Corpus Christi 1964, writ ref'd n.r.e.).

If there is excess acreage and if there is a navigable stream, the lands conveyed by a deed of acquittance will be affected by the following regulation.

> (1) If a resurvey reveals excess acreage, and it is determined that the survey crosses a navigable stream, then, under the provisions of Texas Civil Statutes, Article 5414a, commonly referred to as the "Small Bill," the owner is entitled to the acreage for which the survey is patented, even though a part or all of the stream bed may be included in this acreage. However, if more than the patented acreage lies outside of the stream bed, the state will hold title to all of the stream bed and the land owner may make application to purchase such excess not included in the stream bed.
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> ….
>
> (4) In surveys where the state retains only a part of the stream bed acreage, the state's part of the stream bed will be taken from the entire length of the stream bed, using the thread of the stream bed as the center of the state's acreage.

31 Tex. Admin Code § 7.3. For further discussion of streambeds, see Standard 5.30.

Land within a Vacancy. Unlike excess acreage, land within a vacancy has never been segregated from the public domain. A vacancy is unsurveyed public school land that is not in

conflict on the ground with land previously titled, awarded, or sold. Tex. Nat. Res. Code § 51.172(6). Strong v. Sunray DX Oil Co., 448 S.W.2d 728 (Tex. App.—Corpus Christi 1969, writ ref'd n.r.e.). A vacancy generally consists of a gap between adjacent surveys. Under early vacancy laws (before 1931), a person who discovered a vacancy had a preferential right to purchase the vacancy. Short v. W.T. Carter & Bro., 126 S.W.2d 953 (Tex. 1938). The 1931 Sales Act gave a preferential right to the adjacent landowner to purchase a vacancy under fence. In 1939 amendments to the 1931 Sales Act restored some rights to the finder.

Current law favors a "good faith" claimant as described in Tex. Nat. Res. Code § 51.172(2). A person qualifying as a good-faith claimant to a vacancy, such as one occupying the land, may file an application with the General Land Office to establish that the land is in fact vacant and to request the General Land Office to sell the vacancy. Tex. Nat. Res. Code § 51.171 et seq. See also 31 Tex. Admin. Code § 13.32 et seq., implementing Tex. Nat. Res. Code §§ 51.171-51.195. If no good-faith claimant exists, or if no good-faith claimant exercises a preferential right, an applicant may have a preferential right to purchase or lease the land or an interest in the land at the price set by the school land board, subject to any mineral or royalty reservations by the board. Tex. Nat. Res. Code § 51.195. The school land board sets the terms and conditions for each sale and lease of a vacancy to an applicant and adopts rules governing such terms, including rules governing mineral or royalty reservation, Tex. Nat. Res. Code § 51.175.

Beginning in 2001, the Texas Constitution was amended to relinquish the state's claims to specified land and prospectively to authorize the release of the State's interest in land held by a person under color of title, Tex. Const. of 1876, Art. VII, Sec. 2A – 2C. See also, Tex. Nat. Res. Code § 11.084. For applicable procedures for a patent under this section, see Tex. Nat. Res. Code § 11.085.

Caution:

See the above discussion on the desirability of securing a patent, rather than relying on a certificate of facts.

See the above discussion on the desirability of securing a deed of acquittance for excess acreage.

Regarding Relinquishment Act lands, the General Land Office generally requires the agent (owner of the soil) to use the lease form provided by the General Land Office and submit the lease to the General Land Office for approval. An examiner should confirm with the General Land Office that the lease has been approved.

"An oil, gas, or other mineral lease on land in which the state reserves a mineral or royalty interest is not effective until a certified copy of the recorded lease is filed in the General Land Office." Tex. Nat. Res. Code § 51.054(e).

Source:

Citations in the comment.

History:

Adopted February 12, 2017.

CHAPTER XVIII

ADVERSE POSSESSION

Standard 18.10. Effect of Adverse Possession

The ownership evidenced by record title is subject to any title arising by adverse possession; however, an examiner ordinarily reports the title as it appears from the record.

Comment:

Adverse Possession is the actual and visible appropriation of real property under a claim of right which is inconsistent with and hostile to the claim of the rightful owner, (Tex. Civ. Prac. & Rem. Code Sec. 16.021) even though the adverse claimant believes that the land belongs to him. Calfee v. Duke, 544 S.W. 2d. 640 (Tex. 1976). Such actual and visible appropriation should be open, continuous, exclusive, adverse, and notorious.

A limitation title arises because statutes of limitation bar the claims of other claimants, including record title holders. Each of six different statutes within the Texas Civil Practice and Remedies Code may cause title to a possessory estate to be vested by adverse possession:

- "Three-Year Statute" (Tex. Civ. Prac. & Rem. Code § 16.024)
- "Five-Year Statute" (Tex. Civ. Prac. & Rem. Code § 16.025)
- "Ten-Year Statute" (Tex. Civ. Prac. & Rem. Code § 16.026)
- "Fifteen-Year Cotenant Heir Statute" (Tex. Civ. Prac. & Rem. Code § 16.0265)
- "Twenty-Five Year Statute" (Tex. Civ. Prac. & Rem. Code § 16.027)
- "Twenty-Five Year Statute" (Tex. Civ. Prac. & Rem. Code § 16.028)

Because the perfection of a limitation title depends on the determination of the factual elements specified by the applicable statute, the examination of record title can neither negate the existence of adverse possession claims against the record title ownership nor confirm the perfection of a limitation title against the record title ownership. The examiner should, however, identify any claims based on adverse possession revealed by the documents within the material examined or otherwise known to the examiner.

No limitations statute may be asserted against the state or a political subdivision. Tex. Civ. Prac. & Rem. Code § 16.061.

The Three-Year Statute requires the execution and delivery of a deed from a grantor owning 'title or color of title." Tex. Civ. Prac. & Rem. Code § 16.021(2) (defining color of title) and (4) (defining title). Because of the definitions, the Three-Year Statute has limited application. See, e.g., Burnham v. Hardy Oil Co., 195 S.W. 1139 (Tex. 1917) (refusing to apply the Three-Year Statute for lack of color of title). Neither should the

deed be lacking in fairness and honesty, Eddings v. Black, 602 S.W. 2d 353 (Tex. App. -El Paso, 1980, writ ref'd n.r.e.) (refusing to apply the Three-Year Statute due to inherent unfairness and dishonesty). But see Phelps v. Pecos Valley Southern Ry. Co., 182 S.W. 1156 (Tex. App.—El Paso 1916, no writ) and Shaw v. Ball, 23 S.W.2d 291 (Tex. 1930) (applying the Three-Year Statute).

The Five-Year Statute requires the timely payment of taxes and a duly recorded deed. Hunter v. Dodds, 624 S.W. 2d 365 (no writ).

The Three-Year Statute, the Five-Year Statute, and the Twenty-Five-Year Statute (§ 16.028) each require a deed or other written instrument, other than a mere quitclaim, as an element of the adverse possessor's claim. A quitclaim, a forged deed, and a deed executed under a forged power of attorney will not support limitations based on a deed or other written instrument under the five-year statute of limitations, Tex. Civ. Prac. and Rem. Code § 16.025(b). The Twenty-Five-Year Statute (§ 16.027) does not require any such instrument, nor does the Ten-Year Statute for claims to 160 acres or less or to a larger area actually enclosed. Under the Ten-Year Statute, possession under a recorded deed or memorandum of title that fixes the boundaries of the claim extends to the boundaries specified in the instrument. Even when there are recorded instruments that evidence claims of adverse possession, these instruments are not necessarily within any record owner's chain of title. Thus, depending on how the materials examined are compiled, recorded instruments evidencing claims arising through adverse possession may not be included in the instruments reviewed by the examiner. The Fifteen-Year Cotenant Heir Statute requires a recorded instrument but is discussed separately in the comment under Standard 18.30.

Upon the inception of adverse possession, all possessory estates are subject to the later perfection of a limitation title by the adverse possessor or her successors in the continuous adverse possession; however, a mineral interest severed prior to the inception of adverse possession will not be divested by adverse possession of the surface. Atlantic Ref'g Co. v. Noel, 443 S.W.2d 35 (Tex. 1968). Limitations will not begin running against a future-interest estate, like a remainder interest, until the owner is entitled to possession. Ferguson v. Johnston, 320 S.W.2d 906 (Tex. App.—Texarkana 1959, writ ref'd n.r.e.).

Notwithstanding that a record title examination does not typically identify or negate any limitation title claim, the usual practice of examiners is to include a comment or requirement for the client to investigate the historic use and possession of the land and to obtain affidavits of use and possession reciting facts that, if true, would negate the elements required to perfect a limitation title against the record title ownership.

Commencement of limitations under the Three-, Five-, and Ten-Year Statutes of Limitatcions is subject to disabilities. Where title to real property is claimed adversely to a (i) minor, (ii) a person of unsound mind, or (iii) a person who is serving in the armed forces of the U.S. during time of war, limitations does not begin to run until the disability no longer exists, Tex. Civ. Prac. & Rem. Code § 16.022. The two Twenty-Five Year statutes are not subject to disabilities; however, state law is preempted by the Soldier's and Sailor's Civil Relief Act of 1940, § 205, as amended, 50 U.S.C. App. § 525, which

supersedes Tex. Civ. Prac. & Rem. Code § 16.022, so that the adverse possession statutes (including both Twenty-Five Year statutes) are all tolled during the military service of the apparent owner of the property, even if the owner is a career serviceman. Limitations are also tolled in favor of the grantee from the service member who is sued under an adverse possession statute. Barstow v. State, 742 S.W. 2d 495 (Tex. App. – Austin 1987 writ denied). All limitation statutes are subject to being interrupted by the death of the title holder for a period of twelve (12) months, or until the appointment of an executor or an administrator, whichever is sooner, Tex. Prac. & Rem. Code Sec. 16.062.

Caution:

If the owner of a future interest also owns a current possessory estate, e.g., with children inheriting the separate property of an intestate decedent under Section 201.002(b)(3) Texas Estates Code, then the possession will be adverse to both estates and the claims to both estates will be barred upon the running of the applicable limitation statute. See Elcan v. Childress, 89 S.W. 84 (Tex. App.—Worth 1905, writ ref'd).

Source:

Citations in the Comment.

5A Aloysius A. Leopold, Land Titles and Title Examination §§ 44.10, 44.15 (Tex. Prac. 3d ed. 2005). History:

Adopted June 4, 2021.

Standard 18.20. Quality of Title by Adverse Possession

When title by adverse possession is perfected, the ownership in the land arising thereby is as full as can be held under any other character of title.

Comment:

A limitation title is not a marketable title prior to the final adjudication regarding the application of the appropriate statute of limitation because it requires proof of the requisite factual elements under the respective statute. *See* the Caution under Standard 2.20. Nevertheless, if the requisite facts obtain, a limitation title is vested and complete. Once the title is perfected, the owner under a limitation title need not subsequently maintain possession or take any action to make that owner's rights a matter of record. The examiner's comment or requirement for the investigation of use and possession should cover as long a time period as possible, but at least the greater of the most recent 25 years or prior to the severance of the minerals, and should discuss all use and possession details, even those regarding use or possession that has been discontinued.

Once vested, title by adverse possession cannot be lost by abandonment. In Republic Nat'l Bank v. Stetson, 390 S.W.2d 257 (Tex. 1965), after title by adverse possession had

vested, the owner by adverse possession executed a sworn statement assuring the owners of record title "[t]hat all the time he has been living on said land he has been there as a tenant at will and agent of [the deceased predecessor of current record owner]". Id., at 259, fn1. This characterization of the prior possession was insufficient to convey or otherwise divest the adverse possessor of the ownership previously perfected, Id. at 261, or to estop the owner by adverse possession from asserting his ownership. Id. Any curative documentation submitted to the examiner to address the rights of persons in possession or who may otherwise have adverse possession claims should contain granting language and legally sufficient descriptions of the subject land if there is any possibility that the person currently or previously in possession has perfected a limitation title. The continuous possession required to perfect a limitation title need not be maintained by the same claimant for the full limitation period, but in order to tack the consecutive possession of multiple claimants, there must be privity of estate between them. See Miller v. Fitzpatrick,418 S.W.2d 884 (Tex. App.—Corpus Christi 1967, writ ref'd n.r.e.).

Once limitation title is perfected, any prior conveyances or encumbrances that were created by the adverse possessor during the running of limitations are validated, and any prior conveyances or encumbrances that were created by the true owner during the limitations period are no longer effective. Broughton v. Humble Oil & Ref'g Co., 105 S.W.2d 480 (Tex. App.—El Paso 1937, writ ref'd.).

Caution:

The insufficiency of a one-time inspection of the premises to negate adverse possession claims is illustrated by the case of McGregor v. Thompson, 26 S.W. 649 (Tex. App.—Galveston 1894, no writ). Under the facts of that case, the record title owner executed and delivered the deed to the buyer after the houses, fences, and other evidence of the possession through which the adverse possessor had perfected his ownership "were burned, occupancy ceased, and there were no vestiges upon the land itself to show that it had ever been occupied." *Id.* Nevertheless, the buyer bought subject to the ownership rights previously perfected by adverse possession even though neither an inspection of the land nor a record title search gave notice of this ownership.

Texas case law regarding fences and adverse possession demonstrates that these cases are factually intensive. A leading case is Rhodes v. Cahill, 802 S.W. 2d 643 (Tex. 1990). There, the court distinguished a "casual fence," which cannot establish a limitations boundary from a "designed enclosure," which can support limitations. A fence that existed before the claimant took possession is a "casual fence" unless the adverse claimant can demonstrate the purpose for which the fence was erected. Although maintaining a "casual fence" does not make the fence a "designed enclosure;" a claimant may change the character of a "casual fence" so that it becomes a "designed enclosure." Id. at 646.

Where the requirements of the relevant limitations statute cannot be proven, the claimant nevertheless will have made a prima facie case that title has passed from the apparent title holder to the claimant if the claimant proves that during the preceding 25

years before filing suit- (i) the holder of the apparent title did not exercise dominion or pay taxes, and (ii) during that time the claimant has exercised dominion over and asserted a claim to the property and has timely paid the taxes. Tex. Civ. Prac. & Rem. Code § 16.029(a). This section does not affect the right to prove title by circumstantial evidence or a suit between a trustee and a beneficiary of the trust. Id.§ 16.029(b).

Source:

Citations in the Comment; Tex. Civ. Prac. & Rem. Code § 16.030; 5A Aloysius A. Leopold, Land Titles and Title Examination §§ 44.3, 44.4, 44.5, 44.6, 44.43 (Tex. Prac. 3d ed. 2005).

History:

Adopted June 4, 2021.

Standard 18.30. Adverse Possession by Co-owners

An examiner should presume that possession by less than all co-owners is not adverse to other co-owners in the absence of repudiation, notice of adverse claim, or ouster.

Comment:

A co-owner cannot claim the benefit of any of the adverse possession statutes except the Fifteen-Year Cotenant Heir Statute (discussed below) unless that co-owner proves, in addition to the usual adverse possession requirements, the possessing co-owner accomplished the ouster, or repudiated the title, of the non-possessing co-owner(s). Phillipson v Flynn, 19 S.W. 136 (Tex. 1892); Frazier v. Donovan, 420 S.W.3d 463 (Tex. App.—Tyler 2014, no pet.). Before a possessing co-owner can start the running of the limitation period against a co-owner, the non-possessing co-owner must receive actual or constructive notice of a hostile claim by the possessor. Allied Chemical Corp. v. G.E. Kadane & Sons, 373 S.W.2d 778 (Tex. App.—Eastland 1963, no writ). The hostile intent of the possession should be manifested by acts of a more unequivocal character than would be necessary in ordinary cases because acts by a stranger which would be a disseizin can be consistent with title of a co-owner. Todd v. Bruner, 365 S.W.2d 155 (Tex. 1963).

The act of a co-owner in conveying only his interest in the premises is not notice to the other co-owners of a repudiation of the cotenancy. Toscano v. Delgado, 506 S.W.2d 317, 320 (Tex. App.—San Antonio 1974, no writ). A deed, purporting to convey an interest greater than that held by the co-owner is not sufficient, standing alone, to prove adverse possession. Dyer v. Cotton, 333 S.W.3d 703, at 711 (Tex. App.—Houston [1st Dist.] 2010, no writ). But see Beets v. Hickok, 701 S.W.2d 281 (Tex. App.—Tyler 1985, no writ) (holding that the recording of a conveyance by cotenants to another cotenant purporting to convey the entire title followed by the grantee's possession constitutes a notice of repudiation sufficient to divest the nonsigning cotenant). The giving of crop mortgages on the land is not necessarily conclusive of adverse possession. Lidell v. Gordon, 226 S.W. 459 (Tex. App.—Texarkana 1920, no writ).

The payment of 100% of the taxes on the subject land, even when coupled with exclusive possession, is not notice to a co-owner of the repudiation of the common title. Todd at 160. Likewise, the redemption by a co-owner from a tax foreclosure was for the benefit of all co-owners in Poenisch v. Quarnstrom, 361 SW2d 367, 372 (Tex. 1962).

Effective September 1, 2017, the Legislature addressed adverse possession of real property by a co-owner heir by adding the Fifteen-Year Cotenant Heir Statute to the Tex. Civ. Prac. & Remedies Code § 16.0265(a). It applies to "cotenant heirs" who simultaneously acquire identical, undivided ownership by operation of intestate succession laws or to a successor in interest to one such person. A qualifying person may acquire the interests of other co-owner heirs by adverse possession if the claiming heir holds the property for a continuous 10-year period in exclusive possession, uses the property, and pays all property taxes not later than two years after the date the taxes become due, provided that no other co-owner heir contributed to the taxes or maintenance of the property, challenged possession, filed a notice of the co-owner heir's claimed interest in the deed records, or has signed a written agreement allowing the possessory co-owner to possess the property without forfeiting that heir's ownership interest. Sec. 16.0265(b). The possessory co-owner must also file an affidavit of heirship and an affidavit (may be combined) setting out the legal description, attestation of exclusive possession for 10 years, qualifying use, evidence of payment of property taxes, certification of publication notice and to the last known address of the other co-owners, and an attestation that no use of the property has been made by another co-owner. Sec. 16.0265(c) and (d). A co-owner heir must file a controverting affidavit or bring suit within 5 years of the filing of the claimant's affidavits. Sec. 16.0265(e); if not, then title vests in the adversely possessing co-owner, precluding all claim by other co-owner heirs. Sec. 16.0265(f). A lender for value will be protected if it had no notice, if the affidavits have been of record for the 10 year plus the 5 year periods described above, and if no controverting affidavit has been filed, id. § 16.0265(g). The acreage covered by the claim is limited to 160 acres, including improvements, or to the number of acres enclosed if greater, id. § 16.025(h). The claim also covers the number of acres specified in a duly registered deed describing the acreage under possession, id.§ 16.0265(h). This statute does not apply if the grant that created the cotenancy was by will or deed, id.§ 16.026(a).

If the affidavits and other recorded notices contemplated by this statute are executed by successors to record title owners, these documents presumably will be part of the material examined. The examiner should disclose to the client any claims arising under this statute that come to the examiner's attention.

Source:

Citations in the Comment; 5A Aloysius A. Leopold, Land Titles and Title Examination §§ 44.64, 44.66, 44.68, 44.67 (Tex. Prac. 3d ed. 2005).

History:

Adopted June 4, 2021.

Standard 19.10. Cotenancy Presumed

Subject to Standard 19.20, if title to an estate or interest is vested in two or more persons, an examiner should ordinarily presume that title is held in cotenancy and that each cotenant may separately convey its estate or interest. Absent evidence of contrary intent, an examiner should ordinarily presume that an instrument creating a cotenancy conveys undivided equal interests in the property.

Comment:

Tenants-in-common (cotenants) hold property in undivided ownership, and all cotenants have equal rights to the property, although their interests may be in unequal shares. A cotenancy is not an estate, but a relation between persons. Meaders v. Moore, 113 S.W.2d 689 (Tex. App.—Texarkana 1937), aff'd, 132 S.W.2d 256 (Tex. 1939). See also Welch v. Armstrong 62 S.W.2d 335 (Tex. App.—Texarkana 1933, writ ref'd). Cotenancy is formed when two or more persons share unity of exclusive use and present right to possession of property held in common. Laster v. First Huntsville Properties Co., 826 S.W.2d 125 (Tex. 1991). The possession of land by a cotenant is presumed to be in his right as cotenant and thus not adverse to the claim of ownership by his cotenant. Page v. Pan Am. Petrol. Corp., 412 S.W.2d 797 (Tex. App.—Houston 1967, writ ref'd n.r.e.). Possession by a cotenant is presumed in favor of the common title. Todd v. Bruner, 365 S.W.2d 155 (Tex. 1963).

"The co-ownership of separate, undivided interests in land is a cotenancy." Cecola v. Ruley, 12 S.W.3d 848, 853 (Tex. App.—Texarkana 2000, no pet.). Cotenancy title may be derived separately by different instruments and at different times. Starr v. Dunbar, 69 S.W.2d 816 (Tex. App.—Texarkana 1934, writ ref'd). Unless a contrary intention appears in an instrument creating a cotenancy, a rebuttable presumption exists that each cotenant is vested with an equal and undivided interest in the common property. Zephyr v. Zephyr 679 S.W.2d 553 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). Moreover, "a bona fide purchaser from a cotenant without notice of any equities that exist between such cotenant and the other cotenants, takes not charged therewith." Kirby Lumber Co. v. Temple Lumber Co., 83 S.W.2d 638, 642 (Tex. 1935).

In a partition action by a cotenant, one court disregarded an unrecorded tenancy-in-common agreement, showing different ownership, based on the "four corners" rule and enforced the presumption that each cotenant has an equal undivided interest in the property where the interest of each grantee was not stated in the recorded document. Estate Land Co. v. Wiese, No. 14-13-00524-CV, 2015 WL 1061553 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (mem. op.). One grantee's subsequent conveyance of an undivided interest of 40 acres in a tract did not raise a presumption that the interest conveyed was a whole interest nor did it rebut the presumption arising from the first deed that grantees owned the land in equal shares. Wade v. Boyd, 60 S.W. 360 (Tex. App. 1900, writ ref'd). In Mueller v. United States, 119 F.3d 1 (5th Cir. 1997), a father was allowed to prove in a dispute with a lien creditor that

he never intended that his son have an ownership interest even though the deed named both father and son; however, the case was ultimately decided on resulting trust grounds.

Each cotenant may acquire its interest in a different manner, i.e., conveyance, inheritance, limitations, or some other legal means. Frazier v. Donovan, 420 S.W.3d 463 (Tex. App.—Tyler 2014, no pet.) The common law distinctions among estates held by tenants-in-common, joint tenants, and coparceners generally are not recognized in Texas, and the holders of such estates are tenants in common without regard to how such estates are acquired. Peterson v. Fowler, 11 S.W. 534, 535 (Tex. 1889). No cotenant can be exclusively seized of any specific part of co-owned property. Each cotenant has its undivided interest in the whole of the property. In re Marriage of Skarda, 345 S.W.3d 665 (Tex. App.—Amarillo 2011, no pet.). If one accepts and claims under a conveyance of interests owned by one or more cotenants, that party becomes a tenant in common with any other co-tenants. Peterson v. Fowler, 11 S.W. 534, 535 (Tex. 1889).

Mineral interests may be co-owned. A mineral lessee of one tenant in common becomes a cotenant with the other cotenants other than its lessor. Powell v. Johnson, 170 S.W.2d 273, 276 (Tex. App.— Texarkana), aff'd sub nom. Rancho Oil Co. v. Powell, 175 S.W.2d 960 (Tex. 1943), citing Simpson-Fell Oil Co. v. Stanolind Oil & Gas Co., 125 S.W.2d 263, 267 (Tex. 1939). Generally, a tenant in common has the right to execute an oil and gas or mineral lease on his undivided interest in the common property, notwithstanding the nonjoinder of other cotenants. Whelan v. Placid Oil Co., 274 S.W.2d 125, 128 (Tex. App.—Texarkana 1954, writ ref'd n.r.e.).

Caution:

An examiner should be careful to distinguish a joint tenancy from a joint tenancy with right of survivorship, which is discussed in the next standard. The courts in Texas may describe an interest as a joint tenancy when referring to a cotenancy derived from the same instrument and at the same time. See Skarda, at 671-72. To be a joint tenancy with right of survivorship, the instrument must include a survivorship provision. In Texas, the right of survivorship was abolished by statute in 1840 Pas. Dig. Art. 3429, note 791, discussed in Ross v. Armstrong, 25 Tex. Supp. 354 (1860). This abolition is currently codified in Texas Estates Code § 101.002. However, under id., § 111.001, parties may agree in writing to hold property as joint tenants with right of survivorship. See Standard 19.20 below.

An examiner should be careful to distinguish cotenancy ownership from community property. Community property, which arises between married parties, is addressed in Standard 14.10. "Where a husband and wife, owning community property, are divorced without the court in its decree having made any division of such property in the divorce decree, they become tenants in common in the property or joint owners thereof, just as if they had never been married." Taylor v. Catalon 166 S.W.2d 102, 104 (Tex. 1942). See Chapter XIV of these Standards.

On termination of a trust, legal and equitable titles to trust property vest in beneficiaries as tenants in common without the necessity of transfer or conveyance of title to them. Sorrel v. Sorrel, 1 S.W.3 867 (Tex. App.—Corpus Christi 1999, no pet.).

In general, cotenants are not in a special relationship, e.g., a partnership, that imparts fiduciary duties. However, in MacDonald v. Follett, 175 S.W.2d 671 (Tex. App.—Galveston 1943), aff'd, 180 S.W.2d 334 (Tex. 1944), the court applied the rules of cotenancy to a non-possessory overriding royalty interest (ORR), concluding that the holder of an ORR owed a duty to another ORR owner when the first owner acquired a new lease. There was evidence of a pre-existing relationship that might have created such a duty, but the court broadly stated that "[i]t is now well settled that overriding royalties similar to those held [here] were real property and that they, as royalty owners thereunder, were joint owners or joint tenants in the land in question." MacDonald, 175 S.W.2d at 674. The supreme court affirmed but avoided characterizing the relationship of the parties as a cotenancy. 180 S.W.2d at 337. The court of civil appeals did not expressly find that the cotenants were partners, which may have been a more appropriate rationale for finding fiduciary duties.

When acquiring an interest from a cotenant, the acquiring party should inquire of the interest of any party in possession, Collum v. Sanger Bros., 82 S.W. 459 (Tex. 1904), even if the party's possession is consistent with record title. Aldridge v. N. E. Indep. Sch. Dist., 428 S.W.2d 447, Tex. App.—San Antonio 1968, writ ref'd). But see Madison v. Gordon, 39 S.W.3d 604 (Tex. 2001) (no duty to inquire of tenants in a multi-unit facility whether a tenant held an unrecorded deed to the premises).

See also comments to Standard 18.30, addressing adverse possession by a cotenant.

Source:

Citations in the Comment; 3A Aloysius A. Leopold, Land Titles and Title Examination § 13.23 (Tex. Prac. 3d ed. 2005).

History:

Adopted June 4, 2021, amended March 6, 2026.

Standard 19.20. Joint Tenancy with Right of Survivorship

Except for community property, which requires an additional agreement between the spouses, an examiner should conclude that an estate or interest is held

in joint tenancy with right of survivorship only if the deed or other instrument expressly provides for survivorship rights.

Comment:

Historically, a joint tenancy included the common law doctrine of survivorship, meaning the entire estate held in joint tenancy went to the survivors and so on to the last survivor.

Common law survivorship was abolished in 1848 by predecessor statutes to Tex. Estates Code §§ 101.001 and 101.002. Tex. Estates Code § 101.002 provides that if an interest in property is co-owned and one owner dies, "the interest of the decedent in the joint estate ... does not survive to the remaining joint owner or owners...." An instrument of conveyance may expressly provide that parties hold title with right of survivorship, or parties may contract among themselves that the property should pass to and vest in the survivor. Chandler v. Kountze, 130 S.W.2d 327, 329 (Tex. App.—Galveston 1939, writ ref'd); Stauffer v. Henderson, 801 S.W.2d 858 (Tex. 1990).

Tex. Estates Code § 101.001 is not limited to marital property. Unmarried persons may also hold property in joint tenancy with right of survivorship. Tex. Estates Code § 111.001 (addressing agreements to hold in joint tenancy). For a detailed historical treatment of survivorship, see generally Edwin P. Horner, "Community Property and Rights of Survivorship (before Hilley v. Hilley and H.B. 670)," 13 Baylor L. Rev. 113 (1961).

Prior to the amendment of the Texas Constitution in 1987 (Tex. Const. art. 16, § 15), a right of survivorship could not be created for community property, but married couples could convert their community property into separate property through a partition agreement and, thereafter, separately agree to establish a joint tenancy with right of survivorship. See, Hilley v. Hilley, 342 S.W.2d 565 (Tex. 1961). The 1987 amendment eliminated the necessity of having to partition community property into separate property before agreeing to survivorship.

For community property, effective November 3, 1987, Texas Estates Code § 112.051 provides, "At any time, spouses may agree between themselves that all or part of their community property, then existing or to be acquired, becomes the property of the surviving spouse on the death of a spouse." To accomplish this result, the agreement must be in writing and signed by both spouses but need not be acknowledged or recorded, subject to the recording statutes. See Standard 4.40. Though not exclusive, certain phrases are sufficient to create a right of survivorship as to community property, such as "with right of survivorship," "will become the property of the survivor," "will vest in and belong to the surviving spouse," or "shall

pass to the surviving spouse." Tex. Estates Code § 112.052. A community property survivorship agreement may be revoked as provided in the agreement or if the property covered by the agreement is disposed of prior to death consistent with the agreement. Tex. Estates Code § 112.054.

Caution:

While of Tex. Estates Code § 101.002 abolishes the common law concept of a joint tenancy automatically including a right of survivorship, § 111.001 allows co-owners to enter into a written agreement that the interest of a deceased joint owner passes to the survivor without executing a deed to this effect. Case law is thin regarding what constitutes a sufficient agreement. In Chandler v. Kountze, 130 S.W.2d 327, 328 (Tex. App.—Galveston 1939, writ ref'd), a deed conveyed land to two grantees with a right of survivorship provision. The court was satisfied that this was sufficient evidence of a survivorship agreement.

The need for careful drafting is illustrated in Wagenschein v. Ehlinger, 581 S.W.3d 851 (Tex. App.—Corpus Christi 2019, pet. denied). Seven landowners conveyed the surface and minerals in a tract in DeWitt County, Texas, reserving one-half of the royalty. The reservation excepted the royalty "for Grantors and the survivor of Grantors. . . until the death of the last survivor of the seven (7) individuals referred to as Grantors in this deed." Generally, the parties and the mineral lessee treated the reserved interest as a joint tenancy with right of survivorship, passing proportionately to the surviving grantors each time a grantor died, but successors to some grantors asserted that the interest could be assigned by the grantors or could be inherited by their successors "until the death of the last surviving [Grantor]," while the other side asserted that the interest was held as joint tenants with the right of survivorship. The court was persuaded that the use of the word "survivor" indicated the grantors' intent that their royalty reservation was held in joint tenancy with right of survivorship, so that upon the death of each grantor the cotenancy interest passed to the surviving grantors, to terminate upon the death of the last of the original grantors to die.

Although a joint tenant with right of survivorship may sever the joint tenancy with right of survivorship into a tenancy in common, Hoover v. El Paso Nat'l Bank, 498 S.W.2d 276 (Tex. App.—El Paso 1973, writ ref'd n.r.e.), case law is scarce on whether a conveyance of less than the full interest constitutes a severance or whether a severed joint tenancy may be resurrected by expiration of the interest that severed the joint tenancy. A severance of the joint tenancy with right of survivorship into a tenancy in common (no survivorship) was asserted in Wagenschein v. Ehlinger, above, but the case was decided against the grantees of the joint tenant without discussion of this claim.

Serious questions arise from common-law principles as applied in other jurisdictions regarding the effectiveness of a deed from a property owner to the property owner and another person, as joint tenants with right of survivorship. 20 Am. Jur.2d Cotenancy and Joint Ownership § 14 (2020); W. W. Allen, Annotation, Character of Tenancy Created by Owner's Conveyance to Himself and Another, or to Another Alone, of an Undivided Interest, 44 A.L.R.2d 595, § 4 (1955). No Texas case law is on point, although it may be reasonable to suppose that such a deed is likely effective given the trend toward utilitarian approaches to deed construction and away from formalistic, mechanical rules. Nevertheless, a title examiner is justified in requiring curative action to clarify ownership before relying on a deed from an owner to the same owner and another as joint tenants with right of survivorship. The traditional method of avoiding the issue is for the grantor to convey to an intermediary third party, who may then convey to the grantor and another grantee, as joint tenants with right of survivorship. If a purported joint tenant has died, an examiner may choose to require quitclaims from the deceased person's heirs or devisees in favor of the survivor where the examiner has reason to doubt that the deed expressed a survivorship intent.

Source:

Citations in the Comment; 3A Aloysius A. Leopold, Land Titles and Title Examination §§ 13.27, 13.28 (Tex. Prac. 3d ed. 2005).

History:

Adopted June 4, 2021; amended March 6, 2026.

Standard 19.30. Co-Ownership and Easements

A co-owner may not give an effective easement without the consent or ratification of other co-owners.

Comment:

Easements are addressed in Standard 5.50 and can be distinguished from conveyances of interests as discussed in Standard 19.50 below, because an easement does not give the holder the right to possess, take from, improve, or sell the land. An easement "is a nonpossessory interest that authorizes its holder to use the property for only particular purposes." Marcus Cable Assocs., L.P. v. Krohn , 90 S.W.3d 697, 700 (Tex. 2002) (citing Restatement (Third) of Property (Servitudes) § 1.2 cmt. d). Absent consent or subsequent ratification by the other co-owners, the general rule is that one co-owner cannot impose an easement upon the common property in favor of third persons. Elliott v. Elliot, 597 S.W.2d 795, 802 (Tex. App.–

Corpus Christi 1980, no writ). In Lee v. Phillips, 329 F.Supp. 579 (S.D. Tex. 1971), aff'd sub nom. Tex. Mortg. Co. v. Phillips Petrol. Co., 470 F.2d 497 (5th Cir. 1972), one co-owner, Korge, granted a single pipeline easement to a Phillips subsidiary under which a pipeline was installed. Later the other 1/2 co-owner, Turner, granted an easement for multiple pipelines to the Phillips parent company, which started construction. The holder of the Korge interest sued Phillips for trespass. The court found for Korge, holding that "a tenant in common cannot, without the precedent authority or subsequent ratification of his cotenants, impose an easement or dedication upon the common property in favor of a third party." Id. at 582. Apparently, the easement granted by Korge cotenant was not contested by the other cotenant.

Caution:

Although both wind and solar leases commonly in use in Texas today each contain multiple easements, the instruments themselves are often worded as though they ostensibly suggest a tenancy for years; however, no case law directly supports this classification. The practice in Texas has been to obtain consent from all cotenants for a wind or solar lease. Wind leases are classified as "wind power facility agreements" under Chapter 301 of the Texas Utilities Code. Solar leases are classified as "solar power facility agreements" under Texas Utilities Code, ch. 301. Moreover, an examiner should not presume that wind or solar rights may be severed from the surface estate like mineral rights or presume how such a right should be classified—i.e., a form of easement, profit a` prendre, or other interest. See generally Ernest E. Smith, Wind, Water, Oil, Gas and Whitetails: A Comparison of Property Rights and Theories, Wind, Solar, and Renewables Inst. (Univ. of Tex. School of Law 2010), and Ernest E. Smith, Roderick E. Wetsel, Becky H. Diffen, and Melissa Powers, Wind Law (2018). Carbon sequestration agreements raise the same issue.

Source: Citations in the Comment; 2 James N. Johnson, Real Estate Trans. §15:103 (Tex. Prac. Guide 2019).

History: Adopted June 4, 2021.

Standard 19.40. Cotenant's Authority Regarding Title

If cotenants acquired their ownership through the same instrument or if cotenants are in some relationship of privity or mutual trust and confidence existing among them, and if one cotenant satisfies an outstanding adversarial claim against co-owned property, then an examiner should assume that the acts of the satisfying cotenant inure to the benefit of the

other cotenants. No such assumption should be inferred solely from the relationship of cotenancy.

Comment:

In some circumstances a cotenant that acquires an adversarial claim against the co-owned property does so for the benefit of fellow cotenants. The most common circumstance occurs when cotenants hold under the same instrument, such as inheriting real property in cotenancy.

Roberts v. Thorn, 25 Tex. 728, 736 (1860), describes the circumstances where the action of a cotenant does, and does not, inure to the benefit of other cotenants:

> [J]oint tenants and co-parceners stand in such confidential relations in regard to one another's interest, that one of them is not permitted in equity to acquire an interest in the property hostile to that of the other; and, therefore, a purchase, by a joint tenant or co-parcener, of an incumbrance on the joint estate, or an outstanding title to it, is held at the election of his co-tenants within a reasonable time, to inure to the equal benefit of all the tenants upon condition that they will contribute their respective ratios of the consideration actually given.
>
> The duty arising among cotenants, or tenants in common, is conditioned on the existence of elements beyond mere cotenancy, such as claiming through a joint acquisition or the co-owners having entered an undertaking under which a duty arises:
>
> But, it is said in the notes to the leading case of Reich v. Sanford, upon a review of the authorities, that "tenants in common probably are subject to this mutual obligation, only where their interest accrues under the same instrument, or act of the parties or of the law, or where they have entered into some engagement or understanding with one another; for persons acquiring unconnected interests in the same subject, by distinct purchases, though it may be under the same title, are probably not bound to any greater protection of one another's interests, than would be required among strangers."

Id. 735-36, citing 1 Lead. Cas. Eq. 74, 75.

If a cotenant who is subject to the duties resulting from a special relationship acquires a lien that encumbers the interest of other cotenants, such as purchasing the jointly owned interest at a foreclosure sale or exercising the right of redemption to

acquire the jointly owned interest, the acquisition will inure to the benefit of the joint owners. Johnston v. Johnston, 204 S.W. 469, 470 (Tex. App.—Texarkana 1918, writ ref'd), citing Roberts v. Thorn; and Radford v. Coker, 519 S.W.2d 934 (Tex. App.—Waco, 1975, writ ref'd n.r.e.). However, in Fielding v. White, 32 S.W.1054 (Tex. App—1895, writ ref'd), the cotenants, Fielding and White, each bought an undivided one-half interest separately from a common source subject to a pre-existing lien, with each assuming one-half of the outstanding debt. Fielding's purchase of the land at a foreclosure sale of the lien did not inure to the benefit of White. "[T]he relation existing between Fielding and White did not create between them such a fiduciary or trust relation as exists between tenants in common when holding under the same conveyance…." *Id.* at 1055.

The cotenant who redeems a jointly owned interest has a right to demand contribution from cotenants, and a lien remains in force to secure the redeeming cotenant's right for reimbursement from defaulting cotenants. Johnston, at 470. See Standard 18.30 regarding adverse possession claims among cotenants.

Under Texas Property Code Chapter 29, enacted in 1995 and amended in 2001, a co-owner who receives property due to the death of another person by inheritance, by will, by right of survivorship, or by a survivorship agreement, as well as certain nonprofit organizations exempt from federal income tax, may acquire another co-owner's undivided interest in real property by paying ad valorem taxes on the latter's behalf if the non-paying co-owner fails to reimburse the co-owner after a demand for reimbursement. Tex. Prop. Code §§ 29.001 and 29.002. This method is not exclusive, so common law remedies remain, and the chapter does not address monies expended for maintenance of, or improvement to, the common property. Ramos v. Unknown Heirs of Tomasa Gonzalez, 2016 WL 1690314 (Tex. App.—San Antonio April 27, 2016, no pet.) (mem. op). "This chapter applies only to real property that is not exempt from forced sale under the constitution or laws of this state," such as a homestead. Tex. Prop. Code §§ 29.001.

Caution:

While evidence that cotenants acquired their interests under a common deed of record is readily determined, an examiner may have difficulty determining whether cotenants are in a relationship of privity or mutual trust and confidence. Examples of such relationships include a trust, partnership, joint venture, close familial or marital relationship, or a contract relating to the co-owned property. Such a relationship is not necessarily indefinite in duration. See, e.g., MacDonald v. Follett, 175 S.W.2d 671 (Tex. App.—Galveston 1943), aff'd. 180 S.W.2d 334 (Tex. 1944).

Source:

Citations in the Comment; 2 James N. Johnson, Real Estate Trans. § 12:31 (Tex. Prac. Guide 2019).

History:

Adopted June 4, 2021; amended March 6, 2026.

Standard 19.50. Co-Tenant Conveyances and Leases

An examiner may ordinarily presume that a conveyance executed by one co-tenant purporting to convey the entire interest conveys only the grantor's interest, and the grantee becomes a co-tenant with the other co-tenants.

Comment:

"A conveyance by a tenant in common of the common property to a third person terminates the cotenancy between himself and his cotenant." Welch v. Armstrong 62 S.W.2d 335, 338 (Tex. App.— Texarkana 1933, writ ref'd). However, a deed by one co-tenant purporting to convey the entire interest conveys only the grantor's interest. Thomas v. Sw. Settlement & Dev. Co., 123 S.W.2d 290, 297 (Tex. 1939). See also Tex. Prop. Code § 5.003. But see Thedford v. Union Oil Co. of Cal., 3 S.W.3d 609 (Tex. App.—Dallas 1999, pet. denied) (holding that when a party obtained title to property from one co-tenant purporting to convey the entire title to the land, such conveyance constituted an ouster of the other cotenants under the particular facts and circumstances of the case). A deed that purports to convey the entire interest in a specific portion of the land held in common with other co-tenants is good as between the parties but is voidable by the other co-tenants insofar as the grantor's deed may affect their rights. Maverick v. Burney, 32 S.W. 512 (Tex. 1895).

Caution:

For greater detail regarding adverse possession among co-owners, see Standard 18.30.

Examiners should be aware that case law allows a co-tenant to ratify an oil and gas lease executed by another co-tenant. For example, if a co-tenant purports to lease all the property for oil and gas development, which is customary, then each of the other co-tenants may elect to ratify the lease and receive their proportionate shares of any royalty due under the lease. Tex. & Pac. Coal & Oil Co. v. Kirtley, 288 S.W. 619 (Tex. App.—Eastland 1926, writ ref'd). In the absence of ratification, each unleased co-tenant of the drillsite tract is entitled to its proportionate share of production less its proportional share of the drilling co-tenant's recovery of drilling, completion, and day-to-day operating costs. Cox v. Davison, 397 S.W.2d 200 (Tex. 1965).

If an unleased mineral co-tenant's interest is in a nondrillsite tract that has been pooled with the drillsite tract without consent of the unleased owner, then the unleased mineral co-owner is not entitled to any part of production. Superior Oil Co. v. Roberts, 398 S.W.2d 276 (Tex. 1966); Hunt Oil Co. v. Moore, 656 S.W.2d 634 (Tex. App.—Tyler 1983, writ ref'd n.r.e.). Although the co-tenant lessee has no duty to offer an unleased mineral co-tenant a right to participate in a pooled unit, Donnan v. Atl. Richfield Co., 732 S.W.2d 715 (Tex. App.—Corpus Christi 1987, writ denied), the unleased mineral cotenant may ratify the nondrillsite lease executed by another co-tenant or ratify the pooling. Montgomery v. Rittersbacher, 424 S.W.2d 210 (Tex. 1968) (relating to a nonparticipating royalty owner). Although rarely encountered, if a lease only purports to lease the lessor's fractional interest, then that lease may not be ratified. No case law addresses whether a pooling agreement can limit the right of ratification.

Source:

Citations in the Comment.

History:

Adopted June 4, 2021; amended March 6, 2026.

Standard 19.60. Executive Right

A conveyance of a mineral interest by an executive rights owner also conveys the executive right unless reserved or excepted. A conveyance or reservation of a nonparticipating royalty interest does not include the executive right. Owing to the fact-specific nature of an exercise of executive rights, an examiner ordinarily should not opine about whether the owner of an executive right has exercised its executive powers consistently with its duty of utmost good faith and fair dealing to the non-executive owners.

Comment:

A conveyance of a mineral interest by an executive rights owner will also convey the executive interest unless reserved or excepted. Day & Co. v. Texland Petroleum, Inc., 786 S.W.2d 667, 669-70 (Tex. 1990) (holding that the executive right is alienable and may be subdivided); Lesley v. Veterans Land Bd., 352 S.W.3d 479, 487 (Tex. 2011). A mineral interest shorn of the executive right remains an interest in the mineral fee. Altman v. Blake, 712 S.W.2d 117, 118-19 (Tex. 1986).

The owner of the executive right is charged with a duty of utmost good faith and fair dealing towards the non-executive mineral interest from which that executive right has been separated. Schlittler v. Smith, 101 S.W.2d 543, 544-45 (Tex. 1937). Generally, this duty requires a party holding the executive right to acquire for the holder of the non-executive

right every benefit exacted for the executive and to seek the same terms and benefits as the executive would have sought in the absence of an outstanding, non-executive interest. Manges v. Guerra, 673 S.W.2d 180 (Tex. 1984). This duty extends to other nonparticipating interests derived from a mineral estate, such as a non-participating royalty interest. Friddle v. Fisher, 378 S.W.3d 475, 480-81 (Tex.App. —Texarkana 2012, pet. denied).

Caution:

Ordinarily, an examiner should avoid opining on whether the owner of an executive right has properly exercised its powers. A co-owner in land is not a trustee or agent for, and owes no fiduciary duty to, the other co-owners. Myers v. Crenshaw, 116 S.W.2d 1125 (Tex. App.—Texarkana 1938), aff'd, 137 S.W.2d 7 (Tex. 1940). However, Texas case law recognizes that the owner of an oil, gas or mineral executive right does owe a high duty of care to non-executive owners. In Manges v. Guerra, 673 S.W.2d 180 (Tex. 1984), the court affirmed lease cancellation and punitive damages for failing to negotiate an oil, gas, and mineral lease with third persons but qualified the duty owed to the non-executive as not requiring the executive owner to consider the interests of the non-executive before his own. In In re Bass, 113 S.W.3d 735 (Tex. 2003), the court rejected liability for the executive for self-dealing where the executive had not negotiated a lease that would have resulted in revenue for non-participating royalty owners. However, the court did find liability where the executive rights owner imposed restrictive covenants that prevented drilling on the acreage covered by the mineral estate. Lesley v. Veterans Land Bd., 352 S.W.3d 479 (Tex. 2011). Subsequently the court held that liability could be imposed for failing to lease where the refusal was arbitrary or motivated by self-interest to the non- executive's detriment. Texas Outfitters Ltd. v. Nicholson, 572 S.W.3d 647 (Tex. 2019). The party who takes a lease from the owner of the executive right is ordinarily protected from liability to non-executive owners absent collusion between the executive and the lessee. KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70, 85-86 (Tex. 2015).

Do not confuse an executive right with a power of attorney. See Standard 8.10.

Source:

Citations in the Comment.

3A Aloysius A. Leopold, Land Titles and Title Examination § 14.31 (Tex. Prac. 3d ed. 2005).

History:

Adopted June 4, 2021; amended March 6, 2006.

Standard 19.70. Partition

Subject to exceptions, co-owned property may be partitioned by agreement or by court decree. An examiner should verify that the proceedings in a partition

action, whether in kind or by sale, were performed in compliance with the applicable partition statutes and rules of civil procedure. In a voluntary partition, the examiner should determine whether each co-owner was a party to the partition. Although an equitable partition may be valid, an examiner with notice of a possible equitable partition should require proper documentation to confirm the partition.

Comment:

Partition generally: A partition may occur by a district court action, by estate administration, or by voluntary agreement. A co-owner of real property may compel a partition of the property among the co-owners by an action in a district court in a county in which any part of the property is located. Tex. Prop. Code §§ 23.001 and 23.002, Tex. Rules of Civ. Proc. 756 et seq., Henderson v. Chesley, 273 S.W. 299 (Tex. App.—Texarkana 1925), writ denied per curiam, 292 S.W. 156 (Tex. 1927); Humble Oil & Ref'g Co. v. Lasseter 95 S.W.2d 730 (Tex. App.—Texarkana 1936, writ dism'd). In a partition action, the trial court shall issue an order decreeing partition. Tex. R. Civ. P. 760.

Suit for partition of land requires a common interest in the land and equal right to present possession. Manchaca v. Martinez, 148 S.W.2d 391 (Tex. 1941). Partition applies to parties with possessory interests that are the subject of the partition action. Partition does not affect nonpossessory interests, Belgam Oil Co. v. Wirt Franklin Petroleum Corp., 209 S.W. 2d 376 (Tex. App.—Galveston- 1948, no writ). Unless the homestead right has vested into a present possessory life interest, a homestead right attaching to a property interest held by a co-owner is subordinate to another co-owner's right to partition. Grant v. Clouser, 287 S.W.3d 914 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

The law favors partition in kind of land or minerals over partition by sale. Outlaw v. Bowen, 285 S.W.2d 280 (Tex. Civ. App. 1955, writ ref'd n.r.e.). A partition in kind vests each party with separate ownership of the allotted land and does not convey title. Rather a partition of land dissolves co-ownership. Houston Oil Co. v. Kirkindall, 145 S.W.2d 1074 (Tex. 1941). When necessary for access in a partition in kind, the examiner should confirm the grant of a nonexclusive easement for ingress and egress on a tract of partitioned property to provide access to other partitioned tracts, unless waived. Tex. Prop. Code §23.006. Although the law favors partition in kind, if property cannot be fairly and reasonably partitioned in kind or if the value of the property would be materially diminished by a partition in kind, then the court will order a partition by sale of all or a portion of the property. Tex. R. Civ. P. 770. If there is an absence of knowledge of the location of minerals and any value or existence of such minerals is speculative, then the mineral owner may be able to secure partition in kind of the minerals. Otherwise, partition may be secured by sale of the entirety of the minerals. White v. Smyth, 147 Tex. 272, 214 S.W. 967 (1948).

Estate administration proceedings: A partition may occur within the administration of an estate in Texas, which proceedings could occur outside the county where the property is located. At any time after the first anniversary of the date original letters testamentary or of administration were granted, an executor, administrator, heir, or devisee of a decedent's estate,

by written application filed in the court in which the estate is pending, may request the partition and distribution of the estate. Texas Estates Code §360.001.

Voluntary partition: Co-owners may agree to partition. Joinder of all co-owners is necessary for the partition agreement to be binding; however, if a co-owner has not signed the partition agreement, the co-owners who sign may be estopped to deny that it binds them. An agreed partition made without the joinder of all co-owners is void as to the nonsigning co-owner unless it is subsequently ratified by the nonsigning co-owner. Saenz v. Thorp Petroleum Corp., 2011 WL 1303802 (Tex. App.—San Antonio July 15, 2015, pet. denied) (mem op.), citing Garza v. de Montalvo, 217 S.W.2d 988 (Tex. 1949). Cf., Joyner v. Christian, 113 S.W.2d 1229 (Tex. 1938) (holding that a partition agreement not signed by all co-owners was void but became effective when the evidence showed that the nonjoining co-owner had acquiesced to the partition).

A parol partition can be made by co-owners and is not invalid under the statute of frauds. Aycock v. Kimbrough, 12 S.W. 71 (Tex. 1887), Cantrell v. Woods, 150 S.W.2d 838 (Tex. App.—Waco 1941, no writ). However, if an examiner has notice of a parol partition, the examiner should require written evidence that verifies the parol partition.

Agreement not to partition: The right to partition is not absolute and may be waived by agreement, express or implied. MCEN 1996 Partnership v. Glassell, 42 S.W.3d 262 (Tex. App.—Corpus Christi-Edinburg 2001, pet. denied). Co-owners may implicitly agree not to partition, and such agreements are enforceable for a reasonable time, Dimock v. Kadane, 100 S.W.3d 622, 625 (Tex. App.—Eastland 2003, pet. denied), Long v. Hitzelberger, 602 S.W.2d 321 (Tex. App.—Eastland 1980, no writ), Davis v. Davis, 44 S.W.2d 447 (Tex. App.—Texarkana 1931, no writ) (dicta).

Occasionally, tenants in common may record an agreement to govern their relationship. Provisions may include duration, a separate management agreement, voting and approval process, additional contribution or assessment provisions, rights of first refusal, provisions relating to partition (subject to buy-sell procedures), purchase option (by the manager), call options by the tenants, disclaimer of partnership, dispute resolution, and governing law. An examiner should ordinarily presume that such agreements are valid.

An agreement not to partition may be implied. In Long v. Hitzelberger, 602 S.W.2d 321 (Tex. App— Eastland 1980, no writ), Hitzelberger, under the terms of a letter agreement, conveyed a partial interest in an oil and gas lease in return for Long's drilling wells on the property. Subsequently, the parties entered into an operating agreement, which expressly incorporated by reference the prior letter agreement and provided that the terms of the letter agreement would prevail in case of a conflict. Long filed suit to partition. Even though the parties had deleted a printed provision in the operating agreement waiving the right to partition, the court of appeals affirmed the trial court's denial of partition. The court of appeals reasoned: "[T]he contract [letter agreement] requires . . . the drilling of two wells within four years. We conclude that it must be inferred by such clear language that the parties did not intend for their estate to be partitioned." Id. at 323.

In Odstrcil v. McGlaun, 230 S.W.2d 353 (Tex. App.—Eastland 1950, no writ), the mineral owner, McGlaun, conveyed the minerals to Birdwell, reserving 1/2 but further gave Birdwell a power of attorney to execute leases for McGlaun's reserved 1/2. The court held that the power of attorney estopped McGlaun from seeking partition.

Ownership of the general and the limited common elements of a condominium regime may not be partitioned or divided while they are "suitable for a condominium regime" and, even then, cannot be partitioned unless any mortgages have been paid or the mortgagee has consented to partition. Any agreement to the contrary is void. Tex. Prop. Code § 81.108.

The fact that co-owners obtained a loan secured by deed of trust did not raise an implied agreement not to partition. Lichtenstein v. Lichtenstein Bldg. Corp., 442 S.W.2d 765 (Tex. App.—Corpus Christi 1969, no writ).

Charitable trust: A charitable trust cannot be divested of a mineral interest by partition except where it has refused a fair and reasonable offer to lease. Tex. Prop. Code § 124.002.

Heirship property: Effective September 1, 2017, "Heirs' property" must be partitioned per the Texas Uniform Partition of Heirs' Property Act, Tex. Property Code §§ 23A.001-23A.013. "Heirs' property" is defined as:

> real property held in tenancy in common that satisfies all of the following requirements as of the filing of a partition action:
>
> (A) there is no agreement in a record binding all the cotenants that governs the partition of the property;
>
> (B) one or more of the cotenants acquired title from a relative, whether living or deceased; and
>
> (C) any of the following applies:
>
> (i) 20 percent or more of the interests are held by cotenants who are relatives;
>
> (ii) 20 percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or
>
> (iii) 20 percent or more of the cotenants are relatives.

The Act sets out provisions relating to the service of notice of a petition in a partition action, the appointment of commissioners by the court to partition property in accordance with a decree of partition, the determination of value of heirs' property subject to a partition

action, and cotenant buyout of the property interests of cotenants requesting partition by sale. The Act provides for the sale by open-market sale, sealed bids, or auction.

Caution:

Equitable partition. While Texas case law recognizes the doctrine of equitable partition, an examiner should not rely on this doctrine in absence of a court decree applying the doctrine. Thomas v. Sw. Settlement & Dev. Co., 123 S.W.2d 290 (Tex. 1939).

Joint tenancy with right of survivorship. Presumably, since one joint tenant with right of survivorship may unilaterally sever the joint tenancy into a tenancy in common, a joint tenant with right of survivorship should have the right to file a partition action; however, no relevant Texas case so states and the Uniform Partition of Heirs' Property Act, Tex. Property Code §§ 23A.001-23A.013, defines "heirs' property" as "real property held in tenancy in common."

Joinder of oil and gas lessors, lessees, and overriding royalty owners. Partition of the surface does not affect previously severed mineral interests or oil and gas leases. Tex. Prop. Code §23.004(c). In Garza v. de Montalvo, 217 S.W.2d 988 (Tex. 1949), lessors were allowed to partition land and minerals in kind without the joinder of the oil and gas lessee. In Texas Oil and Gas Corp. v Ostrom, 638 S.W.2d 231 (Tex. App—Tyler 1982, writ ref'd. n.r.e.), the court held that oil and gas lessors are not necessary parties to a partition action among lessees, and if not joined, their interest is not affected. However, in Chaffin v. Hall, 210 S.W.2d 191 (Tex. App—Eastland 1948, writ ref'd. n.r.e.), the court affirmed the partition in kind of an oil and gas lessor's interest, holding that a lessor may be joined in a partition action between lessees and that the lessor's royalty and possibility of reverter may be partitioned in such action. On the other hand, Belgam Oil Co. v Wirt Franklin Petroleum Corp., 209 S.W.2d 376 (Tex. App.—Galveston 1948, no pet.), the court concluded that the owner of an overriding royalty could not be compelled to join in a partition action filed by a lessee. The court held that the property could be partitioned by sale, subject to the overriding royalty and subject to an adjustment in the division of the proceeds to account for the fact that the overriding royalty burdened only one co-owner lessee's interest. It is difficult to reconcile these four cases.

Source:

Citations in the Comment; 3A Aloysius A. Leopold, Land Titles and Title Examination § 14.25 (Tex. Prac. 3d ed. 2005); 5A Aloysius A. Leopold, Land Titles and Title Examination § 38.9 (Tex. Prac. 3d ed. 2005).

History:

Adopted June 4, 2021; amended March 6, 2026.

Standard 19.80. Co-Owner Claims Against Other Co-Owners

An examiner ordinarily does not opine upon a potential claim of a co-owner against another co-owner for waste, contribution, or profits or for recoupment for improvements.

Comment:

A title examiner should report the existence of a cotenancy, the identity of the co-owners, and the extent of the undivided interests of each of them but, subject to Standard 19.40, an examiner does not usually comment on the rights and duties of the co-owners as among each other.

Generally, all co-owners have the right to occupy the property, extending to every part of it, but not the right to occupy any particular part to the exclusion of other co-owners. Sayers v. Pyland, 161 S.W.2d 769, 771 (Tex. 1942). One co-owner may not waste or despoil the land to the detriment of other co-owners. See Rancho Viejo Cattle Co. v. ANB Cattle Co., 642 S.W.3d 850, 867-69 (Tex. App.—San Antonio 2021, pet. denied). All co-owners have a duty to preserve the property. Henry v. Brooks, 651 S.W.3d 657 (Tex. App.—Tyler 2022, no pet.). Thus, a co-owner who expends funds for the preservation of the common property is entitled to seek contribution from other co-owners, Wooley v. West, 391 S.W.2d 157, 160 (Tex. App.—Tyler 1965, writ ref'd n.r.e.), but is not entitled to compensation for personal services rendered in managing the property. Gonzalez v. Gonzalez, 552 S.W.2d 175, 182 (Tex. App.—Corpus Christi 1977, writ ref'd n.r.e.). A co-owner may place improvements on the common property if that can be done without injury or detriment to the rights of other co-owners. Gose v. Burnett, 60 S.W.2d 886 (Tex. App.—Texarkana 1933, writ ref'd). A nonconsenting co-owner has no obligation to pay for improvements, Perez v. Hernandez, 658 S.W.2d 697, 701 (Tex. App.—Corpus Christi 1983, no writ), although the nonconsenting owner may be charged for those in a partition action. See I-10 Colony, Inc. v. Lee, 393 S.W.3d 467, 478 (Tex. App.—Houston [14th Dist.] 2012, pet denied).

In 2011, the Legislature adopted Chapter 65 of the Texas Property Code, which allows a cotenant to act as an agent for a cotenant, whether known or unknown, to encumber the common property for purposes of "preserving or improving the residential property." The chapter applies only to residential property primarily designed for not more than four families, is not more than ten acres, and for which one co-owner has received a residence homestead exemption under Tex. Tax Code § 11.13. Tex. Prop. Code. § 65.001. The co-owner is permitted to act "in the name of and on behalf of another co-owner, whether known or unknown, as the co-owner's statutory agent and attorney-in-fact," but only if the co-owner has occupied the property for more than 5 years, has a residence homestead exemption, has paid all ad valorem taxes without delinquency and without contribution from the other co-owner, and makes certain filings. Tex. Prop. Code § 65.002. The other co-owner may not repudiate such lien and the initiating co-owner is the sole obligor of the debt incurred under the contract or mortgage. Tex. Prop. Code § 65.004.

A co-owner who uses and cultivates land has no duty to account for profits unless another co-owner has made a formal demand for possession in common and such possession has been

refused. Thompson v. Jones, 14 S.W. 222 (Tex. 1890). A co-owner in possession has no obligation to pay rent to co-owners not in possession, unless the other co-owners have been barred from using the co-owned property. Id.; In re Estate of Gober, 350 S.W.3d 597 (Tex. App.—Texarkana 2011, no pet.). However, if one co-owner claims the right of exclusive possession, another co-owner may recover for use and occupancy of that co-owner's portion of the property without demanding possession. Vermillion v. Haynes, 215 S.W.2d 605, 608 (Tex. 1948); Dyer v. Hardin, 323 S.W.2d 119, 126-27 (Tex. App.—Amarillo 1959, writ ref'd n.r.e.).

Any co-owner may sell native timber standing on co-owned property and pass good title; however, the selling co-owner is liable to the nonselling co-owners for their proportionate part of the timber cut and removed where the timber cut was more than the selling co-owner's share. Kirby Lumber Co. v. Temple Lumber Co., 83 S.W.2d 638 (Tex. 1935); Green v. Crawford, 662 S.W.2d 123 (Tex. App.—Tyler 1983, writ ref'd n.r.e.). In Kirby, the Texas Supreme Court held that a bona-fide purchaser of timber takes free of equitable claims and liens of other co-owners, Id. at 643, but the court expressly noted the possibility that a purchaser might be on notice of such equitable claims and would in that event take subject to them. The court in Green held the selling co-owner's vendee liable under those circumstances, 662 S.W. 2d at 127, citing Collier v. William Cameron & Co., 117 S.W. 915 (Tex. App.—San Antonio 1909, no writ).

A co-owner can produce oil and gas or lease its interest for that purpose without liability to other co-owners for waste. Hamman v. Ritchie, 547 S.W.2d 698 (Tex. App.—Fort Worth 1977, writ ref'd n.r.e.). In the context of mineral development and production, the rule has been, at least since Burnham v. Hardy Oil Co., 147 S.W. 330, 335 (Tex. App.—San Antonio 1912), aff'd, 195 S.W. 1139 (Tex. 1917), that each co-owner of an interest in a tract of land may extract the minerals without the consent of other co-owners, accounting to them for their share of net profits. "[A] cotenant who produces minerals from common property without having secured the consent of his cotenants is accountable to them on the basis of the value of the minerals taken less the necessary and reasonable cost of producing and marketing the same." Such costs include the cost of drilling and completing the producing well. Cox v. Davison, 397 S.W.2d 200, 201 (Tex. 1965); see, e.g., Byrom v. Pendley 717 S.W.2d 602, 605 (Tex. 1986); Cimarex Energy Co. v. Anadarko Petrol. Corp., 574 S.W.3d 73, 95 (Tex. App.—El Paso 2019, pet. denied).

One co-owner does not have an affirmative duty to drill and produce minerals for the benefit of the other co-owners. Zimmerman v. Texaco, Inc. 409 S.W.2d 607, 614 (Tex. App.—El Paso 1966), writ ref'd n.r.e. per curiam, 413 S.W.2d 387 (Tex. 1967). Co-ownership, in and of itself, does not create a mining partnership. Co-owners who took no actual part in drilling operations or in leasing of a drilling rig did not become members of a mining partnership and were not liable for the rental value of the rig. Rucks v. Burch, 156 S.W.2d 975 (Tex. 1941).

As against a trespasser, a co-owner is entitled to possession of the whole tract and may bring a trespass to try title action against a trespasser without joining the other co-owners. Dahlberg v. Holden, 238 S.W.2d 699, 702 (Tex. 1951). A stranger to title, such as a

trespasser, cannot assert the outstanding title of non-joined co-owners as a defense. Whittle v. Johnston, 392 S.W.2d 867, 870 (Tex. App.—Texarkana 1965, writ ref'd n.r.e.).

See Standard 18.30 for discussion of co-ownership and adverse possession.

Source:

Citations in the Comment; 3A Aloysius A. Leopold, Land Titles and Title Examination §§ 13.24, 13.25 (Tex. Prac. 3d ed. June 2005); 5A Aloysius A. Leopold., Land Titles and Title Examination §§ 13.26, 14.32 (Tex. Prac. 3d ed. June 2005).

History:

Adopted June 4, 2021

CHAPTER XX

ZONING AND LAND USE RESTRICTIONS

Standard 20.10. Zoning Ordinances

Unless specifically directed by the client, an examiner generally does not address compliance with governmental laws, rules, or ordinances affecting the use of the land under examination. However, where the land is located in a municipality or in certain recreational areas or military zones, the client may ask the examiner to identify whether any zoning ordinances affect the use of the land.

Comment:

City ordinances are not required to be recorded. Nevertheless, a person intending to purchase real estate is charged with notice as a matter of law of duly enacted zoning ordinances. The burden is on the purchaser to consult the records of the city. Uvalde Co. v. Tribble, 292 S.W. 932 (Tex. App.—San Antonio), writ dism'd, 300 S.W. 23 (Tex. Comm'n App. 1927). Ordinances are not maintained in a uniform manner, but in the case of cities, the ordinances are normally maintained in the city administration offices.

The Texas Enabling Zoning Statute is contained in Chapter 211 of the Local Government Code. For the most part, zoning powers are delegated to municipalities; however specific, limited land-use regulatory authority has been delegated to certain counties and special political subdivisions. That limited authority is conferred in Chapter 231 of the Local Government Code, including Padre Island §§ 231.011-.023, Amistad Recreation Area §§ 231.031-.040, Military Zones §§ 231.051-.054, as well as certain lakes and the El Paso Mission Trail Historical Area.

Zoning contemplates the prohibition of certain physical uses of land that are detrimental to the health, safety, and welfare of the community. Zoning allows a municipality to create districts where land uses are limited or restricted to specific enumerated purposes. Lacy v. Hoff, 633 S.W.2d 605, 609 (Tex. App.— Houston [14th Dist.] 1982, writ ref'd n.r.e.). Municipal corporations have the right, under the police power to safeguard the health, safety, and general welfare of their citizens by such reasonable regulations as are necessary for that purpose and zoning ordinances fall within the police power of municipalities. Ellis v. City of West Univ. Place, 141 Tex. 608, 175 S.W.2d 396, 397 (1943).

The power of a city to zone does not override restrictive covenants in existence at the time a zoning ordinance is passed. First State Bank of Corpus Christi v. James, 471 S.W.2d 868 (Tex. App.—Corpus Christi 1971, no writ). If the restrictive covenant is less restrictive than the ordinance, the ordinance prevails. If the restrictive covenant is more restrictive than the ordinance, the covenant prevails. Farmer v. Thompson, 289 S.W.2d 351, 354 (Tex. App.—Fort Worth 1956, writ refused n.r.e.).

A city ordinance is presumed to be valid. The presumption applies to amendatory zoning ordinances as well as an original comprehensive zoning ordinance. Courts should not interfere unless the amending ordinance is clearly unreasonable and arbitrary and represents a clear abuse of discretion. Baccus v. City of Dallas, 450 S.W.2d 389 (Tex. App.—Dallas), writ ref'd n.r.e., 454 S.W.2d 391 (Tex. 1970). City zoning authority may be preempted by legislation. See, e.g., Tex. Nat. Res. Code § 81.0523 (preempting certain ordinances regulating oil and gas operations).

Zoning ordinances are not rendered invalid or inoperative for failure of enforcement. The city is not estopped to enforce a zoning ordinance because of its failure to enforce it on other occasions. City of Lufkin v. McVicker, 510 S.W.2d 141 (Tex. App.—Beaumont 1973, no writ).

Source:

Citations in the Comment.

History:

Adopted June 4, 2021.

Standard 20.20. Real Covenants and Equitable Servitudes

An examiner should identify any restrictions affecting the use of the land under examination.

Comment:

Ordinarily, an examiner should presume that restrictions on the use and enjoyment of land in recorded instruments are valid and enforceable against landowners and any successors and assigns to the land. An examiner should also presume that restrictions on the use and enjoyment of land in unrecorded instruments of which the examiner has knowledge are valid and enforceable against landowners and any successors and assigns to the land even though a bona fide purchaser might take free of the restriction. An examiner should expressly disclose an apparent violation of a covenant of which examiner has knowledge.

Nevertheless, the usual priority rules apply. In Property Owners of Leisure Land Inc., Del Mar Properties Owners Assoc. v. Woolf & Magee, Inc., 786 S.W.2d 757 (Tex. App.—Tyler 1990, no writ), restrictions on the use of land were imposed after the minerals had been severed. An oil and gas lessee later bought the surface estate to a couple of restricted lots and began building a road across the lots in violation of the restrictions. The property owners' association sought to enjoin the construction of the road. The court held that the oil and gas lessee's acquisition of the surface estate in the two lots subject to the restrictions did not detract from its status as the lessee of a mineral interest that had been severed prior to the imposition of the restrictions:

Woolf & Magee, as the surface owner of lots 67 and 110, may be subject to the restrictions, since the restrictions were in force at the time the surface estate was conveyed to it. But Woolf & Magee's use of the surface is not based on its rights as the surface owner. Rather, it derives from the right of the mineral owner to use the surface. Therefore Woolf & Magee is not limited by the restrictive covenants imposed subsequent to the severance of the mineral estate.

Id. at 761.

Unfortunately, the law of real covenants and equitable servitudes is somewhat uncertain in Texas. The following discussion offers a general summary, but an examiner should ordinarily conduct an examination in accord with the prior paragraph.

The most common types of restrictions on the use of land recognized in the common law are the easement, the profit a´ prendre, the real covenant, and the equitable servitude. For an easement see Standard 5.50. For a profit a´ prendre, see Standard ____ .

Restrictions on land may be created in four ways: (1) by grant or reservation, (2) by mutual agreement, (3) by implication, and (4) by a general plan of development. Selected Lands Corporation v. Speich, 702 S.W.2d 197 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

Covenants are either real or personal. The primary distinction between the two is that real covenants run with the land and personal covenants do not. In its broadest sense a real covenant is a contract. A real covenant may be express or implied. A real covenant (or covenant that runs with the land) is a covenant that burdens an interest in land, and that burden cannot be separated from the land or transferred apart from the land. Ordinarily, a real covenant is binding on the heirs, successors, and assigns of the covenanting parties.

In general, a real covenant is typically appurtenant to benefitted land, but if the benefit of the covenant is held in gross, then the burden might not run with the land. Real covenants may be enforced at law for damages, but parties generally prefer to enforce them specifically in equity as an "equitable servitude." Typically, a real covenant may be specifically enforced as an equitable servitude when (i) the successor to the burdened land took its interest with notice of the restriction; (ii) the covenant limits the use of the burdened land; and (iii) the covenant benefits the land of the party seeking to enforce it. Note that the term real covenant (or covenant running with the land) is the term used to identify the burden at law in a suit for damages, while equitable servitude is commonly the term used to identify the burden at equity in a suit for specific performance.

In the most general sense, a subsequent purchaser who takes with notice of a real covenant takes subject to it. Frey v. DeCordova Bend Estates Owners Ass'n, 632 S.W.2d 877, 879 (Tex. App.—Fort Worth 1982), aff'd 647 S.W. 2d 246 (Tex. 1983). A purchaser is bound by only those restrictive covenants attaching to the property of which he has actual or constructive notice; thus, one who purchases for value without notice takes the land free from restriction. Hill v. Trigg, 286 S.W. 182, 184 (Tex.Com. App. 1926). However, where the "record

first indicates…a reference to the deed restrictions on the [recorded] warranty deed…defendant cannot avoid the constructive notice that accompanies recordation." Lee v. Powers, 446 S.W.2d 938 (Tex. App.—Houston [14th Dist.] 1969, no writ.)

Texas case law is somewhat unclear as to the elements necessary to enforce a real covenant whether in law or in equity. In Clear Lake Apts. v. Clear Lake Utilities, 537 S.W. 2d 48, 51 (Tex. App.—Houston [14th Dist.]), modified on other grounds, 549 S.W.2d 383 (Tex. 1977), the court said the parties making a real covenant must be in "privity of estate" when the covenant was initially created. This is sometimes called "horizontal" privity, but whether it is required in both law and equity in Texas is unclear. In addition, subsequent takers are supposed to be in "vertical" privity with each other—at common law a successor must have succeeded to the identical intertest of the promisor, but the strictness of this requirement has been relaxed in some states. In Texas, a restrictive covenant may be enforced only by the parties to the restrictive covenant agreement and those parties in privity with them. Privity of estate exists when there is a mutual or successive relationship to the same rights of property. Any person entitled to benefit from a restrictive covenant may enforce it. Moseley v. Arnold, 486 S.W.3d 656 (Tex. App.—Texarkana 2016, no pet.). The acceptance of a deed made subject to restrictions acknowledges the existence of, but not the validity of the restrictions. Joe T. Garcia's Enterprises, Inc. v. Snadon, 751 S.W.2d 914 (Tex. App.—Dallas 1988, writ denied). If a deed does not acknowledge the validity and enforceability of restrictions, then the grantee cannot be estopped from claiming the restrictions are not valid and enforceable. Teal Trading and Development, LP v. Champee Spring's Ranches Property Owners Association, 432 S.W.3d 381 (Tex. App.—San Antonio 2014, pet. denied).

Whether gas gathering, transportation, and processing agreements are executory contracts that can be rejected pursuant to Section 365 is uncertain due to the fact-specific nature of the agreements and conflicting case law. For a brief discussion, see Standard 12.100.

At common law, restrictions on the use of property are not generally favored, and provisions relating to restrictions in written instruments concerning real estate must be construed strictly in favor of the grantee and against the grantor, resolving any ambiguity in favor of the free use of the land. Baker v. Henderson, 137 Tex. 266, 153 S.W.2d 465 (Tex.Com.App. 1941). Under the common law, a restrictive covenant's words cannot be enlarged, extended, stretched, or changed by construction. Wilmoth v. Wilcox, 734 S.W. 2d 656, 657 (Tex. 1987). Nevertheless, when restrictions are confined to a lawful purpose and are within reasonable bounds and the language employed is clear, such covenants will be enforced. Wald v. West MacGregor Protective Assoc., 332 S.W.2d 338, 343 (Tex. App.—Houston 1960, writ ref'd n.r.e.). Chapter 202 of the Texas Property Code addresses restrictive covenants in residential subdivisions and applies "regardless of the date on which they were created." Tex. Prop. Code Ann. § 202.002. Tex. Prop. Code Ann. § 202.003 provides that a restrictive covenant is to be liberally construed to "give effect to its purpose and effect." The Texas Supreme Court has noted, but not fully resolved, the potential conflict between the common law and § 202.003(a); see Pilarcik v. Emmons, 966 S.W. 2d 474, 478 (Tex. 1998). The term "restrictions" generally means one or more restrictive covenants contained or incorporated by reference in a properly recorded map, plat, replat, declaration, or other instrument filed in

the county real property records, map records, or deed records of each county in which the property to which the dedicatory instruments relate is located. Tex. Prop. Code Ann. § 201.002. A dedicatory instrument has no effect until the instrument is filed. Tex. Prop. Code Ann. § 202.006. A dedicatory instrument includes restrictive covenants and all lawful amendments to it. Tex. Prop. Code Ann. § 202.001.

In general, courts recognize the right of parties to impose conditions restricting the use of land conveyed, providing that those restrictions are not unlawful, impossible, repugnant to the grant or contrary to public policy. Curlee v. Walker 244 S.W. 497 (Tex. 1922). A racially restrictive covenant is unenforceable. Shelley v. Kraemer, 334 U.S. 1 (1948) and Clifton v. Puente, 218 S.W.2d 272 (Tex. App.— San Antonio 1948, writ ref'd).

As provided in Tex. Prop. Code Ann. § 202.007, a property owner's associations may not include or enforce a provision in a dedicatory instrument that prohibits or restricts a property owner from: (1) implementing measures promoting solid-waste composting of vegetation; (2) intalling rain barrels or a rainwater harvesting system; (3) implementing efficient irrigation systems; (4) using a drought-resistant landscaping or water conserving natural turf.

This section does not restrict a property owner's association from regulating the above, including size, type, shielding, materials, and location. This section does not apply to property owners' associations located in a municipality with a population of more than 175,000 that is located in a county in which another municipality with a population of more than one million is predominately located or that manages or regulates a development in which at least 4,000 acres is subject to a covenant, condition, or restriction designating the property for commercial use, multifamily dwellings, or open space.

Chapter 202 places limits on restrictions regarding: solar energy devices, see § 202.010; certain roofing materials, see § 202.011; flag display, see § 202.012; display of certain religious items, see § 202.018; standby electric generators, see § 202.019; firearms and ammunition, see § 202.020; certain sales of beverages by children, see § 202.020.

Typically, the developer of a residential or mixed-use land development, acting in the capacity of a declarant, executes a "Declaration of Covenants, Conditions, Restrictions and Easement" and then develops the physical infrastructure of the development. The term declarant refers to an owner of property who records a declaration containing or referencing restrictive covenants in contemplation of a scheme to subdivide and develop the restricted property, e.g., for single-family homes. The property owners in a common development have the right to modify the restrictions but it requires the same mutuality to vary the restrictions as it did to create them. One party cannot modify or repeal a restrictive covenant without the concurrence of all the other owners in the common development. Farmer v. Thompson, 289 S.W.2d 351, 354 (Tex. App.—Fort Worth 1956, writ ref'd n.r.e.). Restrictive covenants can be rescinded by the execution of a release by all persons who own property in a restricted subdivision. Amason V. Woodman, 498 S.W.2d 142, 143 (Tex. 1971). The instrument creating the restrictions can provide a procedure for amending them, including the ability to modify or repeal restrictions by less than a unanimous vote. A plan of development can be abandoned; however, it is necessary to establish a waiver of the plan and to show such plan has

been violated to such an extent to reasonably lead to the conclusion it had been abandoned. Barham v. Reames, 366 S.W.2d 257 (Tex. App.—Fort Worth 1963, no writ). For certain residential restrictive covenants there are special procedures set forth in chapters 200 to 215 of the Texas Property Code that pertain to particular types of developments and vary depending on whether located in certain cities, counties and unincorporated areas based on population or location. Each chapter contains the procedural details for modification, repeal, or extension of restrictive covenants. Generally, changes to restrictive covenants made under these chapters become effective when filed in the county deed records.

To create a restrictive covenant running with the land: (1) the covenanting parties must be in privity of estate; (2) the covenant must relate to something in esse or assigns must be named if they are to be found in the covenant; (3) the covenant must touch or concern the land; and (4) the parties must intend that the restrictive covenant run with the land. Unless these requirements are present, the covenant cannot bind subsequent vendees. Billington v. Riffe, 492 S.W.2d 343, 345, 346 (Tex. App.—Amarillo 1973, no writ). The chief consideration in deciding whether a covenant runs with the land is whether it is so related to the land as to enhance its value and confer a benefit upon it. Prochemco, Inc. v. Clajon Gas Co., 555 S.W.2d 189, 191 (Tex. App.—El Paso 1977, writ refused n.r.e.).

In the absence of a general plan of development there is no implied covenant as to the size or further subdivision of lots shown on a map. The mere filing of a map depicting lots, but which has no declaration thereon restricting the size of the lots is not a prohibition upon re-subdividing into smaller lots. Lehmann v. Wallace, 510 S.W.2d 675, 680 (Tex. App.—San Antonio 1974, write refused n.r.e.) citing MacDonald v. Painter, 441 S.W.2d 179 (Tex. 1969).

A restrictive covenant may be unilateral but are most often reciprocal. Most commonly, reciprocal restrictive covenants arise when a common owner of related parcels of land files a declaration, as discussed above. However, reciprocal restrictions may arise by implication where the owner of related land subdivides and conveys lots with restrictions, e.g., restrictions to build only single-family homes for the benefit of the land retained, thereby evidencing a scheme or intent that the entire tract should be similarly treated. When applicable, the burden placed upon the lots conveyed is by operation of law reciprocally placed upon the land retained.

The doctrine of implied reciprocal negative easements applies when an owner of real property subdivides it into lots and sells a substantial number of those lots with restrictive covenants designed to further the owner's general plan or scheme of development. The central issue is usually the existence of a general plan of development. The lots retained by the owner, or lots sold by the owner from the development without express restrictions to a grantee with notice of the restrictions in the other deeds, are burdened with what is variously called an implied reciprocal negative easement, or an implied equitable servitude, or negative implied restrictive covenant, that they may not be used in violation of the restrictive covenants burdening the lots sold with the express restrictions. Evans v. Pollock, 796 S.W. 2d 465 (Tex. 1990) (applying the doctrine). Cf. Saccomanno v. Farb, 492 S.W.2d 709, 713 (Tex. App.—Waco 1973, writ refused n.r.e.) (acknowledging this doctrine of implied reciprocity but refusing to apply it). Mere recitals in a deed subjecting the property to

"all…restrictions…apparent from visual inspection" did not create restrictions where none already existed concerning an adjoining tract that was not within the boundaries of the subdivision or subject to a declaration of restrictions. Sills v. Excel Services, Inc., 617 S.W.2d 280 (Tex. App—Tyler, 1981, no writ). However, where restrictions demonstrate a scheme or plan of development imposing restrictions on property not encompassed within a subdivision's boundaries, the fact that the property was outside the platted boundaries does not preclude the application of restrictions on the property. Rakowski v. Committee to Protect Clear Creek Village Homeowners' Rights, 252 S.W.3d 673 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (distinguishing Sills and holding that the "appurtenant property is arguably outside the dark line that demarcates the lots of the subdivision, but the restrictions specifically reference it, and a review of the recorded map of the subdivision clearly marks that section as Recreation Area, putting any person on notice that it is part of a plan or scheme of development").

Note for title insurance purposes, restrictive covenants are not a title defect. McGonagle v. Stewart Title Guar. Co., 432 S.W.3d 535, 542 (Tex. App.—Dallas 2014). Thus, restrictive covenants are not a covered risk, but rather a matter affecting market value. State v. Reece, 374 S.W.2d 686, 689 (Tex. App.—Houston [14th Dist.] 1964).

Source:

Citations in the Comment.

History:

Adopted June 4, 2021.

CHAPTER XXI

RULE AGAINST PERPETUITIES

Standard 21.10. Rule Against Perpetuities [Under construction]

An examiner should identify any future interest that violates the rule against perpetuities and warn that the interest may be void, subject to a court's interpretation to avoid application of the rule, to the operation of the cy-pr`es statute, and to the statutory 300-year wait-and-see period.

Comment:

Texas' prohibition of "perpetuities" is rooted in the Texas Constitution: "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed…." Tex. Const. art. I, § 26.

The Texas Supreme Court has enforced this prohibition of perpetuities by applying the common law rule against perpetuities, ConocoPhillips Co. v. Koopman, 547 S.W.3d 858, 866-67 (Tex. 2018), which in its abbreviated form provides that "no interest is valid unless it must vest, if at all, within twenty-one years after the death of some life or lives in being at the time of the conveyance." Id. At 867. The rule is applied as of the effective date of the instrument, and any future interest that violates the rule is void. A future interest violates the rule if any possible circumstance, no matter how remote, might cause the future interest not to vest in time. Id.; Foshee v. Republic Nat'l Bank of Dallas, 617 S.W.2d 675, 677 (Tex. 1981); Kettler v. Atkinson, 383 S.W.2d 557, 560 (Tex. 1964). However, when an instrument is equally open to two constructions, the construction that renders it valid, not void, will be adopted. BP Am. Prod. Co. v. Laddex, Ltd., 513 S.W.3d 476, 480 (Tex. 2017).

Historically, the rule against perpetuities renders invalid any "executory interest," "contingent remainder," or "vested remainder subject to open" that violates the rule. Executory interests are the most likely future interests to violate the rule since they "vest" for purposes of the rule at possession—that is when they become present interests. A contingent remainder vests for purposes of the rule when it becomes a vested remainder or at possession. A vested remainder subject to open vests when the class closes, e.g., when no more members of the class are possible. The rule against perpetuities does not apply to charitable trusts. See Tex. Prop. Code § 112.036. The rule has not been applied to possibilities of reverter, which are regarded as vested from their creation.

Although the Texas Supreme Court purports to apply the common law rule against perpetuities, it has been willing to liberally construe interests that appear to violate the rule as being vested. See, e.g., ConocoPhillips v. Koopman, 547 S.W.3d 858 (Tex. 2018) (holding that a springing executory interest following a reserved determinable mineral interest was vested—akin to a vested remainder—and thus not subject to the rule). In BP Am. Prod. Co. v.

Laddex, Ltd., 513 S.W.3d 476 (Tex. 2017) (oil and gas top lease was found to be vested at issuance as a partial alienation of a possibility of reverter, not a springing executory interest). But see Peveto v. Starkey, 645 S.W.2d 770 (Tex. 1983) (invalidating a top royalty deed as a springing executory interest that might vest beyond the period allowed by the rule). Nevertheless, except for future interests that fall directly within existing case-law precedent, examiners should continue to apply a traditional analysis of future interests to determine whether they are subject to the rule; however, as discussed below, an examiner should consider inserting a comment about the availability of a court-ordered reformation to bring an offending future interest into compliance with the rule, as well as to the possibility, just discussed, that a court may reclassify an interest to avoid application of the rule. In addition to interests already discussed, other future interests that may pose perpetuity problems are options to purchase, rights of first refusal, and area-of-mutual interest provisions that may not terminate within the rule.

Unlike an option to buy at a fixed price, a prior right to purchase at the same price that the owner could secure from another purchaser does not violate the rule against perpetuities. Weber v. Texas Co., 83 F.2d 807 (5th Cir. 1936). If a preferential right to purchase does not operate to restrain alienation but only dictates which party has the first right to acquire the property if the owner desires to sell it, the agreement does not violate the rule against perpetuities. Cherokee Water Co. v. Forderhause, 641 S.W.2d 522 (Tex. 1982); Foster v. Bullard, 496 S.W.2d 724 (Tex. App.—Austin 1973, writ ref'd n.r.e.),

The rule against perpetuities apparently does not apply to an option to purchase that is appendant to a leasehold interest. Ezer v. Tex. Tower Ltd., 2014 U.S. Dist. LEXIS 99607 (S.D. Tex. July 22, 2014); Muzquiz v. Para Todos, Inc., 624 S.W.3d 263 (Tex. App. – El Paso 2021, pet. denied). Leases in perpetuity generally do not violate the rule against perpetuities, but are disfavored and, absent express language granting a right of perpetual renewal, the lease will not be construed as granting a perpetual renewal right. Muzquiz v. Para Todos, Inc., 624 S.W.3d 263 (Tex. App. – El Paso 2021, pet. denied).

An easement granting the right to lay another pipeline creates an expandable easement with vested rights that do not violate the rule against perpetuities. Strauch v. Coastal States Crude Gathering Co., 424 S.W.2d 677 (Tex. App. – Corpus Christi 1968, writ dism'd w.o.j.); Williams v. Humble Pipe Line Co., 417 S. W. 2d 453 (Tex. App.–Houston [1st Dist.] 1967, no writ) Covenants and restrictions that run with land do not violate the rule against perpetuities. Cornett v. Houston, 404 S.W.2d 602 (Tex. App. – Houston 1966, no writ).

Effective September 1, 2021, Texas Prop. Code § 112.036 was amended and now provides:

(a) The rule against perpetuities applies to an interest in a trust other than a charitable trust

(b) For purposes of this section, the effective date of a trust is the date the trust becomes irrevocable.

(c) An interest in a trust must vest, if at all:

(1) not later than 300 years after the effective date of the trust, if the effective date of the trust is on or after September 1, 2021; or except as provided by Subsection (d), not later than 21 years after some life in being at the time of the creation of the interest, plus a period of gestation, if the effective date of the trust is before September 1, 2021.

(d) An interest in a trust that has an effective date before September 1, 2021, may vest as described by Subsection (c)(1) if the trust instrument provides that an interest in the trust vests under the provisions of this section applicable to trusts on the date that the interest vests.

(e) Any interest in a trust may be reformed or construed to the extent and as provided by Section 5.043.

(f) Under this section, a settlor of a trust may not direct that a real property asset be retained or refuse that a real property asset may be sold for a period longer than 100 years.

Tex. Prop. Code § 5.043 allows a court to reform an instrument that contains interests that violate the rule against perpetuities. It provides:

(a) Within the limits of the rule against perpetuities, a court shall reform or construe an interest in real or personal property that violates the rule to effect the ascertainable general intent of the creator of the interest. A court shall liberally construe and apply this provision to validate an interest to the fullest extent consistent with the creator's intent.

(b) The court may reform or construe an interest under Subsection (a) of this section according to the doctrine of cy pres by giving effect to the general intent and specific directives of the creator within the limits of the rule against perpetuities.

(c) If an instrument that violates the rule against perpetuities may be reformed or construed under this section, a court shall enforce the provisions of the instrument that do not violate the rule and shall reform or construe under this section a provision that violates or might violate the rule.

(d) This section applies to legal and equitable interests, including noncharitable gifts and trusts, conveyed by an inter vivos instrument or a will that takes effect on or after September 1, 1969, and this section applies to an appointment made on or after that date regardless of when the power was created.

In Yowell v. Granite Operating Co., 620 S.W.3d 335, 350 (Tex. 2020), the court held that an overriding royalty provision that violated the rule against perpetuities could be reformed under Tex. Prop. Code § 5.043. Prior to this opinion, the general supposition had been that the statute only authorized the reformation of trusts. See Yowell v. Granite Operating Co., 557 S.W.3d 794, 804 (Tex. App.—Amarillo 2018), aff'd in part, rev'd in part, 620 S.W.3d 335 (Tex. 2020). The court further held that reformation was not subject to the 4-year limitations period in Tex. Civ. Prac. & Rem. Code § 16.051. Id. at 352.

Caution:

Ordinarily, an examiner should not speculate on how a future interest that violates the rule against perpetuities might be reformed under Tex. Prop. Code § 5.043 to comply with the rule. Moreover, while this statute allows reformation of an interest to bring it into compliance with the rule, it does not expressly allow for reformation of interests to take advantage of the new statutory 300-year vesting rule. Although not construed in Texas, a perpetuity saving clause requiring that an interest vest or terminate no later than 21 years after the death of the last survivor of a group of designated individuals may be used to save an interest that would be initially invalid at common law. Uniform Statutory Rule Against Perpetuities (1986/1990), not adopted in Texas.

The 2021 amendments clarify that a settlor of a trust may not direct that a real property asset be retained or refuse that a real property asset may be sold for a period of longer than 100 years. Tex. Prop. Code 112.036(f). Accordingly, a party cannot use a trust to prevent the alienation of real property for longer than 100 years.

Source:

Citations in the Comment.

History:

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