# PROPOSED TEXAS TITLE EXAMINATION STANDARDS

Owen L. Anderson, Editor in Chief
Texas Title Examination Standards Editorial Board

The current Texas Title Examination Standards appear as Title 2—Appendix to the Texas Property Code. In addition, the Standards are also accessible on the Section web page via the Internet.

The Title Examination Standards Joint Editorial Board proposes to add nine new Texas Title Standards: Standards 4.40 through 4.120, inclusive.

Please study these proposed changes together with the proposed comments and cautions. The Title Examination Standards Board requests and encourages you to submit your comments to the Board so that this work will be refined before it is submitted for final adoption and promulgation.

We would also appreciate any recommendations that you may have to amend or augment the existing Standards. Please send your comments and suggestions by **June 15, 2013**, to:

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**[To be inserted after Standard 4.30]**

**Standard 4.40. Notice Recording System**

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

Comment:

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

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

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

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

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

How A Notice Recordation Statute Operates: Under a notice statute, if the subsequent instrument is executed and delivered before the prior instrument is filed for record and if the subsequent purchaser or lienholder pays value and has no notice of the prior instrument, then the subsequent instrument prevails regardless of whether the prior instrument is filed for record before the subsequent instrument. Houston Oil Co. v. Kimball, 122 S.W. 533 (Tex. 1909); Watkins v. Edwards, 23 Tex. 443 (1859); White v. McGregor, 50 S.W. 564 (Tex. 1899); Penny v. Adams, 420 S.W.2d 820 (Tex. Civ. App.—Tyler 1967, writ ref'd); Matthews v. Houston Oil Co., 299 S.W. 450 (Tex. Civ. App.—Beaumont 1927, no writ); Raposa v. Johnson, 693 S.W.2d 43 (Tex. App.—Ft. Worth 1985, writ ref'd n.r.e.). For example, assume that Homeowner grants an oil and gas lease on February 1 to A, who does not file for record. Thereafter, Homeowner gives another oil and gas lease to B, a bona fide purchaser, as defined in the comments to Standard 4.90, on February 5. As between A and B, B prevails regardless of whether either A or B records. And, under Texas case law, if A assigned his lease to C on February 10, B would also prevail over C even if B has not recorded. Houston Oil Co. v. Kimball, 122 S.W. 533 (Tex. 1909). However, if Homeowner, on February 15, granted a third oil and gas lease to D for value, who took without notice of B's lease (and assuming that B has still not recorded), D would prevail over B.

Filing and Recording: A paper document filed for record may not be validly recorded or serve as notice of the paper document unless: (1) the paper document contains an original signature or signatures that are acknowledged, sworn to with a proper jurat, or proved according to law; or (2) on or after September 1, 2007, the paper document is attached as an exhibit to a paper affidavit or other document that has an original signature or signatures that are acknowledged, sworn to with a proper jurat, or proved according to law. Tex. Prop. Code Ann. § 12.0011. An original signature is not required for an electronic document that complies with the requirements of Chapter 15, Tex. Prop. Code Ann. (Uniform Real Property Electronic Recording Act); Chapter 195, Tex. Loc. Gov't Code Ann. (electronic filing of records); Chapter 322, Tex. Bus. & Comm. Code Ann. (Uniform Electronic Transactions Act); "or other applicable law." Tex. Prop. Code Ann. § 12.0011. See Standard 4.120. If made as provided by law, a certified copy, when recorded, has the same effect as the original. Tex. Loc. Gov't Code Ann. § 191.005 and Tex. Evid. Rules 902(4).

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

"[A]n electronic document or other instrument is filed with the county clerk

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

County Clerk's Records: The county clerk is required to:

(1) Record instruments in a well bound book, microfilm records, or other medium (such as optical imaging). Tex. Loc. Gov't Code Ann. § 191.002;

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

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

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

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

(1) Deed Records (since 1836)
(2) Probate Records (since 1836)
(3) Release Records (since 1836)
(4) Marriage Records (since 1837)
(5) Deed of Trust Records (since 1879)
(6) Abstract of Judgment Records (since 1879)
(7) Vendor's Lien Records (since 1879)
(8) Lis Pendens Records (since 1905)
(9) Oil and Gas Lease Records (since 1917)
(10) Federal Tax Lien Records (since 1923)
(11) Mechanic's and Materialmen's Lien Records (since 1939)
(12) State Tax Lien Records (since 1961)
(13) Financing Statements (since 1966)
(14) Utility Security Records (since 1966)

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

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

microfiche image. Tex. Loc. Gov't Code Ann. §§ 193.009 and 193.010.

**Caution:**

An instrument properly filed for record but not yet indexed or not properly indexed nevertheless imparts constructive notice upon filing. See Standard 4.50.

A properly filed instrument imparts constructive notice even if the records have been destroyed. For a list of Texas counties whose records are not complete because of fires or other record deficiencies, see 3 Aloysius A. Leopold, Land Titles and Title Examination §38.7 (Texas Practice 3d ed. 2005). In some cases, copies of or information pertaining to destroyed records may have been maintained by an independent abstract or title company, and examiners customarily rely on such records.

Source:
Citations in the Comment.

History:
Adopted, _____ 2013.

**Standard 4.50. Constructive Notice**

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

Comment:

Definition: Instruments filed for record within the chain of title impart constructive notice. Constructive notice is notice imputed as a matter of law as a result of an instrument having been filed for record. "An instrument that is properly recorded in the proper county is … notice to all persons of the existence of the instrument." Tex. Prop. Code Ann. §13.002. "Constructive notice is as effectual and binding as actual notice, but it is the very opposite of actual notice and would not exist but for statute. It is the legal effect prescribed by law of certain things most frequently illustrated by registration statutes, lis pendens notices, and the like. Unlike actual notice, the inference is not rebuttable." Hexter v. Pratt, 10 S.W.2d 692, 693 (Tex. Comm'n App. 1928, judgm't adopted).

An instrument that appears of record but does not meet the statutory requirements for recordation does not impart constructive notice, Hill v. Taylor, 14 S.W. 366 (Tex. 1890); however, such an instrument may impart actual or inquiry notice to one who learns of its existence.

"A reference in an instrument to the volume and page number, film code number, or county clerk file number of the 'real property records' (or other words of similar import) for a particular county is equivalent to a reference to the deed records, deed of trust records, or other specific records, for the purpose of providing effective notice to all persons of the existence of the referenced instrument." Tex. Prop. Code Ann. § 11.007.

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

An electronic instrument is deemed filed and generally imparts constructive notice when it is received by the county clerk,

unless rejected by the next business day. Tex. Loc. Gov't Code Ann. § 195.009 and 13 Tex. Admin. Code Ann. § 7.144.

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

"To be effectively recorded [to impart constructive notice], an instrument relating to real property must be eligible for recording and must be recorded in the county in which a part of the property is located." Tex. Prop. Code Ann. § 11.001(a). Thus, if a tract of land is partly located in more than one county, recordation of an instrument affecting the tract in any of the counties imparts constructive notice in each of the counties of its existence and contents.

> We do not think, however, that the registration of a deed, or other instruments which affects the title to several separate or distinct tracts of land situated in different counties, in a county in which some of the tracts may be situated, would be such registration as would operate as notice of the deed or other instrument, in so far as the same might embrace lands not situated in the county in which registration is made.
>
> If, however, such deed or instrument affects the title to land in one tract, but partly in two or more counties, then registration in either county would be notice.

Hancock v. Tram Lumber Co., 65 Tex. 225, 232 (1885). See also Brown v. Lazarus, 25 S.W. 71 (Tex. Civ. App. 1893, no writ) and Tom v. Kenedy Nat'l. Farm Loan Ass'n, 123 S.W.2d 416 (Tex. Civ. App.—El Paso 1938, no writ).

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

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

Interests Not Subject To The Recording Statutes: Various rights and interests are not subject to the recording statutes and thus are not rendered void by the recording statutes as to a subsequent purchaser or lienholder without notice even though such rights or interests are not of record in the county clerk's office. Those rights and interests include:

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

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

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

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

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

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

(7) An easement by necessity. Fletcher v. Watson, No. 14-02-00508, 2003 Tex. App. LEXIS 10493 at *25 (Tex. App.—Houston [14th Dist.] Dec. 4, 2003, pet. denied) ("[I]t makes sense that an easement by estoppel could be defeated by a purchaser in good faith without notice, but that an estoppel {*sic*} by necessity would not be defeated.").

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

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

Title under a will probated in any Texas county may not be subject to the recording statutes, so that notwithstanding that the will is not of record in the county where the land is located, a purchaser from the decedent's intestate heirs without knowledge of the will cannot acquire title free of the devisees' title. See Howth v. Farrar, 94 F.2d 654 (5th Cir. 1938) (holding that the probate of a will is an in rem proceeding and notice to the world). Although that case has never been overruled, some commentators have expressed serious doubt that it accurately represents Texas law. See 17 M. K. Woodward & Ernest E. Smith, III, Probate and Decedents' Estates § 87 (Tex. Practice 1971), in which the authors, pointing out that a purchaser should not be expected to search all of the counties in the state, offer the opinion that to impart notice to persons

other than the parties to a probate proceeding and their privies as to land outside the county of probate, the decree must be recorded in the records of the county in which the land lies. The authors further note that title examiners customarily require the recording of proceedings for the probate of a will in the county where the land under examination is located. In view of the uncertainty whether a will and its Texas probate must be recorded in the county where the land is located, in addition to the county where the will was probated, to impart constructive notice of the devisees' title, the only prudent course for the examiner is to require that any known will and its probate be recorded in the county where the land under examination is located.

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

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

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

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

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

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

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

(6) Instruments executed by a grantor after the grantor has previously conveyed the property, White v. McGregor, 50 S.W. 564, 565 (Tex. 1899) ("If a grantor conveys the same property twice, and the second grantee puts his deed upon record, is it notice to one who subsequently purchases from the first grantee? We think not. The record is not notice to the first grantee, for he is a prior purchaser. Nor do we think it was intended to be notice to anyone who should purchase from him. In other words, we think the subsequent purchasers who are meant are only those the origin of whose title is subsequent to the title of the grantee in the recorded deed. … and it is such subsequent

> purchasers alone to whom the registry acts extend. The language of these statutes, so far as they affect deeds, is that, unless recorded, such deeds shall be void as against subsequent purchasers. When recorded, therefore, they have been held to operate as notice to such persons. The object of all the registry acts, however expressed, is the same. They were intended to affect with notice such persons only as have reason to apprehend some transfer or encumbrance prior to their own, because none arising afterwards can, in its own nature, affect them; and after they have once, on a search instituted upon this principle, secured themselves against the imputation of notice, it follows that everyone coming into their place by title derived from them may insist on the same principle in respect to himself.").

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

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

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

However, Texas case law provides that: "A purchaser is required to look only for conveyances made prior to his purchase by his immediate vendor, or by any remote vendor through whom he derives his title." Houston Oil Co. v. Kimball, 122 S.W. 533, 540 (Tex. 1909). The unfortunate decision in Delay v. Truitt, 182 S.W. 732 (Tex. Civ. App.–Amarillo 1916, writ ref'd), illustrates that late-recording grantees who recorded their instrument outside the chain of title may prevail over a later grantee who recorded first. Consider the following example: O conveys Blackacre to A, who does not immediately record. Thereafter, O conveys to B, who records but with actual notice of O's prior conveyance to A. Thus, B cannot be a bona fide purchaser, as defined in the comments to Standard 4.90. Thereafter, A records. If B subsequently conveys to C, C must look beyond the date of recordation of B's deed for the late recorded O to A deed because the O to A deed imparts constructive notice under Texas law (in most states, the late-recorded O to A deed would be "outside the chain of title" and thus not impart constructive notice). In this example in Texas, A would defeat C. In the absence of a judicial determination of such facts, the record will not reveal whether B had actual notice of O's prior conveyance to A. Thus, the record alone will not determine title between A and C. Because this scenario is unlikely to occur, many examiners do not perform this extended forward search, instead opting

to do the more limited search described above immediately under this subheading.

Source:
Citations in the Comment.

History:
Adopted, _____, 2013.

**Standard 4.60. Recitals In Instruments In Chain Of Title**

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

Comment:

A purchaser will be charged with constructive notice of the contents of instruments in that person's chain of title, including instruments incorporated by reference or otherwise identified in a series of unrecorded instruments where a reference in the chain of title would lead an examiner to such instruments. Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903 (Tex. 1982); Houston Title Co. v. Ojeda De Toca, 733 S.W.2d 325 (Tex. App.–Houston [14 Dist.] 1987), rev'd on other grounds, Ojeda de Toca v. Wise, 748 S.W.2d 449 (Tex. 1988); Abercrombie v. Bright, 271 S.W.2d 734 (Tex. Civ. App.–Eastland 1954, writ ref'd n.r.e.); MBank Abilene, N.A. v. Westwood Energy, 723 S.W.2d 246 (Tex. App.—Eastland 1986, no writ). A purchaser is charged with constructive notice of the referenced instrument unless the purchaser can prove that the purchaser made a diligent search to obtain the instrument and was unable to obtain it. Loomis v. Cobb, 159 S.W. 305 (Tex. Civ. App.–El Paso 1913, writ ref'd); Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903 (Tex. 1982); Waggoner v. Morrow, 932 S.W.2d 627 (Tex. App–Houston [14th Dist.] 1996, no writ). "'A purchaser is charged with and bound by every recital, reference and reservation contained in or fairly disclosed by any instrument which forms an essential link in the chain of title under which he claims.'" Wessels v. Rio Bravo Oil Co., 250 S.W.2d 668, 670 (Tex. Civ. App.—Eastland 1952, writ ref'd), citing 43 TEX. JUR. 647, 650.

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

Loomis v. Cobb, 159 S.W. 305, 307 (Tex. Civ. App.—El Paso 1913, writ ref'd). See also Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903, 908 (Tex. 1982). Other examples of the binding effect of such references include:

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

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

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

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

(5) A reference to a deed of trust in an assignment of oil and gas leases.

MBank Abilene, N.A. v. Westwood Energy, 723 S.W.2d 246 (Tex. App.—Eastland 1986, no writ).

Source:
Citations in the Comment:

History:
Adopted, _____, 2013.

**Standard 4.70. Duty Of Inquiry Based On Actual Notice**

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

Comment:

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

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

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

In common parlance 'actual notice' generally consists in express information of a fact, but in law the term is more comprehensive. … So that, in legal parlance, actual knowledge embraces those things of which the one sought to be charged has express information, and likewise those things which a reasonably diligent inquiry and exercise of the means of information at hand would have disclosed.

Hexter v. Pratt, 10 S.W.2d 692, 693 (Tex. Comm'n App. 1928, judgm't adopted). See also Flack v. First Nat'l Bank, 226 S.W.2d 628, 632 (Tex. 1950).

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

A purchaser with constructive notice of a deed of trust is put on inquiry to determine the status of the deed of trust, such as whether it had been released or foreclosed. Realty Portfolio, Inc. v. Hamilton, 125 F.3d 292 (5th Cir. 1997); Clarkson v. Ruiz, 140 S.W.2d 206 (Tex. Civ. App.—San Antonio 1940, writ dism'd).

Notice to an agent will constitute notice to the principal if the agent is one who had the power to act with reference to the

subject matter to which the notice relates. J.M. Radford Grocery Co. v. Citizens Nat'l Bank, 37 S.W.2d 1080 (Tex. Civ. App.–El Paso 1931, writ dism'd). Accordingly, a purchaser is generally legally charged with such facts that come to his or her attorney's knowledge in the course of employment as an attorney to examine title, Hexter v. Pratt, 10 S.W.2d 692 (Tex. Comm'n App. 1928, judgm't adopted) and Ramirez v. Bell, 298 S.W. 924 (Tex. Civ. App.–Austin 1927, writ ref'd), or with such facts that would have become known to the purchaser's attorney upon further inquiry into irregularities arising in connection with the closing of a transaction. Carter v. Converse, 550 S.W.2d 322 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.). Therefore, even though a case may have been dismissed for want of prosecution, the attorney and principal have a further obligation to investigate the suit to determine if there is any claim which may remain outstanding although the lis pendens does not continue as constructive notice to the world. Hexter v. Pratt, 10 S.W.2d 692 (Tex. Comm'n App. 1928, judgm't adopted). In contrast, a title company does not become an insured's agent in examining title or in acting as escrow agent, and notice that the title company acquires is not imputed to the insured. Tamburine v. Center Savings Assoc., 583 S.W.2d 942 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.) (in examining title in order to issue a title insurance policy, the title company does not act on behalf of the parties to the real estate transaction but acts exclusively for itself; in supervising the transfer of title in accordance with the commitment, the title company acts for its own benefit and protection; and in acting as escrow agent, the authority of the title company does not extend to examination of title).

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

Source:
Citations in the Comment:

History:
Adopted, _____, 2013.

**Standard 4.80. Duty Of Inquiry Based On Possession**

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

Comment:

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

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

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

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

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

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

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

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

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

**Caution**:

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

Source:
Citations in the Comment:

History:
Adopted: _____, 2013.

**Standard 4.90. Qualification As Bona Fide Purchaser**

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

Comment:

Definition: A bona fide purchaser is one who, in good faith, pays valuable consideration without actual, constructive, or inquiry notice of an adverse claim. Sparks v. Taylor, 99 Tex. 411, 90 S.W. 485 (1906). The terms "good faith purchaser" and "bona fide purchaser" have the same meaning. Bank of America v. Babu, 340 S.W.3d 917 (Tex. App.—Dallas 2011, no pet).

A lender acquiring a mortgage, deed of trust, or other lien based on sufficient consideration and without notice of a prior claim is a bona fide purchaser. Graves v. Guaranty Bond State Bank, 161 S.W.2d 118 (Tex. Civ. App.–Texarkana 1942, no writ).

For discussion of the Texas recording law, see Standard 4.40.

This discussion will make numerous references to the following terms that were previously defined:

Constructive notice – See Standard 4.50;
Actual notice – See Standard 4.70; and
Inquiry notice – See Standards 4.70 and 4.80.

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

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

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

Quitclaim Deed: In Texas the grantee of a quitclaim deed cannot qualify as a bona fide purchaser for value against unrecorded instruments and equities that existed at the time of the quitclaim, Threadgill v. Bickerstaff, 29 S.W.757 (Tex. 1895); Rodgers v. Burchard, 34 Tex. 442 (1870-71). The rationale is that the fact that a quitclaim deed was used, in and of itself, attests to the dubiousness of the title. See Richardson v. Levi, 3 S.W. 444, 447-48 (Tex. 1887). Although a quitclaim is fully effective to convey whatever interest the grantor owns in the property described in the deed, Harrison Oil Co. v. Sherman, 66 S.W.2d 701, 705 (Tex. Civ. App.—Beaumont 1933, writ ref'd), the grantee takes title subject to any outstanding interest or defect, whether or not recorded and whether or not the grantee is aware of it or has any means of discovering it. See, e.g., Woodward v. Ortiz, 237 S.W.2d 286, 291-92 (Tex. 1951). Moreover, in Texas, not only is the grantee under a quitclaim deed subject to any outstanding claims or equities, all subsequent purchasers in his chain of title, however remote, are likewise subject to any unknown and unrecorded interests that were outstanding at the time of the quitclaim. Houston Oil Co. v. Niles, 255 S.W. 604, 609-11 (Tex. Comm'n App. 1923, judgm't adopted).

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

Unfortunately, Texas case law regarding quitclaim deeds is unclear. A quitclaim deed, as traditionally defined, is one that purports to convey not the land or a specific interest but only the grantor's right, title and interest in it. See Rogers v. Ricane Enterprises, Inc., 884 S.W.2d 763, 769 (Tex. 1994); Richardson v. Levi, 3 S.W. 444 (Tex. 1887). Texas courts have developed and liberally applied the notion that, if the language of a deed as a whole reasonably implies a purpose to effect a transfer of particular rights in the land, then it will be treated as a conveyance of those rights, not a mere quitclaim, despite the presence of traditional quitclaim language and even the word "quitclaim" itself. See, e.g., Cook v. Smith, 174 S.W. 1094 (Tex. 1915); Benton Land Co. v. Jopling, 300 S.W. 28 (Tex. Comm'n App. 1927, judgm't adopted), building on a line of reasoning that seems to have originated with F. J. Harrison & Co. v. Boring & Kennard, 44 Tex. 255 (1875). This manner of construction of apparent quitclaims has been treated by at least one authority as being peculiar to Texas. See Annotation, Grantee or Mortgagee by Quitclaim Deed or Mortgage in Quitclaim Form as Within Protection of Recording Laws, 59 A.L.R. 632, 648-49 (1929).

The confusion should have been resolved by the holding in Bryan v. Thomas, 365 S.W.2d 628 (Tex. 1963), which construed a deed where the grantors conveyed "all of our undivided interest" in the minerals in a tract of land. The court in Bryan stated unequivocally, "To remove the question from speculation and doubt we now hold that the grantee in a deed which purports to convey all of the grantor's undivided interest in a particular tract of land, if otherwise entitled, will be accorded the protection of a bona fide purchaser." Id. at 630. See also Miller v. Hodges, 260 S.W. 168, 171 (Tex. Comm'n App. 1924, judgm't adopted). Unfortunately, other cases, discussed below, largely ignore Bryan.

Given the Texas courts' long history of construing deeds not to be quitclaims whenever there is any indication in the conveyance of the grantor's intention actually to convey some interest in land and the aforesaid holding in Bryan v. Thomas in particular, title examiners are warranted in passing conveyances without question except when the quitclaim characterization is inescapable. This has been the practice of Texas title examiners. However, there remains an element of subjectivity in construing deeds with quitclaim language that can lead to the interpretation of a conveyance of all the grantor's "right, title, and interest" as a mere quitclaim, particularly where the court is sympathetic to the holder of an unrecorded claim. See, Enerlex, Inc. v. Amerada Hess, Inc., 302 S.W.3d 351 (Tex. App.—Eastland 2009, no writ); Riley v. Brown, 452 S.W.2d 548 (Tex. Civ. App.—Tyler 1970, no writ). It is questionable whether Enerlex and Riley represent good law. Neither opinion distinguishes or even mentions Bryan v. Thomas. The Enerlex opinion purports to rely on Geodyne Energy Income Production Partnership I-E v. Newton Corp., 161 S.W.3d 482 (Tex. 2005), and Rogers v. Ricane Enterprises, Inc., 884 S.W.2d 763 (Tex. 1994), neither of which involved the question of whether the grantee could assert the status of a bona fide purchaser. The cases nevertheless illustrate the uncertainty in applying the relevant case law. Further, blanket conveyances, for example, of all the grantor's interests in land in a particular county or in the entire state, have generally been held to be quitclaims. See, e.g. Miller v. Pullman, 72 S.W.2d 379 (Tex. Civ. App.—Galveston 1934, writ ref'd).

Thus, the examiner should err on the side of construing deeds as quitclaims for purposes of rendering an opinion about title.

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

Statutes Permitting or Requiring Recordation: The following statutes permit or require recording of particular instruments:

- Tex. Bus. Org. Code Ann. § 252.005 (reliance on recorded statement of authority of unincorporated nonprofit association);
- Tex. Civ. Prac. & Rem. Code Ann. §§ 16.035-16.037 (extension of liens);
- Tex. Civ. Prac. & Rem. Code Ann. § 34.046 (purchaser of property sold under execution considered to be an innocent purchaser without notice, if the purchaser would have been so considered had the sale been made voluntarily and in person by the defendant);
- Tex. Family Code Ann. § 3.004 (schedule of spouse's separate property);
- Tex. Family Code Ann. § 3.104 (presumed authority of spouse who is record owner);
- Tex. Family Code Ann. §§ 3.306,3.308 (order affecting the management of community);
- Tex. Family Code Ann. § 4.106 (a partition or exchange agreement of spouses);
- Tex. Family Code Ann. § 4.206 (an agreement converting separate property to community property);
- Tex. Occupations Code Ann. § 1201.2055 (a real property election for a manufactured home is not considered perfected until a certified copy of the statement of ownership and location has been filed in the real property records);
- Tex. Prob. Code Ann. § 8(a) ("When two or more courts have concurrent venue of a probate proceeding…a bona fide purchaser of real property in reliance on any such subsequent

proceeding, without knowledge of its invalidity, shall be protected in such purchase unless before the purchase the decree admitting the will to probate, determining heirship, or granting administration in the prior proceeding is recorded in the office of the county clerk of the county in which such property is located."), recodified as Tex. Estates Code Ann. § 33.055 (effective January 1, 2014);

- Tex. Prob. Code Ann. § 42(b)(2) (good faith purchaser relying on affidavit of heirship takes free of interest of child not disclosed in affidavit if child not found under court decree to be entitled to treatment as child and not otherwise recognized), recodified as Tex. Estates Code Ann. § 201.053 (effective January 1, 2014);

- Tex. Prob. Code Ann. § 73 (if will is not probated within four years of date of death, purchaser can rely upon deed from heir) Tex. Estates Code Ann. § 256.003, recodified as (effective January 1, 2014);

- Tex. Prob. Code Ann. § 89 (certified copies of the will and order probating the will may be recorded in other counties), recodified as Tex. Estates Code Ann. § 256.201 (effective January 1, 2014);

- Tex. Prob. Code Ann. § 98-99 (ancillary probate), recodified as Tex. Estates Code Ann. §§ 503.051, 503.052;

- Tex. Prob. Code Ann. § 137 (reliance on small estates affidavit), recodified as Tex. Estates Code Ann. § 205.006 (effective January 1, 2014);

- Tex. Prob. Code Ann. §§ 486, 487 (conclusive reliance on affidavit of lack of knowledge of termination of Power of Attorney), recodified as Tex. Estates Code Ann. § 751.055 (effective January 1, 2014);

- Tex. Prop. Code Ann. § 5.030 (correction instrument – unsettled). See Standard 5.10.

- Tex. Prop. Code Ann. § 5.063(c) (affidavit stating that executory contract is properly forfeited);

- Tex. Prop. Code Ann. § 12.005 (a court order partitioning or allowing recovery of title to land must be recorded);

- Tex. Prop. Code Ann. § 12.007 (a party seeking affirmative relief may file a notice of pending action in an eminent domain proceeding or a pending suit affecting title);

- Tex. Prop. Code Ann. § 12.0071 (procedure to expunge lis pendens)

- Tex. Prop. Code Ann. § 12.008 (procedure for cancellation of lis pendens);

- Tex. Prop. Code Ann. § 12.017 (affidavit as release of lien);

- Tex. Prop. Code Ann. § 12.018 (affidavit or memorandum of sale, transfer, purchase or acquisition agreement between receiver and conservator of failed depository institution and another depository institution);

- Tex. Prop. Code Ann. § 13.004 (a recorded lis pendens is notice to the world of its contents);

- Tex. Prop. Code Ann. § 64.052 (recordation and perfection of security interest in rents);

- Tex. Prop. Code Ann. § 101.001 (conveyance by trustee if trust not identified and names of beneficiaries not disclosed);

- Tex. Prop. Code Ann. § 141.017 (third party, "in the absence of knowledge," may deal with any person acting as custodian under Texas Uniform Transfers to Minors Act);

- Tex. Prop. Code Ann. § 202.006 (effective January 1, 2012, a dedicatory instrument has no effect until the instrument is filed in the real property records);

- Tex. Prop. Code Ann. § 209.004(e) (a lien of a property owners' association that fails to file a management certificate to secure an amount due on the effective date of a transfer to a bona fide purchaser is enforceable only for an amount incurred after the effective date of sale);

- Tex. Transp. Code Ann. § 251.058 (a copy of the order closing, abandoning, and vacating a public road shall be filed in the deed records);

- 11 U.S.C. §§ 362(b)(20), 362(d)(4) (lift of stay order finding that filing of bankruptcy petition part of scheme to delay, hinder, or defraud creditors shall be binding in any other bankruptcy case filed within two years of order, if recorded in real property records);

- 11 U.S.C. § 544 (trustee and debtor in possession are treated as bona fide purchasers and lien creditors for avoidance of unperfected interests);

- 11 U.S.C. § 547 (deed, mortgage, or other instrument may be avoidable preference in bankruptcy unless perfected within 30 days after it takes effect);

- 11 U.S.C. § 549(c) (protection of transfer from debtor to good faith purchaser without knowledge of commencement of bankruptcy case unless a copy or notice of the bankruptcy petition is filed);

- Bankruptcy Rule 4001(c)(1)(B)(vii) (a motion for authority to obtain a mortgage during a bankruptcy case may include a waiver or modification of the applicability of non-bankruptcy law relating to the perfection of a lien on property of the estate);

- 28 U.S.C. § 1964 (recordation of notice of action concerning real property pending in a United States district court, if required by state law).

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

- A right to reform due to a mutual mistake, Farley v. Deslande, 69 Tex. 458, 6 S.W. 786 (1888);

- A claim that the deed was induced by fraud, Pure Oil Co. v. Swindall, 58 S.W.2d 7 (Tex. Comm'n App. 1933, holding approved); Ramirez v. Bell, 298 S.W. 924 (Tex. Civ. App.–Austin 1927, writ ref'd); Hickman v. Hoffman, 11 Tex. Civ. App. 605, 33 S.W. 257 (1895, writ ref'd);

- Any rights of parties based on adoption by estoppel, Moran v. Adler, 570 S.W.2d 883 (Tex. 1978);

- A claim of equitable subrogation, AMC Mortgage Services, Inc. v.

Watts, 260 S.W.3d 582 (Tex. App.—Dallas 2008, no pet.);

- An easement by estoppel, Cleaver v. Cundiff, 203 S.W.3d 373 (Tex. App.—Eastland 2006, pet. denied) (however, if possession and use are sufficient to place the purchaser on inquiry, then the purchaser will not be bona fide); and

- Any claim that the deed was, in actuality, given as a mortgage. Brown v. Wilson, 29 S.W. 530 (Tex. Civ. App. 1895, no writ).

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

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

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

- A claim that a deed was given while the person was a minor or insane, Gaston v. Bruton, 358 S.W.2d 207 (Tex. Civ. App.–El Paso 1962, writ dism'd w.o.j.); Pure Oil Co. v. Swindall, 58 S.W.2d 7 (Tex. Comm'n App. 1933, holding approved); McLean v. Stith, 112 S.W. 355 (Tex. Civ. App. 1908, writ ref'd);

- Any claim that the deed was forged, Pure Oil Co. v. Swindall, 58 S.W.2d 7 (Tex. Comm'n App. 1933, holding approved);

- Any claim of heirs, whether known by the bona fide purchaser, New York & Tex. Land Company v. Hyland, 28 S.W. 206 (Tex. Civ. App. 1894, writ ref'd);

- A conveyance by a person who had the identical name of the record owner but who was not the same person, Blocker v. Davis, 241 S.W.2d 698 (Tex. Civ. App.–Fort Worth 1951, writ ref'd n.r.e.); Pure Oil Co. v. Swindall, 58 S.W.2d 7 (Tex. Comm'n App. 1933, holding approved).

Burden of Proof: A purchaser has the burden of proving its bona fide purchaser status as an affirmative defense in a title dispute. Madison v. Gordon, 39 S.W.3d 604, 607 (Tex. 2001). However, a person claiming title through principles of equity has the burden to establish that the subsequent purchaser is not a bona fide purchaser. Bank of America v. Babu, 340 S.W.3d 917 (Tex. App.—Dallas 2011, no pet.); Noble Mortgage & Investments, LLC v. D&M Vision Investments, LLC, 340 S.W.3d 65 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

Source:
Citations in the Comment:

History:
Adopted, _____, 2013.

**Standard 4.100. Qualification As Lien Creditor**

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

Comment:

The recording statutes provide that a lien creditor without notice takes free of a prior deed, mortgage, or other instrument that has not been acknowledged, sworn to, or proved and filed for record. Tex. Prop. Code Ann. § 13.001. A "creditor" is a claimant whose claim is fixed by some legal process as a lien on the land, such as by attachment, execution, judgment, landlord or mechanic's lien, or a tax lien (such as IRS or state tax lien). Johnson v. Darr, 272 S.W. 1098, 1100 (Tex. 1925.) ("The Texas courts have construed the words 'all creditors' of the statute to mean creditors who acquired a lien by legal proceedings without notice of the unrecorded instrument."); Prewitt v. United States, 792 F.2d 1353 (5th Cir. 1986); United States v. Creamer Industries, Inc., 349 F.2d 625 (5th Cir. 1965); Underwood v. United States, 118 F.2d 760 (5th Cir. 1941); Bowen v. Lansing Wagon Works, 43 S.W. 872 (Tex. 1898). A junior lender whose mortgage secures an antecedent debt is not a lien creditor and cannot take priority over a prior unrecorded deed. Turner v. Cochran, 61 S.W. 923 (Tex. 1901). A trustee or debtor-in-possession in a bankruptcy will be treated as a judgment creditor in order to set aside unrecorded interests. 11 U.S.C. § 544; Faires v. Billman, 849 S.W.2d 455 (Tex. App.—Austin 1993, no pet.); Segrest v. Hale, 164 S.W.2d 793 (Tex. Civ. App.–Galveston, 1941, writ ref'd w.o.m.).

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

(1) An equitable right to have a deed corrected to convey a lot originally intended to be included in the conveyance (but not included due to mutual mistake), United States v. Creamer Industries, Inc., 349 F.2d 625 (5th Cir. 1965); Henderson v. Odessa Building & Finance Co., 24 S.W.2d 393 (Tex. Comm'n App. 1930); North East Independent School District v. Aldridge, 528 S.W.2d 341 (Tex. Civ. App.–Amarillo 1975, writ ref'd n.r.e.);

(2) An unrecorded contract for sale, Linn v. Le Compte, 47 Tex. 440 (1877);

(3) A prior unrecorded deed, Whitaker v. Farris, 101 S.W. 456 (Tex. Civ. App. 1907, writ ref'd);

(4) A divorce decree not filed of record in the real property records; Prewitt v. United States, 792 F.2d 1353 (5th Cir. 1986);

(5) An unrecorded sheriff's deed; Wiggins v. Sprague, 40 S.W. 1019 (Tex. Civ. App. 1897, no writ);

(6) An unrecorded extension of deed of trust. The Cadle Co. v. Butler, 951 S.W.2d 901 (Tex. App.–Corpus Christi 1997, no writ); and

(7) An entry of a constable's sale in the litigation records (execution docket) of the county clerk's office. Noble Mortgage & Investments, LLC v. D&M Vision Investments, LLC, 340 S.W.3d 65 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

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

(1) An executory contract to convey real property where the purchaser goes into possession of the property. The

Cadle Company v. Harvey, 46 S.W.3d 282, 287 (Tex. App.—Ft. Worth 2001, pet. denied);

(2) A completed contract for sale where no deed had been executed to the purchaser, Texas American Bank/Levelland v. Resendez, 706 S.W.2d 343 (Tex. App.—Amarillo 1986, no writ);

(3) A deed intended as a mortgage, Michael v. Knapp, 23 S.W. 280 (Tex. Civ. App. 1893, no writ);

(4) A deed of trust released by mutual mistake, First State Bank v. Jones, 183 S.W. 874 (Tex. 1916);

(5) A right to reform a deed where by mutual mistake the grantor conveyed a greater interest than intended, Cetti v. Wilson, 168 S.W. 996 (Tex. Civ. App.–Fort Worth 1914, writ ref'd); and

(6) A mortgage signed by all partners and recorded prior to an abstract of judgment lien against one partner who had record title prevails, Lone Star Industries, Inc. v. Lomas & Nettleton Financial Corp., 586 S.W.2d 192 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.)

Source:
Citations in the Comment.

History:
Adopted, _____, 2013.

**Standard 4.110. Electronic Filing And Recordation**

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

Comment:

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

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

An electronic instrument or instrument filed electronically must be available for public inspection in the same manner and at the same time as an instrument filed by other means. Tex. Loc. Gov't Code Ann. § 195.007(a). An electronic document or instrument filed electronically is filed with the county clerk when it is received, unless the county clerk rejects the filing within the time and manner provided by Chapter 195 or by applicable rules. Tex. Loc. Gov't Code Ann. § 195.009. A county clerk that accepts an electronic filing shall confirm or reject the filing no later than the first business day after the date of filing. If the county clerk fails to provide notice of rejection within the time provided, the filing is considered accepted and may not subsequently be

rejected. Tex. Loc. Gov't Code Ann. § 195.004. An electronic document or other instrument that is filed electronically is considered recorded in compliance with a law relating to electronic filing as of the county clerk's business day of filing. Tex. Loc. Gov't Code Ann. § 195.005.

If a law requires as a condition for recording that a document be an original or be in writing, the requirement is satisfied by an electronic document (a document received by a county clerk in an electronic form) that complies with Chapter 15, Texas Prop. Code Ann. If a law requires as a condition for recording that a document be signed, the requirement is satisfied by an electronic signature. A requirement that a document be notarized, acknowledged, verified, witnessed, or made under oath is satisfied if the electronic signature of the person authorized to perform that act, and all other information required to be included, is attached or logically associated with the document or signature. A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature. Tex. Prop. Code Ann. § 15.004; Tex. Bus. & Com. Code Ann. § 322.011. An original signature may not be required for an electronic instrument or other document that complies with Chapter 15, Tex. Prop. Code Ann.; Chapter 195, Tex. Loc. Gov't. Code Ann., Chapter 322, Tex. Bus. & Com. Code Ann., or other applicable law. Tex. Prop. Code Ann. § 12.0011.

Source:
Citations in the Comment.

History:
Adopted, _____, 2013.

**Standard 4.120. Estoppel By Deed**

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

Comment:

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

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

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

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

Where a deed conveys land and reserves a mineral interest, but fails to except prior reserved minerals thus creating an over-conveyance, the grantor loses his title as necessary to make his grantee whole. Duhig v. Peavy-Moore Lumber Co, 144 S.W.2d 878 (Tex. 1940). This rule of estoppel set forth in the Duhig case will not apply, however, if the deed refers to a prior deed (which create the separate reservations) by language such as "reference to which is made for all purposes" or "for all legal purposes." Harris v. Windsor, 294 S.W.2d 798 (Tex. 1956).

A grantee in a deed will be bound by the terms and provisions of the deed, including reservation of minerals, where the grantor's interest, if any, in the land is disputed. The grantee and its successors may not thereafter acquire superior title free of the reservation even by subsequent conveyance from a third party who acquired title by limitations. Adams v. Duncan, 215 S.W.2d 599 (Tex. 1948); Greene v. White, 153 S.W.2d 575 (Tex. 1941). However, before the grantor can secure a mineral interest by estoppel by reservation, the grantee must have all of the interest that the grantor purported to convey to the grantee. Dean v. Hidalgo County Water Improvement District Number Two, 320 S.W.2d 29 (Tex. Civ. App.–San Antonio 1959, writ ref'd n.r.e.).

A conveyance in a representative capacity only by a party who does not expressly convey his or her individual interest will, nevertheless, convey whatever interest that person owns individually where that party's deed purports to convey the property (as opposed to a quitclaim deed). Conveyances where such estoppel has been recognized include those by an estate representative, Tomlinson v. H.P. Drought & Co., 127 S.W. 262 (Tex. Civ. App. 1910, writ ref'd); agents on behalf of principals, Ford v. Warner, 176 S.W. 885 (Tex. Civ. App.–Amarillo 1915, no writ); trustee, Grange v. Kayser, 80 S.W.2d 1007 (Tex. Civ. App.–El Paso 1935, no writ); and corporations by officers (such issue was discussed although estoppel was not applicable in the case at hand). Carothers v. Alexander, 12 S.W. 4 (Tex. 1889); see also American Savings & Loan Assoc. v. Musick, 517 S.W.2d 627 (Tex. Civ. App.–Houston [14th Dist.] 1974), rev'd on other grounds, 531 S.W.2d 581 (Tex. 1975).

Source:
Citations in the Comment.

History:
Adopted, _____, 2013.