

# Real Estate for Estate Planners

A Smorgasbord of Issues

Cassie McGarvey

**McGARVEY**  
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# Introduction

Considerations for Co-Tenancy: Partition

Deed Issues and Preserving Title Insurance

Title Litigation Overview

The Estate as Lender

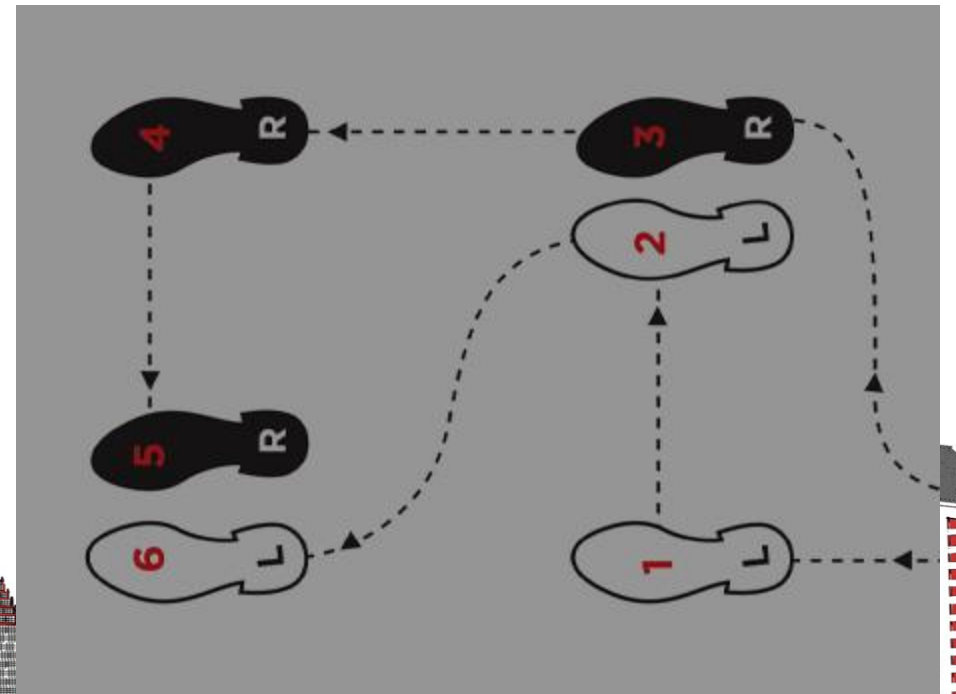


# Partition

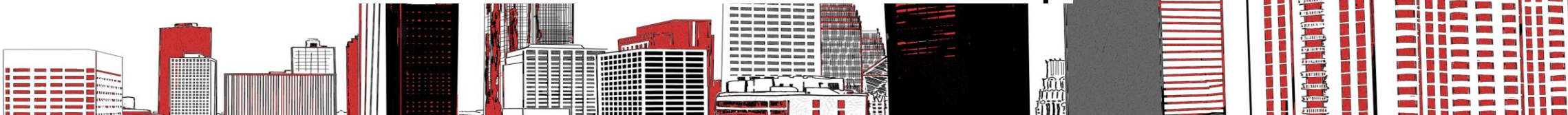
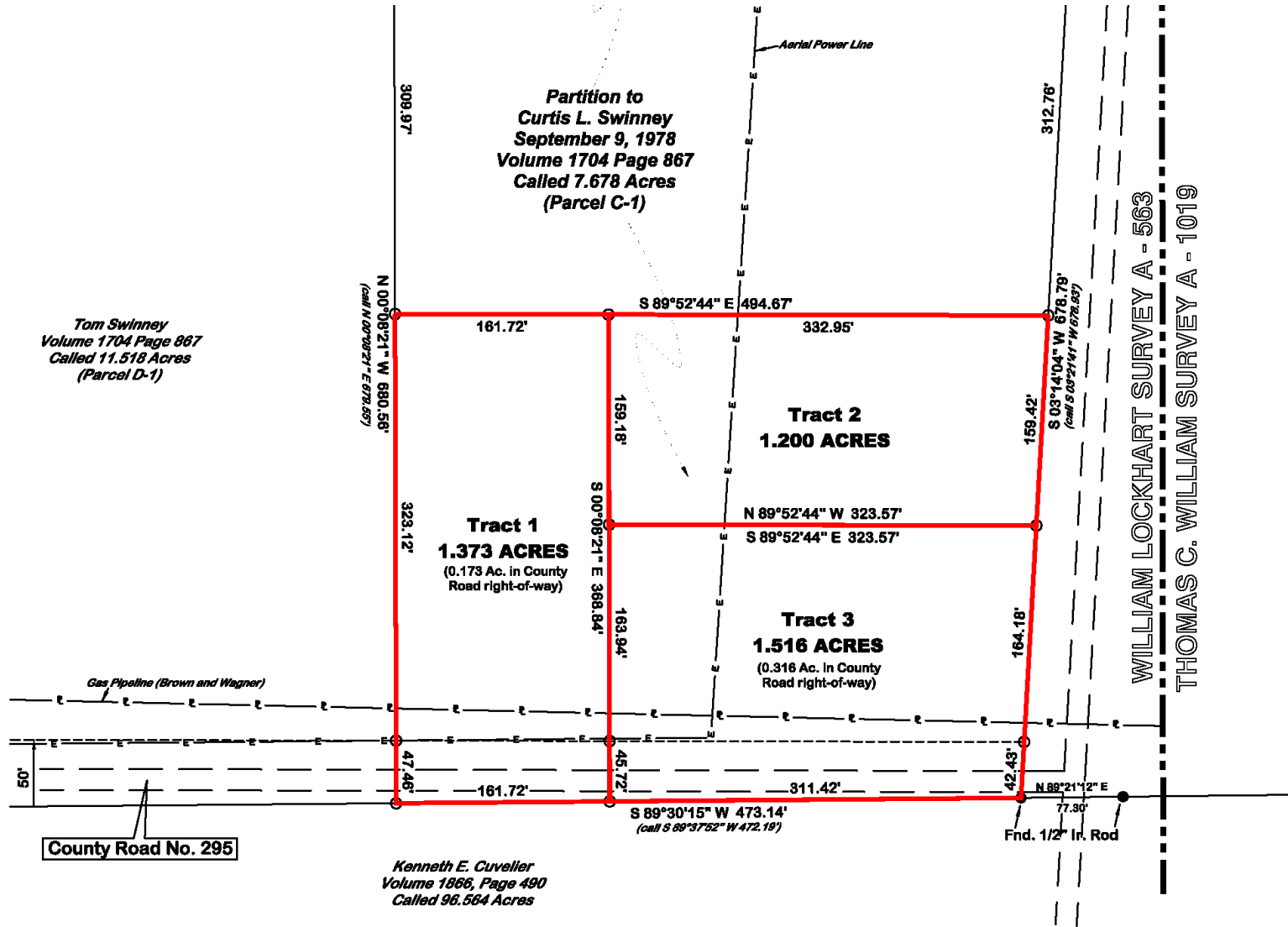


# What is a Partition?

- ◇ Division of land according to quantity and value
- ◇ Texas Property Code §§ 23, 23A, and 29
- ◇ Two-phase judgment
  - ◇ First judgment orders the partition (either in kind or by sale)
  - ◇ Second judgment confirms the action taken



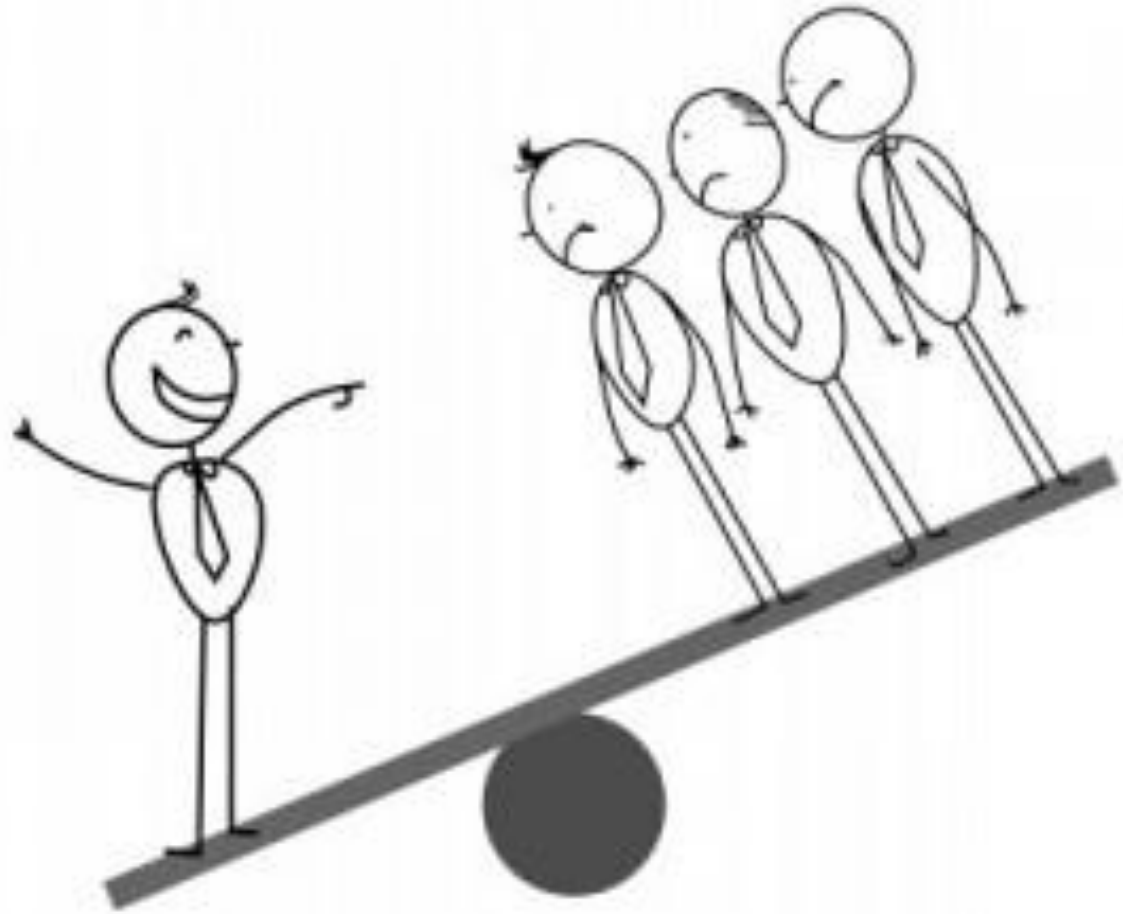
# Partition in Kind





Partition  
By  
Sale





# Balancing the Equities



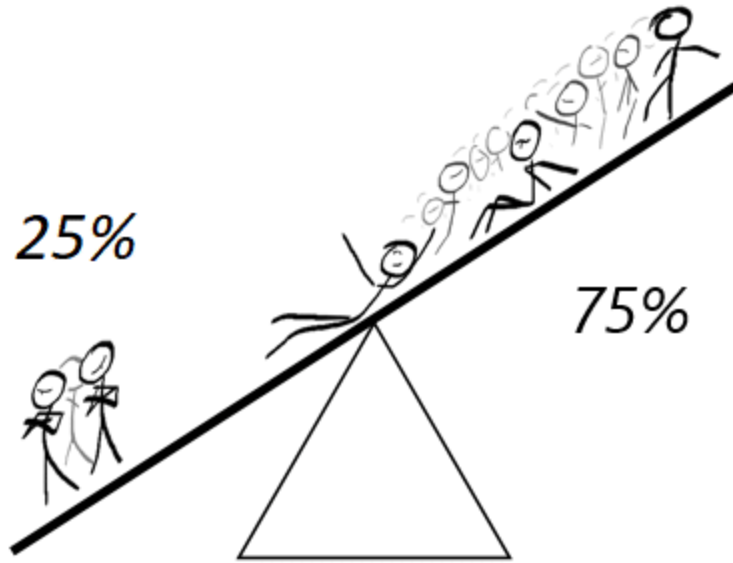
# Types of Partition Actions

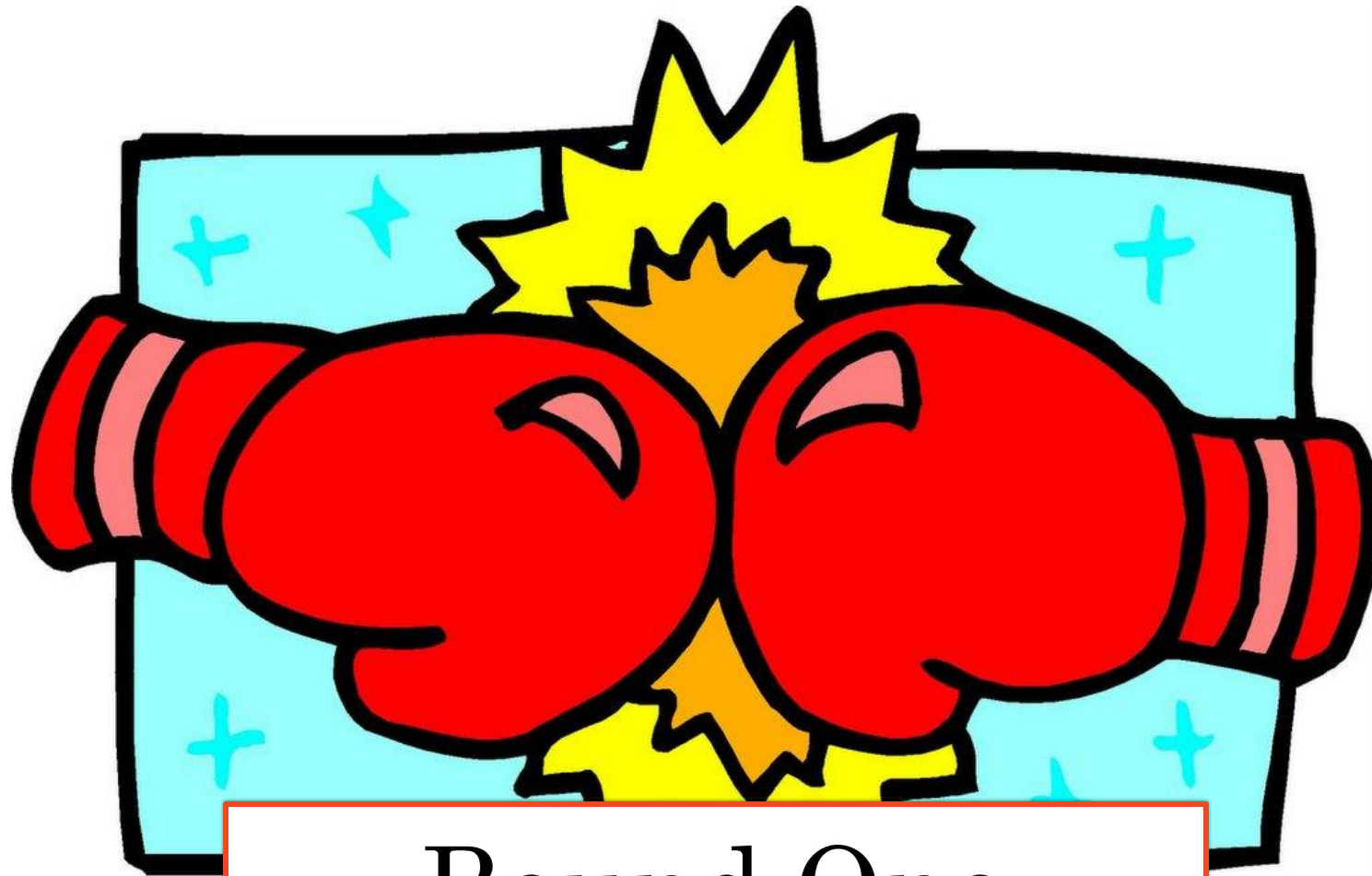




# Chapter 23

## “Standard” Partition Actions





Round One

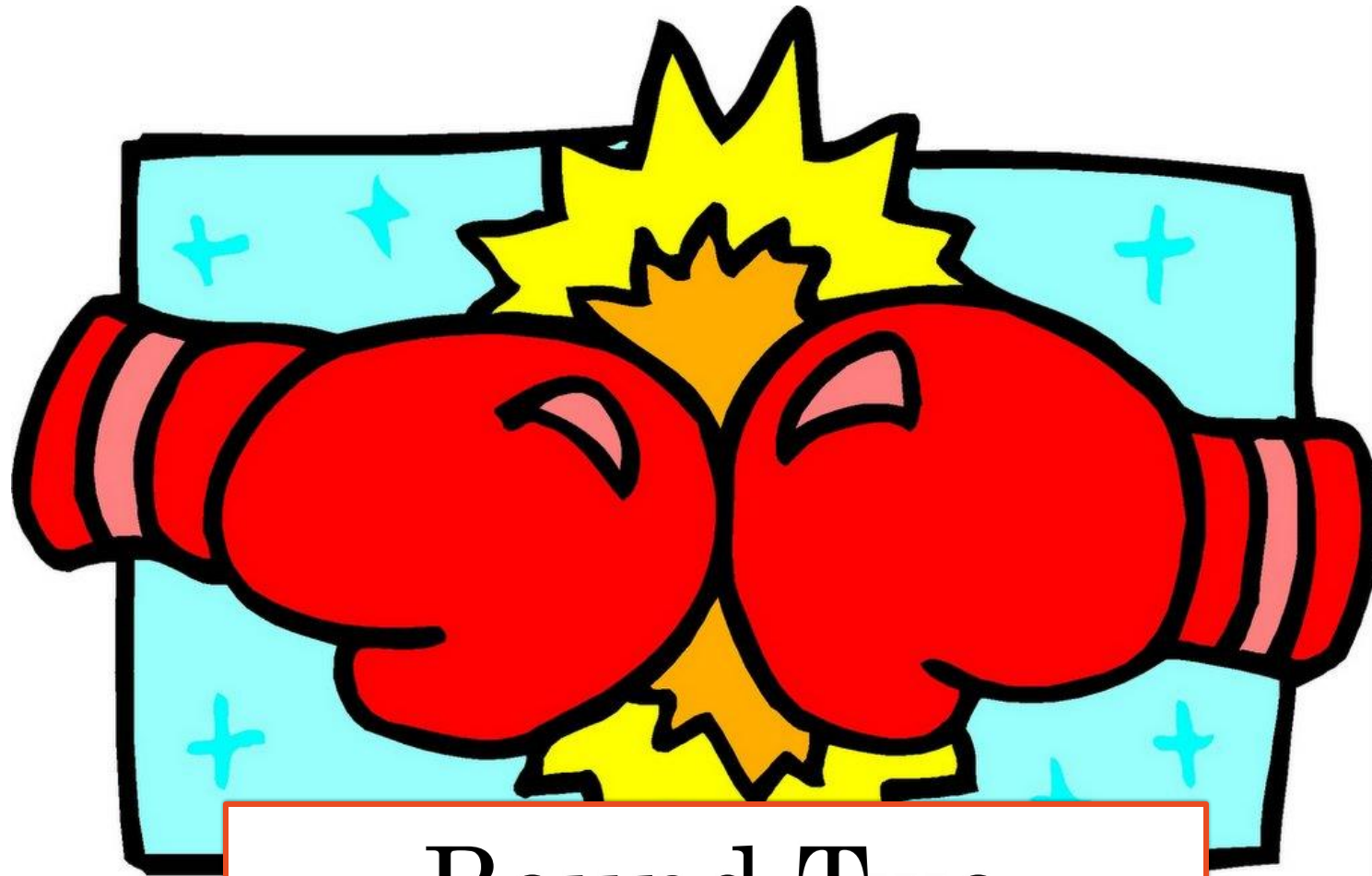


# Judgment Number 1

- ◆ Is property susceptible to partition-in-kind
- ◆ Determination of Fractional Interests
- ◆ All questions of law and equity
- ◆ Value of improvements / other equitable balancing factors
- ◆ Appointment of Commissioners







Round Two



# Judgment Number 2

- ◆ File Objections to the Commissioners' Report within 30 days
- ◆ Hearing held on the Commissioners' report (45-day notice)
- ◆ Judgment either partitions the property or divides the proceeds from the sale
- ◆ Include necessary easements in the judgment





# Chapter 23A

## Uniform Partition of Heirs Act





# Distinctions for the Uniform Partition of Heirs Act

- ◆ Is this Heir's Property?
- ◆ 23A supersedes the provisions of Chapter 23 when it applies
- ◆ Determination of Value of the Property
- ◆ Ability to buy out defaulting defendants





*Let the Buy Outs Begin*



# After the Buy Outs, the Partition

- ◆ If anyone is left, then the Court considers partition in kind
- ◆ Additional factor of “sentimental attachment”
- ◆ Partition in Kind favored – unless the it “will result in substantial prejudice to the co-tenants as a group.”
- ◆ Then, Court will order partition by sale --- unless no one asked for it.



# Property Code Chapter 29: Forced Sale for Payment of Property Taxes



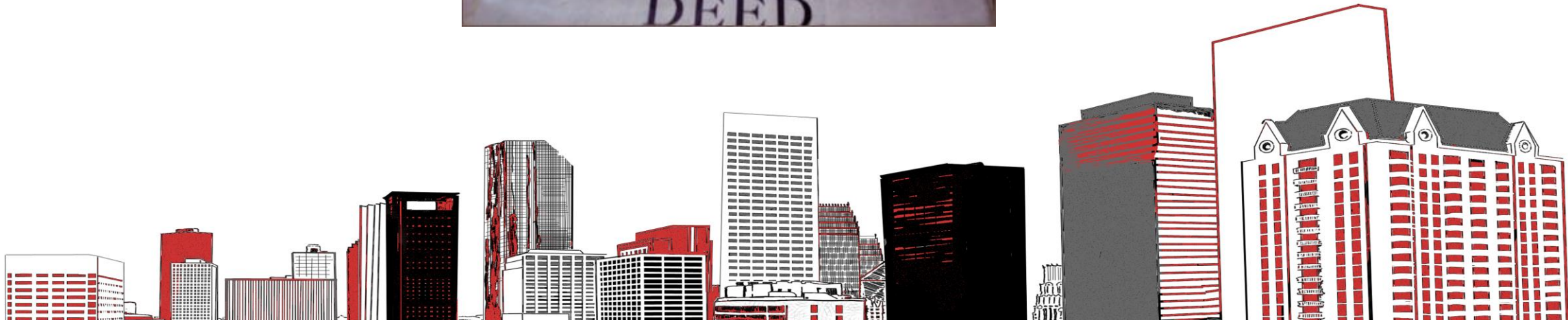
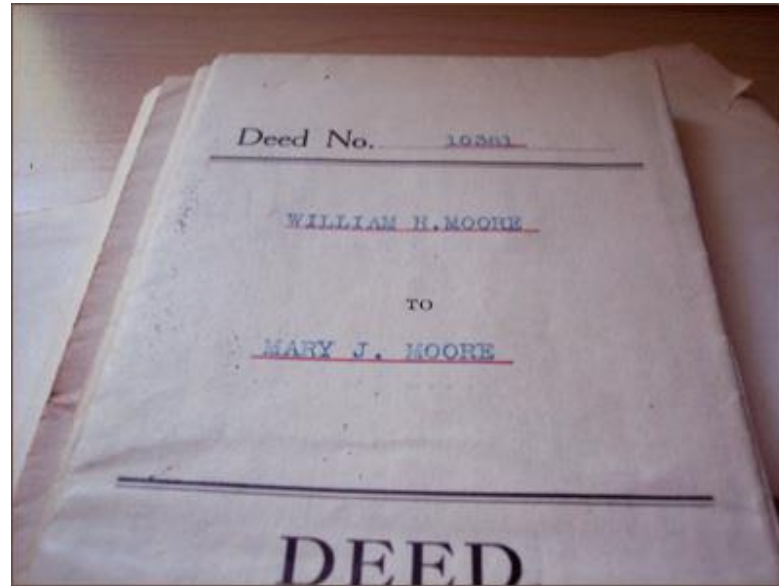
# Considerations in Co-Tenancy Agreements



# When Good Deeds Go Bad: How to Manage Problematic Deeds



# Correction Instruments



# *Myrad Properties Inc. v. LaSalle Bank N.A., 300 S.W.3d 746 (Tex. 2009).*

Involved a foreclosure issue where one of the two foreclosed properties were omitted from the deed, where Texas Supreme Court held that a correction deed could not be used to add property to an original deed that was completely omitted.

Language in the opinion suggested that certain correction instruments may be void, which created uncertainty in the real estate industry regarding validity of correction instruments.



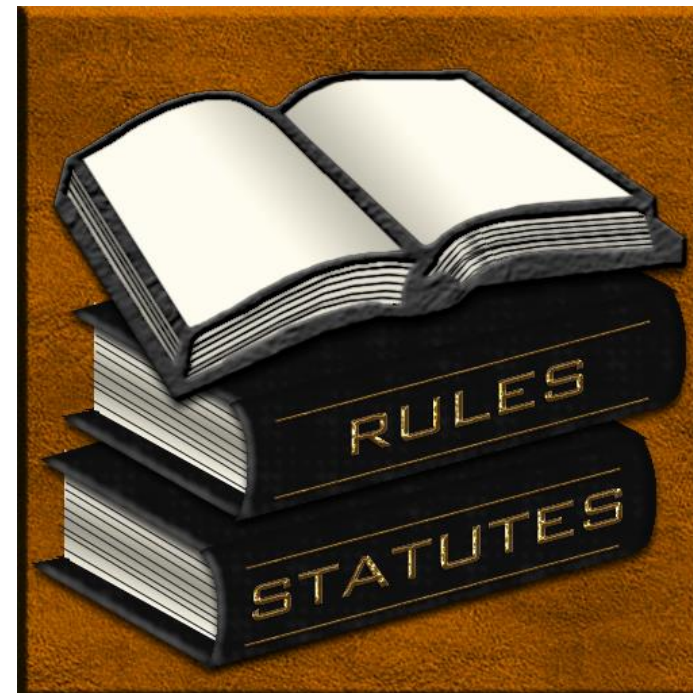




# Use and Limitations



# Statutory Compliance



# Statutory Compliance / BPF Protections

Under Texas Property Code § 5.030(a), a statutorily compliant correction instrument is:

1. Effective as of the effective date of the recorded original conveyance instrument;
2. Prima facie evidence of the facts stated in the correction instrument;
3. Presumed to be true, but subject to rebuttal; and
4. Notice to a subsequent buyer of the facts stated in the correction instrument



# Types of Corrections

**Nonmaterial**

**Material**



# Nonmaterial Corrections – 5.028

- ❖ **Clerical errors or inadvertent mistakes**
- ❖ **Prepared by person with personal knowledge**
- ❖ **Recorded in each county**



# Material Corrections

- ❖ **Defined under Texas Property Code § 5.029**
- ❖ **List of Examples**
- ❖ **Executed by all parties, or the parties' heirs, successors, or assigns**



# Nonmaterial and Material Corrections

**Both §§ 2.028 and 5.029 provide lists of included error examples, but the lists are not exclusive.**

**The errors listed are treated as nonmaterial or material according to the section of listing and unlisted errors will require a judgment call.**

**Unlisted errors should be presumed to be material.**

**An incorrect use of a Correction Instrument may result in it being void.**



# *Broadway Nat'l Bank v. Yates Energy Corp.*

- ◆ Texas Supreme Court interpreted the “executed by each party to the recorded original instrument of conveyance the correction instrument is executed to correct, or if applicable, a party’s heirs, successors, or assigns . . . .” clause to require that the original parties must sign the material correction instrument if they are “available,” or the heirs, successors, or assigns if the original parties are not available.
- ◆ Issues with enforceability of a Correction Mineral Deed and 2013 Amended Correction Deed





# Quit Claim Deeds: I Convey NOTHING



# What is a Quitclaim Deed?

- ❖ **Conveys the “right, title, and interest” of the grantor**
- ❖ **Compare: Typical deed conveys the property described**
- ❖ **Deed Without Warranty**



# Property Code Section 13.006

- ❖ **Applies to QCDs recored after September 1, 2021**
- ❖ **4-year look back**
- ❖ **Impact on bona fide purchaser status**



# Deeds Without Monetary Consideration



# Gift Consideration

- ◆ Nominal consideration inappropriate for friendly deed
- ◆ “\$10.00 and other good and valuable consideration” = purchase
- ◆ “for the love and affection I have for [Grantee]” = gift
- ◆ *Jenschke v. Claussen*, NO. 04-17-00132-CV, 2018 WL 733807 (Tex.App.—San Antonio Feb. 7, 2018, pet. denied).



# Community Property Consideration

- ◆ Conveyance of Property into a newly formed LLC
- ◆ May cause property to change from separate property to community property



# Effect on Title Insurance

- ◆ Limited guidance from Texas Courts
  - ◆ California: *Kwok v. Transnation Title Insurance Company*, 170 Cal.App.4<sup>th</sup> 1562, 89 Cal. Rptr. 3d 141(Cal. App. 2009).
  - ◆ New York: *Carbone v. 243 E. 118<sup>th</sup> St., LLC*, 2009 NY Slip Op 31381 (N.Y. Sup. Ct. 6/18/2009), 2009 NY Slip Op 31381 (N.Y. Sup. Ct. 2009)



# Title Insurance Considerations

- ◆ Definition of “Insured”

- ◆ T-1: broader definition of insured

- ◆ Allows the original policy holder to transfer the property in a deed w/o payment to – another entity that policyholder owns, a grantee that wholly owns the named Insured, a grantee that is an affiliated entity, a trust formed for estate planning purposes

- ◆ T-1R: no definition of insured – just “you” and “your”

- ◆ Coverage continues when transferred to a trust





# Continuation of Coverage

- ◇ When does the Insured maintain coverage – even after the transaction has been completed?
  - ◇ T1-R: “We insure you as long as you ... are liable for any Title warranties you make.”
  - ◇ T-1: “The coverage of this policy shall continue in force ... in favor of the Insured, but only so long as ... the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title.”



# 2024 Title Insurance Changes

- ◆ Form T-26: Additional Insured Endorsement

- ◆ Procedural Rule P-57: Estate Planning Vehicle

A legal entity, a trust, or a trustee of a trust, if the entity or trust is established by the insured for the purpose of planning the disposition of the Insured's estate.



# Title Litigation Overview



# Trespass to Try Title

- ◇ Texas Property Code § 22.001
- ◇ A Plaintiff may prove legal title by:
  - ◇ A regular chain of title of conveyances from the sovereign to the plaintiff;
  - ◇ A superior title to that of the defendant out of a common source;
  - ◇ Title by limitations; or
  - ◇ Possession that has not been abandoned.



# Adverse Possession

- ◆ The actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person. CPRC § 16.021(1)
- ◆ Usually a question of fact
- ◆ Requires proof of actual possession that is:
  - ◆ Open and notorious
  - ◆ Peaceable
  - ◆ Under a claim of right
  - ◆ Hostile to the claim of the owner



# Adverse Possession

## 3-Year Statute CPRC 16.024

- ◆ Deed in regular chain of conveyances
- ◆ Color of title
- ◆ For some reason the deed does not fit within the chain of title

## 5-Year Statute CPRC 16.025

- ◆ Cultivates, uses, or enjoys the property.
- ◆ Pays applicable taxes
- ◆ Claims the property under duly registered deed
- ◆ Forged deeds or forged POAs inapplicable

## 10-Year Statute CPRC 16.26

- ◆ Cultivates, uses, or enjoys the property;
- ◆ If no title instrument then limited to 160 acres, unless enclosed acres exceeds 160 acres
- ◆ With title instrument, extends to the boundaries of the instrument

## 25-Year Statute CPRC 16.027

- ◆ Regardless of disability
- ◆ Cultivates, uses, or enjoys the land

## 25-Year Statute CPRC 16.028

- ◆ Based on title instrument, even if that instrument is void on its face



# Suit to Quiet Title

- ◆ Purpose is to declare invalid or ineffective the defendant's claim to title.
- ◆ Elements:
  - ◆ An interest in a specific property;
  - ◆ title to the property is affected by a claim by the defendant;
  - ◆ The claim, although facially valid, is invalid or unenforceable.



# Declaratory Judgment CPRC 37.001

- ◆ A person interested under a deed ... or whose rights, status, or other legal relations are affected by a ... contract ... may have determined any question of construction or validity arising under the instrument ... and obtain a declaration of rights, status, or other legal relations thereunder.
- ◆ May be used with the sole issue concerning title to real property is the proper boundary line between adjoining properties.





# Lost Deed

- ◆ Chapter 19 of the Civil Practice and Remedies Code
- ◆ Method to establish the existence of a deed, bond, bill of sale, mortgage, deed of trust, power of attorney, conveyance or a judgment, order, or decree of a court of record of this state



# The Estate as Lender: How to Handle a Decedent's Loan Portfolio



# Is the Decedent a Licensed Lender?

- ❖ **No. Three year look-back and liability considerations**
- ❖ **Yes. Proceed accordingly.**



# Identify the Documents

- ❖ **Promissory Note**
- ❖ **Warranty Deeds with Vendor Lien**
- ❖ **Deed of Trust**



# Payment History

- ❖ **Maturity Date of the Loans**
- ❖ **Reliable Payment History and Amortization Schedule**
- ❖ **Escrow for Taxes and Insurance**
- ❖ **Payments for Taxes and Insurance**



# Foreclosure and Fixing the Paper

- ❖ **Obtain Title Reports**
- ❖ **Send the Notice of Default and Notice of Acceleration for Non-Judicial Foreclosure**
- ❖ **Assist in Refinance**
- ❖ **Reinstate the Loan**



# Further Questions?

Cassie McGarvey

713.242.1746

[cmcgarvey@mcgarveypllc.com](mailto:cmcgarvey@mcgarveypllc.com)

3220 Broadway, Suite 200  
Houston, Texas 77017

907 S. Friendswood Drive, Suite 211  
Friendswood, Texas 77546

