PROPERTY TAXES AND TITLE INSURANCE: ISSUES AND ANSWERS FOR THE ESTATE LAWYER

MICHAEL A. WREN
McGinnis, Lochridge & Kilgore, LLP
600 Congress Avenue, Suite 2100
Austin, Texas 78701
Telephone: (512)495-6000
Telecopy: (512)495-6093

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Michael A. Wren
McGinnis, Lochridge & Kilgore, LLP
600 Congress Avenue, Suite 2100
Austin, Texas 78701
Telephone: (512) 495-6028
Telecopy: (512) 505-6328
E-mail: mwren@mcginnislaw.com

BIOGRAPHICAL INFORMATION

EDUCATION

Blinn Junior College, Brenham, Texas, A.A., 1975
The University of Texas at Austin, B.B.A., 1977
The University of Texas at Austin School of Law, J.D., 1981

PROFESSIONAL ACTIVITIES

Of Counsel, McGinnis Lochridge & Kilgore, LLP, Austin, Texas

LICENSES AND CERTIFICATIONS

Certified Public Accountant, 1980
Board Certified, Commercial Real Estate Law, Texas Board of Legal Specialization
Board Certified, Farm and Ranch Real Estate Law, Texas Board of Legal Specialization
Board Certified, Residential Real Estate Law, Texas Board of Legal Specialization

LAW RELATED PUBLICATIONS AND HONORS

Author and Speaker:
- Advanced Real Estate Law Course, State Bar of Texas (2005)
- Advanced Estate Planning and Probate Course, State Bar of Texas (2008)
- Wills and Probate Institute, Houston Bar Association (2010)
- Advanced Real Estate Drafting Course, State Bar of Texas (2011)

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INTRODUCTION TO PROPERTY TAX DISCUSSION

This part of the paper will focus on ad valorem taxation of real property and improvements of interest to the estate lawyer.

I. GENERAL PRINCIPALS

A. What are "ad valorem" taxes?

The term "ad valorem" is Latin for "according to value." So, an ad valorem tax is a tax based on the value of the property being taxed, as opposed to a fixed amount of tax on a particular class or category of property. In this way it is similar to a sales tax, which is a tax based on the sales price (i.e., agreed upon value) of the item. The statutes refer to both "ad valorem taxes" and "property taxes," and for purposes of this paper those terms will be used interchangeably.

B. Authority for ad valorem taxes and lien to secure payment.

Article 8, Section 1 of the Texas Constitution authorizes the taxation of certain real and personal property. Section 1(b) provides:

> (b) All real property and tangible personal property in this State, unless exempt as required or permitted by this Constitution, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law.

The enabling legislation is found in the Texas Tax Code, Title 1 being the Property Tax Code.

References to the "Code" in this paper will refer to the Property Tax Code, and unless otherwise noted, references to a "Section" (without reference to the Constitution) will be references to particular Sections from the Code. Section 11.01(a) provides:

> (a) All real and tangible personal property that this state has jurisdiction to tax is taxable unless exempt by law.

Subject to some exceptions in the Insurance Code, Texas does not levy a tax on intangible personal property. See Section 11.02(a). See also Section 21.06.

Article VIII, Section 15 of the Texas Constitution creates a lien on property to secure payment of ad valorem taxes. It provides:

> Sec. 15. LIEN OF ASSESSMENT; SEIZURE AND SALE OF PROPERTY. The annual assessment made upon landed property shall be a special lien thereon; and all property, both real and personal, belonging to any delinquent taxpayer shall be liable to seizure and sale for the payment of all the taxes and penalties due by such delinquent; and such property may be sold for the payment of the taxes and penalties due by such delinquent, under such regulations as the Legislature may provide.

With the adoption of Article 8, Section 1-e to the Texas Constitution, there are no ad valorem taxes levied by and payable to the state.

C. Property not subject to ad valorem taxes.

Section 11.11 sets out the property that is exempt from ad valorem taxes. In general, property owned by the state or a political subdivision is exempt from taxation if the property is used for a public purpose. There are, however, some interesting exceptions and property specific rules, such as:

(a) Land owned by the Permanent University Fund is taxable for county purposes.
(b) Agricultural or grazing land owned by a county for the benefit of public schools is taxable for all purposes.
(c) Property that is owned by the state that is not used for public purposes is taxable. An example would be property owned by a state agency that is leased to a private business enterprise.
(d) Oil, gas and other mineral interests owned by an institution of higher education are exempt from all ad valorem taxes.
(e) Property bequeathed to an institution of higher education is exempt from ad valorem taxes from the date of the decedent's death unless (1) the property is leased for

compensation to a private business enterprise or (2) the transfer to the institution is contested in probate court, in which case ad valorem taxes are assessed to the decedent's estate until the final determination of the disposition of the property is made. The property becomes exempt from taxation upon the vesting of title in the institution.

II. ADMINISTRATION OF AD VALOREM TAXATION

A. Appraisal Districts.

Chapter 6, Subchapter A of the Code authorizes the creation, and sets out the rules, governing Appraisal Districts. A brief summary of the important provisions are:

(a) Each county has an Appraisal District responsible for appraising property in the district. An Appraisal District is political subdivision of the state.

(b) The Appraisal District's boundaries are the same as the county's boundaries. The board of directors of two or more adjoining Appraisal Districts may provide for a consolidated Appraisal District by interlocal contract.

(c) An Appraisal District is governed by a board of directors, consisting of 5 members. If the county Assessor-Collector is not appointed to the board, they serve as a nonvoting director. The voting directors must be a resident of the District and have resided in the District for at least 2 years before they take office. Subject to some exceptions, voting members serve 2 year terms beginning on January 1 of even-numbered years.

(d) Members of the board of directors are appointed by the governing bodies of the incorporated cities and town, the school districts and, if applicable, a conservation and reclamation district.

B. County Assessor-Collector.

Article VIII, Section 14 of the Texas Constitution creates the position of the Assessor-Collector. The Assessor-Collector is elected by the voters of each county, although for counties with less than 10,000 inhabitants, the sheriff shall be the Assessor-Collector unless the commissioner's court submits for election an Assessor-Collector that is not the sheriff.

Under Section 6.23, the Assessor-Collector is charged with assessing and collecting taxes in the county for the county. The Assessor-Collector will also assess and collect taxes for another taxing unit (i.e., school districts, etc.) if, among other reasons, (i) the law creating the other taxing unit requires it to use the Assessor-Collector, (ii) the law creating the other taxing unit does not mention who will assess and collect its taxes, or (iii) an intergovernmental contract so provides.

C. Chief Appraiser.

The Appraisal District's board of directors appoints a Chief Appraiser. The Chief Appraiser is responsible for determining the taxable value of property in the Appraisal District.

D. Appraisal Review Board.

Each Appraisal District has an Appraisal Review Board (ARB). Under Section 6.41, the ARB consists of 3 members, unless the District board of directors increases the number. The Appraisal District's board of directors appoints the members of the ARB. Each members of the ARB must be a resident of the district and must have resided in the District for at least 2 years.

The purpose of the APB is to hear protests by taxpayers of the valuations determined by the Appraisal District.

III. AD VALOREM TAX LIEN AND ENFORCEMENT

A. Date of tax lien.

Real property is taxable by a taxing authority if the property is located in that taxing authority's boundaries on January 1 of each year. Section 21.01.

On January 1 of each year, a tax lien attaches to the property to secure payment of the tax. The lien is in favor of each taxing authority. This lien is automatically perfected by statute; the taxing authority is not required to take any steps to further perfect the lien. Section 32.01.

Manufactured homes are treated separately. Of course, if the owner of a manufactured home is not the owner of the land it sits on, the tax on the home is separate from the tax on the land. However, if the owner of the home and land are the same, the owner may make an election to have the home and land taxed together if (i) under the Occupations Code a statement of ownership reflects that the owner has elected to treat the home as real property, and (ii) the statement is filed in the real property records. Section 25.08. Then, under Section 32.014, the tax on the manufactured home also attached to the land if the election was made under Section 25.08; if the election was not made, the tax on the home does not attach to the land.

B. Tax lien on mineral interest.

If a mineral estate is severed from the surface estate and if different persons own the mineral estate and surface estate, a lien is imposed separately on the mineral interest. However, if the severed mineral interest terminates (such as a reservation of a mineral

interest for a term of years), the lien against that interest expires. The lien would then attach to the estate resulting from the termination of the previously severed mineral interest. However, the taxes imposed on that terminated mineral estate remain the personal obligation of the person who owned it on January 1 of the year for which the tax was imposed. Section 32.02. Subject to an exception, each separate interest in the minerals in place is listed separately from the other interests in the minerals in the name of the owner of the mineral interest. Section 25.12.

C. Due date to pay taxes; penalties for late payment.

Ad valorem taxes are paid in arrears. For example, the taxes owed for 2011 are not due until 2012. The Assessor-Collector is to mail tax bills to property owners by October 1 or as soon thereafter as practical. Section 31.01(a).

The taxes owing for a particular year are due on January 31 of the following year; if paid by that date, there are no penalties or interest. If paid on or after February 1, however, the taxes are delinquent. Section 31.02(a).

A delinquent tax incurs a <u>penalty</u> of 6% of the amount of the tax owed for the first calendar month it is delinquent, plus 1% for each month thereafter, up to a total of 12%. Section 33.01(a). A delinquent tax accrues <u>interest</u> at a rate of 1% per month. Section 33.01(c). The taxing authority can also recover expenses in collection, including attorney's fees in the amount of 15% of the total amount of taxes, penalties and interest due. Section 33.48(a).

D. Personal liability for payment.

Subject to some exceptions noted below, property taxes are the personal obligation of the person who owns or acquires the property on January 1 of the year in which the tax is imposed. A person is <u>not</u> relieved of personal liability because he no longer owns the property. Section 32.07(a).

If property that is exempt from taxation based on the identity of the owner is subject on January 1 to a contract of sale to a person <u>not</u> entitled to exemption, the property shall be listed in the name of the purchaser for purposes of the taxation statutes. Section 25.13. In that event, under Section 32.07(b), the purchaser becomes personally liable for the taxes for that year. The statute is silent on what happens if the sale does not occur, but presumably no taxes would be owed since the property would remain in the hands of the non-taxable entity.

Section 11.13(j) sets out the circumstances in which a "residence homestead" has been transferred to a "qualifying trust." If those conditions are met, Section 32.07(c) provides that the trust and each trustor (i.e., grantor) are jointly and severally liable for the tax.

Any person who receives or collects an ad valorem tax from another person holds it in trust for the benefit of the taxing authority and is liable for the full amount collected. Section 32.07(d).

Further, an individual who controls or supervises the collection of tax or money for another person and who willfully fails to pay the tax is liable for the tax. Section 32.07(e).

E. Liability of estate vs. heirs.

In *Bailey v. Cherokee County Appraisal District*, 862 S.W.2d 581 (Tex. 1993), the Appraisal District sought to hold the heirs of an estate personally liable for taxes, as opposed to the estate. It reasoned that, under Section 37 of the Probate Code, when a person dies intestate, ownership of property vests immediately in the heirs at law, and under Section 32.07 of the Tax Code, the taxes are the personal obligation of the person who owns the property on January 1.

However, the Court rejected this argument. Instead, the Court notes that, under Section 37 of the Probate Code, the administrator, as trustee of the estate property, assumes legal title. As holder of legal title, the administrator is therefore the owner for purposes of taxation.

As noted above, *Bailey* involved an intestacy. However, the Court's logic would seem to apply to estates in which there is a will. The Court cited Section 322 of the Probate Code, which classifies claims against estates; the Court held that ad valorem taxes are Class 2 administration expenses incurred in the preservation, safekeeping and management of the estate.

The result is that, for purposes of ad valorem taxes, the <u>estate</u>, not the heirs, is considered the owner of the property and thus has liability for payment of the taxes.

F. Liability of life tenant vs. remainder.

The life tenant has the duty to pay ordinary taxes in the absence of some contrary intention by the creator of the life tenancy and remainder. *Trimble v. Farmer*, 305 S.W.2d 157 (Tex. 1957); *Roberts v. Roberts*, 150 S.W.2d 236 (Tex. 1941). The Texas Supreme Court has held that a homestead is akin to a life estate. *Trimble*; *Sargeant v. Sargeant*, 118 Tex. 345; 15 S.W.2d 589 (1929). Therefore, the homestead claimant typically has the duty to pay property taxes.

G. Listing of undivided interests.

Excluding minerals, which are governed under Section 25.12, a property owned in undivided interests may be listed jointly in the name of all the owners of undivided interests, or in the name of any one or more owners. An undivided interest is listed separately from

other undivided interests if the interest is described in a recorded instrument of title and the owner files with the Appraisal District a written request for separate taxation (Form 50-171). Once the undivided interest qualifies for separate taxation, the qualification remains in effect and need not be requested again. However, the qualification for separate taxation ceases when ownership is transferred or when an owner requests to cancel separate taxation. Section 25.11.

H. Priority of tax liens over other property interests.

Sections 32.04 and 32.05 set out the priority rules. Section 32.04 states that federal law determines the priority of a federal lien vs. the ad valorem tax lien. However, it further states that, in the absence of a federal law dictating the priority, the ad valorem tax lien takes priority over a federal tax lien.

Section 32.05 sets out the general rules for lien priority other than those pertaining to federal tax liens. In summary, subject to the exceptions noted below, the ad valorem tax lien takes priority over:

(a) homestead interests,
(b) creditors with a lien against the property,
(c) other creditors with a lien, such as liens of a property owners' association for dues, special assessments, etc., and
(d) the rights of a remainder, right or possibility of reverter, or other future interest in the property, whether vested or contingent.

The priority over the items listed in (a) to (d) above exists regardless of whether the debt, lien, future interest, or other encumbrance existed before the attachment of the tax lien.

The exceptions to the above priority are found in Section 32.05(c), which provides that the tax lien is inferior to:

(a) a claim for any survivor's allowance, funeral expenses, or expenses of the last illness of a decedent made against the estate of a decedent,
(b) a recorded restrictive covenant that runs with the land and that was recorded before January 1 of the year the tax lien arose, and
(c) a valid easement recorded before January 1 of the year the tax lien arose.

I. Foreclosure.

Section 34.21 sets out the procedures for foreclosing the tax lien. A few highlights:

(a) The owner of the property may file with the officer charged with the sale a written request that the property be divided and only as many portions be sold as necessary to pay the tax due. The owner shall describe the desired portions (not to exceed 4) and specify the order in which the portions should be sold.
(b) Upon a sale, if a third party is not the high bidder, the taxing unit that requested the sale takes title in its name, but for the benefit of itself and all other taxing units that established tax liens in the suit.
(c) The deed vests "good and perfect title" in the purchaser to the interest owned by the defendant, including the right to use and possession, subject only to the defendant's right of redemption and the items that survive a tax sale (see above).

J. Right of redemption for homestead, ag land and mineral interest.

The owner of property sold at a tax sale to a purchaser other than a taxing unit that was used as the residence homestead or that was land designated for agricultural use, or is a mineral interest, may redeem the property on or before the 2nd anniversary date on which the purchaser's deed was recorded by paying the purchaser (i) the amount the purchaser bid for the property, (ii) the amount of the deed recording fee, (iii) the amount paid by the purchaser as taxes, penalties, interest and costs on the property, and (iv) a redemption premium of 25% of the aggregate total if the property is redeemed during the first year of the redemption period, or 50% of the aggregate total if the property is redeemed during the second year of the redemption period. Section 34.21(a)

K. Right of redemption for non-homestead and non-ag land.

The owner of property sold at a tax sale to a purchaser other than a taxing unit that was used other than as the residence homestead or that was land designated for agricultural use, or that is a mineral interest, may redeem the property on or before 180 days after the date on which the purchaser's deed recorded by paying the same expenses listed earlier, but the redemption premium may not exceed 25%. Section 34.21(e)

L. Redemption when buyer at tax sale cannot be found, refuses to convey, etc.

If the owner whose property was sold at a tax sale to a purchaser other than the taxing authority cannot locate the purchaser, or the purchaser refuses to convey the property to the owner, the owner may tender the redemption price to the assessor-collector and make an affidavit stating that the redemption period has not expired, and explain why he is tendering the money (i.e., the owner cannot locate the purchaser, the purchaser refuses to deed the property to the owner,

etc.). The assessor-collector then will give the owner a signed receipt which, when recorded, is notice to all persons that the property has been redeemed. If the purchaser then demands payment of the redemption price, the assessor-collector pays the money to the purchaser.

M. Resale by taxing unit.

If the property is sold to a taxing unit that is a party to the judgment, the taxing unit may sell the property at any time by public or private sale. The sale is subject to the right of redemption, which begins on the date the deed to the taxing unit is recorded. Section 34.05(a).

If the property is sold at a public sale, it may be sold for any amount. Section 34.05(b).

If the property is sold by private sale, the sales price may not be less than the lesser of:

(a) the market value specified in the judgment of foreclosure, or
(b) the total amount of the judgments against the property.

An exception to the minimum sales price for a private sale exists if each taxing unit entitled to receive proceeds consents to a sale for an amount less than the amount described above.

N. Limitations on collection.

If there is no pending litigation concerning the delinquent tax, the Assessor-Collector shall cancel and remove from the delinquent tax roll (i) a tax on real property that has been delinquent for more than 20 years, and (ii) a tax on personal property that has been delinquent for more than 10 years.

IV. SPECIAL RULES

A. Definition of "residence homestead."

Section 11.13(j) defines the "residence homestead." It means a structure (including a mobile home) or a separately secured and occupied portion of a structure (together with the land, not to exceed 20 acres, and improvements used in the residential occupancy of the structure, if the structure and the land and improvements have identical ownership).

The residence homestead must:

(a) be owned by one or more individuals, either directly or through a beneficial interest in a qualifying trust;
(b) be designed or adapted for human residence;
(c) be used as a residence; and
(d) be occupied as the principal residence by an owner or, for property owned through a beneficial interest in a qualified trust, by a trustor of the trust.

A "trustor" is a person who transfers an interest in a residential property to a qualifying trust, by deed or by will, or the person's spouse.

A "qualifying trust" means a trust in which the trust instrument, will or court order creating the trust provides that the trustor or beneficiary has the right to occupy the property as the trustor's or beneficiary's principal residence rent free and without charge except for taxes and other costs specified in the instrument or court order. The right to occupy lasts for the shorter of the life of the individual or a terms of years specified in the instrument or court order, or until the trust is revoked or terminated by an instrument or court order that describes the property with sufficient certainty to identify it and is recorded in the real property records of the county where the property is located.

B. Limitations on appraised value of residence homestead.

Section 23.23 limits the annual increase of the appraised value of a residence homestead for tax purposes. Regardless of the increase in the fair market value of the residence over the prior year, the Appraisal District may increase the appraised value of a residence homestead for a tax year to an amount equal to the lesser of:

(a) the most recent value of the property determined by the District, or
(b) the sum of:
    (1) 10% of the appraised value of the property for the preceding year;
    (2) the appraised value of the property for the preceding year; and
    (3) the market value of all new improvements to the property.

In other words, the appraised value for tax purposes is limited to an increase of 10% of the preceding year valuation, plus the value of any improvements.

C. Special exemptions for residence homestead.

1. $3,000 exemption.

Counties are authorized to levy taxes solely for construction and maintenance of roads or flood control. However, the first $3,000 in value of residential homesteads of married or unmarried adults (including those living alone) is exempt from levy by counties. Constitution Article VIII, Section 1-a.

Section 11.13(a) codifies the $3,000 exemption from county taxes on a residence homestead.

$3,000 in value of residence homesteads of married or unmarried adults (including those living alone) is exempt from levy by the state. Constitution Article VIII, Section 1-b(a).

2. Optional $5,000/20% exemption.

The governing taxing authority may adopt an exemption on the residence homestead of a percentage of the appraised value. The exemption may not be less than $5,000, nor exceed 20% of the appraised value. Section 11.13(n).

3. $15,000 exemption.

$15,000 in value of residence homesteads is exempt from taxation by a school district. Section 11.13(b).

4. $10,000 exemption.

In addition to the $15,000 exemption in Section 11.13(b), $10,000 in value of a residence homestead is exempt from taxation by a school district for an adult who is disabled or is 65 or older. Section 11.13(c).

5. $3,000 exemption.

An individual who is disabled or is 65 or older is entitled to an exemption if the exemption is adopted either by the governing body or a favorable vote of a majority of qualified voters. Section 11.13(d). The amount of the exemption is $3,000, unless a larger amount is specified by the governing body or by the election of the voters. Section 11.13(e).

6. Surviving spouse of deceased 65 or older individual.

Under Section 11.13(q), the surviving spouse of an individual who qualified for an exemption under Section 11.13(d) due to being 65 or older is entitled to retain the exemption that the deceased spouse had qualified for if:

(a) The deceased spouse dies in a year in which the deceased spouse qualified for the exemption;
(b) The surviving spouse was 55 or older when the deceased spouse died; and
(c) The property was the residence homestead of the surviving spouse when the deceased spouse died and remains the residence homestead of the surviving spouse.

7. School district tax freeze on disabled/65 or older individual.

A school district may not increase the total annual amount of ad valorem tax on the residence homestead of an individual 65 years or older, or on the residence homestead of an individual who is disabled, above the amount of the tax it imposed in the first year in which the individual qualified that residence homestead for the applicable disabled/65 or older exemption. Section 11.26(a). However, if the individual makes improvements other than required by law or for repairs, the school district may increase the tax in the first year the value of the homestead is increased based on the enhanced value. Section 11.26(b). See also Article VIII, Section 1-b(d) of the Constitution.

8. School district tax freeze on surviving spouse of 65 or older individual.

A school district may not increase the total annual amount of ad valorem tax on the residence homestead of an individual 65 years or older who dies but is survived by a spouse, so long as (a) the property remains the residence homestead of the surviving spouse and (ii) the surviving spouse is 55 years or older on the date of death. However, taxes may be increased to the extent the value of the homestead is increased by improvements other than repairs or improvements made to comply with governmental requirements. Article VIII, Section 1-b(d) of the Constitution.

9. Optional disabled/65 or older exemption.

The governing taxing authority or the voters may give an additional exemption on a residence homestead of not less than $3,000 to an individual who is disabled or is 65 or older. Section 11.13(d). Once adopted, the governing body of the taxing unit may (i) repeal the exemption, (ii) decrease the exemption to not less than $3,000, or (iii) increase the exemption.

10. Disabled Veteran.

A disabled veteran is entitled to an exemption of up to $12,000 based on the percentage of disability. Section 11.22(a). A disabled veteran (regardless of the degree of disability) who is over 65, totally blind in one or both eyes, or has lost the use of one or more limbs, is entitled to an exemption of $12,000. Section 11.22(b). The surviving spouse or children may retain the exemption in certain circumstances. Section 11.22(c).

If an individual dies while on active duty in the armed services, the surviving spouse or children are entitled to an exemption of $5,000 under certain circumstances. Section 11.22(d).

11. Deferral of taxes for 65 or older and disabled.

A homeowner who is 65 or older or disabled is entitled to defer payment of current property taxes on the person's residence homestead until he or she no longer owns or occupies the home as a residence. To obtain a deferral, an individual must file with the Chief Appraiser an affidavit establishing the qualifications for deferral. Section 33.06.

Property taxes continue to accrue during the deferral period, and are assessed interest at the rate of 8% per year. Once an over-65 or disability deferral has

been granted, additional charges cannot be levied for delinquent penalty and interest.

Note that this is only a deferral of the payment of taxes; it merely postpones when the taxes must be paid.

12. No double counting of exemptions.

Only one of any applicable exemption applies to a residence homestead in any one year. For example, a husband and wife may not claim two homestead exemptions. A person who is both disabled and 65 or older can claim one or the other exemption, but not both. Section 11.13(h).

D. Charitable organizations.

The land and buildings of charitable organizations meeting the requirements of Section 11.18 are exempt from taxation. Use of the exempt property by non-charitable organizations does not result in a loss of an exemption if the use is incidental to use by the qualified charitable organization and limited to activities that benefit the beneficiaries of the charitable organization.

E. Reappraisal of property in natural disaster area.

Section 23.02 provides that, if the governor declares an area to be a natural disaster, the taxing authority may authorize the reappraisal of all property damaged in the disaster at its market value immediately after the disaster. Taxes are assessed at the pre-disaster value for the period of time before the occurrence of the disaster, and at the post-disaster value for the period of time after the occurrence of the disaster.

F. Appraisal of property subject to environmental remediation.

Section 23.14 requires the Chief Appraiser to take into account the estimated cost of any required environmental remedial action in determining the market value of the property.

G. Texas Constitution: ag and open space valuations.

The authority for the special valuation of land designated for agricultural or open space use (discussed below) is Article 8, Section 1-d and 1-d-1 of the Texas Constitution.

Section 1-d (which is the subject of Section 23.41 below) restricts the designation for agricultural use to land owned by "natural persons". Minerals and subsurface rights do not qualify for this designation.

Section 1-d-1 (which is the subject of Section 23.51 below) does not restrict the special valuation to natural persons. It applies to open-space land devoted to farm, ranch or wildlife management.

H. Appraisal of land used for agricultural purposes ("Section 1-d").

Section 23.41 provides that land owned by an individual designated for agricultural use is appraised at its value based on the land's capacity to produce agricultural products. The value is determined by capitalizing the average net income that the land would have yielded under prudent management during the 5 years preceding the current year.

Land qualifies for designation for agricultural use if, on January 1:

(a) the land has been devoted exclusively to or developed continuously for agricultural use for the 3 preceding years;
(b) the individual is using and intends to use the land for agricultural use as an occupation or business venture for profit during the current year; and
(c) agriculture is the individual's primary occupation and primary source of income.

Land subject to a home equity loan is not eligible for designation for agricultural use.

Section 23.43 requires the individual claiming the right to the agricultural use designation to apply for the designation each year he claims it.

Section 23.46 requires the Chief Appraiser to also appraise the land at its market value and record both the market value and the value based on its capacity to produce agricultural products in the appraisal records.

"Roll back" is triggered by either (i) a sale or (ii) a change in use to a nonagricultural use. If this occurs, the total amount of additional taxes for the 3 years preceding the year in which the land is sold or diverted to a different use becomes due. Section 23.46.

The amount of the "roll back" is the difference between the taxes assessed based on this special classification and the amount of taxes that would have been imposed had the land been taxed based on the market value in each of the 3 preceding years, plus interest at the rate provided for delinquent taxes. A tax lien attaches to secure the payment of this additional tax.

Land is not diverted from agricultural use solely because the owner of the land claims it as part of his residence homestead under Section 11.13.

I. Appraisal of land used as "open space", etc. ("Section 1-d-1").

Section 23.51 covers "qualified open-space land". Land qualifies if:

(a) the land has been devoted principally to "agricultural use" to the degree of intensity generally accepted in the area and that has

been devoted principally to agricultural use or to produce timer or forest products;

(b) such use has existed for 5 of the preceding 7 years.

"Agricultural use" includes cultivating the soil, growing crops, raising livestock, harvesting logs or posts for use in constructing or repairing fences, barns, etc, and use of land for wildlife management. It also includes land between 5 and 20 that is used to raise or keep bees for pollination, production of human food or other products with a commercial value.

Section 23.52 provides for the appraisal to be based using income capitalization methods. The appraisal of minerals or subsurface rights to minerals does not fall under this statute.

"Roll back" is triggered by a change in use to a nonagricultural use (unlike the Section 1-d designation, a sale does not trigger a roll back). If this occurs, the total amount of additional taxes for the 5 years preceding the year in which the change of use of the land occurs becomes due. Section 23.55.

The amount of the "roll back" is the difference between the taxes assessed based on this special classification and the amount of taxes that would have been imposed had the land been taxed based on the market value in each of the 5 preceding years, plus interest at an annual rate of 7%. A tax lien attaches to secure the payment of this additional tax.

Unlike the Section 1-d designation, the landowner does not have to reapply for this designation every year. Once it has qualified under this statute, it retains its qualification until the ownership of the land changes or its eligibility has ended. However, the sale itself does not trigger a roll back as it does under Section 1-d; instead, the new owner must file an application in their own name. Section 23.54(e).

The following events do not constitute a change in use that would end the land's eligibility: (i) a sale for right-of-way, (ii) a condemnation, (iii) a transfer of property to the state or a public subdivision of the state to be used for a public purpose or certain economic development purposes. Section 23.55(f).

Certain land does not qualify for Section 1-d-1 designation, such as land located in the corporate limits of a city or town (subject to certain exceptions), and land owned by a nonresident alien. Section 23.56.

Wildlife management is a use which qualifies for the open-space valuation. Section 23.51(7).

J. Timber land.

Land qualifies for appraisal based production of timber under Section 23.72 if it is currently and actively devoted principally to production of timber or forest products.

INTRODUCTION TO TITLE INSURANCE DISCUSSION

This section of the paper will focus on methods that attorneys can use to attempt to preserve existing title insurance coverage when conveying real property between family members, family limited partnerships, limited liability companies, trusts and similar situations. The goal is to preserve existing title insurance coverage and save the client the expense of purchasing new coverage.

A title insurance policy is a contract of indemnity. In other words, it is a contract under which the insurer insures against certain losses. The title policy will describe the extent of coverage and it will carve out exceptions to that coverage. It is important to understand this contractual nature of title insurance rather than to view the policy as a guaranty of good or marketable title.

The paper has three parts. The first part will be a brief review of the statutory requirements for deeds, a discussion of the three components of a typical deed, and the different forms of warranties of title in deeds used to convey real property.

The second part will review the coverage of an Owner Policy of Title Insurance in Texas and how that coverage is affected (i.e., either lost or preserved) when title to real property is conveyed.

The third part will cover some other drafting tips that often affect the conveyance of real property.

References to Procedural Rules, Rate Rules and Endorsement forms are to the Basic Manual of Rules, Rates and Forms for the writing of Title Insurance in the State of Texas that is promulgated by the Texas Department of Insurance (the "Basic Manual"). If you don't have a current copy of the Basic Manual, you can view it at the Texas Department of Insurance website at www.tdi.state.tx.us/title/titleman.html. Useful information is also available on the Texas Land Title Association website at: www.tlta.com.

I. DEEDS: STATUTORY REQUIREMENTS, COMPONENTS AND WARRANTIES OF TITLE

A. Statutory requirements for deeds

There aren't many statutory requirements for a deed to convey real property in Texas. Section 5.022(a) of the Texas Property Code provides a form of deed that will convey fee simple title with a covenant of "general" warranty. However, Section 5.022(b) provides that a covenant of warranty is not even required in a conveyance, and Section 5.022(c) permits the parties to insert any clause or use any form of conveyance that is not in contravention of law.

In terms of implied covenants, Section 5.023 states that, unless the conveyance expressly provides otherwise, use of the words "grant" or "convey" in a deed implies only that the grantor covenants to his grantee that:

(1) prior to the conveyance, the grantor has not conveyed the estate or any other interest in the estate to another person other than his grantee, and
(2) at the time of the conveyance the estate being conveyed is free from encumbrances.

An "encumbrance" is defined in Section 5.024 as including "a tax, an assessment, and a lien on real property."

The upshot of the above provisions is that a party has a great deal of latitude in how expansive or narrow a warranty of title in a deed can be while still conveying title to real property in Texas.

B. Components of a deed

There are three basic parts to a deed, and each has important drafting implications when considering the effect on title insurance. They are:

1. Granting clause

The typical language used to convey title to property includes the phrase that the grantor does hereby "*grant, sell and convey*" title to the grantee. Remember that Section 5.023 of the Property Code specifies that there are two implied covenants whenever the grantor uses the terms "grant" or "convey," namely (i) a covenant that the grantor has not previously conveyed the estate or an interest in the estate to another party, and (ii) there are no encumbrances (i.e., liens) against the property.

2. Habendum clause

The habendum clause is the language that begins "*to have and to hold . . .*" It essentially defines the extent of the title, or the quantity of title, being conveyed to and owned by the grantee. The habendum clause from Section 5.022 of the Property Code reads:

> *To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in any wise belonging, unto the said [grantee], his heirs or assigns forever.*

The upshot of the granting clause and the habendum clause is that the grantor is conveying to the grantee the entire "bundle of sticks" to the property. In other words, upon giving effect to the conveyance in the deed, the grantee will own fee simple title to the real property without any qualifications; no other party has any liens against the property, no other party has any rights to the property, and the grantee may make

such use of the property as the grantee wishes (subject, of course, to applicable zoning and other laws).

If, however, title to the property is already burdened by existing liens, deed restrictions, easements, leases, mineral reservations, or similar matters, the deed should be qualified in one of two ways (the "subject to" provisions discussed below), so that the grantor does not breach the covenants in the granting clause and the habendum clause.

The granting clause and the habendum clause are similar to the protections given the grantee/owner in an Owner Policy of Title Insurance. The Owner Policy will insure the owner's fee simple title to the property, subject to the exceptions in Schedule B of the Policy. In Schedule B of the Policy, the title company will qualify their indemnity of title by disclosing the liens, deed restrictions, etc. that were discovered as a result of the title company's review of the real property records. If it turns out that the property was burdened by a recorded title exception (for example, an easement) that the title company simply missed in its title examination, the title company will indemnify the owner for losses he incurs by reason of such title exception.

3. Warranty clause.

The warranty clause describes the warranty, if any, that the grantor gives to the grantee. The warranty language from Section 5.022 of the Property Code reads:

> *And I do hereby bind myself, my heirs, executors, and administrators to warrant and forever defend all and singular the said premises unto the said [grantee], his heirs, and assigns, against every person whomsoever, lawfully claiming or to claim the same, or any part thereof.*

This warranty language in Section 5.022 is a general warranty of title.

As noted above, the combination of the granting clause (with the statutorily implied covenants when the terms "grant" or "convey" are used), the habendum clause and the warranty clause will, unless qualified, cause the grantor to give to the grantee an absolute assurance that he is conveying unencumbered, free and clear fee simple title to the real property. The grantor may qualify the conveyance and his warranty by the use of a "subject to" provision.

In an earlier version of the recommended form of Warranty Deed drafted by the Real Estate Forms Committee of the State Bar of Texas, the recommended paragraph heading for the "subject to" provision was the following:

> **Reservations from and Exceptions to Conveyance and Warranty:**

> The above language left a lot to be desired in terms of clarity. For example, assume a deed read:

> ***Reservations from and Exceptions to Conveyance and Warranty**:*

> *One-half of the oil, gas and other minerals*

> Would the above language mean:

> (a) That the grantor was reserving of one-half of the mineral estate? In other words, was this a "*Reservation from . . . Conveyance*"?
> (b) That one-half of the minerals were already outstanding in some remote third party, and this was therefore an "*Exception to Conveyance*"?
> (c) That one-half of the minerals were already outstanding in some remote third party, and this was therefore an "*Exception to . . . Warranty*"?

The Texas Supreme Court noted that there are "refined and subtle distinctions between a reservation and an exception in a deed, which terms are frequently used interchangeably and indiscriminately." *King v. First National Bank of Wichita Falls*, 192 S.W.2d 260, 262 (Tex. 1946).

Perhaps due to the possibility of confusion in the use of those headings, the Forms Committee revised the recommended paragraph heading and broke it into two paragraphs to read as follows:

> **Reservations from Conveyance:**

> *and*

> **Exceptions to Conveyance and Warranty:**

> Under the current Bar form, if the grantor wishes to reserve some or all of the minerals to himself in the current deed, this reservation should be done under the "Reservations from Conveyance" section. On the other hand, if the grantor wishes merely to disclose to the grantee that minerals have already been severed and are outstanding in a third party, the proper place to disclose that is under the "Exceptions to Conveyance and Warranty" section, since the outstanding minerals are both an "exception"

to the conveyance (i.e., the grantor can't convey what he doesn't own), and an "exception" to the warranty (i.e., the grantor can't warrant title to what he doesn't own).

However, the above still leaves room for potential confusion. Just look at how one court sought to clarify the difference between a "reservation" and an "exception":

> A "reservation" operates for the benefit of the grantor and serves to retain in him his ownership to the extent stated, whereas an "exception" is a mere exclusion from the grant in favor of the grantor only to the extent that such interest as is excepted may then be vested in the grantor and not outstanding in another.

York v. Kenilworth Oil Company, 614 S.W.2d 468, 471 (Tex. App. – Waco 1981, writ ref'd, n.r.e.).

Using the word "Conveyance" in both headings might still lead to confusion about where a reservation of minerals to the grantor should be listed and where a reference to the outstanding mineral rights of third parties should be listed. Consider the conveyance of a 100 acre tract "save and except" a 5 acre tract. This sounds similar to a "reservation" of the 5 acres out of the 100 acres, since the grantor is retaining ownership of the 5 acres. However, instead of "reserving" 5 acres, the language uses the word "except," which sounds like an "exception to the conveyance." Any ambiguity could pose problems since it might be difficult to explain to a judge who is not versed in real estate conveyance documents, or worse yet a jury, the difference between a "reservation from conveyance" and an "exception to conveyance."

The lesson here is to be very careful in drafting deeds. And, do not rely on the headings in the deed form to describe what you are intending to do. Instead, state clearly what is and is not conveyed.

For example, if the grantor wishes to reserve one-half of the minerals, instead of simply saying "One-half of the oil, gas and other minerals" under the "Reservations from Conveyance" heading, the deed should instead have a complete, clear and coherent sentence such as "Grantor does hereby reserve to himself, his heirs and assigns, one-half of the oil, gas and other minerals . . . ." In other words, use the paragraph headings as subject matter headings only, not as the operative reservation language.

Similarly, any title exceptions listed under the "Exception to Conveyance and Warranty" section should contain a clear and concise statement of the purpose for listing the title exceptions, instead of simply listing recorded instruments. As noted above, this is often referred to as the "subject to" paragraph since it lists the title exceptions that the grantee will take title subject to. Using the "subject to" language in the deed has the effect of limiting the conveyance in some way, since a "subject to" clause limits the estate granted and warranted. *Avert v. Grande, Inc.*, 717 S.W.2d 891, 894 (Tex. 1986).

The language that would be inserted under the "Exceptions to Conveyance and Warranty" heading can be drafted in one of two ways, the selection of which will have an impact on the continued coverage of the grantor's Owner Policy. In Appendix A, the sample form of Warranty Deed, you'll see "OPTION ONE" and "OPTION TWO." They differ in the following respects:

In OPTION ONE, the grantor uses the broad exception clause, which is more to his favor. He takes on no responsibility for informing the grantee what specific documents might be recorded with the County Clerk that may affect title, which puts the burden on the grantee to ascertain that. Of course, the grantee does not actually search the real property records, and instead relies on the title company to do this. Under Option One, there is little likelihood that the grantee will ever have a claim for breach of warranty against the grantor, since the grantor made his warranty of title subject to anything that is recorded with the County Clerk. For example, assume that the title company searches title and fails to discover a mineral reservation in the chain of title. Although the grantee might have a claim against the title company, he would probably not have a claim against the grantor since the mineral reservation was duly recorded and the grantor made the conveyance subject to everything of record.

In OPTION TWO, the grantor takes exception only for specific matters reflected in the real property records. This of course means that, if the grantor fails to list an instrument affecting title to the property, the grantee may have a claim for breach of the grantor's warranty. In the above example where the title company also missed the reservation in its title search, the grantee would have a claim against both the title company and the grantor.

The most important point about the two options for purposes of this paper is that you should NOT use OPTION ONE if you are trying to preserve coverage for the grantee under the grantor's title policy.

Appendix B contains a sample Schedule B from an Owner Policy and the corresponding exception clause to be used in a deed under OPTION TWO.

C. Warranties of title in deeds

There are four commonly referred to forms of warranties (or lack thereof) in a deed. There is the "general" warranty of title, the "special" warranty of title, the "no warranty" of title, and the "quitclaim" form of deed. There are of course many other types of deeds that have commonly used titles, such as an

owelty deed, gift deed, partition deed, mineral deed, correction deed, deed in lieu of foreclosure, etc., but those titles mainly focus on the purpose of the instrument as opposed to the form of the actual warranty of title contained in the conveyance language itself. Below is a brief discussion of the four common warranties of title:

1. General warranty of title.

As noted above, the sample form of deed in Section 5.022 conveys fee simple title with a general warranty of title. A general warranty of title is often described as an absolute warranty of title. In a deed with a general warranty of title, the grantor is, in effect, standing absolutely and completely behind the title he purports to give to the grantee, beginning from the sovereignty and continuing long after he conveys title. In other words, the grantor binds himself to defend title to all subsequent owners of the property, even if a remote grantee acquires title under a limited warranty (such as a special warranty deed, quitclaim, sheriff's deed, etc.) which would prevent that grantee from making a claim for breach of warranty against his immediate grantor. *Flanniken v. Neal*, 67 Tex. 629, 4 S.W. 212 (1887). In addition, the grantor under a general warranty of title is liable for title defects that occurred before he acquired title.

Keep in mind, however, that the grantor under a general warranty of title is only responsible for the title as it existed as of the date of his conveyance. In spite of a general warranty of title that runs forever, the grantor would not be responsible for title defects that occurred after his conveyance. And, of course, even with a general warranty of title, if the deed was made "subject to all matters of record" as in OPTION ONE in the attached sample Warranty Deed, the grantor would likely not be liable if the defect was one that was properly reflected in the real property records.

2. Special warranty of title.

A special warranty of title differs from a general warranty of title in that the grantor is liable only for defects in the chain of title that arose after the grantor acquired title but before his conveyance. The simple addition of the words, "by, through or under Grantor, but not otherwise" to the warranty clause converts the warranty of title from a general warranty to a special warranty.

3. Deed without warranty of title.

As noted above, Section 5.022(b) of the Property Code does not require a covenant of warranty to convey title to real property. A "deed without warranty," or "no warranty deed," conveys whatever title the grantor has, but without any warranties, express or implied, by the grantor. Although it may sound like the functional equivalent of a quitclaim deed, one of the advantages of using a deed without warranty is that (unlike the quitclaim deed) it is considered a "duly registered deed" under the 5-year statute of limitations in Section 16.025 of the Texas Civil Practices and Remedies Code. If the no warranty deed uses the words "grant" or "convey" and the grantor wishes to exclude even the implied warranties of Section 5.023 of the Property Code that arises when those words are used, those warranties should be specifically excluded.

4. Quitclaim deed.

A quitclaim deed also omits any warranties of title. It only purports to convey whatever interest the grantor has, if any, at the time of its execution. Unlike the above-described deeds, it is not considered a "duly registered deed" for purposes of the 5-year limitations period; it does not pass after-acquired title that the grantor may later acquire; and it does not make the grantee an innocent purchaser for value. For those reasons, a quitclaim deed should be sparingly used. For example, in a probate context you might ask for a quitclaim deed from a remote relative of a decedent simply to prevent that relative from asserting some claim to the property. In a more common context, land that has been conveyed multiple times with different surveys might result in uncertainties in the actual boundary lines; in that context, you might ask a neighboring landowner to sign a quitclaim deed to ensure that they are not claiming title to small portions of property that might otherwise be subject to a dispute as to ownership.

II. COVERAGE UNDER AN OWNER POLICY OF TITLE INSURANCE

There are several factors one must consider when trying to preserve title insurance coverage under an Owner Policy of Title Insurance.

A. Type of property and related Owner Policy

The first factor to clearly understand is the *type* of property and related Owner Policy you are dealing with.

1. Non-residential property.

"T-1" policies are used for properties other than one-to-four family residences.

2. Residential property

"T-1R" policies are used for one-to-four family residences.

Ideally, you will have the opportunity to review the actual Owner Policy in question.

B. Date of Policy

The next factor you must consider is the *effective date* of the Owner Policy that you are dealing with.

1. Non-residential property.

For non-residential properties, you must determine whether the T-1 Owner Policy you are trying to keep in force was issued before May 1, 2008, or on or after May 1, 2008, because the State Board of Insurance changed certain language in the T-1 Policy form, as well as language in certain Rate and Procedural Rules, effective as of May 1, 2008. The result of these changes is described below.

2. Residential property.

For residential properties, you must determine whether the T-1R Owner Policy was issued before January 1, 2010, or on or after January 1, 2010, because in 2009 the 81st Legislature passed HB 3768, which became Section 2703.101(g) of the Texas Insurance Code, and it affects residential title policies issued on or after January 1, 2010. The effect of this new law is also described below.

C. Definition of "Insured

Once you are aware of the type of policy and its effective date, then you must consider the definition of "Insured" under the Owner Policy.

1. Non-residential Policies issued before May 1, 2008.

Appendix C contains the full definition of "Insured" from the Conditions and Stipulations for non-residential T-1 policies issued before May 1, 2008. Essentially, the Owner Policy defines the "Insured" as just about anyone or any entity that succeeds to title by operation of law. This includes the **heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate, partnership or fiduciary successors**. Also included in the definition of "insured" is the surviving corporation from a merger and the **beneficiaries of certain trusts**.

By the literal terms of the definition of the "Insured," there is no need to purchase a new Owner Policy upon the occurrence of any of the events that are included in the definition.

This is similar to the effect of certain state statutes. For example, under Sections 10.008 and 10.106 of the Texas Business Organizations Code, when a merger or conversion takes place, the new entity succeeds to title to all real estate owned by the prior entity without the need for formally conveying title to the new entity. These provisions were formerly found in Sections 5.06 and 5.20 of the Texas Business Corporation Act (for corporations) and Article 6132b-9.02 of the Texas Revised Partnership Act (for partnerships).

2. Non-residential Policies issued on or after May 1, 2008.

Appendix D contains the full definition of "Insured" from the Conditions and Stipulations for non-residential T-1 policies issued on or after May 1, 2008. The changes made by the State Board of Insurance expanded the definition of "Insured" for these later policies to include:

(a) successors to the Title of the Insured by operation of law as distinguished from purchase, including heirs, devisees, survivors, personal representatives or next of kin;
(b) successors to an Insured by dissolution, merger, consolidation, distribution or reorganization;
(c) successors to an Insured by its conversion to another kind of Entity;
(d) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title:

(1) If the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured,
(2) If the grantee wholly owns the named Insured,
(3) If the grantee is wholly-owned by an affiliated Entity of the named Insured, provided the affiliated Entity and the named Insured are both wholly-owned by the same person or Entity, or
(4) If the grantee is a trustee or beneficiary of a trust created by a written instrument established by the Insured named in Schedule A for estate planning purposes.

It is very important to note that the definition of "Insured" is different under pre-May 1, 2008 T-1 policies and those issued on or after May 1, 2008, and you must carefully study the relevant definition for each transfer in order to determine whether the coverage continues or if other steps might be appropriate, as described below.

3. Residential Policies issued before January 1, 2010.

Appendix E contains the full definition of "Insured" from the Conditions for residential policies issued before January 1, 2010. The "Insured" under those policies is the original insured, and the Conditions say:

"We insure you as long as you:

a. own your Title,
b. own a mortgage from anyone who buys your Title, or

c. *are liable for any Title warranties you make.*

We insure anyone who receives your title because of your death.

We do not insure your transferee or assignee."

(emphasis added).

Notice how the above language in the T-1R combines both the definition of the "Insured" (i.e., the named Insured in the Policy and "*anyone who receives your title because of your death*"), but also incorporates the "warrantor's policy" coverage that we'll discuss later in this paper (i.e., the title company insures you so long as you "*are liable for any Title warranties you make*"). In the T-1 Policy, the definition of the "Insured" is separate from the provisions defining the "warrantor's coverage", as you'll see in Appendix I discussed below.

4. Residential Policies issued on or after January 1, 2010.

Appendix F contains the new Texas Insurance Code Section 2703.101(g), which provides that the Texas Insurance Commissioner **shall** adopt terms that provide for continuation of coverage issued to an individual for:

(1) a person who inherits the original named insured's title on the original named insured's death;
(2) the original named insured's spouse who receives title in a dissolution of marriage with the original named insured;
(3) the trustee or successor of a trust established by the original named insured to whom the original named insured transfers title after the date of policy; or
(4) the beneficiaries of a trust described by Subdivision (3) on the death of the original named insured.

The effective date provisions of this new law state that it applies only to an insurance policy or contract that is delivered, issued for delivery, or renewed on or after January 1, 2010, and that an insurance policy or contract delivered, issued for delivery, or renewed before January 1, 2010, "is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose."

Unfortunately, as of the date of submission of this article, the T-1R Owner Policy form has not been revised to incorporate the statutorily required coverage of Section 2703.101(g). A hearing at the State Board of Insurance was held February 28, 2012 to consider agenda items, including a proposed revision to the form. The next step is to publish the proposed revisions in the Texas Register for public comment. Once that occurs the Commissioner may issue a final order adopting the agenda item. Appendix G contains excerpts from the Commissioner's Agenda Item 2012-73 with the mark-up of the proposed changes to the T-1R form.

So, for policies issued on or after January 1, 2010 but before the form is revised, we are in an unusual situation. The only policy form a title company may issue has less coverage than required by state law. Do you still have the expanded coverage under these policies?

Again, as with the non-residential properties, the relevant definition of "Insured" for residential policies depends on the date of the policy (i.e., before January 1, 2010, on or after January 1, 2010, or perhaps when the form is revised), and you must carefully study the relevant definition for each transfer in order to determine whether the coverage continues or if other steps might be appropriate, as described below.

D. Additional Insured -- Procedural Rule P-57

Procedural Rule P-57 states that you may add an additional insured to your Owner Policy. Appendix H contains Procedural Rule P-57, Rate Rule R-33, and the T-26 Endorsement.

Under Procedural Rule P-57, there are 3 parties who may be added as an additional insured to an Owner Policy:

(a) The trustee or successor of a Living Trust to whom the insured transfers title after the issuance of the Owner Policy, and/or the beneficiaries of the Living Trust.

(Unfortunately, neither "Living Trust" nor "the beneficiaries of the Living Trust" are defined in Procedural Rule P-57.)

(b) Any partner, member or stockholder that acquires the interests of the other owners of the insured in accordance with a written agreement in effect on the date of the Owner Policy.
(c) A family partnership or family corporation solely composed of or owned by members of the insured's family and the insured.

(Unfortunately (c) above does not include limited liability companies, and the "insured's family" is not defined by the Rule.)

Under (a), above, if your individual client purchased the property and has an Owner Policy in his

name, but wants to transfer title to the trustee of a living trust, you can obtain a T-26 Endorsement and add that Trustee as an additional insured. This endorsement is available regardless of whether the conveyance uses OPTION ONE or OPTION TWO in the granting deed.

Item (b) above has interesting possibilities. It does not state that the partner, member or stockholder must have been a partner, member or stockholder of the insured on the date of the Owner Policy. The reference to a "written agreement in effect on the date of the Owner Policy" is typically a reference to the partnership agreement, stock purchase agreement, etc. A title company is simply looking for the typical provisions whereby (in the context of a partnership) partners have the right to buy out other partners. So long as a partnership agreement has these provisions, you may be able to bring in a new partner, have that partner added as an additional insured, then allow that partner to buy out the other partners and have title insurance coverage in his own name without ever purchasing a new Owner Policy. If you attempt this and are successful in getting the P-57 endorsement, please let the author know!

The cost of the Additional Insured Endorsement is 10% of the Basic Rate for each Owner Policy (based on the amount of the insurance coverage in the Policy). Rate Rule R-33 does not state whether this premium is based on the Rates in effect on the date of the original Owner Policy or the date of the endorsement. Generally, however, the premium a title company will charge for an endorsement will be based on the Rates in effect when the endorsement is requested.

E. Conveyance language.

If not covered by the definition of "Insured" under the grantor's Owner Policy, and no T-26 Endorsement for an additional insured is available or purchased, then the language in the deed becomes extremely important.

It is often said that, after the owner conveys title to property, his Owner Policy becomes in effect a "warrantor's policy," such that if the owner is sued by a subsequent grantee, the Owner Policy will defend the owner under a breach of warranty claim. Appendix I contains the basis for this coverage in a T-1 Owner Policy, which is Paragraph 2 of the Conditions section of the Policy. Note that the language changed for T-1 Policies issued on or after May 1, 2008. As noted earlier, the "warrantor's policy" coverage under a T-1R is included with the language further defining the "Insured", which is shown in Appendix E.

Prior to around 1991, the terms of the T-1 Owner Policy specified that the warrantor's coverage was in effect for 25 years. Now, there is no set time limit; instead, the coverage lasts so long, but only so long, as the owner has an interest in the land, holds a debt secured by the land, or has liability by reason of warranties in a deed (e.g., warranties of title).

Example 1:

Assume a property owner has purchased land, and has a T-1 Owner Policy insuring the title. The owner then decides to form a partnership or other entity to own the land, and he either does not want to purchase a P-57 Endorsement to add the partnership as an additional insured, or the partnership is not owned entirely by his family members. The inclination may be to limit the owner's liability under the deed by using a special warranty of title, "subject to" all matters of record. However, by doing so, he may have effectively lost the "warrantor's policy" coverage under his Owner Policy simply because the partnership will have no claim against the owner under a breach of warranty in the deed.

In order to maintain the "warrantor's policy" coverage under the existing Owner Policy, the owner should use a deed with a (i) general warranty of title, and (ii) subject only to those matters reflected in Schedule B of his Owner Policy. Then, if title fails in the hands of the partnership, the partnership may make a claim against the prior owner under the warranty of title in the deed, and the prior owner may then make a claim under his Owner Policy on the basis of the "warrantor's policy" coverage.

As indicated in Appendix I, the coverage under the "warrantor's policy" exists in this example only so long as the insured has liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the title. Obviously, if there are no covenants of warranties made in his deed, there is no warrantor's coverage for the owner in his Owner Policy.

Example 2:

This time assume the owner conveys the property to a living trust or family partnership composed solely of family members. With a conveyance to such a living trust or family partnership, the owner can get the T-26 endorsement under Procedural Rule P-57 and have the trustee or family partnership added as a named insured. Or, he can give the trustee or family partnership a general warranty of title subject only to the exceptions in his Owner Policy, and effectively maintain coverage through his "warrantor's policy" coverage. Thus, he can maintain coverage in two separate ways.

It may seem counterintuitive to draft a deed in a way to intentionally leave your client exposed to being sued for a breach of warranty claim by either his immediate grantee or some remote owner in the future chain of title. However, the goal is to maintain coverage while the property is owned by the client's family limited partnership, by the trust established by

the client, etc., and so long as title is so held, the client probably has control over when and to what extent the grantee makes a claim against him. And, even though a general warranty deed exposes your client to a breach of warranty claim by remote grantees, the likelihood of ever being sued by a remote grantee fades with time, particularly since most grantees will have their own Owner Policy of Title Insurance to make a claim against.

When a title company pays a claim under an Owner Policy, it is subrogated to the claims of its insured. Appendix J contains Paragraph 13 of the Conditions and Stipulations for a T-1 Owner Policy issued before May 1, 2008, and Appendix K contains Paragraph 13 of the Conditions for a T-1 Owner Policy issued on or after May 1, 2008. Appendix L contains Paragraph 7 of the Conditions for a T-1R Owner Policy.

Even though a title company has subrogation rights against the grantor, they rarely make such claims. Most likely, a title company will explore a possible subrogation claim against the grantor if that grantor has their own Owner Policy to fall back on. If the grantor does not have coverage, a title company is less likely to exercise their subrogation claim against the grantor.

F. Subsequent purchase of Owner Policy.

A frequently asked question is whether a party may purchase an Owner Policy for a nominal insured amount. For example, assume your client wishes to transfer title to property worth $1,000,000 to a family limited partnership, but does not, due to the possibility of claims by future grantees in the chain of title, want to transfer by general warranty deed in a way to preserve the coverage under their existing Owner Policy. Can the owner simply purchase an Owner Policy in the name of the partnership for, say, $50,000, to at least have a title company on the hook to provide some degree of coverage?

Unfortunately, the answer is no. Rate Rule R-3 (for policies issued before May 1, 2008) and Procedural Rule P-66.A.1. (for policies issued on or after May 1, 2008) provide that a title company may only issue an Owner Policy "for the amount of the current sales price," or if no sale is occurring, "for an amount equal to the value of the land and any existing improvements . . . ."

III. OTHER DRAFTING TIPS

A. "Right, title and interest" language.

Be VERY careful in your drafting of deeds. In *Enerlex, Inc. v. Amerada Hess, Inc.*, 302 S.W.3d 351 (Tex. App. – Eastland, no pet.), Enerlex sought title to minerals under its deed, claiming it was a bona fide purchaser who cut off a previously unrecorded gift deed. Enerlex's deed was recorded, contained a general warranty of title and described minerals in specific property. However, the introduction to the property conveyed included the language "All right, title and interest in and to . . ." Even though the Enerlex deed contained a general warranty of title and did not include any disclaimer of warranties, the Court held that the deed was in fact a quitclaim deed. For that reason, Enerlex was not a bona fide purchaser whose title cut off a previous unrecorded deed.

So, if you do not want to risk your deed being considered a quitclaim deed, avoid the "right, title and interest" language.

B. Expired mineral leases in "subject to" paragraph.

Notice that, in both OPTION ONE and OPTION TWO in the sample Warranty Deed in Appendix A, included is the phrase "*to the extent the same are valid and enforceable and affect the Property* . . ." Assume that you are drafting a deed conveying property from your individual client to a family limited partnership. Assume also that, when your client purchased the property, there was a valid mineral lease in effect for a term of years. For that reason, the Owner Policy took exception to the mineral lease in Schedule B. However, by the time your client decides to convey the property to the partnership, the lease has expired.

This is one instance where you will not want to reference the expired mineral lease in the "subject to" part of the general warranty deed. Courts have held that a reference in a general warranty deed which recited that the conveyance was "subject to" an oil and gas lease (which by its terms had expired) had the effect of ratifying the lease. *Morgan v. Fox*, 536 S.W.2d 644 (Tex. Civ. App. – Corpus Christi 1976, write ref'd, n.r.e.). See also *Humble Oil & Refining Co. v. Clark*, 126 Tex. 262, 87 S.W.2d 471, 474 (1935) (execution of a mineral deed which referenced an expired lease and treated it as valid served to revive the lease).

The language added to the OPTION ONE and OPTION TWO paragraphs in the sample Warranty Deed are intended to avoid the ratification problem in the event you insert a reference to an instrument which has expired. OPTION TWO also has an additional sentence after the listing of the instruments attempting to specifically avoid ratification of an expired instrument.

C. Administrators and executors cannot bind estate with general warranty of title.

In *Dallas County v. Club Land & Cattle Co.*, 95 Tex. 200, 66 S.W. 294, 297 (Tex. 1901), the Court held that an administrator cannot bind an estate by a covenant of warranty of title, reasoning that "[t]he policy of the law is to require an estate to be

administered and the administration closed with as little delay as may be practicable. To permit the administrator to bind the estate by a warranty in his deed would be to impose a new contingent liability upon it, and to delay indefinitely the close of the administration."

The holding in *Club Land & Cattle* was extended to independent executors in *Burleson v. Whaley*, 299 S.W. 718, 721 (Tex. Civ. App. – Austin 1927 (no writ history).

D. Notice of Confidentiality Rights

Section 11.008 was added to the Property Code effective on September 1, 2003 to attempt to keep a person's driver's license and social security number out of the public records. It is only a slight exaggeration to say that this statute attempted to solve a problem no one knew ever existed. As originally drafted, County Clerks were not permitted to record an instrument subject to this statute unless the Notice was included.

The Texas Attorney General created an enormous uproar with Opinion No. GA-0519 dated February 21, 2007, which addressed §552.147 of the Public Information Act (TEX. GOV'T. CODE ANN. § 552.147 (Vernon Supp. 2006). In the opinion, the Attorney General said that the Act made social security numbers confidential, and that a governmental body could not release someone's social security number without their authorization. He also concluded that the social security numbers of all living persons in all county clerk records subject to the Act were confidential and protected from disclosure. The Act creates criminal liability for violations, and County Clerks became concerned about having their records open to the public with such information contained in the records. Some Clerks closed their records temporarily, and those that had made or were in the process of making records available on their website stopped almost immediately. For a tense few days, it appeared that the real estate market was about to come to a screeching halt.

In response, the Attorney General, by letter dated February 28, 2007, abated his earlier opinion for 60 days to allow the Legislature time to try to fix the problem, and the Legislature promptly passed legislation attempting to fix the problem.

The statute requiring the Notice of Confidentiality Rights was amended effective May 13, 2006, and again March 28, 2007. The current Notice is reflected in the sample Warranty Deed in Appendix A.

The statute provides that any instrument "transferring an interest in real property to or from an individual" must include the Notice in either 12-point boldfaced type or 12-point uppercase letters. And, it must appear at the top of the first page.

Curiously, it no longer matters whether or not the instrument actually contains a social security number or driver's license number. Rather, if the instrument conveys an interest in real property to an individual, it must contain the Notice.

However, under the subsequent amendments to the original statute, the County Clerk may not refuse to record an instrument that does not contain the Notice, and the validity of the instrument is not affected if the Notice is not included.

E. What County should be inserted at the top of page 1 of the deed and in the acknowledgment?

A common question for newly minted lawyers is what County to reference at the top of page 1 of a deed and in the acknowledgment. The County where the land being conveyed is located goes at the top of page 1, and the County where the acknowledgement is taken by the notary public goes in the acknowledgement form. This of course means that the two aren't necessarily the same. As a matter of fact, if the acknowledgement is taken in a different state, the acknowledgement will reference that state and county.

F. Must the party executing the deed appear in person before the Notary Public?

Yes. TEX. CIV. PRAC. & REM. CODE §121.004 provides that "To acknowledge a written instrument for recording, the grantor or person who executed the instrument *must appear before an officer* and must state that he executed the instrument . . ."

An acknowledgement may not be taken over the telephone.

The Texas Secretary of State's website has a number of helpful answers to frequently asked questions at:

http://www.sos.state.tx.us/statdoc/edinfo.shtml#Questions

G. What forms of acknowledgments should be used?

TEX. CIV. PRAC. & REM. CODE §121.007 – 121.008 contains permitted forms of acknowledgements.

H. Suggested drafting terms for certain deeds.

Appendix M contains some suggestions when drafting gifts deeds, distribution deeds, etc. Remember that the statutory requirements of Section 5.022 of the Texas Property Code give you a lot of flexibility in drafting a deed to convey real property.

Although Appendix M has suggested titles for deeds, this is not necessary. For example, a deed with a special warranty of title, rather than a general warranty of title, does not need to be titled "Special Warranty Deed"; you can simply call it a "Warranty

Deed" and insert whatever warranty you wish, or simply "Deed." Likewise, a deed which makes a gift of property does not have to be called a "Gift Deed." However, descriptive terms such as "Gift Deed," "Distribution Deed" and the like can be helpful to future title examiners and others who are interested in the purpose for the conveyance.

APPENDIX A

Sample Form of Deed

<u>NOTICE OF CONFIDENTIALITY RIGHTS</u>: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

WARRANTY DEED

STATE OF TEXAS §
§
COUNTY OF BEXAR §

<u>Date</u>: ________________________, 2012

<u>Grantor</u>: ______________________________

<u>Grantor's Mailing Address</u>:

____
____

<u>Grantee</u>: ______________________________

<u>Grantee's Mailing Address</u>:

____
____

<u>Consideration</u>:

[i.e., cash payment, gift, assumption of loan, subject to existing loan, etc.]

<u>Property</u>:

[insert legal description]

<u>Reservations from Conveyance</u>:

[insert reservations by Grantor, if any]

<u>Exceptions to Conveyance and Warranty</u>: *[select OPTION ONE or OPTION TWO]*

OPTION ONE:

This conveyance is expressly made and accepted subject to all matters on the ground that a true and correct survey would reveal and all valid and subsisting easements, restrictions, reservations, covenants, conditions and other

matters relating to the Property to the extent that the same are valid and enforceable and affect the Property, as same are shown by instruments filed for record in the office of the County Clerk of Bexar County, Texas.

OPTION TWO:

This conveyance is expressly made subject to the following matters (the "Exceptions"), but only to the extent the same are valid and enforceable and affect the Property:

(a)

(b)

(c)

The Exceptions listed above are solely for the purpose of qualifying the estate conveyed herein and Grantor's warranty of title, and no reference or recital herein shall create, enlarge, extend, ratify, confirm or be the basis for any right, title, estate, claim or demand in favor of any party other than Grantor and Grantee, and their respective heirs, legal representatives, successors and assigns.

Grantor, for the consideration set forth herein, has GRANTED, SOLD and CONVEYED and does hereby GRANT, SELL and CONVEY to Grantee the Property, including the improvements located thereon and all right, title and interest of Grantor in and to adjacent streets, alleys, rights-of-way, roadways, strips and gores, easements and in-the-ground utilities. TO HAVE AND TO HOLD the Property, together with all and singular the rights and appurtenances thereto in any wise belonging, to Grantee, Grantee's heirs, executors, administrators, legal representatives, successors or assigns forever. Grantor binds Grantor and Grantor's heirs, executors, administrators, legal representatives, successors and assigns to warrant and forever defend all and singular the Property to Grantee and Grantee's heirs, executors, administrators, legal representatives, successors and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to any reservations from conveyance and exceptions to conveyance and warranty set forth above. *//by, through, or under Grantor, but not otherwise.//*

____
[typed name of Grantor]

STATE OF TEXAS §
§
COUNTY OF BEXAR §

This instrument was acknowledged before me on ______________________, 2012 by _______________________.

____
Notary Public, State of Texas

APPENDIX B

SAMPLE SCHEDULE B

(shaded title exceptions to be included in OPTION TWO)

File No. ________ Policy No. ________

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage (and the Company will not pay costs, attorney's fees or expenses) that arise by reason of the terms and conditions of the leases and easements, if any, shown in Schedule A and the following matters:

1. The following restrictive covenants of record itemized below (the Company must either insert specific recording data or delete this exception):

   Volume 100, Page 1000 of the Official Public Records of Travis County, Texas, and recorded on plat of record under Document Number 200000000 of the Plat Records of Travis County, Texas.

   (But omitting any covenant, condition or restriction, if any, based on race, color, religion, sex, handicap, familial status or national origin unless and to the extent that the covenant, condition or restriction (a) is exempt under Title 42 of the United States Code or (b) relates to handicap, but does not discriminate against handicapped persons.)

2. Any discrepancies, conflicts, or shortages in area or boundary lines, or any encroachments or protrusions, or any overlapping of improvements.

3. Homestead or community property or survivorship rights, if any, of any spouse of any insured.

4. Any titles or rights asserted by anyone, including but not limited to, persons, the public, corporations, governments or other entities,

   a. to tidelands, or lands comprising the shores or beds of navigable or perennial rivers and streams, lakes, bays, gulfs or oceans, or

   b. to lands beyond the line of the harbor or bulkhead lines as established or changed by any government, or

   c. to filled-in lands, or artificial islands, or

   d. to statutory water rights, including riparian rights, or

   e. to the area extending from the line of mean low tide to the line of vegetation or the right of access to that area or easement along and across that area.

5. Standby fees, taxes and assessments by any taxing authority for the year ____, and subsequent years; and subsequent taxes and assessments by any taxing authority for prior years due to change in land usage or ownership, but not those taxes or assessments for prior years because of an exemption granted to a previous owner of the property under Section 11.13, Texas Tax Code, or because of improvements not assessed for a previous tax year.

6. The following matters and all terms of the documents creating or offering evidence of the matters (The Company must insert matters or delete this exception).:

a. 25 foot setback line along the front of the property and 15 foot setback line along the rear of the property as reflected on the plat of record under Document Number 200000000 of the Plat Records of Travis County, Texas.

b. Electric easement to the City of Austin 10 feet wide along Primrose Lane frontage, as recorded in Document Number 20000000 of the Official Public Records of Travis County, Texas.

c. Variable-width 100-year floodplain and drainage easement along the southerly and easterly property lines, as recorded in Document Number 20000001 of the Official Public Records of Travis County, Texas, as shown on the survey dated March 18, 2005 prepared by James Bond, Registered Public Surveyor No. 007.

d. Lease agreement dated May 6, 1997, executed by and between Joe Bloe and Pargaman Lingerie & Nail Salon, Inc., and evidenced by the instrument recorded in Volume 10000, Page 10 of the Real Property Records of Travis County, Texas. Modified under Document Number 2000000094 of the Official Public Records of Travis County, Texas.

e. Oil, gas and mineral lease dated June 11, 2002 to ABC Oil Company, Inc., as reflected in the Memorandum of Lease dated June 11, 2004 recorded under Document Number 200000005 of the Official Public Records of Travis County, Texas.

f. This policy expressly does not guarantee against the rights of persons who are in possession of any portion of the subject property that lies outside of the fences shown on the survey dated March 18, 2005 prepared by James Bond, Registered Public Surveyor No. 007.

g. Location of concrete walk and concrete water vault upon portions of the 10-foot electric and telephone easement along Primrose Lane, as shown on the survey dated March 18, 2005, prepared by James Bond, Registered Public Surveyor No. 007.

h. Rights of parties in possession.

i. Any and all leases, recorded or unrecorded, with rights of tenants in possession.

j. Easements, or claims of easements, which are not recorded in the public records.

APPENDIX B, con't.

DEED INSERT USING OPTION TWO

(using shaded title exceptions from sample Schedule B)

Exceptions to Conveyance and Warranty:

This conveyance is expressly made subject to the following matters (the "Exceptions"), but only to the extent the same are valid and enforceable and affect the Property:

(a) Restrictions in instruments recorded in Volume 100, Page 1000 of the Official Public Records of Travis County, Texas, and recorded on plat of record under Document Number 200000000 of the Plat Records of Travis County, Texas.

(b) 25 foot setback line along the front of the property and 15 foot setback line along the rear of the property as reflected on the plat of record under Document Number 200000000 of the Plat Records of Travis County, Texas.

(c) Electric easement to the City of Austin 10 feet wide along Primrose Lane frontage, as recorded in Document Number 20000000 of the Official Public Records of Travis County, Texas.

(d) Variable-width 100-year floodplain and drainage easement along the southerly and easterly property lines, as recorded in Document Number 20000001 of the Official Public Records of Travis County, Texas.

(e) Lease agreement dated May 6, 1997, executed by and between Joe Bloe and Pargaman Lingerie & Nail Salon, Inc., and evidenced by the instrument recorded in Volume 10000, Page 10 of the Real Property Records of Travis County, Texas. Modified under Document Number 2000000094 of the Official Public Records of Travis County, Texas.

(f) Oil, gas and mineral lease dated June 11, 2002 to ABC Oil Company, Inc., as reflected in the Memorandum of Lease dated June 11, 2004 recorded under Document Number 200000005 of the Official Public Records of Travis County, Texas.

The Exceptions listed above are solely for the purpose of qualifying the estate conveyed herein and Grantor's warranty of title, and no reference or recital herein shall create, enlarge, extend, ratify, confirm or be the basis for any right, title, estate, claim or demand in favor of any party other than Grantor and Grantee, and their respective heirs, legal representatives, successors and assigns.

APPENDIX C

Definition of "Insured" in T-1 Owner Policy Issued Before May 1, 2008

1. **DEFINITION OF TERMS.**

The following terms when used in this policy mean:

(a) "insured": the insured named in Schedule A, and, subject to any rights or defenses the Company would have had against the named insured, those who succeed to the interest of the named insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate, partnership or fiduciary successors, and specifically, without limitation, the following:

(i) the successors in interest to a corporation, limited liability company or limited liability partnership resulting from merger or consolidation or conversion or the distribution of the assets of the corporation or limited liability company or limited liability partnership upon partial or complete liquidation;

(ii) the successors in interest to a general or limited partnership or limited liability company or limited liability partnership which dissolves but does not terminate;

(iii) the successors in interest to a general or limited partnership resulting from the distribution of the assets of the general or limited partnership upon partial or complete liquidation;

(iv) the successors in interest to a joint venture resulting from the distribution of the assets of the joint venture upon partial or complete liquidation;

(v) the successor or substitute trustee(s) of a trustee named in a written trust instrument; or

(vi) the successors in interest to a trustee or trust resulting from the distribution of all or part of the assets of the trust to the beneficiaries thereof.

APPENDIX D

Definition of "Insured" in T-1 Owner Policy Issued On or After May 1, 2008

1. DEFINITION OF TERMS.

* * * *

(d) "Insured": the Insured named in Schedule A.

(i) The term "Insured" also includes:

(A) successors to the Title of the Insured by operation of law as distinguished from purchase, including heirs, devisees, survivors, personal representatives or next of kin;

(B) successors to an Insured by dissolution, merger, consolidation, distribution or reorganization;

(C) successors to an Insured by its conversion to another kind of Entity;

(D) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title;

(1) If the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured,

(2) If the grantee wholly owns the named Insured,

(3) If the grantee is wholly-owned by an affiliated Entity of the named Insured, provided the affiliated Entity and the named Insured are both wholly-owned by the same person or Entity, or

(4) If the grantee is a trustee or beneficiary of a trust created by a written instrument established by the Insured named in Schedule A for estate planning purposes.

(ii) With regard to (A), (B), (C) and (D) reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured.

APPENDIX E

Definition of "Insured" in T-1R Owner Policy Issued Before January 1, 2010

Insured Party -- Unlike under the form T-1, the definition of the "Insured" under the Texas Residential Owner Policy of Title Insurance, One-to-Four Residence, known as the form "T-1R", does not explain the scope of coverage. You must look to the "Continuation of Coverage" section to find this. And, the "Continuation of Coverage" section not only defines the scope of the "Insured", but incorporates the "warrantor's coverage" for the T-1R.

The following is from the Residential Policy:

CONDITIONS

1. DEFINITIONS

 . . .

 k. You, your. The insured.

2. CONTINUATION OF COVERAGE

 We insure you as long as you:

 a. own your Title,

 b. own a mortgage from anyone who buys your Title, or

 c. are liable for any Title warranties you make.

 We insure anyone who receives your title because of your death.

 We do not insure your transferee or assignee.

(emphasis above added)

APPENDIX F

Definition of "Insured" in T-1R Owner Policy Issued On or After January 1, 2010

House Bill 3768 added a new subparagraph (g) to Section 2703.101 of the Texas Insurance Code.

Text of Section 2703.101(g):

(g) For an owner's title insurance policy on residential real property that is issued to an individual, the commissioner shall adopt terms that provide for continuation of coverage subject to rights and defenses against the original named insured for:

(1) a person who inherits the original named insured's title on the original named insured's death;

(2) the original named insured's spouse who receives title in a dissolution of marriage with the original named insured;

(3) the trustee or successor of a trust established by the original named insured to whom the original named insured transfers title after the date of policy; or

(4) the beneficiaries of a trust described by Subdivision (3) on the death of the original named insured.

Added by Acts 2003, 78th Leg., ch. 1274, § 6, eff. April 1, 2005. Amended by Acts 2009, 81st Leg., ch. 985, § 1, eff. Sept. 1, 2009.

Historical and Statutory Notes

2009 Legislation

Section 2 of Acts 2009, 81st Leg., ch. 985 provides:

"This Act applies only to an insurance policy or contract that is delivered, issued for delivery, or renewed on or after January 1, 2010. An insurance policy or contract delivered, issued for delivery, or renewed before January 1, 2010, is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose."

APPENDIX G

Proposed Revisions to Form T-1R Owner Policy

Agenda Item: 2012-73

Submitted By: Robert R. Carter, Jr.
On Behalf Of: Texas Department of Insurance
Address: P.O. Box 149104
Austin, Texas 778714

Telephone No.: (512)-322-3482

The Title Division Staff recommends that the Commissioner of Insurance amend Subsection 2 "Continuation of Coverage" of the Conditions of Form T-1R Residential Owner Policy of Title Insurance in accordance with newly enacted §2703.101 (g) of the Insurance Code. Section 2703.101 (g) was enacted by HB 3768 by the 81st Legislature, Regular Session, effective, September 1, 2009.
. . .

The recommended changes are as follows:
. . .

2. CONTINUATION OF COVERAGE

We insure you as long as you:

a. own your Title,

b. own a mortgage from anyone who buys your Title, or

c. are liable for any Title warranties you make.

[~~We insure anyone who receives your title because of your death.~~]

We [~~do not~~] insure your transferee or assignee only as follows:[~~.~~]

a. A person who inherits the original named insured's title on the original named insured's death;

b the original named insured's spouse who receives title in a dissolution of marriage with the original named insured;

c the trustee or successor of a trust established by the original named insured to whom the original named insured transfers title after the date of policy; or

d the beneficiaries of a trust described by Subdivision (c) on the death of the original named insured.

APPENDIX H

Additional Insured Endorsement for Owner Policy

Procedural Rule P-57:

P-57. Additional Insured Endorsement (T-26)
A Company may issue its Additional Insured Endorsement (T-26) on or after the date that Rate Rule R-33 is effective to an Owner Policy by naming a person as an additional insured in the endorsement, if (1) its underwriting requirements are met, (2) it is paid the premium, if any, prescribed in Rate Rule R-33, and (3) the additional insured is (a) the trustee or successor trustee of a Living Trust to whom the insured transfers the title after Policy Date, and/or the beneficiaries of the Living Trust, or (b) any partner, member or stockholder that acquires the interests of the other owners of the insured in accordance with the terms and provisions of a written agreement in effect at Date of Policy, or (c) a family partnership or family corporation solely composed of or owned by members of the insured's family and the insured. Any matter covered in the Additional Insured Endorsement (T-26) may be insured only by the use of this endorsement.

Rate Rule R-33:

R-33. Premium for Additional Insured Endorsement (T-26)
When the Additional Insured Endorsement (T-26) is issued with an Owner Policy in accordance with Rule P-57, the premium for the Additional Insured Endorsement (T-26) shall be 10% of the Basic Rate for each policy provided that the minimum premium shall be not less than $25.00.

T-26 Endorsement:

ADDITIONAL INSURED ENDORSEMENT T-26

Attached To and Made a Part of
Policy No. _______________

Issued By

BLANK TITLE INSURANCE COMPANY

The policy is hereby amended by adding as a named insured therein:
____

This endorsement does not extend the coverage of the policy to any later date than Date of Policy, nor does it impose any liability on the Company for loss or damage resulting from (1) failure of such added insured to acquire an insurable estate or interest in the land, or (2) any defect, lien or encumbrance attaching by reason of the acquisition of an estate or interest in the land by such added insured.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

APPENDIX I

"Warrantor's Policy Coverage" under a T-1 Owner Policy for Policies Issued Before May 1, 2008

CONDITIONS AND STIPULATIONS

2. CONTINUATION OF INSURANCE AFTER CONVEYANCE OF TITLE.

The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any purchaser from the insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to the insured.

"Warrantor's Policy Coverage" under a T-1 Owner Policy for Policies Issued On or After May 1, 2008

CONDITIONS

2. CONTINUATION OF INSURANCE.

The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured, but only so long as the Insured retains an estate or interest in the Land, or holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title. This policy shall not continue in force in favor of any purchaser from the Insured of either (i) an estate or interest in the Land, or (ii) an obligation secured by a purchase money Mortgage given to the Insured.

APPENDIX J

Subrogation Rights of Title Company under a T-1 Owner Policy Issued Before May 1, 2008

CONDITIONS AND STIPULATIONS

13. SUBROGATION UPON PAYMENT OR SETTLEMENT.

(a) The Company's Right of Subrogation.

Whenever the Company shall have settled and paid a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant.

The Company shall be subrogated to and be entitled to all rights and remedies that the insured claimant would have had against any person or property in respect to the claim had this policy not been issued. If requested by the Company, the insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect this right of subrogation. The insured claimant shall permit the Company to sue, compromise or settle in the name of the insured claimant and to use the name of the insured claimant in any transaction or litigation involving these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to these rights and remedies in the proportion that the Company's payment bears to the whole amount of the loss.

If loss should result from any act of the insured claimant, as stated above, that act shall not void this policy, but the Company, in that event, shall be required to pay only that part of any losses insured against by this policy that shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

(b) The Company's Rights Against Non-insured Obligors.

The Company's right of subrogation against non-insured obligors shall exist and shall include, without limitation, the rights of the insured to indemnities, guaranties, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments that provide for subrogation rights by reason of this policy.

APPENDIX K

Subrogation Rights of Title Company under a T-1 Owner Policy Issued On or After May 1, 2008

CONDITIONS

13. RIGHTS OF RECOVERY UPON PAYMENT OR SETTLEMENT.

(a) Whenever the Company shall have settled and paid a claim under this policy, it shall be subrogated and entitled to the rights of the Insured Claimant in the Title and all other rights and remedies in respect to the claim that the Insured Claimant has against any person or property, to the extent of the amount of any loss, costs, attorneys' fees and expenses paid by the Company. If requested by the Company, the Insured Claimant shall execute documents to evidence the transfer to the Company of these rights and remedies. The Insured Claimant shall permit the Company to sue, compromise or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies.

If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company shall defer the exercise of its right to recover until after the Insured Claimant shall have recovered its loss.

(b) The Company's right of subrogation includes the rights of the Insured to indemnities, guaranties, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments that address subrogation rights.

APPENDIX L

Subrogation Rights of Title Company under a T-1R Owner Policy

CONDITIONS

7. TRANSFER OF YOUR RIGHTS

When we settle a claim, we have all the rights you had against any person or property related to the claim. You must transfer these rights to us when we ask, and you must not do anything to affect these rights. You must let us use your name in enforcing these rights.

We will not be liable to you if we do not pursue these rights or if we do not recover any amount that might be recoverable.

With the money we recover from enforcing these rights, we will pay whatever part of your loss we have not paid. We have a right to keep what is left.

APPENDIX M

Suggested Drafting Alternatives for Deeds

Gift Deed:

Suggested title: GIFT DEED

Suggested consideration: For the purpose of making a gift to Grantee.

Other changes: When making a gift, replace

. . . has GRANTED, SOLD and CONVEYED and does hereby GRANT, SELL and CONVEY to Grantee . . .

with

. . . has GRANTED, GIVEN and CONVEYED and does hereby GRANT, GIVE and CONVEY to Grantee . . .

Distribution Deed:

Suggested title: DISTRIBUTION DEED

Suggested consideration: For the purpose of making distributions out of the Estate of John Jones, Deceased.

Other changes: When making a distribution, replace

. . . has GRANTED, SOLD and CONVEYED and does hereby GRANT, SELL and CONVEY to Grantee . . .

with

. . . has GRANTED and CONVEYED and does hereby GRANT and CONVEY to Grantee . . .

Contribution to family partnership, etc.:

Suggested title: DEED

Suggested consideration: For the purpose of contributing property to Grantee.

Other changes: When making a distribution, replace

. . . has GRANTED, SOLD and CONVEYED and does hereby GRANT, SELL and CONVEY to Grantee . . .

with

. . . has GRANTED and CONVEYED and does hereby GRANT and CONVEY to Grantee . . .