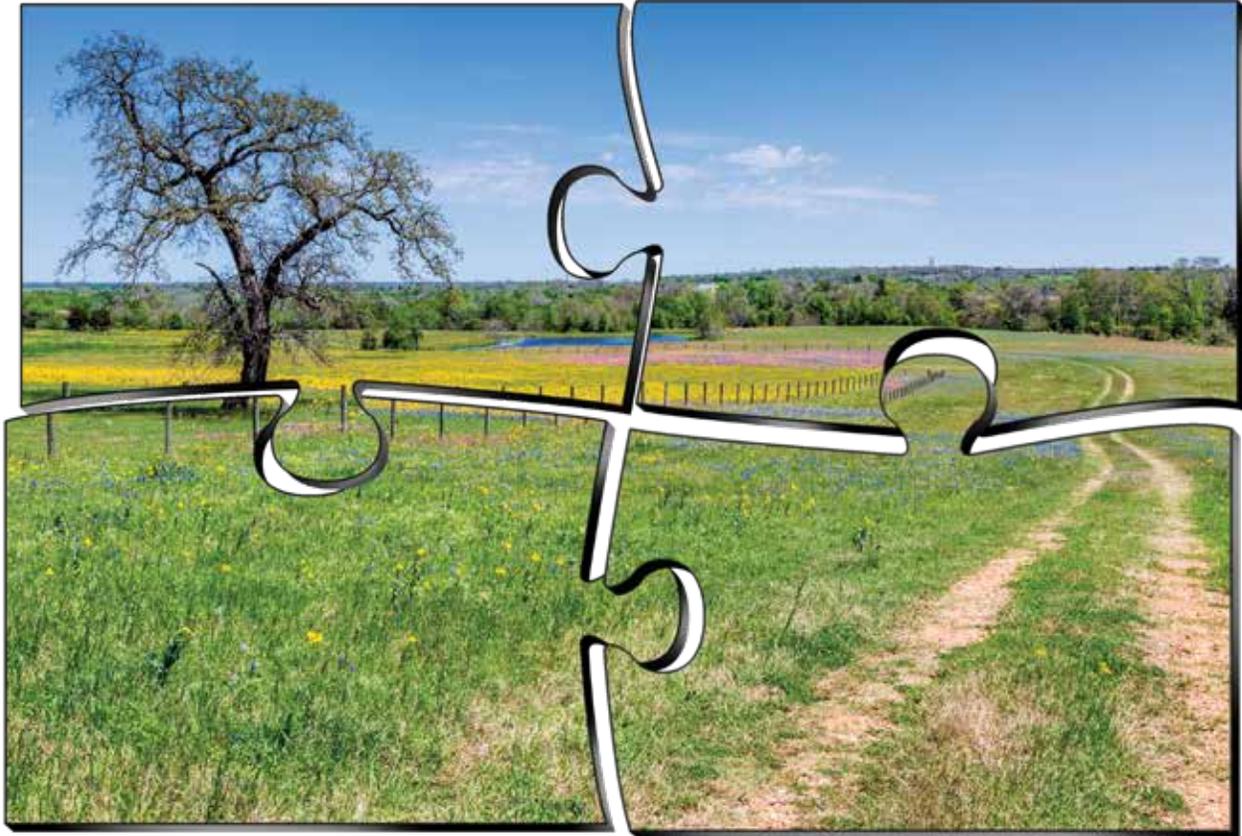


Little Law, Big Deal

The New Quitclaim Bill

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Effective Sept. 1, 2021, S.B. 885 adds only 78 words to Texas codes and barely fills half a page, yet this little bitty bill could have a significant impact on Texas real estate transactions.

To understand how the changes work, one must look at the existing law relating to quitclaims. This will include a quick detour to explore bona fide purchasers. Start with the following example.

In 2012, Larry owned a 500-acre ranch. In 2015, he divided it into five 100-acre tracts. Larry kept Tract 5 for himself; Tracts 1-4 were sold as follows:

- Tract 1 to Ty, giving Ty a general warranty deed, which was promptly recorded.
- Tract 2 to Casey, giving Casey a general warranty deed, which was not recorded.
- Tract 3 to Lane, giving Lane a quitclaim deed, which was promptly recorded.

The Takeaway

In Texas, a quitclaim in the chain of title often creates problems that don't go away. A new Texas statute promises to alleviate these issues, but it doesn't eliminate them completely.

- Tract 4 to Tuff, giving Tuff a quitclaim deed, which was not recorded.

On Aug. 12, 2021, Larry sold the entire 500-acre ranch to Freckles, giving Freckles a general warranty deed, which was recorded on Aug. 31, 2021.

Now, Larry has sold some of the same land more than once and to different people, which certainly exposes Larry to liability, but that's a topic for another day. What happens when everyone else finds out? They end up at the courthouse, of course, and the dispute involves the concept of the bona fide purchaser.

Bona Fide Purchasers

Conveyances of real property definitely should be recorded in the county deed records, because they provide constructive notice of their existence.

For example, Ty's recorded general warranty deed gives constructive notice "to the world" that Tract 1 was conveyed to Ty. It matters not whether anyone actually checks the deed records and actually knows the deed is there. Nevertheless, a properly executed deed, delivered to the grantee, even if not recorded, is sufficient to convey title.

However, Tex. Prop. Code § 13.001(a) says an unrecorded conveyance of real property is void as to a subsequent purchaser for a valuable consideration who takes in good faith and without notice of the prior conveyance. Such a subsequent purchaser is called a bona fide purchaser. An unrecorded deed is still binding on a subsequent purchaser who does not pay a valuable consideration or who has notice of the conveyance, according to Tex. Prop. Code § 13.001(b). The notice may be actual or constructive.

Actual notice means the purchaser actually has personal knowledge. A person is also charged with notice of those facts that a reasonable inquiry would have disclosed. For instance, if Casey is using the land in a way that should alert Freckles to his conflicting claims, then Freckles would be on notice of the competing claim and could not be a bona fide purchaser. Constructive notice means the law imputes notice to the purchaser even if he does not have actual knowledge. The most common example of constructive notice is that given by a recorded deed.

In the battle for Tract 1, Freckles cannot be a bona fide purchaser because Ty's deed is recorded, constituting constructive notice to Freckles. Thus, Ty will prevail. In the Tract 2 lawsuit, however, Casey's deed is unrecorded, and Freckles is a bona fide purchaser. Freckles will win on Tract 2. For purposes of the illustration, Freckles gave adequate consideration for the ranch and has no actual knowledge of the previous conveyances.

To examine the cases of Tracts 3 and 4, the quitclaim deed must be introduced.

Quitclaims

Former Baltimore Orioles manager Earl Weaver once quipped, "There's a place for the sacrifice bunt, and it's deep in your closet." The same could be said for the quitclaim. Clients often ask lawyers for quitclaim deeds or sometimes "quick claim deeds." In most cases,

though, using a quitclaim deed is a bad idea. When should a quitclaim be used in Texas? The answer is almost never.

The term quitclaim deed is something of a misnomer because it's not exactly a deed. A deed is an instrument in writing that, when properly executed and delivered, conveys title to real property. A quitclaim doesn't necessarily do that. The term "quitclaim," however, is appropriate. A quitclaim does exactly what it says. It quits a claim. In other words, it is a disclaimer in which the grantor releases his claim in favor of the grantee.

A quitclaim does not establish title in the grantee. It does not contain words of conveyance or warranty. It merely passes whatever interest, if any, the grantor has at the time the quitclaim is made and delivered (unless the language shows the intent to pass something other than the grantor's then-existing interest). Thus, if the grantor has no interest in the property, the quitclaim conveys nothing.

The courts determine whether an instrument is a conveyance or a quitclaim based on the wording of the document. If the document demonstrates an intent to transfer the land itself, it is a conveyance. If it indicates an intent only to relinquish the right, title, and interest of the grantor, if any, then it is a quitclaim. This is true regardless of the title of the document and regardless of whether it includes the word "quitclaim." See, e.g., *Porter v. Wilson*, 389 S.W.2d 650 (Tex. 1965).

A general or special warranty deed conveys title and warrants the title. A deed without warranty conveys title but does not warrant title. A quitclaim merely relinquishes the grantor's interest, if any, to the grantee. If the grantor has title at the time of the execution and delivery of the quitclaim, it operates as a conveyance, but it creates a problem in the chain of title.

Because a quitclaim only passes the interest presently owned by the grantor, quitclaims "are commonly used to convey interests of an unknown extent or claims having a dubious basis." *Id.* at 655. Therefore, a quitclaim in the chain of title is considered legal notice to a purchaser that another person may have a claim on the property. *Richardson v. Levi*, 67 Tex. 359, 3 S.W. 444 (1887). This doubt is never removed from the title. It stays in the title chain and is imputed to all subsequent purchasers. All subsequent purchasers take title subject to whatever claims might be out there.

Because the quitclaim is considered legal notice of a potential claim, the purchaser in this situation cannot be

a bona fide purchaser. If the owner of a prior unrecorded interest comes forward, the purchaser is at risk of losing the property or at least is saddled with the hassle and expense of defending it. This creates an uncertain and unmarketable title and can make it difficult to obtain title insurance. There has never before been a good way to fix this problem under Texas law.

Back in the courthouse, where title to Tracts 3 and 4 are being litigated, the deeds from Larry to Lane and Tuff are quitclaims. They still operate to transfer Tracts 3 and 4 to Lane and Tuff. But remember, an unrecorded conveyance of real property is void as to a subsequent purchaser for a valuable consideration who takes in good faith and without notice. With respect to Tract 4, Freckles will prevail over Tuff's unrecorded quitclaim. But Freckles will lose Tract 3 to Lane because Lane's recorded quitclaim is constructive notice to Freckles.

Now, look at the example again, but this time assume Larry's deed to Freckles was a quitclaim made and delivered on Aug. 12, 2021, and recorded on Aug. 31, 2021. Freckles is back in the courthouse fighting over the title.

The quitclaim is effective to transfer title to Tract 5 from Larry to Freckles. After all, Larry did own it, and he quitclaimed it directly to Freckles. Note, however, that no one claiming Tract 5 under Freckles in the future may be a bona fide purchaser. As to Tracts 1-4, Freckles cannot be a bona fide purchaser because the quitclaim itself is notice. No one claiming under Freckles in the future can ever be a bona fide purchaser in this scenario.

The Commission of Appeals lamented the sometimes harsh results of this rule:

We therefore regard the question as settled in this state until such time as the legislative branch of the government may deem it in the interest of public policy to change the rule by statute. *Houston Oil Co. of Texas v. Niles*, 255 S.W. 604, 610 (Tex. [Comm'n Op.] 1923).

That time is now.

The New Law

Almost 100 years later, after several previous attempts, the 87th Texas Legislature passed S.B. 885, a new law that changes the way quitclaims are treated effective Sept. 1, 2021. First, the bill adds three words to Section 16.025(b) of the Texas Civil Practice and Remedies Code, providing that the five-year adverse possession

statute does not apply when a claim is based on a quitclaim deed. As Chief Justice Robert W. Calvert observed in a dissenting opinion in *Porter*, the words of that statute do not exclude quitclaim deeds from its operation. Nevertheless, it is already settled law in Texas courts that a quitclaim deed will not support an adverse possession claim under the five-year statute. Therefore, this seems to be a nonsubstantive clarification rather than a change in the law.

Second, and more importantly, the bill adds Section 13.006 to the Texas Property Code. This section provides that once a quitclaim deed has been recorded for four years, it does not affect the question of the good faith of a subsequent purchaser or creditor and is not notice to a subsequent purchaser or creditor of any unrecorded conveyance, transfer, or encumbrance.

In other words, once a quitclaim has been recorded for four years, it is not automatically notice that another person might have a claim, and it can allow a buyer to be a bona fide purchaser when there is a quitclaim in the chain of title. This law applies only to a quitclaim deed recorded on or after Sept. 1, 2021. Act of April 21, 2021, 87th Leg., R.S., ch. 94, §§ 3-4, 2021 Tex. Session Law Serv. (S.B. 885) (Vernon's) (codified at Tex. Prop. Code § 13.006). It is important to note that while the law only applies to a quitclaim recorded on or after Sept. 1, 2021, that language did not make it into the code.

Notice that even under the new law the result is the same because the quitclaim was recorded on Aug. 31, 2021. Now change the facts a little bit to illustrate the effect of the new law. What if, instead, the same quitclaim from Larry to Freckles is recorded a day later, on Sept. 1, 2021, and then, just over four years later, Freckles sells the ranch to Charmayne on Sept. 2, 2025, giving her a deed (not a quitclaim)? What a difference a day makes.

In a dispute between Charmayne and Ty over Tract 1, Ty wins this go-round. The quitclaim from Larry to Freckles, recorded on Sept. 1, 2021, and of record for four years, is not a problem for Charmayne. However, Charmayne cannot be a bona fide purchaser because Ty's deed was recorded. It is still constructive notice of a conflicting claim, and it is not extinguished by the quitclaim under the new statute.

Charmayne outruns Casey for Tract 2. Charmayne is a bona fide purchaser. Casey's deed is not constructive notice because it was never recorded. Previously, Larry's quitclaim to Freckles would have precluded Charmayne's bona fide purchaser status. But under the new statute, Larry's quitclaim is not constructive notice to

Charmayne because it was recorded on or after Sept. 1, 2021, and has been of record for more than four years.

In the (fictitious) case of Charmayne v. Lane, with respect to Tract 3, Lane wins. Charmayne is not a bona fide purchaser. Under the new statute, Larry's quitclaim to Freckles is not constructive notice. However, Lane's previous quitclaim is of record, and its constructive notice to Charmayne is not affected by the new statute because it was recorded prior to Sept. 1, 2021.

Charmayne runs away from Tuff with Tract 4. Charmayne is a bona fide purchaser. Larry's quitclaim to Freckles has been recorded for more than four years and is, therefore, not constructive notice under the new statute. Tuff's quitclaim is not notice because it was never recorded.

As for Tract 5, not only is Charmayne the owner, but future purchasers claiming through her may be bona fide

purchasers. The only quitclaim in the title chain of Tract 5 was recorded on Sept. 1, 2021, and has been of record for more than four years.

As these examples show, quitclaims in the chain of title can still be the proverbial fly in the ointment. But this new legislative enactment, no matter how small, has the potential to change the landscape of real estate transactions on properties with heretofore unmarketable titles.

The examples in this article are fictitious and for illustrative purposes only. Nothing in *TG* should be considered legal advice. For advice on a particular situation, consult an attorney. 🍀

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