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TITLE 2—APPENDIX

TEXAS TITLE EXAMINATION STANDARDS

For easier reference, the Title Examination Standards appear in their entirety in the pocket part of V.T.C.A., Property Code, vol. 1.

As Initially Adopted 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 on June 27, 1997, as revised through June 30, 2012.

By

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PREFACE

TEXAS TITLE EXAMINATION STANDARDS

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. Through the newsletter of that Section, Section members were notified of the project. Lawyers from all parts of Texas responded evidencing their interest in working as active participants on this project. Subsequently, the Oil, Gas and Mineral Law Section (now the Oil, Gas and Energy Resources Law Section) of the State Bar of Texas asked to co-sponsor this project.

After substantial study of the use of title examination standards and many hours of drafting and meeting time, proposed standards were published for comment in 1996 in the newsletters of both of the sponsoring sections. Following the receipt of comments from lawyers across Texas, additional revisions were made by the committee (now the "Title Standards Joint Editorial Board") and the proposed standards were once again published for comment in the Spring of 1997.

At the State Bar of Texas Convention on June 27, 1997, 33 standards were approved by both the Section of Real Estate, Probate and Trust Law and the Oil, Gas and Mineral Law Section. The initial standards constituted the beginning of title examination standards in Texas. Under current procedure, the Title Standards Joint Editorial Board, appointed by these two sections, meets at least semiannually to consider amendments to existing standards and additional standards. As with the initial standards, amendments or new standards are presented to the membership of these two sections prior to formal adoption; however, the Board makes changes to the comments and cautions as needed. In keeping with this process, the Comments, Cautions, Sources, and Histories have been updated from the initial Standards.

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 Ann. Section 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 must advise their clients honestly as to their beliefs and opinions regarding the ownership of a particular interest in land. The judgment of an examiner must 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.

CHAPTER I

TITLE EXAMINER

Standard 1.10. Purpose Of Title Examination

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

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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.

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 irregularities, defects, and encumbrances have been discovered by the examination. Then an examiner should determine, to the extent reasonably possible, who, if anyone, can take advantage of each irregularity, defect, or encumbrance against the owner and/or client, and if there are consequent risks.

Source:

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

History:

Adopted, June 27, 1997; amended June 16, 2006. 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.”

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 starting from the date that the title passed from the sovereign to the present. Occasionally, an examiner may base an opinion upon a chain of title covering a shorter time 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 must 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 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.

Source:

Title Standards Joint Editorial Board.

History:

Adopted, June 27, 1997.

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, 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.

CHAPTER II

MARKETABLE TITLE

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 absolutely 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, in the event of suit, become genuine issues of fact. 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 deed. *Woodward v. Ortiz*, 237 S.W.2d 286, 291-92 (Tex. 1951) (purchaser under a quitclaim deed takes with notice of all prior unrecorded conveyances and equitable claims of third persons). Nevertheless, because quitclaim deeds are often found in chains of title, examiners do not typically question marketability merely because a quitclaim deed is found

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within a chain of title. Moreover, case law is not clear as to what constitutes a quitclaim. See, e.g., *Bryan v. Thomas*, 365 S.W.2d 628 (Tex. 1963) (conveyance of all of grantor's interest in a tract is not a quitclaim deed).

Matters that may make a title unmarketable include:

- (1) Land acquired by limitation title, *Greer v. International Stock Yards Co.*, 43 Tex.Civ. App. 370, 96 S.W. 79 (Tex.Civ.App. 1906, writ ref'd).
- (2) Land acquired by accretion, *Gaines v. Dillard*, 545 S.W.2d 845 (Tex.Civ.App.—Fort Worth 1976, writ ref'd n.r.e.).
- (3) Title that is subject to an outstanding oil and gas lease, *Roberts & Corley v. McFaddin, Weiss & Kyle*, 74 S.W. 105 (Tex.Civ.App. 1903, writ denied).
- (4) Title that is subject to an outstanding royalty interest, *Sweet v. Berry*, 236 S.W. 531 (Tex.Civ.App.—Amarillo 1921, writ dism'd).
- (5) Title that is subject to an outstanding covenant, *Dupree v. Savage*, 154 S.W. 701 (Tex.Civ.App.—Amarillo 1913, writ ref'd).
- (6) Title that is subject to an outstanding easement, *Shaw v. Morrison*, 14 S.W.2d 953 (Tex.Civ.App.—Eastland 1929, no writ).
- (7) Title that is subject to a mortgage, judgment lien, or tax lien, *Crutcher v. Aiken*, 252 S.W. 844 (Tex.Civ.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 Ann. §§ 5.027-5.031. These statutes were enacted in response to *Myrad Properties, Inc. v. LaSalle Bank Nat'l Ass'n*, 300 S.W.3d 746 (Tex. 2009) (holding that a particular correction deed was void as a matter of law). Until these statutes are either amended or construed by the Texas courts, examiners should be wary of relying upon any correction deed issued under these new statutes.

Source:

- Lund v. Emerson*, 204 S.W.2d 639 (Tex.Civ.App.—Amarillo 1947, no writ).
Owens v. Jackson, 35 S.W.2d 186 (Tex.Civ.App.—Austin 1931, writ dism'd w.o.j.).
Texas Auto Co. v. Arbetter, 1 S.W.2d 334 (Tex.Civ.App.—San Antonio 1927, writ dism'd w.o.j.).
Austin v. Carter, 296 S.W. 649 (Tex.Civ.App.—Eastland 1927, writ dism'd).
Alling v. Vander Stucken, 194 S.W. 443 (Tex.Civ.App.—San Antonio 1917, writ ref'd).
Adkins v. Gillespie, 189 S.W. 275 (Tex.Civ.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.

CHAPTER III

NAME VARIANCES

Standard 3.10. Idem Sonans

An examiner may presume that differently spelled names refer to the same person when the names sound alike or 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.Civ.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

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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.Civ.App.—Dallas 1976, no writ) (“O’Brian” and “O’Brien”). In *Hill v. Foster*, 181 S.W.2d 299, 304 (Tex.Civ.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.Civ.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.Civ.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.Civ.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.Civ.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:

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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.Civ.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.Civ.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.

Comments

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. Civ. 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 Ann. 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 Ann. § 71.201. Reference to a county’s assumed name certificate records may be helpful in resolving identity questions and may be relied upon in the absence of 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 be presented with names which, although recited to be alternative names of the same person, are entirely dissimilar. Under such circumstances the

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examiner must bear in mind the presumption that names that are not the same refer to different persons. See *Fox v. Grand Union Tea Co.*, 236 S.W.2d 561, 563 (Tex. Civ. 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.

Comments

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.,” the presumption that they are the same person would be rebutted. Or, if the grantee in one instrument is “John Doe,” and in another instrument the grantor is “John Doe, Jr.,” the presumption of identity may be rebutted.

The Texas Supreme Court, in a case concerning service of process, reversed a court of appeals’ decision 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

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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.

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

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.

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 Ann. § 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.

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 Robert Jones but signed by John Smith certainly should not be passed.

Source:

Bell v. Sharif–Munir–Davidson Dev. Corp., 738 S.W.2d 326 (Tex. App.—Dallas 1987, writ denied).

Stout v. Oliveira, 153 S.W.2d 590 (Tex.Civ.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.

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.

Caution:

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

Source:

Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 5.8 (1960).

History:

Adopted, June 27, 1997.

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, acknowledgment, 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.Civ.App.—Fort Worth 1935, no writ); *Owens v. Jackson*, 35 S.W.2d 186, 188 (Tex.Civ.App.—Austin 1931, writ dismissed w.o.j.); *Brown v. Rodgers*, 248 S.W. 750 (Tex.Civ.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.Civ.App.—Fort Worth 1941, writ dismissed).

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.Civ.App.—Amarillo 1935, writ dismissed).

Regarding instruments that have been filed for record, examiners should consider Tex. Civ. Prac. & Rem. Code Ann. § 16.033, which contains a four-year (two-year, effective September 1, 2007) statute of limitations that bars certain actions to recover real property based upon acts and omissions specified in the statute. Act of June 15, 2007, 80th Leg., R.S., ch. 819, § 2, 2007 Tex. Gen. Laws 1695 (nonretroactivity provision). For further discussion, see Comment and Caution to Standard 4.20. In addition, Tex. Loc. Gov't Code Ann. § 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 Ann. § 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

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acknowledged, sworn to with a proper jurat, or proved according to law, may be recorded and, if recorded, imparts notice.

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 Ann. § 12.001. The proper forms for acknowledgments are expressed by statute. Tex. Civ. Prac. & Rem. Code Ann. §§ 121.001—121.015. A jurat may substitute for an acknowledgment in instruments recorded on or after September 1, 1989. Tex. Prop. Code Ann. § 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 Ann. § 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 Ann. § 121.001. For a listing of officers who may administer oaths and supply a jurat, see Tex. Gov't Code Ann. §§ 602.002—602.005.

An acknowledgment or jurat that does not include an official seal and that is taken in the United States or 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 Ann. § 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 Ann. § 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 Ann. § 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 Ann. § 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 Ann. § 13.001(b); *Haile v. Holtzclaw*, 414 S.W.2d 916, 928 (Tex.1967). Substantial compliance with the statutory

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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.Civ.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.Civ.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 Ann. §§ 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 four years after the recordation of the instrument (or two years after the day the instrument was “filed for record,” effective September 1, 2007); however, this limitations period does not apply to a forged instrument. Tex. Civ. Prac. & Rem. Code Ann. § 16.033. Act of June 15, 2007, 80th Leg., R.S., ch. 819, § 2, 2007 Tex. Gen. Laws 1695 (nonretroactivity provision). In addition, regarding instruments “filed for record” on or after September 1, 2007, “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 Ann. § 16.033(c). Act of June 15, 2007, 80th Leg., R.S., ch. 819, § 2, 2007 Tex. Gen. Laws 1695 (nonretroactivity provision). 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, 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 generally 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 four-year (two-year, effective September 1, 2007) statute of limitations discussed in the Comment. Tex. Civ. Prac. & Rem.

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Code Ann. § 16.033. Act of June 15, 2007, 80th Leg., R.S., ch. 819, § 2, 2007 Tex. Gen. Laws 1695 (nonretroactivity provision). 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) (effective September 1, 2007), 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.Civ.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, examiners 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 Ann. § 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.Civ.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.

Caution should be exercised in determining that an acknowledgment is in substantial, though not literal, compliance. 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.Civ. 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 Ann. § 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

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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. Possession of a deed raises the presumption of its due delivery. The date affixed to an instrument is prima facie evidence of the date of delivery. If there is a conflict in dates and the evidence only admits of two possibilities, that the instrument was delivered on the date on the instrument or on the date of the acknowledgment, the appellate courts are divided, numerically favoring the date on the instrument. *Wilson v. Curry*, 151 S.W.2d 356, 358 (Tex.Civ.App.—Fort Worth 1941, writ dism'd). However, parties may by contract make a conveyance effective at any time, either before or after the date on the instrument, the date of the acknowledgment, or the date of actual delivery, if different. *Cox v. Payne*, 174 S.W. 817 (Tex.1915); *Rogers v. Gunn*, 545 S.W.2d 861 (Tex.Civ.App.—Amarillo 1976, no writ); *Hart v. Rogers*, 527 S.W.2d 230 (Tex.Civ.App.—Eastland 1975, writ ref'd n.r.e.).

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. *Vineyard v. Heard*, 167 S.W. 22 (Tex.Civ.App.—San Antonio 1914), aff'd, 212 S.W. 489 (Tex.1919); *Sparks v. Humble Oil & Refining Co.*, 129 S.W.2d 468 (Tex.Civ.App.—Texarkana 1939, writ ref'd). However, 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).

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.

CHAPTER V

LAND DESCRIPTIONS

Standard 5.10. Land Descriptions Generally

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.

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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. Civ. App.—Galveston 1939, writ ref'd); 4 Aloysius A. Leopold, *Land Titles and Title Examination* § 15.2 (Texas Practice 3d ed. 2005). 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. Civ. 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. Civ. App.—Galveston 1939, writ ref'd). However, the description contained in an instrument must furnish, within itself or by reference to other existing writing, the means by which the property can be identified with reasonable certainty. *Broadbuss v. Grout*, 258 S.W.2d 308 (Tex. 1953). 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 the reasonable certainty, the surrounding facts and circumstances should be considered in order to arrive at 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.).

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 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.

While any title is only as good as the weakest link in the chain of descriptions, 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. Civ. 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*,

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75 S.W.2d 993 (Tex. Civ. App.—Beaumont 1934, writ ref'd); *Holman v. Houston Oil Co.*, 152 S.W. 885 (Tex. Civ. 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., Inc.*, 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. Civ. 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.2d 279 (Tex. 1887). Calls for quantity of acreage will be given the least priority. *Collins v. Warfield*, 140 S.W.107 (Tex. Civ. 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. Civ. App.—San Antonio 1939, writ dism'd judgm't cor.); *Stuart v. Coldwell Banker & Co.*, 552 S.W.2d 904 (Tex. Civ. 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, county, or state 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 specific description failed, the court refused to enforce the global description on the ground that the deed was ambiguous. 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. Cf., *J. Hiram Moore, Ltd. v. Greer*, 172 S.W. 3d 609 (Tex. 2005); *Sun Oil Co. v. Burns*, 84 S.W.2d 442 (Tex. 1935). Examiners 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.

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

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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 Ann. § 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. Civ. 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. Civ. 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. Civ. 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. Civ. 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 must be certain 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.

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.

Prior to replacement, 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. 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 in considering whether the sovereign's title has been divested.

With respect to patents issued by the Republic or State of Texas, the laws have always required that before a patent may be issued for an unsevered tract, the tract must be surveyed and the field notes returned to the General Land Office. Those 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. It is possible, although uncommon, for the field notes in the patent to differ from those of the original survey. In

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such a case the original field notes control. *State v. Sun Oil Co.*, 114 S.W.2d 936, 944 (Tex. Civ. App.—Austin 1938, writ ref'd). However, unless the conflict is disclosed in the course of the examination, examiners reasonably and 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 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.”

Comment:

Tidelands: The owner of land adjacent to a shore is a “littoral owner.” Tex. Nat. Res. Code Ann. § 61.001(6). The location of the littoral boundaries is determined by the date of severance from the sovereign. After the Republic of Texas adopted the common law on January 20, 1840, the boundary of the sea was established as the mean high tide of the sea waters. Prior to that time, the boundary of the sea was controlled by civil law, which established the boundary as the mean higher high tide or the highest tide in winter. 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 (Tex. 2002).

Littoral ownership may be encumbered by a migratory easement acquired under the common law doctrine of custom in favor of the public in the beach area between the line of mean high tide or mean higher high tide, depending upon the date of the patent, and the line of natural vegetation. Cf. *Severance v. Patterson*, 54 Tex. Sup. Ct. J. 172, __ S.W.3d __ (Tex. Nov. 8, 2010, rehearing granted) (finding no easement through custom) and *Matcha v. Mattox*, 711 S.W.2d 95 (Tex. App.—Austin 1986, no writ) (finding an easement through custom). See also Tex. Nat. Res. Code Ann. § 61.001(8) (defining the public beach area); Tex. Nat. Res. Code Ann. § 61.013 (prohibiting littoral owners from constructing improvements on the public beach or from interfering with public use of a public beach); Tex. Nat. Res. Code Ann. § 61.016 (establishing the boundary in the absence of a line of natural vegetation).

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

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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. Civ. App.—San Antonio 1954, writ ref'd) (addressing mineral title to a portion of the 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. 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 Ann. § 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. *Motl v. Boyd*, 286 S.W. 458 (Tex. 1926) (addressing Spring Creek, a tributary of the South Concho River, located in Tom Green County). See *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 meet 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 Ann. § 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.

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. 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 it washes the bank without overflowing. *Brainard v. State*, 12 S.W.3d 6, 16 (Tex. 1999). The boundary between the private riparian landowner and the State of Texas is the inner bank at the mean level midway between the line made by the flowing water as it reaches the cut bank and the top of the cut bank. *Diversion Lake Club v. Heath*, 86 S.W.2d 441 (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 (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 (Tex. 1944); *Tyler v. Gonzales*, 189 S.W.2d 519 (Tex. Civ. 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 (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*. 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. Civ. 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. 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

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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. *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).

Although patent survey lines are not supposed to cross navigable streams, Tex. Nat. Res. Code Ann. § 21.012(b), the Small Bill (Tex. Rev. Civ. Stat. Ann. art. 5414a, effective March 3, 1929) validated patents to lands crossing navigable streams where the patent had been issued at least ten years prior to the enactment of the statute (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 in Kent County).

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. *City of Victoria v. Schott*, 29 S.W. 681 (Tex. Civ. App. 1895, no writ); *Muller v. Landa*, 31 Tex. 265 (Tex. 1868). 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. *Maufrais v. State*, 180 S.W.2d 144 (Tex. 1944); *Tyler v. Gonzales*, 189 S.W.2d 519 (Tex. Civ. App.—San Antonio 1945, writ ref’d w.o.m.). 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. *Maufrais v. State*, 180 S.W.2d 144 (Tex. 1944).

Calls in a deed contiguous to a non-navigable stream are presumed to pass title to the center of the stream. *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*, 31 Tex. 265 (1868). 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. *State v. Bradford*, 50 S.W.2d 1065 (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.Civ.App.—Waco 1935, writ dismissed). 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. *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.Civ.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. Examiners may consult the General Land Office for further information on severance.

Source:

Citations in the Comment.

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3 Aloysius A. Leopold, *Land Titles and Title Examination*, ch. 6 (Texas Practice 3d ed. 2005).

History:

Adopted, June 11, 2010.

Standard 5.40. Roads

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.

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) (applies the general rule, which the Supreme Court had previously affirmed as to highways and streams, to a railroad right of way). 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. Civ. App.—Galveston 1942, writ ref’d w.o.m.).

The doctrine may also apply to governmental entities. *Joslin v. State*, 146 S.W.2d 208 (Tex. Civ. App.—Austin 1940, writ ref’d) (general rule, that adjacent owners own 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, judgment adopted) (title to minerals under streets described in a land grant in what were Mexican town lots, such as located in Gonzales, Refugio, Bastrop, Liberty, and Victoria, were vested in the town and not in the lot owners fronting the streets; the term “streets” does not apply in its usual sense where the “street” is not in existence at the time of the conveyance of the property in question) 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).

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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).

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 bounded 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. Civ. 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. At least one court has cited the four principles of *Alkas* in a road context. See *Escondido Services, LLC v. VKM Holdings, LP*, 321 S.W.3d 102 (Tex. App.—Eastland 2010, no pet.).

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.

CHAPTER VI

CORPORATE CONVEYANCES

Note: The Texas Business Organizations Code took effect January 1, 2006. However, prior corporation laws remain in effect as to any corporation then existing until (a) the early adoption of the Code by such corporation or (b) January 1, 2010, whichever comes first.

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).

Caution:

This standard conforms to the standard practice of Texas title examiners. No Texas cases are directly on point. However, in *Allday v. Drummond*, 280 S.W.2d 381 (Tex.Civ.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. A primary basis for the court's holding was that the conveyance in question had been of record more than 10 years.

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Source:

Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 12.4 (1960).

4 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.

Comments

Comment:

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 some type of actual or constructive notice.

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. Ann. 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.Civ.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. Org. Code Ann. §§ 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.

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Comment:

Subject to any approval required by the Texas Business Organizations Code or by the governing body 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.

Source:

Tex. Bus. Org. Code Ann. §§ 9.202, 10.251, 10.253.

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. Org. Code Ann. §§ 9.202, 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 Ann. § 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. For further information on attorneys in fact, see Standards 8.10 and 8.20.

Source:

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. Name Omitted From Signature

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.

Comment:

Although courts have been inclined to declare instruments invalid where the representative capacity of an officer or agent is not noted by the signature, modern curative statutes and title standards have taken a more liberal attitude to promote marketability. Paul E. Basye, *Clearing Land Titles* § 295 (2d ed. 1970). There are apparently no reported Texas cases construing corporate deeds to be invalid merely because of the failure of the executing officer to note that the instrument is being executed in an official capacity. Texas law has always been that a deed executed by an agent passes whatever title the agent has the authority to convey, whether the agent signs as agent or as principal. *Hough v. Hill*, 47 Tex. 148, 153 (1877); *Odell v. Kennedy*, 64 S.W. 802 (Tex.Civ.App.1901, writ ref'd); *Bennett v. Virginia*

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Ranch, Land & Cattle Co., 21 S.W. 126 (Tex.Civ.App.1892, no writ). See also Pride Exploration, Inc. v. Marshall Exploration, Inc., 798 F.2d 864, 866–67 (5th Cir.1986).

Source:

Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 12.2 (1960).

History:

Adopted, June 27, 1997.

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” or “incorporated”; 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:

Although corporations frequently have closely corresponding names, a purported conveyance by an interloper seems extremely unlikely. The significance of a variance should be evaluated on the basis of 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.Civ.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.Civ.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. Org. Code Ann. §§ 5.053, 5.102, 5.153, 9.105.

Source:

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.

CHAPTER VII

**CONVEYANCES INVOLVING PARTNERSHIPS, JOINT VENTURES, LIMITED
LIABILITY COMPANIES, AND UNINCORPORATED ASSOCIATIONS**

Note: The Texas Business Organizations Code took effect January 1, 2006. However, prior laws applicable to partnerships, limited partnerships, and limited liability companies remain in effect as to any such entity then existing until (a) the early adoption of the Code by such entity or (b) January 1, 2010, whichever comes first.

Standard 7.10. Conveyance Of Real 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 venturer 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. Org. Code Ann. §§ 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. Ann. 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. Org. 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. Org. Code Ann. § 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. Rev. Civ. Stat. Ann. art. 6132a–1, § 4.03(a). Texas Bus. Org. Code Ann. § 153.152 provides that such rights and powers may be negated by the Code, other limited partnership provisions, or the limited partnership agreement.

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.

Standard 7.20. 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 venturers 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(s) or joint venturer(s) 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. Rev. Civ. Stat. Ann. art. 6132b–3.02. Tex. Bus. Org. Code Ann. § 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. Org. Code Ann. § 152.302. See Comment to Standard 7.10.

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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. Rev. Civ. Stat. Ann. art. 6132a-1, § 4.03(a). Tex. Bus. Org. Code Ann. § 153.152.

Source:

Citations in the Comment.

History:

Adopted, June 27, 1997.

Standard 7.30. Prior Conveyance In Chain By Partnership Or Joint Venture

An examiner may assume the authority of an apparent partner or a joint venturer 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 7.40, below.

Source:

Citations in the Comment.

History:

Adopted, June 27, 1997.

Standard 7.40. 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. Rev. Civ. Stat. Ann. art. 6132b-2.05(d)). Tex. Bus. Org. Code Ann. § 152.102.

See Comment to Standard 7.10.

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. Rev. Civ. Stat. Ann. art. 6132b-3.02. Tex. Bus. Org. Code Ann. §§ 152.301, 152.302, 153.152. See Comment to Standard 7.10.

Source:

Citations in the Comment.

History:

Adopted, June 27, 1997.

Standard 7.50. 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

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conveyance appears *to be consistent* with the limited liability company's usual way of doing business.

Comments

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. Rev. Civ. Stat. Ann. art 1528n, art. 2.11, art. 2.21.D. Tex. Bus. Org. Code Ann. §§ 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 respecting specified property or obligations. Tex. Bus. Org. Code Ann. § 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. Org. Code Ann. § 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. Org. Code Ann. § 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. Org. Code Ann. § 101.605.

Source:

Citations in the Comment.

History:

Adopted, June 27, 1997; amended, October 9, 1999. 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."

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. Prob. Code Ann. §§ 481-506) (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 Ann. § 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 must 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

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survives incapacity. In the absence of information to the contrary, examiners frequently rely 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 "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. Prob. Code Ann. § 485; (2) by the divorce or annulment of the marriage of the principal and the agent unless otherwise provided by the durable power (Id. § 485A, effective September 1, 1997); or (3) by the death of the principal, *Cleveland v. Williams*, 29 Tex. 204 (1867).

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.

Id. § 487(a). Similarly, regarding a durable power that becomes effective upon the disability or incapacity of the principal, an affidavit executed by the agent stating that the principal is disabled or incapacitated, as defined in the power, is conclusive proof as between the agent and a person other than the principal or the principal's personal representative of the disability or incapacity of the principal at that time. Id. § 487(b). Unless otherwise noted in the power-of-attorney document, a revocation of a durable power is not effective as to a third party until the third party receives actual notice of the revocation. Id. § 488. Tex. Prob. Code Ann. § 12.016. Tex. Prob. Code Ann. § 489 requires the recordation of a durable power for a real property transaction in the county where the property is located.

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

- (1) 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.Civ.App.—Texarkana 1935, writ ref'd);
- (2) 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
- (3) 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 respecting "real estate transactions" would permit the actions involved in the three examples above. Tex. Prob. Code Ann. § 490.

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.Civ.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 pursuant to 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).

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

Caution:

As originally enacted in 1993, Tex. Prob. Code Ann. § 492 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 respecting “real estate transactions” to execute oil, gas, and mineral leases.

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.Civ.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.

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:

- (1) The power of attorney was not executed, acknowledged, and recorded as required by law;
- (2) 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;
- (3) 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;
- (4) The principal was not disabled or incapacitated, as defined by the power; or
- (5) 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 must confirm the identity and powers of the trustee and whether the trust was in effect at the time of a trust transaction.

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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 Ann. §§ 113.003-.027—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 Ann. §§113.001-.002. Although subject to certain limitations, the terms of an express trust prevail over any provision of the Code. Tex. Prop. Code Ann. § 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. However, in lieu of examining the trust instrument, the examiner may examine some other appropriate evidence, e.g., a statute now permits a person who acts in reliance on a “certification of trust” provided by the trustee and meeting specified requirements to assume without further inquiry the facts contained in the certification. Tex. Prop. Code Ann. § 114.086.

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 Ann. § 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.

Caution:

Unless the trust agreement expressly grants the power of delegation to the trustee, *Transamerican Leasing Co. v. Three Bears, Inc.*, 586 S.W.2d 472 (Tex. 1979), the general rule is 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, examiners should not assume that this general rule has been altered by the Texas Trust Code. See, e.g., Tex. Prop. Code Ann. §§ 114.081, 114.086, 117.004, 117.011. Accordingly, a title 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.

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 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.”

Prior Standard 9.10 provided:

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“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 actually 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 does exist 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 aff’d), rev’d on rehearing on other grounds, 120 Tex. 244, 37 S.W.2d 721 (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 Ann. § 101.001. Moreover, in this situation, “the trust property is not liable to satisfy the personal obligations of the trustee.” Tex. Prop. Code Ann. § 101.002. See also Tex. Prop. Code Ann. § 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 and Caution.

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. Texas Gov’t Code Ann. § 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 Ann. §§ 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.

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 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.

Comment:

Texas law presumes that any party to a legal contract has sufficient capacity. Thus, deeds executed by minors are voidable, not void, and convey title until set aside. *Neill v. Pure Oil Co.*, 101 S.W.2d 402 (Tex.Civ.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 Ann. §§ 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.Civ.App.—Austin 1923, no writ). Examples of attempts to disaffirm that were found not to have occurred within a reasonable time are as follows:

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

Any positive act of the minor after the minor reaches majority should satisfy an examiner. As long as the minor continues to take a position that the minor intends to stand by the conveyance, it will be considered as a ratification of the executed deed.

If a legally married minor is divorced or if the marriage is annulled, the minor most likely retains capacity pursuant to Texas Fam. Code Ann. § 1.104. See generally John J. Sampson, Harry L. Tindall, et al., *Sampson & Tindall's Texas Family Code Annotated*, Comment to § 6.306 (2001). The capacity of the minor is uncertain in the hypothetical circumstance where the marriage of a minor is declared void in a suit to declare the marriage void by reason of a prior existing marriage or incest. See Texas Fam. Code Ann. §§ 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.

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.

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. If the lack of capacity has been established, restoration of capacity may be accomplished pursuant to statute.

Comment:

Texas law presumes that the grantor of the deed has sufficient mental capacity at the time of execution to understand the grantor's legal rights. The party alleging incapacity has the burden of proof. *Bradshaw v. Naumann*, 528 S.W.2d 869, 873 (Tex.Civ.App.—Austin 1975, writ dismissed). The Texas Supreme Court has held that an insane person's deed is voidable and not void, evidently reaching this conclusion based upon the similarity between the deed of an insane person and that of 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 dispose of the community property. Tex. Prob. Code Ann. § 883. However, if a lack of mental capacity of a spouse has been previously established, a court, upon determining that the mental capacity of such spouse has been restored, may enter an order terminating the other spouse's full power to dispose of the community property. Tex. Prob. Code Ann. § 883A.

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.Civ.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

In reviewing a sale or encumbrance of property by a guardian, an examiner must 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 must 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. Prob. Code Ann. §§ 694, 745. A guardianship terminates in any of the following circumstances:

- (1) when the ward dies;
- (2) when a minor ward marries, reaches majority (age 18), or has disabilities removed;
- (3) when a court issues an order of restoration in the case of an incapacitated ward; or
- (4) when a court revokes the guardianship.

Specific requirements relating to sales are found in Tex. Prob. Code Ann. § 811 *et seq.* In general, a guardian's sale requires:

- (1) an application by a duly appointed and acting guardian for authority to sell,
- (2) a citation and return,

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- (3) an order of sale,
- (4) notice as required by the court in the order of sale,
- (5) a sale by the guardian, as evidenced by a report of sale,
- (6) an additional guardian's bond if the general bond is inadequate,
- (7) a decree confirming the sale, and
- (8) 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. Prob. Code Ann. § 31. 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. Prob. Code Ann. § 847–852. For provisions relating to mortgages, see Tex. Prob. Code Ann. § 781. For provisions relating to gifts, see Tex. Prob. Code Ann. §§ 865–866.

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. 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 net value of the minor's interest, a minor's property may be sold by a parent or the managing conservator without the appointment of a guardian. Tex. Prob. Code Ann. § 889. Similarly, subject to statutory limitations on the net value of the ward's interest, 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. Prob. Code Ann. § 890. Both statutes require that these sales be approved by a court.

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. Prob. Code Ann. § 485.

Caution:

A decree confirming a sale may not be issued until five days after the date the report of sale is filed. Tex. Prob. Code Ann. § 834. 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. Civ. App.—Dallas 1931, writ ref'd). A foreign guardian may be appointed by a Texas court, without notice or citation, in the manner prescribed by Tex. Prob. Code Ann. § 881.

The statutes governing guardianships were extensively modified effective September 1, 1993. Thus, when reviewing more recent sales by guardians, examiners 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 must verify compliance with those statutes.

Source:

Citations in the comment.

History:

Adopted, June 22, 2007.

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 immediately upon death, subject in each instance, except for exempt property, to payment of debts, including estate and inheritance taxes.

Comment:

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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.

With respect to the property of an intestate person, Tex. Prob. Code Ann. § 45 states the manner in which community property passes, and Tex. Prob. Code Ann. § 38 governs the passage of separate property. A will is not valid to pass title until it has been probated. Tex. Prob. Code Ann. § 94.

Source:

Citations in the Comment.

Tex. Prob. Code Ann. § 37.

Stanley M. Johanson, Johanson's Texas Probate Code Annotated § 37 (2011).

History:

Adopted, October 9, 1999.

Standard 11.20. Estate Proceedings

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.

Comment:

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.

See also, Standard 11.70, addressing affidavits of heirship, and Standard 13.20, addressing reliance on affidavits.

Source:

Title Standards Joint Editorial Board.

History:

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

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 An Executor Or An Independent Administrator

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.

Comment:

If a representative (an executor or an independent administrator) executes a deed to the decedent's property, then the examiner must determine the representative's qualifications. When determining the qualification of a representative to execute a deed, 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. In addition to the above, 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. Prob. Code Ann. § 89.

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. Prob. Code Ann. § 332. If the owner of real property died intestate, or if a will does not give the authority to convey real property, a

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qualified independent executor or a qualified independent administrator may convey real property with the consent of the decedent's distributees if authorized by the order of appointment. Tex. Prob. Code Ann. § 145A.

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 sickness, and allowances and claims against the estate of a decedent. Tex. Prob. Code Ann. §§ 145C and 341(1).

(2) Dispose of any interest in real property "when it is deemed to [be in] the best interest of the estate to sell such interest." Tex. Prob. Code Ann. § 341(2).

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 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 Texas Prob. Code Ann. § 145A 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, that is 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 Texas Prob. Code Ann. § 341(1).

The affidavit in (3), above, is conclusive proof, as between the good-faith purchaser and the heirs or distributees of the estate, of the authority of the independent executor or independent administrator. If this affidavit is obtained, the purchaser need not obtain the signature of an heir or devisee who has an interest in the property. Texas Prob. Code Ann. § 145C(c)(2).

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. Prob. Code Ann. § 188.

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. Prob. Code Ann. § 151 provides a method of closing an independent administration, that procedure is 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. However, during the two year period after the date of the order admitting the will to probate, the order is subject to contest by bill of review filed in the proper court by any interested person. Tex. Prob. Code Ann. § 31. 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. Prob. Code Ann. § 93.

During the two year period after a decision, order, or judgment, the decision, order, or judgment is subject to attack by any interested person by bill of review filed in the same court, and if error is shown, the decision, order, or judgment can be revised or corrected. Tex. Prob. Code Ann. § 31.

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. Prob. Code Ann. § 145C is protected only if the sale was made for the reasons set out in Tex. Prob. Code Ann. § 341(1), that is, for administrative expenses, allowances, and claims. There is no similar protection respecting a sale made because it was deemed by the representative to be in the best interest of the estate.

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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.

Source:

Citations in the Comment.

Tex. Prob. Code Ann. §§ 145, 332, 341.

Roy v. Whitaker, 48 S.W. 892 (Tex.1898).

Stanley M. Johanson, *Johanson's Texas Probate Code Annotated* § 145 (2011).

17 M. K. Woodward & Ernest E. Smith, III, *Probate and Decedents' Estates* §§ 497, 499 (Texas Practice 1971).

History:

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

The original standard provided: "Before accepting an executor's deed, an examiner must 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 An Administrator

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.

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. 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 a decision, order, or judgment, the decision, order, or judgment is subject to attack by any interested person by bill of review filed in the same court, and if error is shown, the decision, order, or judgment can be revised or corrected. Tex. Prob. Code Ann. § 31.

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. Prob. Code Ann. § 188. The recitals in a deed by a personal representative made pursuant to a court order are prima facie evidence that the sale met all applicable requirements of the law. Tex. Prob. Code Ann. § 356.

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.

Source:

Citations in the Comment.

Tex. Prob. Code Ann. § 331.

History:

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

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The original standard provided:

“An administrator may convey property only with authority of the court. Therefore, 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.”

Standard 11.50. Conveyances By Heirs Of An Estate

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.

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.

With respect to the property of an intestate person, Tex. Prob. Code Ann. § 45 states the manner in which community property passes, and Tex. Prob. Code Ann. § 38 governs the passage of separate property. For estates of decedents dying intestate after September 1, 1993, Tex. Prob. Code Ann. § 45 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 husband or wife dies intestate and the community property passes to the surviving spouse, no administration on the community property is necessary. Tex. Prob. Code Ann. § 155.

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 if a will is later offered for probate. Tex. Prob. Code Ann. § 73.

Source:

Citations in the Comment.

Stanley M. Johanson, Johanson’s Texas Probate Code Annotated §§ 45, 155 (2011).

History:

Adopted, October 9, 1999.

Standard 11.60. Liens For Debts And Taxes

An examiner must 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 must determine whether any exist.

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

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of payment of the taxes shown by the letter to be due to the United States and to the State of Texas.

Tex. Prob. Code Ann. § 37 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*, 32 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 Ann. §§ 157.311–157.326. 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, appraisal, and list of claims may contain information that is useful with respect to 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. Prob. Code Ann. § 250. In the latter situation, the examiner should determine that any secured debts do not affect the land under examination.

As a practical matter, the State of Texas imposes no death or inheritance taxes on the estates of persons who die after December 31, 2004, because an inheritance tax is imposed only to the extent that a state tax credit is allowed in connection with the settlement of federal estate taxes. Tex. Tax Code Ann. § 211.055. With respect to the estate of a decedent dying after December 31, 2004, the federal credit for State death taxes is no longer allowed, 26 U.S.C. § 2011, and no tax is due the State of Texas. To claim an inheritance tax lien, the State must file the notice required by Tex. Tax Code Ann. § 113.002. 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.

Federal estate taxes are due or may be due regarding taxable estates exceeding certain amounts. Estate tax may be due on estates exceeding the following amounts for decedents dying in:

1987 to 1997	\$ 600,000
1998	625,000
1999	650,000
2000 and 2001	675,000
2002 and 2003	1,000,000
2004 and 2005	1,500,000
2006, 2007 and 2008	2,000,000
2009	3,500,000
2010 *	5,000,000
2011	5,000,000
2012	5,120,000
2013 **	1,000,000

* This assumes that the estate elected a stepped-up basis. By opting out of a stepped-up basis, no estate tax is levied for decedents dying in 2010.

** Subject to adjustment if current law is extended or altered.

26 U.S.C. § 2010 (current law is subject to sunset at end of 2012).

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

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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 with respect to 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, examiners frequently rely 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. Prob. Code Ann. § 37.

Stanley M. Johanson, Johanson's Texas Probate Code Annotated § 37 (2011).

History:

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

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:

Examiners commonly rely 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. Prob. Code Ann. §§ 48-56.

In addition, Tex. Prob. Code Ann. § 52 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. Prob. Code Ann. § 52A 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.

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

Source:

Citations in the Comment.

Tex. Prob. Code Ann. § 12.001(a).

5A Aloysius A. Leopold, Land Titles and Title Examination § 41.23 (Texas Practice 3d ed. 2005).

Stanley M. Johanson, Johanson's Texas Probate Code Annotated §§ 48, 52 (2011).

17 M. K. Woodward & Ernest E. Smith, III, Probate and Decedents' Estates § 208 (Texas Practice 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 Survivors

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 pursuant to Tex. Prob. Code Ann. § 160, made for the purpose of paying community debts.

Comment:

A surviving spouse who acts as community survivor under the authority of Tex. Prob. Code Ann. § 160 is commonly called an "unqualified survivor" as opposed to a surviving spouse who "qualifies" pursuant to Tex. Prob. Code Ann. § 161.

If a community debt existed at the date of death, it is presumed that the debt continues to exist to the time of the conveyance.

For estates of decedents dying intestate after September 1, 1993, the Texas Probate Code provides that 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. Prob. Code Ann. §§ 45, 155.

Source:

Citations in the Comment.

Tex. Prob. Code Ann. § 160.

4 Aloysius A. Leopold, Land Titles and Title Examination § 20.12 (Texas Practice 3d ed. 2005).

Stanley M. Johanson, Johanson's Texas Probate Code Annotated § 160 (2011).

17 M. K. Woodward & Ernest E. Smith, III, Probate and Decedents' Estates § 544 (Texas Practice 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. §§ 161–177, 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 respecting 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.

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For estates of decedents dying intestate after September 1, 1993, the Texas Probate Code provides that 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. Prob. Code Ann. §§ 45, 155.

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 Annotated §§ 161–177 (2011).

17 M. K. Woodward & Ernest E. Smith, III, Probate and Decedents' Estates § 574 (Texas Practice 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. §§ 161–177, 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 pursuant to Tex. Prob. Code Ann. § 95 or are filed in the deed records pursuant to Tex. Prob. Code Ann. § 96.

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. Prob. Code Ann. § 96 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. Prob. Code Ann. § 95 provides 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. Prob. Code Ann. § 107.

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.

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. Prob. Code Ann. § 95(c). 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. Civ. App.—San Antonio 1904, no writ); 17 M. K. Woodward and Ernest E. Smith III, Probate and Decedents' Estates § 434 (Texas Practice 1971).

Source:

Citations in the Comment.

Tex. Prob. Code Ann. §§ 95, 96, 107.

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17 M. K. Woodward & Ernest E. Smith, III, Probate and Decedents' Estates § 421 (Texas Practice 1971).

History:

Adopted, October 9, 1999.

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." There are generally four types of bankruptcy cases: a Chapter 7 "liquidation"; a Chapter 11 "reorganization"; 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 political subdivision or public agency or instrumentality of a state. 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 postpetition transactions (transactions occurring after the commencement of the bankruptcy case of the debtor), unless protected under §§ 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. 11 U.S.C. § 101(43). A "transfer" includes the creation of a lien, 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 Section 544 and that is not avoidable 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 (Matthew Bender 15th Ed. Revised 2005).

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. 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). Apparently, the post-petition bona fide mortgagee will now be protected if a copy or notice of the bankruptcy petition is not filed before the mortgage is filed. 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 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 (Bankr. 9th Cir.1987).

Source:

Standard 1.20.

Citations in the Comment.

5 Collier on Bankruptcy, Chapter 549 (Matthew Bender 15th Ed. Revised 2005).

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, there are numerous legal principles that will generally 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 authorization to grant a lien does not affect the validity or priority of the lien to an entity that extended credit in good faith, whether or not 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.

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. It appears that Section 106 which waives sovereign immunity of certain governmental units is 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 with respect to 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). 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, 76 L. Ed. 256, 52 S.Ct. 115 (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. . . . In *Van Huffel*, we affirmed the bankruptcy courts' power to sell property free from

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incumbrances, including States' liens, and approvingly noted that some courts had chosen specifically to discharge States' liens for taxes

Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 450–451, 124 S.Ct. 1905, 158 L. Ed. 2d 764 (2004).

Source:

Citations in the Comment.

Standard 3.40.

3 Collier on Bankruptcy, ¶ s 363.11, 364.06; 5 Collier on Bankruptcy, ¶ 549.07; 8 Collier on Bankruptcy, Chapters 1144, 1230, 1330 (Matthew Bender 15th Ed. Revised 2005).

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 pursuant to a farmout agreement or any written agreement directly related to a farmout agreement, or to the extent the debtor has transferred such interest pursuant to 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), 101(56A). 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:

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. 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). Apparently, the post-petition bona fide mortgagee will now be protected if a copy or notice of the bankruptcy petition is not filed before the mortgage is filed. 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

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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 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 (Bankr. 9th Cir.1987).

Source:

Citations in the Comment.

3 Collier on Bankruptcy, Chapters 362, 363, 364; 5 Collier on Bankruptcy, Chapters 541, 549 (Matthew Bender 15th Ed. Revised 2005).

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 (pursuant to 11 U.S.C. § 522(b)(3)) are chosen or whether the federal exemptions (pursuant to 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 pursuant to 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. The title examiner also 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 Chapter 9, 11, 12 or 13, the grant or denial of discharge. 11 U.S.C. § 362; Fed. R. Bankr. P. 4001.

Caution:

Examiners 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

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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 (Matthew Bender 15th Ed. Revised 2005).

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 reverts 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 35 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 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).

Source:

Citations in the Comment.

5 Collier on Bankruptcy, Chapter 554 (Matthew Bender 15th Ed. Revised 2005).

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

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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 there are no committees 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, Rule 4001 of the Bankruptcy Rules for the Southern District of Texas requires that, in addition to service required by Fed. R. Bankr. P. 4001, 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 15 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), 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.A. § 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.A. §§ 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 (Matthew Bender 15th Ed. Revised 2005).

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

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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 The Bankruptcy Estate Not In The 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 than 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 not made, court approval of the sale is not required. Fed. R. Bankr. P. 6004(e); 11 U.S.C. §§ 102(1), 363(b). Apparently, 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”); In re WRT Energy Corporation, 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). A sale of an easement may be made pursuant to § 363. In re Probasco, 839 F.2d 1352 (9th Cir.1988) (sale of co-owner’s interest in easement pursuant to 11 U.S.C. § 363(h)).

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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). Also, an order authorizing a sale is an automatic “stay” 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 (Matthew Bender 15th Ed. Revised 2005).

History:

Adopted, October 9, 1999.

Standard 12.90. Authority To Convey Property Of The Bankruptcy Estate In The 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.

Caution:

In order 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 (Matthew Bender 15th Ed. Revised 2005).

History:

Adopted, October 9, 1999.

Standard 12.100. Authority To Convey Property Of The 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

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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 on 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, 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. 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 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. 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 (if the case is filed on or after October 22, 1994). Fed. R. Bankr. P. 7004(h). The 2005 amendments to the Bankruptcy Code changed the requirements for various notices, 11 USC § 342; however, examiners reasonably and customarily rely on certificates confirming notice as evidence of compliance with the notice requirements.

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 (Matthew Bender 15th Ed. Revised 2005).

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 the confirming 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, the sale may be viewed as a modification of the plan. A cautious examiner may require an order authorizing the sale. Although an appeal from a confirmation order may be 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 and 364. In re Seidler, 44 F.3d 945 (11th Cir.1995). 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 (Matthew Bender 15th Ed. Revised 2005).

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).

Caution:

If the loan has not been fully disbursed, the appeal may not be moot due to failure to obtain a stay. In re Swedeland Develop. Group, Inc., 16 F.3d 552 (3d Cir.1994). 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).

Source:

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3 Collier on Bankruptcy, ¶ 364.01, et seq. (Matthew Bender 15th Ed. Revised 2005).

History:

Adopted, October 9, 1999.

Standard 12.130. Filings In Violation Of The 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. U.S.*, 46 F.3d 1573 (Fed.Cir.1995); *In re Soares*, 107 F.3d 969 (1st Cir. 1997).

Source:

Citations in the Comment.

3 Collier on Bankruptcy, ¶ 362.11 (Matthew Bender 15th Ed. Revised 2005).

History:

Adopted, October 9, 1999.

Standard 12.140. The Discharge And Judgment Liens

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 pursuant to 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.A. § 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 35 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 pursuant to 11 U.S.C. § 522(f) if the lien secures a domestic support obligation. 11 U.S.C.A. §§ 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 (Bankr. 9th Cir.1992) (relating to tax lien); Tex. Prop. Code Ann. §§ 52.025, 52.042. A judgment lien (evidencing a discharged debt) will not attach to property acquired after the petition for debtor relief is filed. Tex. Prop. Code Ann. § 52.042. A judgment lien is automatically released if the debt is discharged and the land is exempt or is otherwise not abandoned. The examiner should review the bankruptcy docket and abstract of judgment to verify that the debt was discharged, and should review the docket and Schedule "A" to verify that the property was scheduled, and was exempt or otherwise was not abandoned.

Source:

Citations in the Comment.

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Adopted, October 9, 1999; amended, June 16, 2006; amended, June 27, 2008. 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 pursuant to 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 pursuant to 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), *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).

Source:

Citations in the Comment.

2 Collier on Bankruptcy, Chapter 108 (Matthew Bender 15th Ed. Revised 2005).

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 reverts the property of the estate in the debtor.

Comment:

The dismissal of the bankruptcy case will revert 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 (Matthew Bender 15th Ed. Revised 2005).

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 Ann. §§ 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. Prob. Code Ann. § 52. See also *Albright v. Bouldin*, 394 S.W.2d 681 (Tex. Civ. 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.

Source:

Citations in the Comment.

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3A Aloysius A. Leopold, Land Titles and Title Examination §§ 10.18, 10.19 (Texas Practice 3d ed. 2005).

Tex. Gov't Code Ann. §§ 312.011(1); 602.002–602.005.

Tex. Prop. Code Ann. § 12.001(a).

Tex. Prob. Code Ann. § 137.

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 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 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:

(1) The date on which the affidavit was made and, if recorded, the length of time it has been recorded;

(2) Whether the party or parties making the affidavit were interested or disinterested;

(3) The completeness of the affidavit, whether it recites facts or merely draws conclusions, and whether it discloses the basis of the maker's knowledge;

(4) The value of the interest in the property under examination;

(5) Whether more reliable and readily obtainable proof is available; and

(6) 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:

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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 term 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. Civ. 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 in suits to declare heirship or involving title to property as prima facie evidence of the stated facts. Tex. Prob. Code Ann.

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§ 52. 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. Civ. App.—Austin 1938, writ dismissed). 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 whose 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 also bear in mind that the special legislative endorsement of reliance on recitals represented by Tex. Prob. Code Ann. § 52 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 and 8.20, regarding the necessity for examination of powers of attorney, and the **Caution** 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.

For example, 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. Civ. 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. Vidaaurri*, 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 must presume that real property acquired during marriage is community property, whether acquired in the name of one or both spouses.

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Comment:

Tex. Fam. Code Ann. § 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. Civ. 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 Ann. §§ 4.202–4.206.) Under Tex. Fam. Code Ann. § 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 Ann. § 3.003. The presumption is rebuttable by clear and convincing evidence that the property is separate property. Tex. Fam. Code Ann. § 3.003; e.g., *Janes v. Gulf Production Co.*, 15 S.W.2d 1102 (Tex. Civ. 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, judgment 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.

Standard 14.20. Gifts, Devise And Descent

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.

Comment:

Property acquired during marriage by gift, devise or descent is separate property. Tex. Fam. Code Ann. § 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. Civ. App.—Beaumont 1929, writ ref'd). Even where the gift is made to both husband and wife, 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. Civ. App.—Fort Worth 1939, no writ); see also *Banks v. Banks*, 229 S.W.2d 99 (Tex. Civ. App.—Austin 1950, writ ref'd n.r.e.); *Williams v. Nettles*, 56 S.W.2d 321 (Tex. Civ. App.—Waco 1932, writ dismissed).

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

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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. Civ. 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.

Standard 14.30. Conveyances Between Spouses

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.

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. 306 (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. Civ. 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 wife to husband after the statutory equalization of the rights of spouses with respect to marital property. See *In re Marriage of Morrison*, 913 S.W.2d 689 (Tex. App.—Texarkana 1995, writ denied).

Tex. Const. Ann. 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 Ann. § 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. Ann. 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 privity 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. Ann. 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.

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. Civ. App.—Waco 1963, writ dismissed). 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 dismissed); *Coggin v. Coggin*, 204 S.W.2d 47, 51–52 (Tex. Civ. 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. 99 S.W.2d at 884.

Many cases have held that 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, judgment adopted); *Morris v. Neie*, 212 S.W.2d 981 (Tex. Civ. App.—Eastland 1948, writ refused 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 May Be Rebutted
By Showing Of 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. Civ. 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. Civ. 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. Civ. 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 Ann. § 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. Ann. 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

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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 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.

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 Ann. § 3.102(c). Tex. Fam. Code Ann. § 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. Civ. App.—Beaumont 1974, writ dismissed); see *Vallone v. Miller*, 663 S.W.2d 97, 98 (Tex. App.—Houston [14th Dist.] 1983, writ refused 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. Ann. art. XVI, § 15, one spouse's purported conveyance of only his or her interest must be considered 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. Ann. 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 Ann. §§ 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. Civ. App.—Fort Worth 1946, no writ). When one spouse has been judicially declared incapacitated, Tex. Prob. Code Ann. § 883 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.

Standard 14.70. Necessity For Joinder When Community Property Is In Name Of Only 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 Ann. § 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 Ann. §§ 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. Civ. App.—Fort Worth 1946, no writ). To the same effect is Tex. Prob. Code Ann. § 883 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 Ann. § 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 Ann. § 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. Civ. 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. Ann. 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, 736 S.W.2d at 629, and the examiner should assume that the exception noted in this **Caution** still governs pre-1968 conveyances.

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.

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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. Civ. App.—Texarkana 1944, writ ref'd w.o.m.). For example, a purchaser without notice of a former spouse's interest pursuant to 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. Civ. 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, judgment adopted); *Strong v. Strong*, 66 S.W.2d 751 (Tex. Civ. 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. Civ. 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 husband and wife (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. Civ. 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 husband and wife 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 must require the joinder of both spouses, unless it is conclusively shown that the property is not, or is no longer, homestead.

Comment:

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Homestead is defined by Tex. Const. Ann. 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 Ann. § 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. Ann. art. XVI, § 51; Tex. Prop. Code Ann. § 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. Ann. art. XVI, § 51; Tex. Prop. Code Ann. § 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. Civ. 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.*, 132 S.W.2d 553 (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 the homestead is separate property of one spouse or community property, Tex. Fam. Code Ann. § 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 Ann. §§ 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. Ann. art. XVI, § 50, and formerly in Tex. Rev. Civ. Stat. Ann. 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. Ann. 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 Ann. §§ 64.001 - .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. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.); see *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. Civ. 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. Ann. 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 a man and woman who occupy the same residence conclusive evidence of whether they are husband and wife. Of course, both spouses' joinder in a deed may also be required for property that is clearly not homestead. See Standard 14.60.

Source:

Citations in the Comment.

History:

Adopted, June 15, 2001.

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 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.

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 Ann. § 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 Ann. § 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 Ann. § 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, it is important that a certified copy of the divorce decree, as well as any property settlement agreement that it incorporates, or a conveyance between the spouses be recorded in the real property records of the county where the property is located; otherwise there is no constructive notice of the new status of the spouses and their property. *Myers v. Crenshaw*, 116 S.W.2d 1125, 1131 (Tex. Civ. 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. Civ. App.—Beaumont 1932, writ ref'd); *Prewitt v. United States*, 792 F.2d 1353 (5th Cir. 1986).

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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). A certified copy of the divorce decree may be recorded in the real property records of the county where the land is located, Tex. Prop. Code Ann. § 12.013. 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 the title in the spouse to whom it is awarded, such recordation, without a conveyance from the other spouse or other formality, is sufficient to evidence record title in the spouse to whom the tract has been allotted. See *Brinkley v. Brinkley*, 381 S.W.2d 725 (Tex. Civ. App.—Houston 1964, no writ).

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.

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 mechanics' and materialmen's liens); however, if the purpose of the examination is to determine the validity and priority of liens, an examiner should caution the client about the possible existence of unrecorded 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 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

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security interest in real property automatically extends to appurtenances. *Pine v. Gibraltar Savings Assoc.*, 519 S.W.2d 238, 242 (Tex. Civ. App.–Houston [1st Dist.] 1974, writ ref'd n.r.e.). 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. Civ. 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 dismissed 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 dismissed 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, 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. Civ. 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. Civ. 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. Civ. App.–Dallas 1971, no writ).

Other Contractual Liens: A lien may be created by contract to secure practically any obligation. Commonly encountered voluntary liens include:

(a) **Mechanics' and Materialmen'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 Ann. § 53.254.

(b) **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).

(c) **Homeowners' Association Lien for Assessments.**

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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). Respecting 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 Ann. § 82.113(b). A deed restriction or other covenant running with the land and 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 Ann. § 209.002), a tax exempt entity (26 U.S.C. § 501(c)(3)), or a governmental entity. Tex. Prop. Code Ann. § 5.017.

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 Ann. § 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. Civ. 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 Ann. § 13.001(b); *Biggs & Co. v. Caldwell*, 115 S.W.2d 461, 463 (Tex. Civ. App.–Fort Worth 1938, writ dismissed). 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. Civ. App.–Fort Worth 1952, writ refused 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 Ann. §§ 12.001, 12.002; Tex. Gov't Code Ann. §§ 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 dismissed w.o.j.); *McGeorge v. Henrie*, 94 S.W.2d 761, 762 (Tex. Civ. 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 dismissed 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.

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Code Ann. § 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 Ann. §§ 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.

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 Ann. § 91.005; *Am. Nat'l Bank & Trust v. First Wis. Mtg. Trust*, 577 S.W.2d 312, 316 (Tex. Civ. 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. Civ. App.—Dallas 1926, writ ref'd). A security interest in the reversion is subject to any then existing lease unless the lease provides for a subordination of interests. *F. Groos & Co. v. Chittim*, 100 S.W. 1006, 1010–1011 (Tex. Civ. 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. Civ. 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. Civ. 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. Civ. 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 as a result of 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 mechanics' and materialmen'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 respecting each party in the chain of title should also extend back from the time that a party acquires an interest for the longest

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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 Ann. § 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 are effective with respect to 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. Tex. Fam. Code Ann. § 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 respecting 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); *Broadus 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. Civ. 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. There are numerous requirements regarding, as well as numerous exceptions to, 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. Ann. § 5.016. Although the law 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).

Source:

Citations in the Comment.

History:

Adopted, June 13, 2003.

Standard 15.20. Involuntary Mechanics' And Materialmen's Liens.

The examiner should identify recorded mechanics' and materialmen's lien affidavits affecting the title under examination.

Comment:

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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. Civ. App.—Fort Worth 1936, writ dismissed). What constitutes a “building” has been construed broadly. See *Ambrose & Co. v. Hutchison*, 356 S.W.2d 215 (Tex. Civ. 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, judgment 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 Manufacturing 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 mechanics’ and materialmen’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 Ann. § 53.021; or (2) for an oil, gas or water well, an oil or gas pipeline, or a mine or quarry, Tex. Prop. Code Ann. §§ 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). 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 Ann. § 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 Ann. § 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 Ann. § 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 Ann. § 53.124. 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.* §§ 53.021 and 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 Ann. § 56.021(a). A

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mineral subcontractor must have served notice of the claim on the property owner at least ten days before filing the affidavit. Tex. Prop. Code Ann. § 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 Ann. § 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 Ann. § 56.005(b). The affidavit must contain the items specified in Tex. Prop. Code Ann. § 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. 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 venturers or that an agency relationship exists. *Youngstown Sheet and Tube Co. v. Penn.*, 357 S.W.2d 239 (Tex. Civ. 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 venturers 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 Ann. §§ 56.001–56.006.

Tex. Prop. Code ch. 62 also enables a broker to perfect a statutory lien on a seller's or lessor's commercial non-residential real estate for the broker's commission. A broker claiming the lien must have earned the commission under a written commission agreement and comply with the filing and notice requirements of Tex. Prop. Code Ann. §§ 62.024–62.026, 62.041.

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. Civ. 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. Civ. 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, Sivals & Bryson, Inc. v. Operators' Oil & Gas Co.*, 37 S.W.2d 313, 315 (Tex. Civ. App.—Eastland 1931, writ *dism'd*). Thus, where a bona fide purchaser is involved, any inquiry for the existence of unfiled liens ordinarily need extend no 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 two years (or one year for a claim arising from a residential construction contract) after the last day the claimant may file the lien affidavit, or within one year after completion, termination, or abandonment of the work under the original contract, whichever is later. Tex. Prop. Code Ann. §§ 53.158, 56.041(a). After the passage of that period, the title examiner may assume 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 limitation for debt actions, Tex. Civ. Prac. & Rem. Code Ann. § 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. Civ. App.—Amarillo 1918, no

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writ). A statutory mechanics' and materialmen's lien may be avoided by the filing of a bond for payment in compliance with Tex. Prop. Code Ann. §§ 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 Ann. § 53.281 et seq., including being signed and delivered using a waiver and release form substantially in compliance with prescribed statutory forms.

For a discussion of voluntary mechanics' and materialmen's liens, see Standard 15.10.

Caution:

A mechanics' and materialmen's lien relates back to the beginning of the work or the furnishing of materials. Tex. Prop. Code Ann. § 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.

Source:

Citations in the Comment.

History:

Adopted, June 16, 2006.

Standard 15.30. Judgment Liens

An examiner should identify recorded abstracts of judgment affecting the title under examination.

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 Ann. §§ 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).

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.

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 will usually assume 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 Ann. § 52.003:

1. The names of the plaintiff and defendant;
2. The birth date of the defendant, if available;
3. The last three numbers of the driver's license number of the defendant, if available;
4. The last three numbers of the social security number of the defendant, if available;
5. The number of the suit in which the judgment was rendered;
6. 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;
7. The date on which the judgment was rendered;
8. The amount for which the judgment was rendered and the balance due;
9. The amount of the balance due, if any, for child support arrearage; and

10. The rate of interest specified in the judgment.

The above requirements summarize current law and do not reflect prior statutory requirements.

Womack v. Paris Grocer Co., 166 S.W.2d 366 (Tex. Civ. App.—Galveston 1942), writ ref'd 168 S.W.2d 645 (Tex. 1943). 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. Civ. 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. Civ. App.—Amarillo 1941, writ ref'd). 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. Civ. 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.

All names must be indexed to create a valid lien. *Shirey v. Trust Co. of Texas*, 69 S.W.2d 835 (Tex. Civ. 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 costs only 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”). 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. Civ. 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 assume 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 Ann. § 52.006. To determine whether a judgment has become dormant, see Tex. Civ. Prac. & Rem. Code Ann. § 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 Ann. § 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.—Ft. 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. Civ. App.—Eastland 1931, writ ref'd).

There are three exceptions to the general rule that a judgment lien lasts for ten years:

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(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.A. § 3201.

(2) Child support liens filed on or after September 1, 1997, and prior to May 26, 2009, are effective indefinitely. Child support liens filed on or after May 26, 2009, are effective for real property until the tenth anniversary of the date on which the lien notice was filed and may be extended for subsequent 10-year periods by filing a renewal lien notice before the tenth anniversary. Tex. Fam. Code Ann. § 157.318. In the Interest of S.C.S. and M.D.S., 48 S.W.3d 831 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); 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 Ann. § 52.006(b).

An abstract of judgment creates a judgment lien only if issued by a Texas state court under Tex. Prop. Code Ann. §§ 52.001, 52.002, or by a United States district court located in Texas, as authorized by Tex. Prop. Code Ann. § 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 domesticated as provided in Tex. Civ. Prac. & Rem. Code Ann. ch. 35 and ch. 36, 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 Ann. § 52.0012 creates a nonjudicial procedure for clearing such cloud by filing an affidavit that operates to release the abstract of judgment respecting the homestead unless the creditor files a contradicting affidavit within the time provided by the statute. 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 Ann. § 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 respecting a child support lien as an affidavit filed respecting 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 Ann. § 157.3171.

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. There are many cases, particularly older cases, which conclude 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.

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. Civ. 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. Civ. 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 received and no deed of trust or mortgage appears.

An equitable or implied vendor's lien is not recordable, but rests upon the principle that it would be inequitable to allow one to retain the property of another without paying for it. 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. Civ. 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. Equity does not infer that the vendor is entitled to a different and additional security from that specified in the contract. *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. Civ. App.—Dallas 1971, no writ). Under these circumstances, no equitable lien will arise, because the purpose of an implied equitable lien is to enforce a purchase money obligation not otherwise secured.

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. Civ. 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, where 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 "not later than four years after the day the instrument was recorded, if the instrument was 'recorded' before September 1, 2007, or two years after the date of recordation, if the instrument was 'filed for record' on or after September 1, 2007. Tex. Civ. Prac. & Rem. Code Ann. § 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 would ordinarily require a release of the vendor's lien, a quitclaim deed 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. Civ. App. 1895, no writ); *Stockwell v. Melbern*, 185 S.W. 399 (Tex. Civ. App.—Galveston

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1916, writ ref'd); *Martin v. Bell-Woods Co.*, 57 S.W.2d 271 (Tex. Civ. 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:

Child Support Lien, Tex. Fam. Code Ann. §§ 157.311–.331.

Cotton Pests (Texas Department of Agriculture), Tex. Agric. Code Ann. § 74.004(e)–(g).

County Assessments For Road Improvements,* Tex. Transp. Code Ann. § 253.009.

County Litter Lien, Tex. Health & Safety Code Ann. § 365.034(c).

County Weed and Sanitary Lien, Tex. Health & Safety Code Ann. § 343.023.

Federal Lien Securing a Judgment Imposing a Criminal Fine, 18 U.S.C. § 3613.

Miscellaneous State Tax Liens, Tex. Tax Code Ann. ch. 113.

Municipal Assessments for Street Improvements,* Tex. Transp. Code Ann. §§ 312.002, 312.064, 313.042, 313.051, 313.054.

Municipal Assessments for Water/Sewer Systems,* Tex. Loc. Gov't Code Ann. §§ 214.013(b), 214.014, 522.065, 522.067.

Municipal Demolition Lien,* Tex. Loc. Gov't Code Ann. § 214.0015–.004.

Municipal Utility Services Lien,* Tex. Loc. Gov't Code Ann. § 402.0025(d)–(h).

Municipal Weed and Sanitary Lien,* Tex. Health & Safety Code Ann. § 342.007.

Solid Waste Facility Remedial Lien, Tex. Health & Safety Code Ann. § 361.194.

State Hospital Lien (for support, maintenance, and treatment of a patient with mental illness or client with mental retardation), Tex. Health & Safety Code Ann. § 533.004.

Surface Coal Mining Reclamation,* Tex. Nat. Res. Code Ann. § 134.150.

Texas Workforce Lien,* Tex. Lab. Code Ann. §§ 61.081–.085.

Unemployment Taxes, Tex. Lab. Code Ann. §§ 213.057–.058.

Water District Standby Fees,* Tex. Water Code Ann. § 49.231.

Water District Taxes,* Tex. Water Code Ann. § 55.604, Texas Tax Code Ann. § 32.01.

For a discussion of mechanics' and materialmen'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:

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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 assume 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 ordinarily determines 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. 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 Ann. § 32.01.

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 Ann. §§ 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 Ann. § 31.08. However, a tax certificate issued through fraud or collusion is void.

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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 Ann. § 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 Ann. § 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 Ann. §§ 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 Ann. § 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 Ann. § 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 Ann. §§ 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.

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. The ad valorem tax lien is superior to a federal tax lien. Tex. Tax Code Ann. § 32.04; 26 U.S.C. § 6323(b)(6). Except as hereafter provided, a tax lien takes priority over the claim of any holder of a lien on the land encumbered by the tax lien, regardless of whether the debt or lien existed before the tax lien. Tex. Tax Code Ann. § 32.05.

The above 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.

The ad valorem tax lien is subordinate to a restrictive covenant running with the land, other than a restrictive covenant in favor of a property owner's association recorded before

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January 1 of the year the tax lien arose, and is subordinate to an easement recorded before January 1 of the year the tax lien arose. Tex. Tax Code Ann. § 32.05.

Tex. Tax Code Ann. § 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. The legislative enactment addresses the prospective nature of this change as follows:

The change in law made by this Act to Sections 32.06 and 32.065, [Tex.] Tax Code, applies to all foreclosures under those sections that occur on or after the effective date of this Act, other than a foreclosure under a transferred ad valorem tax lien that was transferred before the effective date of this Act pursuant to a contract that provided for specific foreclosure procedures under the law in effect at the time the contract was executed. A foreclosure under a transferred ad valorem tax lien that was transferred before the effective date of this Act pursuant to a contract that provided for specific foreclosure procedures under the law in effect at the time the contract was executed is governed by the law in effect at the time the contract was executed, and the former law is continued in effect for that purpose.

Sen. Bill 1520, Section 4, 80th Leg. R. S. 2007.

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. Civ. App.—Austin 1937, writ dismissed). 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 subsequent to the first lien filed 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. Civ. App.—Fort Worth 1961, writ refused n.r.e.); Tex. Prop. Code Ann. § 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 Ann. § 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. Bank of Hobbs*, 491 S.W.2d 954 (Tex. Civ. App.—El Paso 1973, writ refused 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. Civ. 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

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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. Civ. App. 1907, no writ); *Gill v. First Nat. Bank of Harlingen*, 114 S.W.2d 428 (Tex. Civ. 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).

There has been some confusion in the cases 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. Bank*, 838 S.W.2d 263 (Tex. App.—Dallas 1992, no writ).

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. Bank*, 529 S.W.2d 612 (Tex. Civ. App.—Dallas 1975, writ ref’d).

There are several exceptions 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. Bank of Fort Worth*, 549 S.W.2d 250 (Tex. Civ. 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 Ann. § 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. Civ. 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 Ann. § 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 Ann. § 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 Ann. § 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

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vendor's lien. *Slodov v. U.S.*, 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:

Regardless of whether 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. Civ. App.—Eastland 1928, writ ref'd); *Spencer-Sauer Lumber Co. v. Ballard*, 98 S.W.2d 1054 (Tex. Civ. App.—San Antonio 1936, no writ) (full release); *Cook v. Leslie*, 59 S.W.2d 302 (Tex. Civ. 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 Ann. §§ 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 Ann. § 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 which 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 assume 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 assume 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 Ann. §§ 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 Ann. § 16.035 and Tex. Bus. & Com. Code Ann. § 3.118.

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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 Ann. § 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 Ann. § 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 § 16.035 Tex. Civ. Prac. & Rem. Code Ann.), 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 Ann. § 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 provision governing notes and other negotiable instruments. Tex. Civ. Prac. & Rem. Code Ann. § 16.035; Tex. Bus. & Com. Code Ann. § 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 Ann. § 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 mechanics’, contractors’, or materialmen’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 Ann. § 53.281.

Caution:

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.A. § 1821(d)(14), enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), and 28 U.S.C.A. § 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

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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.A. § 2219a (Farm Credit Act of 1971, § 4.36, as amended by Agricultural Credit Act of 1987, Pub. L. No. 100–233 (January 6, 1988), tit. I, § 108, 101 Stat. 1582 and Agricultural Credit Technical Corrections Act of 1988, Pub. L. No. 100–399 (August 17, 1988), tit. I, § 104, 102 Stat. 990).

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.A. § 1985 (Consolidated Farm and Rural Development Act, Pub. L. No. 87–128 (August 8, 1961), tit. VII, § 335(c), 75 Stat. § 315, as amended by Agricultural Credit Act of 1987, Pub. L. No. 100–233 (January 6, 1988), tit. VII, § 610, 101 Stat. 1568); 7 C.F.R. § 1951.911; Food, Agricultural, Conservation and Trade Act of 1990, Pub. L. No. 101–624 (November 28, 1990), 103 Stat. § 3359.

Source:

Citations in the Comment.

History:

Adopted, June 13, 2003.

Standard 15.110. Lis Pendens

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.

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 the parties;
- (4) the kind of proceeding; and
- (5) a description of the property affected.

Tex. Prop. Code Ann. § 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. Civ. App.—Corpus Christi 1977, no writ).

Tex. Prop. Code Ann. § 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

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notice. The notice must be served not later than the third day after the person files the notice. Tex. Prop. Code Ann. § 12.007(d).

Effective September 1, 2009, a court may order expungement of 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 Ann. § 12.0071. After a certified copy of an order expunging the notice of lis pendens is recorded, the notice of lis pendens and any information derived from the notice:

(1) does not: (A) constitute constructive or actual notice of any matter contained in the notice or of any matter relating to the proceeding; (B) create any duty of inquiry in a person with respect to the property described in the notice; or (C) affect the validity of a conveyance to a purchaser for value or of a mortgage to a lender for value; and (2) is not enforceable against a purchaser or lender described in Subdivision (1)(C), regardless of whether the purchaser or lender knew of the lis pendens action.

Id.

Tex. Prop. Code Ann. § 12.008 contains provisions regarding cancellation of a lis pendens.

Tex. Prop. Code Ann. § 13.004 provides:

(a) 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.

(b) 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.

A properly filed lis pendens notice effectively prevents a grantee from being an innocent purchaser. The doctrine 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. *Bayou Terrace Inv. Corp. v. Lyles*, 881 S.W.2d 810 (Tex. App.—Houston [1st Dist.] 1994, no writ).

Caution:

A lis pendens only gives constructive notice while the underlying cause of action is pending and 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. Civ. App.—Amarillo 1923, writ dismissed). However, 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 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.

CHAPTER XVI

FORECLOSURES

Standard 16.10. Nonjudicial Foreclosure

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

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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 must 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 must 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. 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).

An examiner may rely on recitals in appropriate circumstances. See Standards 13.20 and 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. Civ. 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 Ann. 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 Ann. 51.002 (formerly codified as Tex. Rev. Civ. Stat. Ann. art. 3810) sets out the current procedures that must be followed for 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

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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 a "mortgage servicer" is given authority to perform certain prerequisites to foreclose on behalf of a holder of the debt.

For sales held on or after June 17, 2005, and prior to September 1, 2005:

The basic requirements remain the same, except that 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.

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 Ann. §§ 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); (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 Ann. § 51.002(h); (3) one or more persons may be authorized to execute the power of sale under a security agreement, Tex. Prop. Code Ann. § 51.0074; and (4) the purchase price is payable immediately upon acceptance of the bid, Tex. Prop. Code Ann. § 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 Ann. § 51.0075(f).

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Effective June 19, 2009, 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 during the servicemember's active duty and for nine months thereafter unless foreclosed by a court order or with the servicemember's written waiver. Tex. Prop. Code Ann. § 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, then the debtor should send notice of the active duty to the sender of the notice immediately. Tex. Prop. Code Ann. § 51.002(i). For related federal law, see the Caution, below.

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 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 Ann. § 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 Ann. § 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 Ann. § 215.002, is prohibited from foreclosing an assessment lien without a judicial order of sale. Tex. Prop. Code Ann. § 215.015. Notice to junior lienholders and an opportunity to cure is a prerequisite to foreclosure, Tex. Prop. Code Ann. § 209.0091, and the association may not foreclose a lien solely for fines or attorney's fees relating to fines. Tex. Prop. Code Ann. § 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. A residential debtor has 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. Tex. Prop. Code Ann. § 209.011. Effective September 1, 2009, a property owners' association that conducts a foreclosure sale must also send written notice by certified mail, return receipt requested, to each lot owner and each lienholder of record not less than the 30th day after the date of the foreclosure sale informing them of their right to redeem. Tex. Prop. Code Ann. § 209.010. The owner or a lienholder of record may redeem the property from any purchaser at the foreclosure sale not later than the 180th day after the date the association mails written notice of the sale to the owner and lienholder. A lienholder of record may not redeem the property before 90 days after the association mails written notice of the sale to the lot owner and the lienholder and then only if the lot owner has not previously redeemed. Tex. Prop. Code Ann. § 209.011.

The statute of limitations for foreclosure of a lien runs four years from date of maturity of the obligation, unless otherwise tolled. 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. Civ. 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. Civ. 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 of time for foreclosure. *Southland Life Ins. Co. v. Egan*, 86 S.W. 2d 722 (Tex. 1935). Tex. Civ. Prac. & Rem. Code Ann. § 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.

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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 must 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. *Id.* § 7425(d). If the required notice is not given, any transfer remains subject to the federal tax lien. *Id.* § 7425(b)(1). In making the determination that the Internal Revenue Service was properly notified, the examiner may consider (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 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 Ann. § 51.002.

John M. Nolan & Michael F. Alessio, *Texas Annotated Deed of Trust in Univ. Tex. 38th Annual Mortgage Lending Inst.* (2004).

History:

Adopted: June 25, 2004.

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,

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on the first Tuesday of any month between the hours of 10:00 A.M. and 4:00 P.M. Tex. R. Civ. P. 646a and 647. 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 Ann. § 34.045.

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 pursuant to 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. Civ. 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. Civ. App.—Beaumont 1923), *aff'd*, 269 S.W. 1037 (Tex. Comm'n App. 1925, judgment adopted); *Sledge v. Craven*, 254 S.W.2d 888 (Tex. Civ. 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, judgment 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 pursuant to 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 must 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. Civ. 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. Civ. 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).

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. Civ. 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. Civ. App.—Fort Worth 1948, writ *ref'd*); *Tyler v. Henderson*, 162 S.W.2d 170, 174–175 (Tex. Civ. App.—Fort Worth 1942, writ *ref'd w.o.m.*).

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.

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App. Texarkana 1999, no pet.); Hicks v. Sias, 102 S.W. 2d 460 (Tex. Civ. 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.

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 Ann. § 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.

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 Ann. § 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 Ann. § 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 Ann. §§ 33.54, 34.08.

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 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.

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, or the cost of improvements. These 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

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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 must 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 Ann. § 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 ceased to occupy the property for more than twelve consecutive months, 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 the constitutional provision prohibiting a home equity loan from being secured by homestead property designated for agricultural use).

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 2001).

History:

Adopted, June 13, 2003.

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

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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.

If there are senior and junior liens, and if the holder of the senior lien accepts a deed in satisfaction of the debt secured by that lien, there is a question of whether the lien merges into the fee simple title. If there is a merger of title, the grantee would own the land subject to a new first lien held by the original junior lienholder. However, if the mortgagee did not intend that a merger occur, but rather that the lien remain in existence, there will be no merger. As a merger would most commonly be disadvantageous to the mortgagee, unless there is evidence that the parties intended a merger, Texas courts assume that no intent to merge existed and none will result. The junior lienholder will thereafter have a right to redeem within a reasonable period of time. See *North Texas Building & Loan Ass'n v. Overton*, 86 S.W.2d 738 (Tex. 1935).

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.

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 *Yett v. Houston Farms Development Co.*, 41 S.W.2d 305 (Tex. Civ. App.-Galveston 1931, writ ref'd) (mineral deed); *Flag-Redfern Oil Co. v. Humble Exploration Co.*, 744 S.W.2d 6 (Tex. 1987) (mineral deed).

The problems that might arise from accepting a deed in lieu of foreclosure were remedied somewhat by Tex. Prop. Code Ann. § 51.006, which became effective on August 28, 1995. This provision permits the holder of a debt under a deed of trust to void the deed within four years of its date if the debtor did not disclose a lien or other encumbrance before executing the deed to the holder of the debt and the holder had no personal knowledge of the undisclosed lien or encumbrance. A third party may rely conclusively upon an affidavit of the holder stating that the holder has voided the deed as provided in the section. Voiding a deed in lieu of foreclosure does not affect the priority of the deed of trust. The holder may also foreclose the deed of trust without voiding the deed in lieu of foreclosure.

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 under Tex. Bus. & Com. Code Ann. § 21.002 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.

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.