

LETTER of THE LAW

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SOLUTIONS THROUGH RESEARCH

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DEEDS AND THE TEXAS RECORDING STATUTES

Recording a deed is the critical, final step in any real estate transaction, yet the process receives little attention because it occurs after closing. In Texas, title companies handle most closings as well as the responsibility for recording (or filing) the deed. Buyers are rarely aware of when, where or why recording occurs. Nevertheless, real estate purchasers and practitioners should be familiar with the basic rules and the protection afforded by the Texas recording statutes.

First, it is important to note that recordation gives public notice of deed contents but does not validate an otherwise invalid deed. Texas statutes and case law dictate five requirements for a valid deed. It must:

- be in writing,
- be subscribed (signed by the grantor at the end of the document),
- include the grantee's name,
- contain the legal description of the property and
- be delivered to and accepted by the grantee.

Not all deeds qualify for recording. Although a deed may effectively transfer title to the buyer, the county clerk may refuse to record when it fails to satisfy the statutory requirements.

For a deed to be recorded (or registered), the grantor's signature must be properly acknowledged or witnessed (Texas Property Code, Section 12.001[b]). An acknowledgment is a statutory procedure whereby persons signing a document declare their action before a qualified person, usually a notary public. The purpose is to authenticate the instrument, the identity of the signers and their signatures.

Persons qualified to take acknowledgments (referred to in this article as "notaries") are listed in Chapter 121 of the Texas Civil Practices and Remedies Code. The list varies, depending on where the deed is signed. If signed in Texas, the acknowledgment must be before a notary public, district court clerk, or the judge or clerk of a county court.

Regardless of where the signing occurs, special rules apply to military personnel and their spouses. Commissioned officers in the U.S. armed forces or the armed forces auxiliary may take acknowledgments of any armed forces member, auxiliary member or member's spouse. It is presumed that the military officer is commissioned at the time of acknowledgment and that the person signing is in the service or married to someone in the service.

For public policy reasons, having a financial or beneficial interest in a transaction disqualifies notaries from taking acknowledgments. If they proceed to do so and the disqualification is apparent on the face of the deed, the recorded deed is ineffective.

A deed signed and acknowledged by the grantor in the presence of two or more credible, subscribing witnesses qualifies for recording, even though it is not notarized. However, one of the witnesses must later appear before a notary to acknowledge and swear that the witness:

- saw the grantor sign or personally acknowledge the signature and
- signed at the grantor's request.

The notary must then certify the acknowledgment by signing or affixing an official seal. This certification is necessary to validate the acknowledgment so that the deed or other document can be accepted for recording.

Furthermore, notaries must keep a record of each acknowledgment in a bound book. The record must include the dates of the acknowledgments and instruments, the signers' names and signers' addresses. If the notary does not know the signers personally, then the record must include the name and residence of the person who introduced them. If the instrument involves a conveyance

of land, the record must reflect the grantee's name and the county where the land is located.

Once a deed is acknowledged, it should be filed in the county where the land is located. If the tract extends into more than one county, the deed may be recorded in any county where part of the property is located (Texas Property Code, Section 11.001[a]). To avoid problems, however, the deed should be recorded in every county where the tract extends.

Filing a deed in the wrong county has the same effect as not having filed at all. To correct the error, the grantee-owner should submit either the original deed or a certified copy of it for recordation in the proper county. Title will be protected only after the date of recording in the correct county (Texas Property Code, Section 13.003).

On the other hand, if a document is filed in the proper county and the land is later incorporated into a new county, the original filing remains effective. The county court in the new county must obtain a transcript of all the land affected and deposit the records with the county clerk in the new county (Texas Property Code, Section 11.001[b]).

Texas law requires documents presented for recordation to be in English unless signed before 1897, in which case a translation must accompany the document (Texas Property Code, Section 11.002[a] and [b]). An acknowledgment taken outside the United States may be in a foreign language as long as an English translation is attached and certain other criteria are met (Texas Property Code, Section 11.002[c]).

The proper place for filing a deed is the county clerk's office. When a deed is submitted for recordation, the clerk charges a \$3 fee for the first page and \$2 for each succeeding page (Texas Local Government Code, Section

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118.011). A document signed after 1981 must include the grantee's mailing address. Otherwise, the clerk assesses a penalty of \$25 or twice the amount of the normal recording fee, whichever is greater (Texas Property Code, Section 11.003).

Upon payment of the recording fee, the county clerk records and indexes the deed. But what happens when the county clerk indexes a deed incorrectly? Is the clerk personally liable? Does any responsibility fall on the person who submitted the document for recordation?

Texas law provides that the clerk may be liable for a civil penalty not to exceed \$500 for, among other things, not providing and maintaining the indices required by law (Texas Property Code, Section 11.004[b]). Courts have held that the person filing a document with the county clerk and paying the recording fees is not responsible for the clerk's errors (*David v. Roe*, 271 S.W. 196 [1925]).

County clerks in Texas use a name index to find recorded

documents. The grantor-grantee index (or direct index) lists all the grantors' last names in alphabetical order. The grantor's name appears next to the grantee's name. The grantee-grantor index (or indirect index) alphabetically lists all the grantees' last names, with the respective grantors' names next to them.

Both indices group transactions according to recording dates. One set of books, for example, may index all documents recorded from 1967-86 and another from 1987-97. Modern indices are generated by computer; whereas

older indices may be handwritten and difficult to read. The older indices often group names starting with a certain letter but do not alphabetize them beyond the first letter.

Indices do not contain the actual recorded documents. Instead, they reference where the documents may be found—usually by volume and page number—in a separate set of books. However, some counties put all the documents on microfilm, while others have a computer program containing both the indices and document copies from the most recent transactions.

The indices provide a means for researching title to real property. The grantor-grantee index traces the chain-of-title forward in time, and the grantee-grantor index traces it backward. For example, if you know the current owners and want to trace their title back in time to find who sold them the tract, you would look for the current owners' names in the grantee-grantor index. Knowing

either the grantor's or grantee's name keys those interested into the system.

Abstract and title companies typically do not go to the county clerk's office to review recorded documents. Instead, they get copies of the county records and create their own title resources using a "tract index." This index is faster and easier. It allows the examiner to research the title by legal description of the land rather than by grantors' and grantees' names.

Although recording a deed offers important safeguards to a buyer, it need not be recorded to be binding on the parties to the transaction and to their heirs. On the other hand, a deed must be recorded to be effective against a creditor or a subsequent purchaser for valuable consideration without notice (Texas Property Code, Section 13.001[a] and [b]).

This type of purchaser—one who pays "valuable consideration" and takes title "without notice" of a third party's claim—is called a "bona fide or innocent purchaser." Bona fide purchasers enjoy preferred status under Texas law, and the courts go to great lengths to protect their ownership. Accordingly, a bona fide purchaser's title is superior to title held by any earlier purchaser holding an unrecorded deed (Texas Property Code, Section 13.001[a]).

To be protected by the Texas recording statutes, a buyer must be a bona fide purchaser at the time of closing. This means that the buyer:

- paid valuable consideration for the property,
- had no actual knowledge of an earlier unrecorded deed to the property and
- had no constructive notice of a third party's interest in the property.

Texas case law has clarified these requirements. "Valuable consideration" means the buyer paid a substantial amount for the property. Although the amount may be less than fair market value, it cannot be merely nominal or grossly inadequate. The recipient of a gift deed, where no consideration changes hands, cannot be classified as a bona fide purchaser. Even if consideration is paid, the quitclaim deed recipient cannot achieve bona fide purchaser status.

"Constructive notice" refers to information that the law imputes to buyers. In Texas, this information includes the contents of all recorded documents affecting the property as well as any facts that a physical inspection of the property would reveal.

To discover the information in the deed records (sometimes called the real property records), the buyer may:

- examine the recorded documents personally, using the county clerk's indices;
- require the seller to prepare a title abstract and have it examined by an attorney chosen by the buyer; or
- purchase title insurance.

The Texas Real Estate License Act (the Act) emphasizes the need for buyers or their agents to search the deed records. The Act requires licensees to advise purchasers in writing at the time the contract is signed to have the abstract examined by an attorney or obtain a title policy. Failure to do so precludes the licensee from recovering a commission. The promulgated contract contains clauses fulfilling this requirement.

A title search of the county records is no substitute for a physical property inspection. An attorney rendering a title opinion or a company issuing a basic title policy has no liability

for the interest of any third party in possession. Thus, to be classified as a bona fide purchaser, the buyer must actually view, or appoint an agent to view, the property before closing and make appropriate inquiries about any third-party claims apparent on the land.

Texas has adopted a type of recording system known as "race-notice." "Race" refers to the competing bona fide purchaser who first records the deed in the correct county. "Notice" refers to what the buyer knew or could have known at the time of closing about another's claim to the property.

Like Texas, a majority of states use the race-notice system, while most others have adopted a pure "notice" statute. The bona fide purchaser in a pure "notice" jurisdiction need not record a deed to establish ownership against an earlier bona fide purchaser holding an unrecorded deed.

In contrast, Delaware, Louisiana and North Carolina have adopted a pure "race" system. The first buyer to record gets title, whether or not a bona fide purchaser. Although North Carolina requires the buyer to pay value for the property, none of the three states penalizes a buyer for having notice of an earlier unrecorded deed. To prevail in these states, the buyer must win the race to the courthouse.

All 50 states afford significant protection to buyers under the recording statutes, but recording alone does not guarantee good title. A deed can still be void for other reasons, such as fraud, forgery, incapacity or failure of the seller to deliver the deed to the buyer. Furthermore, if a seller conveys the same property to two competing buyers, they may recover damages against the seller, even if their deeds are not recorded.

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Although, the Texas recording system, and others used throughout the United States, do not solve every title problem, they

facilitate the private ownership of land and allow property to be bought and sold with relative speed and minimum risk.

This article was written by Cindy Cole Finley, a Dallas attorney and a fellow with the Real Estate Center. ☒

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