

Date: August 27, 2015  
To: All Texas Agents  
From: Ellen Wied, VP/Underwriting Counsel  
RE: Same Sex Marriages and New Legislation

## **SAME-SEX MARRIAGES**

Earlier this summer, the United States Supreme Court issued its opinion in the case of *Obergefell v. Hodges, Director, Ohio Dept. of Health, et al*, concerning same sex marriages. The Court held that the refusal of a State to license a marriage that is between two people of the same sex and/or to recognize another State's lawfully issued same-sex marriage license violates both the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the Constitution. This ruling has the effect of invalidating existing state and federal laws that prohibit same-sex marriages. Consequently, if a same sex couple is legally married in any State, that marriage will be recognized in Texas.

*Underwriting Guidelines:* If a same-sex married couple is acquiring title or encumbering their property, the designation used should be "a married couple" or "... and spouse" or "married to each other" or other similar designation. The same community property laws will apply to same-sex marriages as opposite-sex marriages. In addition, the same homestead rights and requirements will apply. Any conveyance and/or encumbrance of a homestead, whether the separate property of one spouse or the community property of both spouses (irrespective if same-sex or opposite-sex) will require the joinder of both. (Family Code Section 5.001).

The marital designation on a deed should not be included in an Owner's Policy under title vested, Schedule A, since marital status is not insured in the policy. Some lender's closing instructions do require that the Lender Policy issue with the borrower's name being quoted exactly from the security instrument in the lien description, which is acceptable. However, the marital status should not be included with the title vested information.

## **SIGNIFICANT 2015 LEGISLATION**

### **Texas Real Property Transfer on Death Act. (*SB 462*) Effective 9-1-15**

This legislation added Chapter 114 to the Estates Code to create a non-probate passage of title procedure. The owner of land can execute a Transfer on Death (TOD) Deed, and title will automatically revert to the named beneficiary(ies) at the time of the grantor's death. The owner retains full authority to sell, convey, and encumber during their lifetime and the TOD Deed is revocable prior to the Grantor's death. The TOD Deed must be recorded prior to the transferor's death and may not be created via use of a Power of Attorney. If the transferor conveys, the TOD Deed becomes void.

A Last Will and Testament cannot revoke or supersede a TOD Deed or change the designated beneficiary. A TOD deed is effective without notice or delivery to or acceptance by the designated beneficiary during the transferor's life and no consideration is necessary.

A TOD Deed can be revoked by separate instrument or within a subsequent TOD deed, but the revocation must also be recorded prior to the transferor's death.

If a marriage between the transferor and a designated beneficiary is dissolved by divorce after a TOD deed is recorded, a final divorce decree operates to revoke the TOD deed as to that designated beneficiary if notice of the final divorce is recorded before the transferor's death in the deed records in the county clerk's office of the county where the TOD deed is recorded, notwithstanding Section 111.052.

The recordation of a TOD deed does not affect the rights of existing creditors and does not trigger the due-on-sale clause in any security instrument on the property.

The Act includes many other provisions, but note that following the death of the transferor of a TOD deed, the property transferred upon the death is not part of the decedent's probate estate. However, the Act also provides that to the extent the transferor's estate is insufficient to satisfy a claim against the estate, expenses of administration, any estate tax owed by the estate, or an allowance in lieu of exempt property or family allowance to a surviving spouse, minor children, etc., the liability can be enforced against the property that passed by the TOD Deed. Section 114.106(e) gives creditors a two year right to file claims against the estate and title may not be insurable during that period if the property was non-homestead of the decedent.

Section 114.151 of the Act is a statutory form for the TOD Deed.

### **Rescission of a Non-Judicial Foreclosure on Residential Property.** *(HB 2066), Effective Date: 9-1-15*

New Section 51.016 is added to the Property Code and is applicable to foreclosure sales of residential real estate, which includes a single family home, duplex, triplex, four-plex, or condo unit.

No later than the 15<sup>th</sup> day after a foreclosure sale, the trustee, substitute trustee, or lender can rescind the foreclosure sale if one of the six stated conditions exist, including the cure of the default before the sale or the failure to comply with all statutory requirements in conducting the sale.

The rescinding lender/trustee must give a third-party purchaser and borrower(s) notice of the rescission and record the notices in the real property records. The lender is also required to return the purchaser's bid in five days after the notice of rescission is given and record an affidavit to confirm the return of the bid.

No action challenging the effectiveness of a rescission may be commenced unless the action is filed on or before the 30<sup>th</sup> calendar day after the date the notices of rescission are recorded. A lis pendens notice based on the rescission that is not recorded within that period has no effect.

## **Foreclosure Sale of a Property with an Oil and Gas Lease.** *(HB 2207), Effective Date: 1-1-16*

This legislation adds Chapter 66 to the Property Code. It is a somewhat convoluted statute, but basically if a deed of trust encumbers both the surface and mineral estates, a foreclosure will not wipe out an oil and gas lease on the property. If the deed of trust had priority over the lease, a foreclosure can wipe out the lessee's right to use the surface.

*Underwriting Guideline: Since we rarely know with 100 percent certainty if there are outstanding mineral reservations or severances far back in the chain of title, never assume that an oil and gas lease is extinguished by a foreclosure.*

## **Uniform Disclaimer of Property Interests Act.** *(HB 2428) Effective 9-1-15*

This legislation makes several amendments to the Estates Code and Government Code, among others, but the Act itself is found in new Chapter 240 of the Property Code. The Act is intended to consolidate all of the disclaimer statutes into one place and affects various types of disclaimers. In addition to disclaimers of interests created under intestate succession or will, there can be a disclaimer of an interest in either a testamentary or inter vivos trust, a disclaimer of a survivorship interest, a disclaimer of a power of appointment, etc. (just to name a few).

With respect to disclaimers used in a probate context, this Act eliminates the nine month from death deadline. The Act details the rules for delivery or filing of the disclaimer and also permits some fiduciary disclaimers, although court approval is required for disclaimers by a dependent administrator or a guardian, or if the effect of the disclaimer is to vest the property into the disclaiming fiduciary individually.

The new law tracks the old statute and prohibits a child support obligor from disclaiming property that could be used to satisfy an arrearage.

The Act will apply to disclaimers of property passing from decedents who died before the September 1, 2015, effective date, provided the nine-month deadline has not yet elapsed (i.e. if the decedent died after December 1, 2014).

## **Deadline for Recordation of a Durable Power of Attorney.** *(HB 3316) Effective 9-1-15*

Section 751.151 of the Estates Code has been amended to establish a deadline for recording a Durable POA for a real property transaction: no later than **30 days** after the date the related instrument is filed. The transaction is voidable if the POA is not timely filed.

**Appointment of Escrow Officers.** *(HB 2491) Effective 9-1-15 but only applies to issuance or renewal of an escrow officer license on or after 1-1-16.*

Multiple revisions are made to Chapter 2652 of the Insurance Code, but the addition of Section 2652.1511 is the most significant change. The first subsection makes clear that an escrow officer can be employed and appointed by more than one title agent or direct operation. This new section sets out the requirements for the submission of the appointment form by the agent or direct operation.

Unless otherwise notified by the Department of Insurance, the escrow officer may begin to act in the capacity of an escrow officer after the 2<sup>nd</sup> business day after the date the appointment is submitted, if submitted electronically, or the 8<sup>th</sup> business day if submitted to the Department on a non-electronic form.

**Online Auctions for Ad Valorem Tax Sales.** *(SB 1452) Effective 5-15-15*

This legislation amends Section 34.01 of the Tax Code to add a new subsection that empowers a Commissioner's Court to authorize a public auction for ad valorem tax sales using online bidding.

**Advance Registration of Bidders on Ad Valorem Tax Sales.** *(HB 3951) Effective 1-1-16*

New Section 34.011 is added to the Tax Code. A Commissioner's Court may order people to be pre-registered as a bidder with the county assessor-collector to be eligible to bid at a tax sale. The assessor-collector will issue a written registration statement to the registrants. All bidders must have a registration statement before the sale begins.

**Photo ID Required to File Documents in Certain Counties.** *(HB 1681) Effective 6-19-15*

New Section 191.010 is added to the Local Government Code to authorize a county clerk in a county with a population of 3.3 million or more to require a person who is presenting a document in person for filing in the real property records to present a photo ID to the clerk. The statute lists the forms of identification that are permitted. The clerk may copy the identification, but the information is to be kept confidential. The intent behind this legislation is to prevent fraudulent filings.

**Promulgation of Probate Forms.** *(SB 512) Effective 9-1-15*

Section 22.020 is added to the Government Code to provide for the promulgation of probate forms by the Supreme Court for use by individuals in representing themselves, including a small estate affidavit, probate of a will as a muniment of title, a simple will form and instructions. The forms must be in plain language readily understandable by the general public and translated into Spanish as well.

**Indexing of Correction Instruments Filed in Real Property Records** *(SB 584) Effective 9-1-15*

The purpose of this legislation is to clarify for county clerks that correction instruments, such as the statutory correction affidavit, should be indexed by the names of the grantor/grantee in the instrument being corrected rather than by the name of the Affiant, such as an escrow officer.

**County Imposition of Street Light Fees and Lien.** *(HB 3002) Effective 9-1-15*

Section 280.003 of the Transportation Code is amended to allow a Commissioner's Court to impose a street light fee on landowners who benefit from the street light. The tax assessor-collector will include the fee in the tax bill and collect it in the same manner as ad valorem taxes. The Commissioner's Court may file a lien for the fee. The lien will be inferior to a previously recorded mortgage on the property.

*Underwriting Guideline: If a transaction involves a renewal and extension (refinance) of a mortgage that has priority over a street light lien, we would insure the refinance as a first lien also.*

**Putting an End to Local Anti-Fracking Ordinances.** *(HB 40) Effective 5-18-15*

This legislation makes clear that the State has exclusive jurisdiction to regulate oil and gas operations, which includes exploration, drilling, production, and transport, and that any local regulation of these operations is preempted.

Section 81.0523 is added to the Natural Resources Code to define terms and basically prohibit any city or other political subdivision from enacting or enforcing an ordinance or other measure that bans, limits, or regulates oil and gas production. A city is allowed to adopt ordinances that regulate only above-ground activity related to oil and gas operation that occurs at or above the surface of the ground.

Existing ordinances will remain in effect if adopted prior to 5-18-10.