

Welcome to today's webinar!

**Please Advise:
The 10 Most Common
Underwriter Questions**

Bill Pratt

June 21, 2018

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We welcome any other lawyers to listen, but cannot provide continuing education credit to you.

***PLEASE ADVISE: The Top 10 Most Common
Underwriting Questions***

June 21, 2018

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Who's on First?

NEVER send an underwriter a question that includes the phrase “please advise”.

The response may be a series of charming homilies about maintaining personal hygiene and social acceptability.

Try to make your questions as specific as possible and clear. Testing the underwriter's psychic powers rarely ends well.



Who's on First?

1. Title is in Dad. Dad and Mom are deceased, intestate. They had three children together. One child is deceased, but had a probated will. Who's in title?

I don't know. The first thing that is useful in interpreting inheritance is whether the property is community property or separate property. If title is in just one spouse's name, that doesn't mean it is separate property.



Who's on First?

- The Texas Family Code, Section 3.002:
 - “COMMUNITY PROPERTY.
Community property consists of the property, other than separate property, **acquired** by either spouse **during marriage.**”

So **income** during the marriage is community property. And since the definition of “separate property” doesn’t include the income from separate property, income from separate property is community property. This would include rents, interest and stock dividends.

Appreciation is different from income. If an inherited lot, separate property, is worth \$10,000 when inherited, but \$20,000 when sold, the entire \$20,000 is separate.



Who's on First?

- The Texas Family Code, Section 3.001:
 - “SEPARATE PROPERTY.

A spouse's **separate property** consists of:

- (1) the property **owned or claimed** by the spouse **before marriage**;
- (2) the property acquired by the spouse during marriage by **gift, devise, or descent**; and
- (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.”



Who's on First?

1. Title is in Dad. Dad and Mom are deceased, intestate. They had three children together. One child is deceased, but had a probated will. Who's in title?

We know the couple had three children together, but we would want to make sure any affidavits of heirship said they had no other children and neither adopted other children or took them into their home and raised them.

And when did the child die? If it was after the parents, that interest would pass under the will. If it was before, then the child never owned any interest and the child's descendants would inherit. Date of death is critical in figuring out heirship.



Who's on First?

2. Mom is selling to her daughter. Can we insure?

The danger is that this is a sham transaction. That danger only exists if we are asked to insure a third party, a lender. The mother may not be able to qualify for any sort of loan, including a home equity loan. So in order to pull equity out of the home, there will be a pretend sale to the daughter. Mom will stay in the house and maybe make the payments. The risk is that in the event of a default Mom will say that her homestead rights predate the “sale” and the loan is really a home equity loan done in violation of the Texas Constitution. If proven, the lien is invalid and there is no personal liability.

Sales between family members should be carefully scrutinized.



Who's on First?

2. Mom is selling to her daughter. Can we insure?

If this is a cash transaction, there is no lien that can be invalidated or challenged, so there is no impediment to insuring.

If the property being sold is not the homestead of the selling Mom, and she can provide evidence she owns and occupies another homestead we can insure.

If the property is vacant, there is no occupancy by the seller to put us on notice of homestead claims or rights, so we can insure.



Who's on First?

2. Mom is selling to her daughter. Can we insure?

The property being sold is the homestead of Mom. There is a new loan being taken out by the buyer? What do we require to insure?

Prior to closing the seller must have moved out with all of their belongings. The agent inspects.

We require evidence the seller has acquired a new place to live, by purchase, lease or occupancy agreement. We want to see a utility bill in the seller's name at the new address. And we have affidavits about an arms length transaction to be signed by seller and buyer.



What's on Second?

3. To the surprise of the children, Mom and Dad put their property into a trust. They are both dead now and the family knows nothing of the trust and can't find it. What now?

They need to look for a three ring binder with a bunch of legal documents in it. This form of trust is generally a package of documents. There are generally certificates of trust, powers of attorney, and wills that leave everything to the trust. So if the family can find wills or POAs, the trust may be in the same binder. Also look at the deed to the trust. Three ring binder holes on the deed's left side are a giveaway. See if the name of the preparing attorney is on the deed or you can track the notary through the SOS site.



What's on Second?

4. Restrictions in a 1950's deed for our property restrict it to residential use only. The area has changed and this property now fronts on a highway. Can the owner alone release the restrictions, maybe with the joinder of the heirs of the original grantors?

Be cautious. Examine the restrictions to see if they specify who has the power to enforce them. One danger here is that this may be part of a common scheme of development. The grantor in the 1950's may have owned other property in the area and may have put similar restrictions on those properties. The restrictions may have been intended to benefit all the properties that are similarly restricted, and those other properties may be able to enforce the restrictions.



What's on Second?

4. Restrictions in a 1950's deed for our property restrict it to residential use only. The area has changed and this property now fronts on a highway. Can the owner alone release the restrictions, maybe with the joinder of the heirs of the original grantors?

If the original grantor retained the right to amend the restrictions, don't rely on that without question. Such retained rights have been held by Texas courts to be limited to as long as the grantor still has an interest in the restricted area, either by ownership or retained lien. If the grantor has sold all their interest the retained power to amend may have terminated.



What's on Second?

4. Restrictions in a 1950's deed for our property restrict it to residential use only. The area has changed and this property now fronts on a highway. Can the owner alone release the restrictions, maybe with the joinder of the heirs of the original grantors?

Since there may not be any amendment or termination procedure in the restrictions, this may require 100% agreement of the owners in the restricted area.



What's on Second?

4. Restrictions in a 1950's deed for our property restrict it to residential use only. The area has changed and this property now fronts on a highway. Can the owner alone release the restrictions, maybe with the joinder of the heirs of the original grantors?

Since the restrictions have been violated by numerous other owners, would Stewart consider express insurance? This is a possibility. If more than 30% of the properties violate a restriction, there is a good argument that the restriction has been so violated as to be unenforceable. But if all the violations are clustered in a distant part of the restricted area, we would be unlikely to agree to do this in a new part. Talk or email the underwriter.



What's on Second?

5. The owner has died and among the heirs is a minor.
How can we insure a conveyance of the minor's interest in the property?

Parents have the authority to manage the property of a minor child. But “manage” doesn't include the power to sell real estate for a minor. A full fledged guardianship is extremely expensive, time consuming and cumbersome. An possible alternative is Chapter 1351 of the Texas Estates Code, which can apply if the minor's interest is under \$150,000. A natural parent or conservator of the minor applies to the court for authority to sell the minor's interest in the property. After a hearing, the parent is given authority to convey and minor's interest. The minor's share of the proceeds is deposited in the court registry.



What's on Second?

6. There is a recorded transfer on death deed (TODD). The grantor in the TODD has sold the property to someone else. Do we need a conveyance from the grantees in the TODD?

A TODD is not an immediate conveyance. It only takes effect on the death of the grantor. In the meantime, the grantor has the authority to sell to third parties. A deed to a third party is a revocation of the TODD and ends its effectiveness.

A Lady Bird deed is different. It conveys a remainder interest immediately, but that interest is subject to divestiture if the life tenant chooses to sell or change remaindermen.



What's on Second?

7. The owner has a rental property that he wants to do a cash out loan on. He doesn't own where he now lives. He has a lease in California. Can we insure a cash out loan?

Could this property be considered homestead? In which case the only way to pull cash out would be a home equity loan. So, just what is a Texas homestead?



What's on Second?

7. The owner has a rental property that he wants to do a cash out loan on. He doesn't own where he now lives. He has a lease in California. Can we insure a cash out loan?
- The Texas Constitution, Article XVI, Section 51:
 - “...the homestead **in a city, town or village**, shall consist of **lot or contiguous lots** amounting to **not more than 10 acres of land**, together with any improvements on the land;...”
 - The “urban” homestead
 - Maximum is 10 acres
 - Must be contiguous parcels, adjoining, next to, touching
 - Watch for across the street or alley, platted lots extend to the center of a street or alley



What's on Second?

7. The owner has a rental property that he wants to do a cash out loan on. He doesn't own where he now lives. He has a lease in California. Can we insure a cash out loan?
- The Texas Constitution, Article XVI, Section 51:
 - “AMOUNT OF HOMESTEAD; USES. The homestead, **not in a town or city**, shall consist of **not more than two hundred acres** of land, which may be in **one or more parcels**, with the improvements thereon;...”
 - The “rural” homestead
 - Maximum is 200 acres
 - Can be in multiple parcels
 - Nothing about how the parcels have to be close to each other



What's on Second?

7. The owner has a rental property that he wants to do a cash out loan on. He doesn't own where he now lives. He has a lease in California. Can we insure a cash out loan?

Texas Property Code

Sec. 41.003. TEMPORARY RENTING OF A HOMESTEAD. Temporary renting of a homestead does not change its homestead character if the homestead claimant has not acquired another homestead.

If the owner has never resided in this property or claimed it as homestead on the tax rolls, it may be possible to insure a cash out loan on the basis that they are not a resident of Texas and can claim no homestead.



What's on Second?

8. An affidavit of claim has been filed against a property. The owner has brought in a Conditional Waiver and Release on Final Payment executed by the claimant before the lien was filed. Can we rely on it to delete the affidavit of claim?

On any form of conditional release we require evidence that the conditions have been met. This is a statutory form found in Chapter 53 of the Texas Property Code. It requires the signer to receive a check for a specific sum, for the check to be properly endorsed and for the check to clear. We would also be looking for evidence the claimant provide no additional labor or materials after this occurred.



What's on Second?

9. Title is in the name of a trustee of some sort of “land trust”. Can we insure this sale with just the trustee’s signature?

A trust is not a legal entity. It is where legal title to property is vested in one entity or person, the trustee, while beneficial title is in other parties. The trustee has a fiduciary duty to the beneficiaries to take care of the property with which they have been entrusted. The legal entity that represents the trust is the trustee. The trustee should hold title and is the plaintiff or defendant on behalf of the trust in any litigation. A trustee can be a beneficiary of the trust, but cannot be the sole beneficiary of the trust.



What's on Second?

9. Title is in the name of a trustee of some sort of “land trust”. Can we insure this sale with just the trustee’s signature?

We have recently seen “trusts” used in real estate transactions where the trustee is the sole beneficiary of the trust. We do not believe these meet the legal standard of a true trust and would require the joinder of the trustee/beneficiary individually and for their names to be checked.

Other “trusts” which put title in a trustee, but where the control over the property is entirely in the hands of the beneficiaries may also fail to be true trusts. Here again the joinder of the beneficiaries may be necessary.



What's on Second?

10A. The buyer is buying a tract without access behind the property he already owns and is getting a purchase money loan. The lender wants us to insure an access easement. How can we do this?

Rate Rule R-5 requires the Owner Title Policy to cover the same land as the Loan Policy for the Loan Policy to be a simultaneous issue. How do we get an access easement across the buyer's land into the OTP? You have the buyer give the seller an easement across his land. Then the buyer buys the land and the access easement from the seller. The interest of the lender in the easement prevents there being a merger of title, so both policies can include the access easement.



What's on Second?

10B. The owners bought 20 acres through us last year. Now they are doing a construction loan on 2 acres and want to upgrade their policy. Can they get a credit for their prior OTP and how do we figure it?

Don't think about the 2 acres. Upgrade the OTP on the 20 acres and issue the loan policy on the 2 acres. The loan policy will still be a simultaneous issue. It doesn't have to cover all the land in the OTP. It can just be a part. Sec. 41.003. TEMPORARY RENTING OF A HOMESTEAD. Temporary renting of a homestead does not change its homestead character if the homestead claimant has not acquired another homestead.

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