REAL ESTATE TRANSACTIONS AND PROBATE: WHAT'S LEGAL V. WHAT'S INSURABLE

CHARLES E. KRAMER, *Plano*
Hunter & Kramer, P.C.

Collin County Bar Association
Estate and Probate Planning Section
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REAL ESTATE TRANSACTIONS AND PROBATE: WHAT'S LEGAL V. WHAT'S INSURABLE

I. UNDERSTANDING TITLE INSURANCE AND ITS ASSESSMENT OF RISK

In the world of title insurance, title risk is usually dealt with by either ***risk elimination*** or ***risk avoidance,*** although some legal risks are still assumed, based on a sound and unchallenged legal basis (e.g., case or statutory law).

In estate situations, if the risk of litigation is present or possible, many title companies will not insure, even if the outcome of the litigation appears clear or favorable, because the **cost of defense** is covered by the title policy as well as the risk of loss. To fight and "win" is a big loss for the title company every time.

Additionally, title insurance is fundamentally different from other forms of insurance with respect to risk because it is paid as one single premium and the policy endures for as long as that landowner owns the insured property. Rates for title premium are fixed by the Texas Department of Insurance and do not vary county by county – they are the same everywhere in the State of Texas. Contrary to insurance rates for other forms of insurance like casualty insurance and health insurance, title insurance rates have decreased a total of 18.7% since 1993[1]. Also, because premium is fixed and is the same for every piece of property and every landowner in Texas, rates for title insurance cannot be increased on a case by case basis for increased risk in the same way that is permitted for other forms of insurance.

These concerns over the risk and cost of defense often collide with the emotions and pressures present in the estate scenario. The heirs may be still be grieving the recent loss of a loved one. The contract negotiations and sale of that decedent's real estate is often difficult and stressful. There may exist the difficult task of sorting through, packing up or even selling items of personal property, some of which may have sentimental value to some of the heirs (but not the others).

With all of these emotional undercurrents, it is easy to imagine how difficult it is for your estate clients to hear that there are new title requirements necessary to close a sale.

We have tried to include the most common mishaps, stumbling blocks, problems, and ugly scenarios from actual closings so that you can take steps, as the practitioner, to try to avoid these scenarios for your client, or be able to prepare your client for them in advance, so that these issues can be anticipated and mitigated.

A. An explanation of terms in the title industry

1. Underwriters

A **title underwriter** is an insurance company that is the actual and true insuror of the title. It bears the risk of loss, pays for claims and defense costs, and makes the final decisions is to whether something will or will not be insured, and under what conditions.

The term **underwriter** can also refer to a natural person, usually an attorney, who makes risk decisions for his or her company.

Title underwriters can be publicly traded, or privately owned.

The publicly traded underwriters captured 85.1 percent of the US market share during the last quarter of 2017, while independent underwriters garnered 14.9 percent of such market[2].

The top individual underwriters based on market share (Q4 2017) were[3]:

First American Title Insurance Co.	(24.1%)
Old Republic National Title Insurance Co.	(14.3%)
Chicago Title Insurance Co.	(14.2%)
Fidelity National Title Insurance Co.	(12.9%)
Stewart Title Guaranty Co.	(9.1%)

The top five independent underwriters based on market share were[4]:

Westcor Land Title Insurance Co.	(3.5%)
Title Resources Guaranty Co.	(2.4%)
WFG National Title Insurance Co.	(2.2%)
North American Title Insurance Co.	(1.7%)
Alliant National Title Insurance Co.	(.8%)

2. Agents

The **title agent** is a representative of a title insurance underwriter that, pursuant to contract with the title underwriter, issues the commitment for the title policy, and issues the policy on behalf of the underwriter. They share the overall title premium with the underwriter in a split that is determined by the Texas Department of Insurance.

Title agents can be **independent**, which means they can issue policies on several or more different underwriters, or they can be **direct operations** of the

[1] Data provided by the Texas Land Title Association
[2] "Title Industry Generates $3.9 Billion in Premiums during Q3, https://www.alta.org/news/news.cfm?20171214-Title-Industry-Generates-39-Billion-in-Premiums-During-Q3
[3] Ibid.
[4] Ibid.

underwriter, which usually means they are wholly owned by the underwriter and only issue policies on that underwriter. Note: A few direct operations have the ability to issue on different underwriters, most commonly if they are a large independent agency that was acquired by the underwriter

The term **escrow agent** usually means and refers to a **title agent** that, in addition to offering and issuing the title insurance on behalf of the underwriter, also closes the transaction by preparing the settlement statements for the parties, obtaining the execution of all closing documents, collecting and disbursing all funds, and recording those documents that are required to be recorded. In the state of Texas, the title agent and the escrow agent are almost invariably the same entity and company. In other states, closings can be and are conducted through completely independent escrow agents, or attorneys, that have no role in the issuance of title insurance, although they may collect the premium for the same.

A **title company** is an undefined and generic term that can mean, depending on the context, a title insurance underwriter, a title agent, and/or an escrow agent.

3. Commitments and policies

A **title commitment** is the binding offer by the title underwriter, through its agent, to issue a title insurance policy under the terms and conditions of the commitment. An older term for a title commitment is a "title binder," but we generally refrain from using that term in Texas because it causes confusion with a very specific title insurance product formally termed an "Interim Construction Loan Binder."

A Texas title commitment is broken down into four (4) Schedules:

(a) **Schedule A** of the commitment sets forth the proposed insureds, the policy amounts for each insured (owner policies and loan policies are usually different policy amounts), and the real property to be insured.
(b) **Schedule B** lists all of the exceptions to coverage that will be contained in the policy.
(c) **Schedule C** lists all of the requirements of the title underwriter to issue the policy. Any requirement that is deliberately unsatisfied (i.e., a mortgage to be assumed instead of paid off) at closing will be moved to Schedule B and become an exception to coverage in the issued policy.
(d) **Schedule D** is a disclosure of the ownership and/or management of the title agent and underwriter, the split of premium between agent and underwriter, and the premium for the policy(ies).

A **title policy** is issued, after closing, to the insured listed in Schedule A, with the exceptions set forth in Schedule B, after meeting the requirements in Schedule C and paying the premium in Schedule D. The title policy has only two schedules – Schedule A and Schedule B, which mirror those schedules in the last commitment.

A title commitment endures for only ninety (90) days per its terms, but such commitment can be re-issued to renew the promise of the title agent to issue the policy.

Note: *A title commitment can and often is revised and re-issued to set forth new exceptions and new requirements as additional facts become known to the title underwriter*.

Note: *A title commitment is not a report of title nor a representation of the state of title – it is promulgated policy form that is a unilateral offer of insurance, and the policy for the same is purely a contract of indemnity.*[5]

4. Joinder

This is a very odd word that is rarely used outside the title industry. It generally refers to a requirement of the title underwriter that persons other than the contract seller (or buyer), and/or persons other than the parties vested in title or who are reflected as record owners on Schedule A of the title commitment, ***join*** in the execution of the deed to the insured buyer, and also sign relevant affidavits and closing documents and agree with the seller on the disbursement of funds.

Final comment: **The underwriting positions in this paper are not the definitive, 2019 underwriting positions and requirements of any particular underwriter. Underwriting standards and closing requirements can and do vary from title underwriter to underwriter, and can even vary from attorney to attorney within a single underwriter**. Instead, we have tried to present underwriting requirements that are typical, common and fairly universal among all Texas title underwriters.

Risk assessments can also vary based on the particular facts of a closing, the size of the premium, the past claims experience of that particular underwriter, and, most importantly, *who the customers are*.

[5] *Chicago Title Insurance Company v. McDaniel*, 875 S.W.2d 310, 311 (Tex.1994)

II. A "NON-PROBATE" EXAMPLE OF HOW TITLE COMPANIES AND TITLE UNDERWRITERS THINK (THIS SCENARIO ACTUALLY HAPPENED TO US):

Harry Husband ("H") and Wilma Wife ("W") own a home together, are both on the mortgage, and are in the midst of divorce. Harry is a high wage earner, a successful attorney in a large law firm, and Wilma is a stay at home mother of three. Harry is using all of his firm's resources to wage a divorce war with his wife.

[The story continues…]

III. POWERS OF ATTORNEY

A. What title underwriters WANT (or perhaps, USED TO WANT)

1. Durable
2. Specific to the property being sold
    a. This means a specific POA was preferred to a statutory durable POA
3. List specific powers such as power of sale, power to receive proceeds, power to sign docs related to such sale

B. What title underwriters will accept

1. Statutory durable GENERAL POA
    a. Current version and older ones too
2. Statutory durable POA limited to real estate transactions (i.e., real estate transactions line is initialed)
3. Certain other non-statutory forms of general POA if durable

C. Revocability

1. We want to make sure principal is ALIVE on day (hour) of funding and also, has not revoked the POA (ratification)
2. Usually handled with a 30 second phone call
3. How do we handle NCM principals ?
    a. Letter from attending physician
    b. If the POA has a definition of disability, follow it
4. How do we handle overseas / unable to contact principals (e.g., military) ?
    a. Affidavit from agent
    b. Military death database

D. Buyers, Sellers, attorneys: Send those POAs to title company for approval early – don't bring them in the day of closing.

E. Statutory durable powers of attorney

1. HB 1974 was signed which enacted a new TX Statutory Durable POA – See Sections 751 and 752, Texas Estates Code.
2. Intended to create a hammer against unreasonable rejection of ordinary statutory durable POA
3. Early days of the law (effective 9-1-2017): All sorts of complex timelines, rejection and acceptance forms, and procedures were established by underwriters to ensure compliance with the law
4. Now (February 2019): Attitude and review is generally relaxed, tolerant, and liberal.
5. The law provides for an agent to certify the POA to third parties[6] and this certification is frequently requested by title underwriters

F. Stacking of fiduciary powers

1. Old common law: fiduciaries, such as an Executor, Trustee or Attorney-In-Fact, could not delegate those powers to an agent via POA
    a. What SHOULD happen: powers should pass to the NEXT appointed fiduciary – alternate executor, alternative AIF, successor Trustee.
    b. Might require formal resignation of the first fiduciary
2. New law: Section 113.018 Texas Property Code (See **Appendix A**) – this makes it clear Trustees can appoint agents to sign for real estate transactions
    a. Not all title underwriters and agents are the same

[6] Texas Estates Code Sec. 751.203

b. Some examiners and older attorneys may still cling to the old common law

(1) have the new statute ready and be prepare to talk to an attorney with the underwriter
(2) Note limits: six (6) months duration max

G. POA's need to be recorded – often a battle to release them to title company

1. See Section 751.151 Texas Estates Code – **Appendix B**.
2. See also *Wise v. Mitchell*, 2016 WL 3398447 (Tex. App. – 5th District (Dallas) 2016)

H. POA no-nos

1. Appointment of ex-spouse as agent
2. Appointment of soon to be ex-spouse as agent (parties are divorcing)

a. "Don't worry, we get along great, it's an *amicable divorce*"

3. Agent uses the POA to purchase or acquire property of the principal – self dealing

I. Creative solutions to POA logjams

1. Who could complain ?
2. Let's gather the joinder of all heirs to the deal.

IV. "INDEPENDENT" EXECUTORS AND THE POWER OF SALE

A. The power to sell real property of a decedent's estate **when the will does not expressly provide a power of sale to the executor** has long been a source of misunderstanding, contention and conflict between the probate bar and title companies.

B. Probate attorneys: of course an IE has power of sale – that is the whole point. I should not have to go back to the Court to ask them permission for anything. In fact, if I tried, the judge would laugh at me and throw me out of his or her court.

C. Title companies: Hang on -- the will does not say you can sell anything at all. You are supposed to deliver this asset to the devisee. Your power of sale must come from law if it does not come from the will, and the Estates Code[7] says the IE can sell property of the estate without a specific order of sale to settle various debts of the estate, or if it is in the best interest of the Estate.

1. What debts are you paying with these sales proceeds ?
2. If the devisees challenge your implied powers, and claim you are not in fact selling to pay debts of the estate, and/or it is not in the best interest of the estate: **who pays the lawyers to defends these claims ??**

Answer: the title company that insured the validity of that sale.

D. Probate Bar: Wait a minute !! New law !! See (relatively) new statute in the Estates Code 402.052:

Sec. 402.052. POWER OF SALE OF ESTATE PROPERTY GENERALLY.

Unless limited by the terms of a will, an independent executor, in addition to any power of sale of estate property given in the will, and an independent administrator have the same power of sale for the same purposes as a personal representative has in a supervised administration, but without the requirement of court approval. The procedural requirements applicable to a supervised administration do not apply.

Added by Acts 2011, 82nd Leg., R.S., Ch. 1338 (S.B. 1198), Sec. 2.53, eff. January 1, 2014.

E. Title underwriters: Yes, correct, you don't have to get court approval. But you are still limited by the LAW. The law giving you implied power of sale has not changed. *You still can only sell for a REASON, and if that reason is challenged, WE pay the attorney's fees to defend*.

1. Take a look at the reliance standards in the very next statute (enacted at the same time as part of the same bill) – 402.053. A purchaser (or, by subrogation, a title company) can rely on an IE's powers:

[7] Texas Estates Code Sec. 356.251

a. if the IE has an express power of sale in the will,
b. if there is an express power of sale in the court order appointing the IE; or
c. if IE signs, delivers and records in the real property records, an affidavit that says the sale is **necessary and advisable** for any of the purposes described in E.C. 356.251(1) – debts of the estate or best interest of the estate.

F. Question: So if I can deliver that affidavit to the title underwriter, will that prevent a lawsuit from being filed which disputes the veracity of that affidavit ?

1. "Conclusive proof" just means I (the title underwriter) might (!!) win on summary judgment, after spending tens of thousands in attorneys fees.

G. This power of sale requirement is not as big an issue in an Independent Administration, where all of the devisees or heirs have consented in writing to the appointment of that IA. It's a last will and testament that can be probated by action of only one interested applicant that causes the concern about powers of sale.

Conclusion

These statutes only provide a defense in a court of law to claims by devisee and heirs. They do not prevent claims and lawsuits.

Title underwriters will continue to look for and require an express power of sale in the will or the order appointing the IE. If we do not have this, we usually want joinder of the will devisees on the closing docs or some other written evidence of consent and ratification of the sale.

Its good practice to put an express power of sale in any will. If it is not there, put it in the order appointing the IE.

V. COURT SUPERVISED SALES OF REAL ESTATE – THE BASIC REQUIREMENTS

Title underwriters look for 4 basic steps:

1. After the Personal Representative ("PR") files an application to the sell the real estate[8], the Judge must sign an **Order of Sale** or **Order Authorizing Sale** (the titles can vary) which approves the sale of the real property by the PR per the application to sell the real estate.[9]

   a. This a general order authorizing the concept of a private sale (as opposed to an auction or public sale), and does not authorize any specific contract or buyer.
   b. This order must also state whether an **Oath** and/or **Bond** is required, or waived. If required, title underwriters want to see these things and proof thereof filed with the Court.

[After such order is entered, the Administrator is free to market the property and enter into a contract of sale.]

[property is marketed and placed under contract with a buyer, PR signs as seller]

2. The Administrator then files a "Report of Sale" which attaches the contract that was negotiated and entered into, and reports back to the Probate Court that the property has been sold pursuant to such contract.[10]
3. Closing occurs, docs are signed and held in escrow. *No funds are disbursed from escrow yet.*
4. After closing, but before funding, judge must sign a **Decree or Order Confirming Sale**, which should incorporate and attach a copy of the settlement statement showing the monies in and monies out, which confirms the closing of the sale previously reported to the Court, and approved the disbursement of such funds according to the attached settlement statement.[11]

TIP: Step #3, the closing, should probably be scheduled the day of or the day before the hearing to obtain #4.

Step #4 is critical to title underwriters. Because it is required by statute, you cannot expect funds to be disbursed and then have the title company wait on this requirement – once funds are gone, the deal is over and there is nothing to unwind if the decree confirming sale never comes in.

NOTE: We have seen, and some underwriters may approve, a Report of Sale and Decree Confirming Sale in the same order.

[8] Subchapter F of Chapter 356, Texas Estates Code
[9] Sec. 356.256, Texas Estates Code
[10] Sec. 356.551, Texas Estates Code
[11] Sec. 356.556, Texas Estates Code

IV. AFFIDAVITS OF HEIRSHIP

A. Very commonly used in real estate closings
B. Very little statutory law on them – just two statutes in the Estates Code
   203.001
   203.002

Note: Neither of these statutes say anything about what is required to be an affiant nor how many affiants serve as adequate proof.

C. So what do title underwriters require ?
   1. Two (2) disinterested witnesses
      a. What is disinterested ? Is family disqualified ?
      b. What if the decedent is so old we cannot find two ?
   2. Who have known decedent for some time
      a. FAM: 10 years or more
      b. What if we cannot find two of that seniority ?
   3. That must sign the AOH drafted by or approved by title company
   4. Usually the selling heir(s) must also confirm the same facts in the AOH
      a. Our form of AOH includes affirmations about the size of the estate not being large enough to trigger federal estate taxes – which many disinterested affiants have no clue about
         (1) Why title companies care about federal estate taxes – see Section VIII
      b. We can pull those statements out of the AOH and have them affirmed by separate affidavit and indemnity from the selling heirs
   5. If there is an unprobated will, title underwriter must review it and attach to the AOH
      a. This is to ensure and show the world there is no split or divergence between testate and intestate succession
      b. If there is – **joinder of testate heirs**.
      c. "Gee I know he had a will, but no one can find it."

VII. THE BIG MYTH OF MERP – HOW WE ARE DIFFERENT

The Texas Medicaid Estate Recovery Program

In approximately March of 2008, the DADS Recovery Unit (TX Department of Aging and Disability Services) sent a letter to numerous title companies in Texas concerning MERP recovery and establishing procedures for title companies to contact the recovery unit to settle and pay MERP claims at closings from the sale out of decedent's estates.

Many title companies interpreted this action as an assertion of rights over specific property of a decedent at the closing.

As a consequence, some title underwriters began to impose closing requirements that, for the sale of any property out of a Decedent's estate, the title company close must contact the MERP recovery unit for a payoff of any funds owed to the State for reimbursement of Medicaid expenses.

We have examined this issue more closely and have determined that this is erroneous procedure, at least in the State of Texas:

1. A MERP claim is not a lien on the real estate of the decedent.
2. The MERP has no authority in this state to impose property *liens* (either pre-death or post-death liens) as an instrument of estate.
3. Texas has not adopted the optional provision of the Tax Equity and Fiscal Responsibility Act ("TEFRA") of 1982, at 42 U.S.C.A. §1396p(a), which allows states to impose pre-death liens against the property of persons who have been determined to be permanently institutionalized.
4. Moreover, Texas does not use the post-death liens that are allowed (but not required) under the Omnibus Budget Reconciliation Act of 1993 ("OBRA 1993") at 42 U.S.C.A. § 1396p(b).
5. For the MERP to adopt the use of liens to recover real property of the decedent would require state legislative action, which has not so far occurred.
6. A MERP claim is a class 7 claim under Section 355.102 of the Estates Code (formerly Section 322 of the Probate Code) – one class above credit cards. It is not a claim secured by any specific real estate of the decedent, as far as the title underwriter is concerned.

Conclusion

Question and challenge this requirement of contacting and payoff of MERP claims if you encounter it at a title company. It is a **national underwriting standard** that has no applicability in Texas. The smarter underwriters will not require anything from MERP to close a deal on Texas property.

Good luck – it goes to show it really does matter where you close.[12]

VIII. THE ESTATE TAX LIEN

Under Section 6324(a) of the Internal Revenue Code, the IRS is given a lien to secure the payment of all estate and gift taxes, which lien lasts for ten years. The lien arises AT DEATH. **No filing is required to create the lien** (although filing of a recorded lien usually precedes active collection efforts by the IRS).

It is one of the few "silent" liens that title companies have to deal with in insuring sales out of estates.

Fortunately, the current bar for estate tax liability is pretty high – over $11.58 million per individual for 2020.

But there was this one claim:

This sale involved a decedent's estate. The parties indicated that the estate was of such a size which would fall below the IRS threshold for estate taxation. The executor/beneficiary also confirmed that there were no taxes due as the size of the estate was below the threshold. The executor/beneficiary executed an affidavit to that effect.

(Note: per title insuring procedural rules, this is permissible – one of the few times a title company can insure over a lien without proof of payment. See **Appendix C**).

Unfortunately, the decedent owned millions of dollars' worth of property in another state. The IE had lied on the affidavit that no estate taxes were owed. The IRS found out about the title insured sale in Texas and proceeded to institute collection proceedings against the property owned by the new buyer. Suit was initiated against the executor but by then the executor had liquidated the estate and actually fled the country. The underwriter wrote a check to the IRS for $180,000. The title premium earned was perhaps 2-3% of that.

Conclusion

Remember the earlier comment about underwriting standards that vary with the claims experience of that particular underwriter ? This one really bothered one of the large public underwriters for many years. We stopped relying solely on affidavits and asked for a balance sheet of the estate, or the estate tax return, to determine if there could be estate tax liability, and we scrutinized the liquid assets and sometimes required payment of the estate tax before releasing net proceeds from sale.

The very high exemption amounts from federal estate tax have made these underwriting concerns very rare now, however.

IX. TODDS[13]

Effective September 1, 2015, the Texas legislature enacted the Texas Transfer on Death Deed Act as presented in SB 462. The intent of the Act was to create a statutory vehicle for transferring real property without the expense of a probate proceeding. Through a recorded Transfer on Death Deed ("TODD"), a real property owner can designate a beneficiary or beneficiaries to receive the property upon the owner's death automatically. The beneficiary has no interest in the real property during the owner's lifetime and, therefore, the owner retains full authority to transfer or encumber the property until his/her death.

A. How does it work?

1. Using a TODD, owners can transfer their interest in real property to one or more beneficiaries to be effective at the owner's death. The TODD must be recorded in the deed records in the county clerk's office of the county where the real property is located.
2. A TODD is always revocable during the life of the transferor, but cannot be revoked through a will. A will provision also cannot replace a TODD beneficiary designation.
3. A TODD transfers real property without covenants of warranty of title even if the deed contains a contrary provision.
4. It cannot be created through the use of a power of attorney.
5. Creditors of the grantor have two (2) years to bring a claim against the estate.[14]

[12] For a deeper dive into the myth of the MERP lien in Texas, see the excellent analysis in *Where Real Estate and Estate Planning Collide*, Kristen Quinney Porter and Patricia F. Sitchler, delivered at the 2012 Texas Land Title Institute.

[13] The foregoing guidelines were largely taken from Stewart Title Bulletin TX2015003, but they are fairly universal.

[14] Texas Estates Code Sec. 114.106(e).

B. What must it contain?

1. The essential elements and formalities of a recordable deed
2. State that the transfer of an interest in real property to the designated beneficiary is to occur at the transferor's death; and
3. Be recorded before the transferor's death in the deed records in the county clerk's office of the county where the real property is located
4. No notice, delivery, acceptance, or consideration is required

C. How is the TODD different than a Lady Bird Deed?

1. In a Lady Bird Deed, the Grantor reserves a life estate (full possession, benefit, and use of the property for the remainder of the life of Grantor). The Grantee holds a remainder interest in the Property until Grantor's death. Therefore, two distinct interests are held by both parties.
2. In a TODD, the Grantor retains all interest in the property during Grantor's lifetime and the designated beneficiary has no interest until Grantor's death. The TODD functions much like a pay-on-death bank account.

Because the TODD does not carry a warranty, greater and deeper searching by the title plant is required. In some instances the title plant must conduct a thirty-five (35) year search or a search starting from the first deed older than thirty-five (35) years. This can impact and delay the delivery of title work in short fuse closings.

D. Revocation of a TODD and the Effect of Will or Marriage Dissolution

1. A will may not revoke or supersede a TODD.
2. Revocation by one transferor in a TODD which was made by more than one transferor does not affect the deed as to the interest of the one not revoking.
3. TODD made by joint owners with right of survivorship is revoked only if it is revoked by all of the living joint owners.
4. It should go without saying that a deceased transferor cannot revoke a TODD.
5. Effective revocations:
   a. Subsequent TODD that revokes the preceding TODD or part of the TODD expressly or by inconsistency;
   b. The instrument of revocation that expressly revokes the TODD or part of the TODD (see the statutory Cancellation of Transfer on Death Deed form provided in Texas Estates Code Sec. 114.152);
   c. The final judgment of a court dissolving marriage operates to revoke the TODD as to the designated beneficiary if recorded before the transferor's death in the deed records.

E. The TODD Clawback provisions
1. Section 114.106(e) provides for a 2 year clawback by creditors of the estate
2. Many underwriters will have an exception for this right
3. Removal of the clawback exception varies among underwriters – it is a new risk and not much is know,
4. A thorough listing of debts of the estate, and assets of the estate, will really help an underwriter in resolving / removing this exception.

Conclusion

Most underwriters will accept a TODD as a vesting instrument so long as it substantially conforms to the statutory form as provided in Estates Code Sec. 114.151. They will require proof of death (a death certificate) and will usually want to have the public record evidence the death of the grantor and the absence of claims by affidavit. An example of such an affidavit is contained in **Appendix D**.

To insure title after the REVOCATION of a TODD, the title underwriter will generally require that the revocation be acknowledged by the original TODD transferor, and have such revocation recorded before the transferor's death in the deed records in the county clerk's office of the county where the deed being revoked is recorded.

Surprisingly, no joinder, consent or acknowledgement from the grantee of a revoked TODD is required. The statute is fairly clear and strong that the revocation right is reserved at all times until death.

If a TODD grantee wishes to sell or convey prior to the death of the TODD grantor, the joinder of the TODD grantor will undoubtedly be required.

X. JTROS

Texas has a long history of bucking common law trends in this area. While the common law rule in many states provided that a conveyance of real property to two or more grantees was presumed at law to be a joint tenancy (i.e., with right of survivorship), Texas abolished this common law presumption as early as 1848.[15] This eventually became codified into Texas Probate Code Section 46, now codified at Sec. 101.002 of the Texas Estates Code. Ownership by two or more persons is presumed, by statute, to be ownership as a tenancy in common.

However, Texas recognized that while the law might operate to prevent a presumed joint tenancy, two co-owners could overcome that statutory presumption by express agreement between such co-owners.[16] These rights to create an express JTROS are also codified for separate property of a decedent[17] and the community property of a decedent.[18] Today, there are forms of survivorship agreements for both separate property and community property published by the Real Estate Forms Manual of the State Bar of Texas.

Texas' longstanding statutory rejection of presumed joint tenancy, and the fact that many so-called "joint tenancies" fail to validly arise under these statutes (**hint: the very common practice of adding "as joint tenants with right of survivorship" after the grantees names is probably insufficient**) is perhaps one reason why title underwriters are loathe to vest title solely in a surviving joint tenant, against the rights and possible claims of intestate or even testate heirs.

Conclusion

Some underwriters will ignore the possible claims that could arise if testate or intestate heirs chose to attack the JTROS after closing, and some will not.

The JTROS, while still very popular with clients because of the desire to avoid probate (the same forces which drive the popularity of the TODD), is still, in the end, a poor substitute for a duly prepared and executed last will and testament.

In fact, given the choices for a non-testamentary transfer of real estate at death, the TODD is probably the better option. A recorded and unrevoked TODD will generally be given effect at the death of the TODD grantor by title underwriters (subject to the foregoing affidavit requirements), and a JTROS will generally require the joinder of the decedent's heirs.

XI. "LADY BIRD" DEEDS

Lady Bird Deeds[19] are deed conveyances in which the grantor reserves an "enhanced life estate" and usually expressly retains the power to sell the property without the joinder of the remainderman/men. The avowed purposed of such a transfer instrument is to control the grantor's eligibility for Medicaid – but, as previously discussed, the right and ability of MERP to seize any particular real estate asset in Texas during administration is suspect and apparently non-existent.

The title issue that arises occurs when a Lady Bird life tenant enters into a contract to sell his or her property – often after estate planning counsel has expressly advised the client that this is entirely permissible under the law.

However, remember that title underwriters must foot the bill for defense costs if any remainderman decides the challenge the "enhanced" powers of the life tenant.

Some Lady Bird deeds are drafted well, with very clear language and very strong and specifically enumerated powers of the life tenant, and some are which are signed off on the face of the deed by the remaindermen grantees (e.g., "Agreed and accepted this ___ day of _____, 20____" with signature blocks and acknowledgments). And some Lady Bird deeds are not so artfully drafted.

Conclusion

At present, title underwriters are somewhat split on whether they will respect the power of sale in a Lady Bird Deed.

Some say yes, if they are well-drafted, clear, and specific in reserving the power of sale and not requiring any joinder of remaindermen.

Some say no, all co-owners of the real estate must join in on any deed and sign a disbursement of proceeds, in order to avoid future claims.

And, as always, strife, conflict and/or litigation between family members will makes the defensiveness of the underwriter greater, and their requirements more stringent.

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[15] "Where two or more persons hold an estate, real, personal or mixed, jointly, and one joint owner dies before severance, his interest in said joint estate shall not survive to the remaining joint owner or joint owners, but shall descend to, and be vested in, the heirs or legal representatives of such deceased joint owner in the same manner as if his interest had been severed and ascertained." Act March 18, 1848, p. 129.

[16] *Chandler v. Kountze*, 130 S.W.2d 327 (Tex. Civ. App. – Galveston 1939, write ref'd).

[17] Texas Estates Code Sec. 111.001.

[18] Texas Estates Code Chapter 112

[19] Or is the term conjoined – "Ladybird Deeds" ? And is it capitalized, or not ? We leave it to the Probate Bar to establish uniformity in this area.

XII. TRUST OWNERSHIP AND TRANSFERS

It is a common myth or misunderstanding among your estate planning clients, which myth is shared by title escrow personnel, real estate brokers and agents, and the mortgage lending industry, that a trust, created either by a separate trust agreement or by a will, is a "thing" – a separate legal entity like a corporation. Trusts have become so common and hold title to real estate so frequently that it is common to hear our clients say things like "my trust holds title", "we need to move that real estate into my trust", or "I'm going to have my trust purchase that property."

However, a trust is not a thing or a legal entity – it is a fiduciary relationship. The Texas Supreme Court expressly rejected moving to an entity theory for trusts in *Huie v. Deshazo*, 922 S.W.2d 920 (Tex. 1996), and this is still the law of the land today.[20]

Because of these misconceptions about trusts, vesting errors abound. We have seen (and been requested by clients to prepare) recorded deeds which vest title in "The _____ Family Trust" or "The 2018 _____ Trust", or similar nomenclature. This can create big problems down the road when a title underwriter encounters these erroneous vestings.

Sometimes these deeds can be fixed by correction instruments under the correction statutes found in Sections 5.028 and 5.029 of the Texas Property Code. We note that 5.029 appears to be the operative statute. This statute is for material corrections, and it does not appear the lack of naming the trustee to hold title under a deed is one of the laundry list of "non-material" corrections permitted under Section 5.028.

But what if the improper use of the trust as an entity is not as the vested grantee under a deed, but as a grantor ? What happens when a "trust," as a purported entity, conveys title as grantor, instead of the Trustee of that name trust ? Is that conveyance void ? To eliminate risk, the title underwriter will usually require as a measure of first resort that such deed be corrected by material correction instrument to have the named trustee of the trust act as the grantor. It is important to remember that material correction instrument must be executed by all parties to the corrected instrument – both grantor AND grantee.[21]

If that parties to that trust cannot be located, however, the underwriter does have some protection by reliance on "Master Indemnity Letters" – essentially, most major title underwriters have executed and delivered a standing indemnity to each other for certain things already insured by their policy. The reasoning behind this is simple – if an underwriter is already liable for a risk due to an error made by their agent, then they will agree to indemnify the next title underwriter that insures that risk, subject to certain limitations and requirements set forth in the indemnity letter. A copy of the T-29 Indemnity Letter form running by and between most title underwriters is attached as **Appendix E.**

An additional cure for these erroneous deeds out of trusts might also be found in relying on various statutes of limitation. If enough time has passed since the recording of the bad deed, the underwriter may be willing to insure the risk.[22]

Conclusion

Trusts are not entities, and title to real estate can only be held by, and conveyed by, the trustee(s) of that trust.

Do not draft any title instrument involving a trust which does not name the trustee of the trust and, preferably, which also identifies the source of the trust relationship, e.g.:

> **Charles Kramer, Trustee of the 2019 Kramer Family Trust u/a dtd 1-1-2025.**
>
> **Charles Kramer, Successor Trustee of the testamentary trust created under the Last Will and Testament of Thomas Jefferson, deceased, probated in Cause No. _____, Probate Court of _____ County, Texas.**
>
> [Or the like.]

Note: If your client is greatly concerned about anonymity in the public record, and does not want his or her name listed as trustee, consider creating and vesting title in an LLC or other SOS-filed entity which is then owned and managed by an off-record trustee under a private trust agreement in your file[23], or, possibly, if the you can get the express blessing of the title underwriter and there will be no exceptions in the policy, vest title

[20] The only exceptions known to this author for treatment of a "trust" as an entity exist for REITs and, possibly (although it remains undecided by case law), foreign business trusts created under the laws of another state.

[21] Texas Property Code Sec. 5.029(b).

[22] For additional reading on the title underwriting issues that arise with respect to trusts, see the excellent article *Underwriting Transactions in Trust,* by Richard Worsham, delivered at the 2016 Texas Land Title Institute.

[23] Despite a desire for anonymity, title companies in certain jurisdictions are required by report true ownership of certain high dollar transactions to FinCEN (the Financial Crimes Enforcement Network, a division of the US Department of the Treasury) which has delivered standing "Geographic Targeting Orders" to title operations. For more information see https://www.fincen.gov/news/news-releases/fincen-reissues-real-estate-geographic-targeting-orders-and-expands-coverage-12

in "The Trustee of the 2019 Kramer Family Trust, as named and set forth in trust agreement dated 1-1-2025."

APPENDIX A

Sec. 113.018. EMPLOYMENT AND APPOINTMENT OF AGENTS.

(a) A trustee may employ attorneys, accountants, agents, including investment agents, and brokers reasonably necessary in the administration of the trust estate.

(b) Without limiting the trustee's discretion under Subsection (a), a trustee may grant an agent powers with respect to property of the trust to act for the trustee in any lawful manner for purposes of real property transactions.

(c) A trustee acting under Subsection (b) may delegate any or all of the duties and powers to:

(1) execute and deliver any legal instruments relating to the sale and conveyance of the property, including affidavits, notices, disclosures, waivers, or designations or general or special warranty deeds binding the trustee with vendor's liens retained or disclaimed, as applicable, or transferred to a third-party lender;

(2) accept notes, deeds of trust, or other legal instruments;

(3) approve closing statements authorizing deductions from the sale price;

(4) receive trustee's net sales proceeds by check payable to the trustee;

(5) indemnify and hold harmless any third party who accepts and acts under a power of attorney with respect to the sale;

(6) take any action, including signing any document, necessary or appropriate to sell the property and accomplish the delegated powers;

(7) contract to purchase the property for any price on any terms;

(8) execute, deliver, or accept any legal instruments relating to the purchase of the property or to any financing of the purchase, including deeds, notes, deeds of trust, guaranties, or closing statements;

(9) approve closing statements authorizing payment of prorations and expenses;

(10) pay the trustee's net purchase price from funds provided by the trustee;

(11) indemnify and hold harmless any third party who accepts and acts under a power of attorney with respect to the purchase; or

(12) take any action, including signing any document, necessary or appropriate to purchase the property and accomplish the delegated powers.

(d) A trustee who delegates a power under Subsection (b) is liable to the beneficiaries or to the trust for an action of the agent to whom the power was delegated.

(e) A delegation by the trustee under Subsection (b) must be documented in a written instrument acknowledged by the trustee before an officer authorized under the law of this state or another state to take acknowledgments to deeds of conveyance and administer oaths. A signature on a delegation by a trustee for purposes of this subsection is presumed to be genuine if the trustee acknowledges the signature in accordance with Chapter 121, Civil Practice and Remedies Code.

(f) A delegation to an agent under Subsection (b) terminates six months from the date of the acknowledgment of the written delegation unless terminated earlier by:

(1) the death or incapacity of the trustee;

(2) the resignation or removal of the trustee; or

(3) a date specified in the written delegation.

(g) A person who in good faith accepts a delegation under Subsection (b) without actual knowledge that the delegation is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely on the delegation as if:

(1) the delegation were genuine, valid, and still in effect;

(2) the agent's authority were genuine, valid, and still in effect; and

(3) the agent had not exceeded and had properly exercised the authority.

(h) A trustee may delegate powers under Subsection (b) if the governing instrument does not affirmatively permit the trustee to hire agents or expressly prohibit the trustee from hiring agents.

APPENDIX B

SUBCHAPTER D. RECORDING DURABLE POWER OF ATTORNEY FOR CERTAIN REAL PROPERTY TRANSACTIONS

Sec. 751.151. RECORDING FOR REAL PROPERTY TRANSACTIONS REQUIRING EXECUTION AND DELIVERY OF INSTRUMENTS. A durable power of attorney for a real property transaction requiring the execution and delivery of an instrument that is to be recorded, including a release, assignment, satisfaction, mortgage, including a reverse mortgage, security agreement, deed of trust, encumbrance, deed of conveyance, oil, gas, or other mineral lease, memorandum of a lease, lien, including a home equity lien, or other claim or right to real property, must be recorded in the office of the county clerk of the county in which the property is located not later than the 30th day after the date the instrument is filed for recording.

Added by Acts 2011, 82nd Leg., R.S., Ch. 823 (H.B. 2759), Sec. 1.01, eff. January 1, 2014.
Amended by:

Acts 2015, 84th Leg., R.S., Ch. 808 (H.B. 3316), Sec. 1, eff. September 1, 2015.

Acts 2017, 85th Leg., R.S., Ch. 834 (H.B. 1974), Sec. 7, eff. September 1, 2017.

APPENDIX C

P-11. Insuring Around

Article 9.08 of the Texas Title Insurance Act - 1967, defines "Insuring Around" as follows:
"Insuring Around' is defined as the willful issuance of a title binder or title insurance policy showing no outstanding enforceable recorded liens while the Title Insurance Company knows that in fact a lien or liens are of record against the real property, and shall be prohibited, except under circumstances as the commissioner under his or her rulemaking powers shall approve. A title insurance company knows that an outstanding enforceable recorded matter exists if it determines that the matter is valid and enforceable based on the examination of the title pursuant to which the title binder or title insurance policy is issued. In its discretion, the title insurance company may determine the insurability of title and those matters which it considers to be insurable under the title binder or title insurance policy; provided, however, that insuring around enforceable recorded liens shall be prohibited except as allowed by regulation."

Pursuant to the authority and instruction given the commissioner by the Legislature as above stated, the commissioner hereby sets forth the following rule to be followed by all title insurance companies and title insurance agents in complying with such Article 9.08, viz.:

a. "Willful issuance" shall be defined as the issuance of a title insurance policy or binder with intent to conceal information by suppressing or withholding title information, the consequence of which could result in a monetary loss either to the title insurance company or to the Insured under the policy or binder.

b. "Insuring Around" shall not be construed as prohibiting the issuer of a title insurance policy or binder from issuing a policy or binder without taking exception to a specific lien, or liens, of record when sound underwriting standards and practices would not otherwise prohibit such issuance. Specifically, but not limited to, the term "insuring around" shall not include the issuance of a title insurance policy or binder under the following circumstances:

1. …;
2. …;
3. …;
4. …;
5. …;
6. …;
7. …;
8. …;
9. **In instances where federal estate taxes and state inheritance taxes have not been paid, but the title insurance company:**

a. Examines a balance sheet of the estate and determines that the estate will have no difficulty in paying its estate and inheritance taxes, and the title insurance company

takes an indemnity from responsible persons protecting itself against loss due to unpaid estate and inheritance taxes, or

b. Requires sufficient money or other securities to pay estate and inheritance taxes to be left in escrow with it pending payment of such taxes, or pending the receipt of waivers of lien from the taxing authority or authorities, or

c. Examines the balance sheet of the estate and determines the estate will have no difficulty in paying its inheritance and estate taxes, and the title insurance company obtains a letter from a responsible person agreeing to see that such taxes are paid out of the assets of the estate.

10. ….

11. ….

c. "Texas Master Indemnity Agreement (T-29)" A title insurance company may, in lieu of the execution of separate transaction specific indemnity letters or agreements, indemnify another title insurance company in accordance with P-11b(7) and/or P-11b(10) above by executing the Texas Master Indemnity Agreement (T-29). If a title insurance company elects to provide another title insurance company with a master indemnity agreement, the Texas Master Indemnity Agreement (T-29) must be used if the master indemnity agreement is intended to cover the liens and other matters set forth in the Texas Master Indemnity Agreement (T-29).

Effective January 3, 2014 (Order 2806)

APPENDIX D

AFFIDAVIT of DEATH OF "TODD" GRANTOR

BEFORE ME, the undersigned authority(ies), on this day personally appeared _____, whom, upon oath and under penalty of perjury, deposes and says:

1. The undersigned affiant is a grantee under a Transfer of Death Deed filed _____, recorded _____, Real Property Records of _____ County, Texas (the "TODD"), which conveyed an interest in the following real property:

LEGAL

2. The undersigned affiant has provided a copy of the death certificate of _____ (the "Decedent"), who died on _____ in _____ County, Texas, to [title company name], which certificate of death was issued by the Texas Department of State Health Services, Vital Statistics Unit, on [date of issuance], State File Number [number].

3. The undersigned, being the transferee under the TODD, survived the grantor of the TODD by at least 120 hours.

4. That at the time of death, Decedent owned assets, excluding the above referenced property, consisting of [Bank Accounts, Brokerage Account, Ira and certain items of personalty]. The total combined value of said assets is less than $_____.

5. That at this time Decedent has no unpaid bills of any kind including no outstanding bills for medical, last illness, health or nursing care, taxes, credit cards or funeral expenses, there is sufficient liquidity in the estate to pay any outstanding debts in the future should any arise, and no such bills or debts are expected.

6. All of the foregoing facts set forth above are true and correct. The undersigned is aware of the penalties of perjury under Federal Law, which included the execution of a false affidavit, pursuant to 18 USC Section 1621 wherein it is provided that anyone found guilty shall not be fined more than $2,000.00 or imprisoned not more than 5 years or both. Affiant is also aware that perjury in the execution of a false affidavit is a criminal act pursuant to Section 37.02 of the Texas Penal Code. Finally, affiant is aware that under Section 32.46 of the Texas Penal Code, a person commits an offense, if with intent to defraud or harm a person, he/she, by deception, causes another to sign or execute any document affecting property or service of the pecuniary interest of any person, and that an offense under such Section is a felony of the third degree which is punishable by a fine of $5,000.00 and confinement in the Texas Department of Corrections for a term of not more than 10 years or less than 2 years.

EXECUTED this _____ day of _____, 20___.

_____
, Affiant

STATE OF TEXAS
COUNTY OF

Subscribed and sworn to before me this _____ day of _____, 20_____, by _____, ☐ known to me or ☐ proved to me through _____ (description of identity card) to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that said person executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this ____ day of _____, 20____.

_____
Notary Public, State of Texas

RETURN TO:
[branch]

APPENDIX E

TEXAS MASTER INDEMNITY AGREEMENT (T-29)

[Insert Name of Indemnifying Title Insurance Company] (hereinafter called in this Agreement "We"), subject to the terms, provisions, and conditions of this Agreement, agree to indemnify [Insert Name of Title Insurance Company Requesting the Indemnity] (hereinafter called in this Agreement "You") against loss, cost damage or expense You may suffer by relying on this Texas Master Indemnity Agreement (called in this Agreement "Agreement") because of those "POTENTIAL DEFECTS" described below, if:

1. We previously have issued: (i) an owners policy to the current title holder; or (ii) a mortgagee policy to a lender who subsequently has acquired the insured land and is the seller or mortgagor in the current transaction and remains an insured under the mortgagee policy following foreclosure or a deed in lieu of foreclosure (hereinafter called in this Agreement "Our Policy");

2. Our Policy covers some or all of the land insured under Your Policy (hereafter called in this Agreement the "Land"); and

3. Our Policy did not take exception to the POTENTIAL DEFECTS.

POTENTIAL DEFECTS

I. Questions as to a Homestead interest in the Land

II. Questions as to whether a recorded Abstract of Judgment Lien, Federal Lien or State Tax Lien applies to a prior owner or has been satisfied or released.

III. Questions as to whether a recorded mortgage or other consensual lien, including but not limited to a vendor's lien, deed of trust, mechanic's lien contract, home equity lien, reverse mortgage, or owelty lien (hereinafter called in this Agreement a "Mortgage") has been satisfied or released;

IV. Questions as to whether a trustee or attorney in fact had the proper authority to convey the title to the Land to the current insured owner or a predecessor in title;

V. Questions as to the authority of an executor/executrix, or administrator/administratrix to convey the title to the Land to the current insured owner or a predecessor in title.

HOMESTEAD

Item I above applies when a deed in the chain of title to the Land, prior to or contemporaneously with Our Policy, does not contain either:

1. Joinder by the spouse of the grantor; or
2. A statement on the deed that the grantor is a single person; or
3. A statement on the deed or other recorded instrument that the Land conveyed by the deed is not the homestead of the grantor; or
4. A statement that the property is community property under the sole management and control of the grantor.

JUDGMENT LIENS OR FEDERAL OR STATE LIENS

Item II above applies to a recorded judgment lien(s), including a federal judgment lien(s) or a federal lien(s) securing the payment of a criminal fine/restitution pursuant to 18 USC §3613 or appropriate state law, when the lien or judgment states what appears to be a sum certain, or when a recorded federal tax lien(s) or state tax lien(s) were recorded prior to the date of Our Policy; if

1. The Lien(s) are not against the insured under Our Policy;

2. The face amount of the Lien(s), exclusive of costs, interest and attorneys' fees, do not exceed $500,000.00; and

3. No notice of any proceedings or levy to collect the Lien(s) have been recorded

4. We did not take exception to such Lien(s) in Our Policy.

"State tax lien shall not include: (i) any lien securing the payment of ad valorem taxes; and/or (ii) any municipal/city or county lien for weed or sanitary liens, demolition liens, street assessment or paving liens, and/or utility service liens or other similar matters.

MORTGAGES

Item III above applies when a recorded Mortgage(s) was recorded prior to the date of Our Policy if:

1. No foreclosure proceedings respecting the Mortgage(s) have been recorded; 2. No

Mortgage(s) secure a principal amount of more that $500,000.00; and

3. We did not except to such Mortgage(s) in Our Policy.

AUTHORITY OF TRUSTEES AND ATTORNEYS IN FACT

Item IV above applies when your search of the title finds insufficient or no recorded evidence of the power or authority of the conveying trustee or attorney in fact to make the conveyance of the Land, provided that there is no notice of record in the county where the Land lies of any proceeding to attack or set aside the conveyance by the trustee or attorney in fact. Item IV applies when Our Policy insures the current seller or mortgagor of the Land.

AUTHORITY OF EXECUTOR OR ADMINISTRATOR

Item V above applies when your search of title finds insufficient or no recorded evidence of the power or authority of the conveying executor/executrix or administrator/administratrix to sell and convey the Land, provided that there is no notice of record in the county where the Land lies of any proceeding to attack or set aside the conveyance by the executor/executrix or administrator/administratrix. Item V applies when Our Policy insures the current seller or mortgagor of the Land.

CONDITIONS:

The indemnity provisions of this Texas Master Indemnity Agreement are subject to the following conditions:

1. The agreement is only applicable to policies issued on Texas property.
2. You are not required to authenticate Our Policy that appears valid on its face. However, if We request, You agree to provide a copy of Our Policy as a condition to making a claim under this Agreement.
3. Our liability is limited to the face amount of Our Policy or $500,000.00, whichever is less, subject to the terms and conditions of Our Policy, and shall not enlarge Our liability and obligations beyond those provided in Our Policy.
4. You agree to notify Us of a claim under this Agreement as if You were an insured claimant under Our Policy. The notice should be sent by: (i) certified mail, return receipt requested, to:

   [Insert Mailing Address of the Indemnifying Title Insurance Company]

   Such notice shall be given as soon as possible after receipt by You of a notice of claim under Your Policy, but in no event, more than thirty (30) days thereafter. Provided, however, a notice provided after such 30 day notice period may still be timely, so long as We are not prejudiced by any delay in giving such notice.
5. If any claim is made under this Agreement, You agree to perform in accordance with the terms hereof, promptly and in good faith. However, until We are notified of a claim hereunder, there is no obligation to take any action allowed or required under Our Policy.
6. This Agreement may be supplemented or superseded by a specific written indemnity by and between You and Us and such specific agreement shall not be deemed to suspend, cancel, or otherwise terminate any of the rights or obligations of Yours or Ours under this Agreement as to policies which may be written by You in the future.

7. We may cancel this Agreement by giving written notice to You thirty (30) days after the date We mail such notice. However, it is agreed that such cancellation shall not diminish or impair any of the indemnities arising under this Agreement prior to the expiration of such thirty (30) day period.

8. This Agreement applies when We, the signatory to this Agreement, have issued: (i) an owners title policy to the transferor or mortgagor of the Land in the current transaction; or (ii) a mortgage title policy to a lender who has acquired the title, is the seller or mortgagor in the current transaction, and remains an insured under the policy following foreclosure or a deed in lieu of foreclosure. For this indemnity to apply, you must have issued a title policy to the transferee or mortgagee of Our Insured. We and You understand and agree this agreement shall continue in force so long as You have liability under Your Policy or under its Indemnity(ies) to subsequent insurers for a POTENTIAL DEFECT covered by Our Policy subject to the terms and conditions of this Agreement.

The effective date of this Texas Master Indemnity Agreement is _____, 20____.

INDEMNITOR:

[Insert Name of Indemnifying Title Insurance Company]

By:_____