FAILURES OF RIGHTS OF FIRST REFUSAL AND OPTIONS AND THEIR PERILS FOR THE FAMILY FARM

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I. INTRODUCTION

As we all know, most agricultural operations are money poor and dirt rich.[1] For most agriculturalists, the most prevalent and valuable resource in their estate plan is their real property.[2] Which is why many estate plans for agriculturalists include tools such as trusts (watch out for tax issues), business entities (watch out for FSA-compliance issues), Right of First Refusals (ROFR), or Options to Purchase (Option), in attempts to keep the family farm or ranch together after their passing.[3]

While there can be many challenges to the effective use of a ROFR or Option, this paper will primarily discuss one challenge which has a

1. *See* Garrett Couts & Emily Daniel, *Ancillary Probate,* "*There's No Place Like Home"*, 29 DRAKE J. AGRIC. L. 299, 312 (2024) (citing *Farm Sector Income & Finances: Assets, Debt, and Wealth*, ECON. RSCH. SERV., U.S. DEP'T OF AGRIC. (Feb. 7, 2024)), https://aglawjournal.wp.drake.edu/wpcontent/uploads/sites/66/2024/11/e.-Couts-Final.pdf. [https://perma.cc/2EJH-XLUR].

2. *Estate Planning for Farmers and Ranchers*, PLAINVIEW LEGAL GRP. PLLC (Mar. 18), https://www.plainviewlegal.com/blog/farm-and-ranch-estate-planning [https://perma.cc/4MTH-4ZMZ].

3. Wagner Oehler, *How a Right of First Refusal Protects Family Farmland*, WAGNER OEHLER, LTD. (Feb. 18, 2025), https://www.wagnerlegalmn.com/how-a-right-of-first-refusal-protects-family-farmland/ [https://perma.cc/3TMQ-XCXP].

particularly detrimental impact upon agriculture—a conflicting, or weaponized, power of sale in the probate process.[4]

The "power of sale," commonly granted to executors and administrators of estates, has been frequently weaponized to deprive devisees of the family farm and ranch; unfortunately, Texas law not only enables this conversion but also provides significant protections for those involved in perpetrating it.[5]

II. RIGHT OF FIRST REFUSAL & OPTIONS OVERVIEW

A. Rights of First Refusal—Overview

A ROFR, regarding real property, is a contractual right, which empowers the holder with a "preferential" or "preemptive" right to purchase the subject property, should the property owner intend to sell.[6] The ROFR generally grants the holder the opportunity to purchase the property on the same terms offered by or to any third-party purchaser pursuing the property.[7]

1. Establishing and Interpreting a ROFR

For a ROFR regarding real property, the statute of frauds applies, which means the property must be adequately described.[8] There must also be consideration.[9] However, in Texas, "a preferential right to purchase or a right of first refusal does not violate the rule against perpetuities."[10]

As a contractual right, ROFRs are generally construed under general contract principles of interpretation.[11] The primary concern is to "ascertain and to give effect to the parties' intentions as expressed in the document."[12] The document is reviewed holistically, and the courts "attempt to harmonize and give effect to all of the provisions of the contract."[13] Courts will not consider a contract ambiguous solely because there is disagreement over the interpretation.[14] If one interpretation validates the contract while the other

4. *See* discussion *infra* Section III.B.

5. *See* TEX. EST. CODE ANN. § 356.002.

6. *E.g.*, Hicks v. Castille, 313 S.W.3d 874, 880 (Tex. App.—Amarillo 2010, pet. denied).

7. *Id.*

8. TEX. PROP. CODE ANN. § 5.021; TEX. BUS. & COM. CODE ANN. § 26.01; *see, e.g.*, Morrow v. Shotwell, 477 S.W.2d 538, 540–41 (Tex. 1972) (stating the principle that compliance with the statute of frauds and inclusion of an adequate legal description is required to effectuate a transfer of title).

9. Robert K. Wise, Andrew J. Szygenda, Thomas F. Lillard, *First-Refusal Rights Under Texas Law*, 62 BAYLOR L. REV. 435, 444 (2010) (citing Martin v. Lott, 482 S.W.2d 917, 920 (Tex. Civ. App.—Dallas 1972, no writ)); *see also* Jarvis v. Peltier, 400 S.W.3d 644, 651 (Tex. App.—Tyler 2013, pet. denied).

10. *Jarvis*, 400 S.W.3d at 652.

11. *See* Mulberry v. Burns Concrete, Inc., 435 P.3d 509, 512 (Idaho 2019) (explaining that courts generally apply ROFRs as contract principles).

12. *Hicks*, 313 S.W.3d at 879.

13. *Id.*

14. *Id.* at 880.

invalidates the contract, the court "*must* adopt the construction that validates the contract."[15]

2. Exercising a ROFR—A Volley Rally

A ROFR has been referred to as a "dormant option" because once a landowner expresses an intention to sell the property, the right "matures or 'ripens' into an enforceable option."[16]

Much like a rally of volleys on the tennis court, navigating the function of a ROFR is a back-and-forth pendulum swing of rights and obligations between the granting party and rightholder.[17] At the risk of oversimplifying the process, here is a summary:

> 1. **Offer**. A third-party offer is tendered to the landowner.[18]
> 2. **Intent & Notice**. If the landowner intends to sell the property on the offered terms, the landowner tenders the offered terms to the rightsholder and expresses an intention to sell.[19]
> 3. **Acceptance or Rejection**. The rightholder is then "obligated" to either purchase the property on the exact terms offered or permit its sale to another.[20]
> 4. **Agreement**. If the rightholder accepts the terms of the third-party offer, a contract for the sale of the property is then created.[21]

The pace and rules of the match can vary based upon the terms of the ROFR, but also on the terms of the third-party offer, particularly because the rightholder's exercise of the now matured Option must be "positive, unconditional, and unequivocal[,]" and any "new demand, condition, or modification of the terms" by the rightholder is considered a rejection of the offer.[22]

The somewhat counter-intuitive reality is that the third party is truly in control of the offer.[23] It is generally the third-party offer that triggers the ROFR, unless the landowner refuses or has no intention to sell, and the third party will be pressing to move things along.[24]

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15. *Id.* (emphasis added).
16. *Id.*
17. *See generally id.* (Explaining the different rights held by both the granting party and the rightholder).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 881.
22. *Id.* at 880–81.
23. *Id.* at 880.
24. *See* City of Brownsville v. Goldenspread Elec. Coop., Inc., 192 S.W.3d 876, 880 (Tex. App.—Dallas 2006, pet. denied).

3. Breach of a ROFR

Enforcement and breach of a ROFR were summarized as follows:

> A purchaser from a seller who has given a right of first refusal to buy takes the property subject to that right. A transfer in violation of the preemptive right is equivalent to a declaration by the owner that [they] intend[] to sell the property. Consequently, when the rightholder learns of a sale in violation of [their] right, [they] again ha[ve] the opportunity to elect to purchase or decline to purchase within the time frame specified in the contract creating the right of first refusal. The rightholder does not have a duty to act in order to exercise [their] preferential purchase right unless and until [they] receive[] a reasonable disclosure of the terms of the sale. The new property owner has a duty to make reasonable disclosure of the terms of the purchase to the rightholder.[25]

In *Jarvis v. Peltier*, the landowner conveyed the subject property without providing notice to the rightholder.[26] The rightholder learned of the sale approximately two years after the sale was conducted.[27] The rightholder requested the terms of the sale so they could exercise their right, but the seller and buyer refused to provide the terms.[28] The rightholder sued and obtained the terms through discovery.[29]

The court held as follows: (1) the option agreement was enforceable against the buyer of the property; (2) the buyer had acquired the property subject to the option agreement; (3) the rightholder was entitled to enforce the option agreement against the buyer; and (4) the buyer must convey the property to the rightholder on the same terms as the buyer acquired the property from the seller.[30]

No Bona Fide Purchaser (BFP) defense argument was made in the case—presumably—because the Option had been recorded in the public records, and the title policy commitment disclosed the recording in the exceptions from coverage.[31]

B. Options—Overview

An Option grants the holder the right to "buy certain property at a fixed price within a certain time" and to compel a sale on the stated terms.[32]

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25. *Jarvis*, 400 S.W.3d at 652.
26. *Id.* at 653.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 657–58.
31. *Id.* at 648.
32. *E.g.*, *id.* at 650.

1. Establishing an Option

Similar to a ROFR, an Option must also satisfy the statute of frauds.[33] Additionally, it must meet the same basic contract criteria.[34]

However, unlike a ROFR, an Option must include the price, or a means by which the price can be determined.[35] Additionally, while ROFRs are not subject to the Rule Against Perpetuities (RAP), Options do not have such a luxury and remain subject to RAP.[36]

> The purpose of purchase options is to give the optionee the right to purchase at [their] election within an agreed period at a named price, which presumably was considered satisfactory by the optionor in case the option should be exercised at any time during the option term.[37]

2. Exercising an Option

Options are exercised by strict compliance with their terms.[38] By law and in equity, time is of the essence in Option contracts.[39] However, that does not preclude the parties to an Option from modifying it or the terms of the underlying sale by mutual agreement.[40] If an Option is properly exercised, it ripens into an enforceable contract for the sale of the property.[41]

C. Distinctions Between ROFRs and Options

Although a ROFR matures into an Option, there are critical differences—particularly critical when you are considering both ROFR and Options with a client.[42] The primary—and most potent—distinctions are: what triggers the right, and who controls the terms of the offer or eventual sale of the subject property.[43]

Generally, a ROFR is a reactive right, while an Option is a proactive right.[44] With a ROFR, the landowner "remains the master" over the terms of

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33. *E.g.*, Haskell v. Merrill, 242 S.W. 331, 334 (Tex. App.—Amarillo 1922, writ dism'd w.o.j.).
34. *Id.*
35. *See* Naylor v. Parker, 139 S.W. 93, 98 (Tex. App.—Fort Worth 1911, no writ); *Jarvis*, 400 S.W.3d at 650.
36. Maupin v. Dunn, 678 S.W.2d 180, 182 (Tex. App.—Waco 1984, no writ).
37. Sinclair Refin. Co. v. Allbritton, 218 S.W.2d 185, 188 (Tex. 1949).
38. Herman v. Shell Oil Co., 93 S.W.3d 605, 609 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (citing Zeidman v. Davis, 342 S.W.2d 555, 558 (Tex. 1961)).
39. *E.g.*, McCaleb v. Wyatt, 257 S.W.2d 880, 881 (Tex. App.—Fort Worth 1953, writ ref'd n.r.e.).
40. *Herman*, 93 S.W.3d at 609 (citing Humble Oil & Refining Co. v. Westside Investment Corp., 428 S.W.2d 92, 94–95 (Tex.1968)).
41. *E.g.*, *McCaleb*, 257 S.W.2d at 881.
42. *Hicks*, 313 S.W.3d at 881
43. *Id.*
44. *Id.*

the sale—or whether a sale will occur at all—so long as the terms are "commercially reasonable, imposed in good faith, and not specifically designed to defeat the [ROFR]."[45] Alternatively, with an Option, an Option holder controls when and if an Option is exercised, and has direct involvement in the negotiation of the terms of the sale when crafting an Option.[46]

A ROFR rightholder has "no right to compel a sale or to prevent a sale; they only have the right to be offered the property at a fixed price or at a price offered by a BFP if and when the owner decides to sell."[47] On the other hand, an Option holder has the right "*to compel* a sale of property on the stated terms before the expiration of the option."[48]

Importantly, a ROFR rightholder does not have any authority or right to negotiate the terms of the third-party offer or to participate in the negotiations between the landowner and the third party, except to the extent of asserting the opportunity to purchase on the negotiated terms.[49]

D. Common Uses in Agricultural Practice—Ethics and Practice Tips

Both ROFRs and Options are increasingly used in agricultural law, both from a contractual and an estate planning standpoint.[50] These similarities are not surprising given that most agricultural operations are money poor and dirt rich, with their most prevalent and valuable resource being real property.[51]

In my experience, the most common occurrences of ROFRs and Options are in farm or grazing leases (or other surface leases) and within a landowner's last will and testament.[52]

1. Selection

When a client walks in with a lease or requests a will, and a ROFR or Option is at play, it is worth the time and effort to compare and contrast their choices, to ensure the client fully understands which of the two tools will accomplish their intended goals.[53] Beyond the legal terms of the choices, the

45. *Id.*

46. *E.g.*, *Jarvis*, 400 S.W.3d at 650.

47. *Hicks*, 313 S.W.3d at 881.

48. *Id.* (emphasis added).

49. *See id.*; Mr. W Fireworks, Inc. v. NRZ Inv. Group, L.L.C., 677 S.W.3d 11, 12–13 (Tex. App.—El Paso 2023, pet. denied).

50. Peggy Kirk Hall et al., *Planning for the Future of Your Farm Bulletin Series*, NAT'L AGRIC. L. CTR. (Aug. 2022), https://nationalaglawcenter.org/wp-content/uploads/assets/articles/PlanningforFuture/PFF_Full_Series.pdf [https://perma.cc/e7YU-YF2L].

51. *See* Couts & Daniel *supra* note 1.

52. Buck V. Sweeney, *Farm Leases: Is Your Right of First Refusal Drafted Correctly?* AXLEY LLP (May 26, 2015), https://www.axley.com/publication_article/farm-leases-is-your-right-of-first-refusal-drafted-correctly/ [https://perma.cc/QU4T-J8MW].

53. *Hicks*, 313 S.W.3d at 881.

client should understand the distinctions between the functioning of the two tools.[54]

Depending upon which client you represent, landowner or rightholder, the type of right negotiated can greatly impact which party holds the power over the potential sale and what terms will apply to the sale.[55] Is the client the landowner or the potential rightholder?[56] Do they want to hold control over the future sale, or are they willing to be reactive when an offer comes along or a sale is compelled upon them?[57] Do they want to negotiate terms now or later?[58] Do they know to what extent they will be able to negotiate terms?[59] All of these questions are critical to understanding the functioning of the tools chosen.[60]

2. Drafting—"Tools in the Box"

There is an understanding that a ROFR is reactive (retaining control for the landowner), and an Option is proactive (providing the Option holder with control over the occurrence of a sale); however, these are contractual relationships.[61] When negotiating a lease or drafting a will, each can include terms specific to the property and parties beyond the typical run-of-the-mill agreement—within reason.[62] These specific terms could better balance the power between the parties or create certainty for future exercise of the rights granted.[63]

For example, in *Hicks*, Castille purchased ninety-six acres out of a 100-acre tract from Hicks, who then granted Castille a ROFR regarding the remaining four acres.[64] Hicks had a lease agreement with American Tower, L.P. on a 0.28-acre parcel of the remaining four acres.[65] The ROFR read as follows:

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54. Wise et al*., supra* note 9 at 436, 444.

55. *Compare Hicks*, 313 S.W.3d at 880–81, *with* Rollingwood Tr. No. 10 v. Schuhmann, 984 S.W.2d 312, 315 (Tex. App.—Austin 1998, no pet.).

56. *See generally* Herman v. Shell Oil Co. 93 S.W.3d 605, 607 (explaining that Shell was the potential rightholder and Herman was the landowner).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Difference Between an Option & Right of First Refusal*, BGSW L. (Oct. 16, 2024), https://bgswlaw.com/option-vs-right-of-first-refusal/ [https://perma.cc/JYR8-ZBW3].

62. *E.g.*, *Hicks*, 313 S.W.3d at 883 (holding that a ROFR did not contain terms which would prevent the landowner from selling a portion of the property as opposed to all the property and that such a restriction would be an "unreasonable restraint on alienation" and stating that such terms could have been included in the agreed terms of the ROFR.).

63. *Id.*

64. *Id.*

65. *Id.*

> For and in consideration of the sum of TEN AND NO/100 ($10.00) DOLLARS, the purchase of certain real estate located in Wheeler County, Texas, owned by CECIL HICKS, hereinafter referred to as "Hicks," by TIM CASTILLE, hereinafter referred to as "Castille," that the said Hicks gives Castille the right of first refusal to purchase a four (4) acre tract of land and the American Tower Lease currently in effect on said land, said four acres more fully described by metes and bounds on Exhibit "A" attached hereto and incorporated herein for all purposes.
>
> Such right of first refusal shall be exercised within sixty (60) days of receipt of written notice via certified mail, return receipt requested, from Hicks to Castille, that Hicks no longer desires to use such real estate or desires to sell same. In the event Castille does not exercise the right to purchase within sixty (60) days, this right of first refusal shall terminate and be of no further force and effect.
>
> DATED this 30th day of May, 2006.[66]

In April 2008, Hicks sent Castille a notice of intent to sell the 0.28-acre tract and provided the terms of the offer (among other things, a purchase price of $50,000), which then triggered the ROFR.[67] Castille did not exercise his now matured Option, but instead filed suit for declaratory judgment seeking to establish that Hicks could not sell a portion of the property but must keep the entire four-acre parcel intact.[68]

The court ultimately rejected this argument, reasoning:

> Although the Agreement does refer to "the four-acre tract," it does not specifically provide that the right of first refusal is limited to only the four-acre tract intact. The parties could have negotiated more specific terms but did not do so. We will not read terms into the Agreement, especially not when those terms would lead to an unreasonable construction. . .
>
> [W]e conclude that the Agreement permits the sale of a portion of the four acres so long as Hicks gives proper notice in accordance with the Agreement.[69]

Consider including clarifying terms in your ROFR language that describes the exact procedures that should be followed, such as timeframes for providing notice and acceptance or rejection of the offer, and timeframes for closing (which may be impacted by the third-party offer).[70] In the words of Professor Gary Terrell: "Drafting gives you tools in the box."[71]

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66. *Id.* at 878.
67. *Id.*
68. *Id.*
69. *Id.* at 883.
70. *See id.*
71. Gary R. Terrell, Adjunct Professor of Law, Tex. Tech Univ. Sch. of L., Tex. Tech. Univ. Sch. of L., Tex. Real Prop. Fin. Transactions (Jan. 21, 2016).

There are limits to what drafting can do.[72] For example, simply labeling an agreement or right as a "Right of First Refusal" or an "Option to Purchase" alone will not ensure that a court interprets or applies the right in that manner.[73] In *Jarvis v. Peltier*, the landowner granted an "Option to Purchase" a four-acre tract.[74] However, the court held that the agreement truly created a ROFR, rather than an Option.[75] The court reasoned that the agreement was not an Option as it failed to establish both a fixed purchase price (or a means to establish the price), or a fixed expiration date.[76] Additionally, the agreement stated, if the landowner desired to sell the property and received an offer, then the landowner would tender that offer to the rightholder who would have thirty days to accept.[77] The court reasoned that these terms created a "preemptive" right more comparable to a ROFR rather than an Option.[78]

Therefore, the lesson to be learned is that the drafting of either a ROFR or an Option can greatly impact the duties and obligations of the parties, establish timelines, or alter the functioning of the rights; however, you cannot call an apple an orange and expect the courts to follow along.[79] Additionally, many documents combine the two rights into a single agreement or even a single provision.[80] It is important to avoid this commingling.[81] Be clear and distinctly express whether you are creating a ROFR or an Option, and that clarification should be established not just by the nomenclature you proscribe to the rights but by the terms you draft for how the rights function.[82]

III. FAILURES OF THE LAW

A. The Critical Conflict—Probate "Power of Sale"

While there can be many challenges to the effective use of a ROFR or an Option, this paper will primarily discuss one challenge which has a particularly detrimental impact upon agriculture—a conflicting, weaponized power of sale in the probate process.[83]

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72. *Jarvis*, 400 S.W.3d at 650.

73. *Id.*; *see also* Sinclair Refn. Co. v. Allbritton, 218 S.W.2d 185, 188 (Tex. 1949) ("[i]f the price is to be based on what a third party may offer, the result is not a purchase option in the usual sense-what the contract here calls 'the exclusive option and privilege of purchasing'—but rather a mere right of refusal which should hardly be called an option at all.").

74. *Jarvis*, 400 S.W.3d at 650.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *See* discussion *supra* Part II.

80. *See, e.g.*, *Jarvis*, 400 S.W.3d at 650; *Hicks*, 313 S.W.3d at 878.

81. *See, e.g.*, *Jarvis*, 400 S.W.3d at 650; *Hicks*, 313 S.W.3d at 878.

82. *See, e.g.*, *Jarvis*, 400 S.W.3d at 650; *Hicks*, 313 S.W.3d at 878.

83. *See* discussion *infra* Section III.B.

B. "The Power of Sale" in Probate Estates—A Common, But Dangerous, Tool

1. "The Power of Sale"—Commonly Used

It is common for a last will and testament to name an independent executor empowered to act independently of general court oversight.[84] It is also common for the executor to be granted the power of sale.[85] However, practitioners should know that while the executor having an express authority to sell estate assets is useful to the administration of the estate, particularly in generating liquid cash to satisfy debts, it is also an authority fraught with potential abuse.[86]

Generally, executors are considered fiduciaries.[87] "When an independent executor takes the oath and qualifies in that capacity, [they] assume[] all duties of a fiduciary as a matter of law . . . ."[88] Executors owe beneficiaries of an estate fiduciary duties equivalent to those applicable to trustees.[89]

While executors are considered fiduciaries, subject to a litany of fiduciary duties, they are permitted to exercise extensive authority over the estate and its assets within those duties.[90] The executor's authority is expanded when they are appointed as an independent executor, with such authority augmented further when the executor is granted a power of sale.[91]

2. "The Power of Sale"—Authority

Establishing the power of sale is commonly expressly granted, but it can also be established in other instances.[92] A power of sale can be expressly given, implied, or given by necessity to carry out the terms of the will.[93]

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84. *See* TEX. EST. CODE ANN. §§ 401.001–405.012.

85. *See id.* § 402.052.

86. *See* Oehler, *supra* note 3.

87. TEX. EST. CODE ANN. § 351.101.

88. Punts v. Wilson, 137 S.W.3d 889, 892 (Tex. App.—Texarkana 2004, no pet.) (citing Humane Soc. of Austin & Travis Cnty. v. Austin Nat. Bank, 531 S.W.2d 574, 577 (Tex. 1975); Geeslin v. McElhenney, 788 S.W.2d 683, 686–87 (Tex. App.—Austin 1990, no writ)).

89. *E.g.*, Ertel v. O'Brien, 852 S.W.2d 17, 20 (Tex. App.—Waco 1993, writ denied) ("The executor of an estate is held to the same high fiduciary duties and standards in the administration of a decedent's estate as are applicable to trustees.") (citing Humane Soc. of Aus. & Travis Cnty. v. Aus. Nat. Bank, 531 S.W.2d 574, 577 (Tex.1975)); Punts v. Wilson, 137 S.W.3d 889, 891 (Tex. App.—Texarkana 2004, no pet.) ("The relationship between an executor and the estate's beneficiaries is one that gives rise to a fiduciary duty as a matter of law."); *see also* TEX. EST. CODE ANN. § 113.051.

90. TEX. EST. CODE ANN. § 351.051–54.

91. *Id.* § 401.006.

92. Irons v. Fort Worth Sand & Gravel Co., 260 S.W.2d 629, 631 (Tex. Civ. App.—Fort Worth 1953, writ ref'd n.r.e.).

93. *Id.*

Generally, when the will authorizes a sale of estate property, a court order is not required for the sale to be valid.[94] However, a power of sale can exist in an independent administration even when there is no mention of the power in the will or court order of the probate.[95] Additionally, devisees may consent to the inclusion of a power of sale in the court order.[96]

> 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.[97]

The purposes for which a personal representative may seek to sell real property include the following:

> (1) [to] pay:
> (A) expenses of administration;
> (B) the decedent's funeral expenses;
> (C) expenses of the decedent's last illness;
> (D) allowances; and
> (E) claims against the estate; or
>
> (2) [to] dispose of an interest in estate real property if selling the interest is considered in the estate's best interest.[98]

While a personal representative under a dependent administration would need to apply for approval to sell property for one of these reasons, an independent administrator or executor may do so without any such oversight, including for the alleged purpose of the "best interest" of the estate.[99]

3. "The Power of Sale" in Probate Estates—Limitations

Regardless of these seemingly expansive powers or interpretations, which will establish such powers, not every reference to a sale of property within the terms of a will is equivalent to a grant of the power of sale.[100] The

94. TEX. EST. CODE ANN. § 356.002(a).
95. *Id.* §§ 356.251(2), 402.052.
96. *Id.* § 401.006.
97. *Id.* § 402.052.
98. *Id.* § 356.251.
99. *Id.* § 401.006
100. *See* Irons v. Fort Worth Sand & Gravel Co., 260 S.W.2d 629, 631 (Tex. Civ. App.—Fort Worth 1953, writ ref'd n.r.e.).

testator's intention to give the executor the power to sell real property must be gathered from a reasonable construction of the whole will.[101]

"The mere appointment of an executor of a will that directs a sale of land does not of itself confer on [them] the power to sell" because "[i]t is only [when] the will directs [them] or the law binds [them] to see to the application of the proceeds that [they] become[] invested with the power of sale."[102] Additionally, "[i]f the land directed to be sold is devised, this is regarded as evidence of the intention of the testator that the fund is not to be distributed by the executor, and the power of sale vests in the devisee."[103]

Further, even if a power of sale is established, any terms of the will can dictate limitations upon the power.[104] "Any particular directions in the testator's will regarding the sale of estate property *shall* be followed unless the directions have been annulled or suspended by court order."[105]

Therefore, even if a power of sale can be established by various means, even through implication, that power is limited to the purpose(s) stated in the will, or for one of the express purposes provided by law.[106]

4. "The Power of Sale"—The Rogue and the Ramifications

Why focus on the probate power of sale?[107]

As already stated, most agricultural operations are money poor and dirt rich, with their most prevalent and valuable resource being real property.[108] For most agriculturists, the primary asset to be addressed by their estate plan is their real property.[109] This is why many people attempt to include trusts (watch out for tax issues), business entities (watch out for FSA compliance issues), ROFRs, or Options, as different tools to keep the family farm or ranch together after their passing.[110]

Even if these restrictions are put in place, a rogue executor or administrator could wield the widely applied power of sale to convey the farm or ranch out of the estate, and deprive the devisees of the property to

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101. *Id.*

102. *Id.*

103. *Id.*

104. TEX. EST. CODE ANN. § 402.052.

105. *Id.* § 356.002(b) (emphasis added); *see also In re* Estate of Wharton, 632 S.W.3d 597, 606 (Tex. App.—El Paso 2020, no pet.) (stating that the Testator's intent as express in the will's four corners should be followed); Marlin v. Kelly, 678 S.W.2d 582, 586–87 (Tex. App.—Houston [14th Dist.] 1984), aff'd, 714 S.W.2d 303 (Tex. 1986) (stating because the fundamental rule is that the intention of the testator be followed and there can be limitations placed on the devise of property such as conditional bequests).

106. TEX. EST. CODE ANN. §§ 402.052, 356.002; *see* Smith v. Hodges, 294 S.W.3d 774, 777, 779–80 (Tex. App.—Eastland 2009, no pet.).

107. Author's original thought.

108. *See* Couts & Daniel, *supra* note 1.

109. *See* Plainview Legal Group PLLC, *supra* note 2.

110. 2 WILLIAM H. BYRNES, TEX. EST. P. §§ 170.05, 60.05 (Matthew Bender 2025); Mr. W Fireworks, Inc. v. NRZ Inv. Grp., L.L.C., 677 S.W.3d 11, 23 (Tex. App.—El Paso 2024, pet. denied); Caruso v. Young, 582 S.W.3d 634, 639 (Tex. App.—Texarkana 2019 no pet.).

which they obtained vested title upon the death of the decedent.[111] Recovery of the land will be nearly impossible (unless an heir has negotiating leverage and significant financial resources) and almost certainly impossible if there is BFP defense.[112] The funds from the sale, although due to devisees after administration of the estate, will not replace the history and sentimental value of the prior property, and in fact will not replace the property at all.[113]

Therefore, the heirs are left with only claims of fiduciary breach, which will only deplete the estate resources further and may only lead them to pursue a judgment-proof defendant.[114]

C. The Bona Fide Purchaser (BFP) Defense

There are two primary BFP defenses in Texas law regarding real property.[115] Generally, the first defense applies to real property transactions.[116] The second defense is provided in the Texas Estates Code and specifically applies to real property conveyances from estates.[117]

1. The Texas Bona Fide Purchaser Defense—Generally

"Status as a bona fide purchaser is an affirmative defense to a title dispute."[118] To qualify, the purchaser must have: (1) acquired property, (2) in good faith, (3) for value, and (4) without notice of any third-party claim or interest.[119] Generally, items two and four are the crux of the issue in a title dispute which involves the BFP defense.[120]

2. The Texas Bona Fide Purchaser Defense—Estates Code

The BFP defense provided under the Texas Estates Code states as follows:

> (a) This section applies only to an act performed by a qualified executor or administrator in that capacity and in conformity with the law and the executor's or administrator's authority.
> (b) An act continues to be valid for all intents and purposes in regard to the rights of an innocent purchaser who purchases any of the estate property

111. TEX. EST. CODE ANN. § 402.052.
112. *Id.* § 402.052.
113. Danbill Partners, L.P. v. Sandoval, 621 S.W.3d 738, 747 (Tex. App.—El Paso 2020, no pet.).
114. TEX. EST. CODE ANN. § 403.059.
115. *Id.* §§ 307.001, 33.055.
116. *Id.* § 307.001.
117. *Id.* § 33.055.
118. Madison v. Gordon, 39 S.W.3d 604, 606 (Tex. 2001).
119. *E.g.*, *id.*
120. *Id.*

> from the executor or administrator for valuable consideration, in good faith, and without notice of any illegality in the title to the property, even if the act or the authority under which the act was performed is subsequently set aside, annulled, and declared invalid.[121]

The scope of notice or inquiry that might be imposed upon a purchaser of property from an estate is diluted significantly by Texas Estates Code Section 402.053, which states as follows:

> (a) A person who is not a devisee or heir is not required to inquire into the power of sale of estate property of the independent executor or independent administrator or the propriety of the exercise of the power of sale if the person deals with the independent executor or independent administrator in good faith and:
>
> (1) a power of sale is granted to the independent executor in the will;
> (2) a power of sale is granted under Section 401.006 in the court order appointing the independent executor or independent administrator; or
> (3) the independent executor or independent administrator provides an affidavit, executed and sworn to under oath and recorded in the deed records of the county where the property is located, that the sale is necessary or advisable for any of the purposes described in Section 356.251(1).
>
> (b) As to acts undertaken in good faith reliance, the affidavit described by Subsection (a)(3) is conclusive proof, as between a purchaser of property from the estate, and the personal representative of an estate or the heirs and distributees of the estate, with respect to the authority of the independent executor or independent administrator to sell the property. The signature or joinder of a devisee or heir who has an interest in the property being sold as described in this section is not necessary for the purchaser to obtain all right, title, and interest of the estate in the property being sold.
> (c) This subchapter does not relieve the independent executor or independent administrator from any duty owed to a devisee or heir in relation, directly or indirectly, to the sale.[122]

This provision eliminates the need for a purchaser to investigate the power of sale, provided that certain conditions are met, namely negotiations in good faith and a requirement that the will, a court order, or an affidavit references the power of sale.[123] It does not, however, relieve the executor of duties owed to devisees or heirs.[124]

A purchaser's reliance on the affidavit is limited to sales conducted only for the prescribed purposes stated in Section 356.251(1), and those

121. TEX. EST. CODE ANN. § 307.001.
122. *Id.* § 402.053.
123. *Id.* § 402.053(1), (3).
124. *Id.* § 402.053(c).

limitations do not include a sale by the executor for the ambiguous purpose of the "best interest" of the estate.[125] A purchaser relying on an affidavit will not be able to rely upon the BFP defense, unless they carry the burden of proof in establishing that the sale was conducted by the executor for one of the proscribed purposes of Section 356.251(1).[126]

Therefore, the purchaser does—minimally—have to review at least one of the three documents listed: will (probate records), court order (probate records), or affidavit (property records), and such document must grant the power of sale (will or court order) or provide for such a power under Section 356.251(1) (affidavit).[127]

While Section 307.001 imposes relatively identical BFP defense standards upon purchasers from an estate, Section 402.053 sequesters the notice burden, which applies to other BFP's notice, which is contained in one of three places—the will, the court order, or an affidavit.[128]

D. Notice

For a purchaser to utilize the BFP defense, and specifically the defense provided by Section 307.001, they must first qualify as a BFP, meaning they (1) purchased the property from the executor or administrator, (2) in good faith, (3) for valuable consideration, and (4) without notice of any illegality in the title to the property.[129]

1. Types of Notice—Actual and Constructive, But Also Implied and Inquiry

Many sources—statutes, cases, secondary, or otherwise—will discuss "notice" as a melting pot of various, but distinct, types of notice.[130] Essentially, there are four types of notice: actual, constructive, implied, and inquiry.[131]

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125. *Id.* § 402.053(a)(3).

126. *See, e.g.*, Gatesville Redi-Mix, Inc. v. Jones, 787 S.W.2d 443, 445 (Tex. App.—Waco 1990, writ denied) ("It is the settled rule surrounding the sale of real estate by an independent executor that where the sale was not authorized by the will the burden of proof is on the purchaser to show the existence of debts against the estate or other such conditions that would have authorized the probate court to have ordered the sale."); TEX. PROP. CODE ANN. TIT. 2—APP. TITLE EXAMINATION STANDARDS 11.30, cmt. ("A good-faith, third-party purchaser who relies upon an affidavit described in TEX. ESTATES CODE ANN. § 402.053 is protected only if the sale was made for the reasons set out in TEX. ESTATES CODE ANN. § 356.251(1), that is, for administrative expenses, funeral and last-illness expenses, allowances, and claims.").

127. TEX. EST. CODE ANN. § 356.251.

128. *Compare id.* § 307.001, *with id.* § 402.053(a), *and* standard BFP defense as found in Madison v. Gordon, 39 S.W.3d 604, 606 (Tex. 2001).

129. TEX. EST. CODE ANN. § 307.001(b).

130. Cambridge Prod. v. Geodyne Nominee Corp., 292 S.W.3d 725, 732–33 (Tex. App.—Amarillo 2009, pet. denied).

131. *Id.*

"Notice may be constructive or actual."[132] Actual notice and constructive notice are "by law entirely distinct and apart from each other."[133]

> Whatever brings to the party sought to be charged express information or fairly puts him upon inquiry, as we have seen, is actual notice of those facts which reasonable use of the means at hand would have discovered; and even though this information or duty of inquiry arises in connection with an abortive effort to create a constructive notice, it nevertheless is actual notice. Thus, where a purchaser of land is informed of a recorded deed which was not entitled to record, [they are] nevertheless charged with notice of the grantee's rights.[134]

"The two kinds of notice recognized by law are entirely distinct and apart from each other. Constructive notice is binding in the absence of actual notice, and likewise actual notice is binding independent of any question of constructive notice."[135]

> If a fact is recited in a deed through which a party claims title to land, [they are] held to have notice of that fact. If the facts recited (in a deed through which a party claims title) are sufficient to put a [person] upon inquiry, [they are] charged with notice of those facts which might have been obtained by prosecution of inquiry with reasonable diligence. This is for the reason that the purchaser is entitled to see all the muniments of title, and therefore is presumed to have seen them. If, in any deed through which a purchaser's title is adduced there is a recital or reference to another deed or instrument collateral to the chain of title in which [they] make[] [their] purchase (or not a part of the direct series), [they] would, by means of such recital or reference, have notice of this collateral instrument, or its contents, and all the facts indicated, by which it might be ascertained, through inquiry prosecuted with reasonable diligence, and such notice extends to all deeds and other instruments falling properly within the preceding rules, whether recorded or unrecorded.[136]

a. Actual, Inquiry, & Implied Notice

Actual notice is established by the personal information or knowledge of the party charged with notice.[137] It consists of "express information of a

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132. *Madison*, 39 S.W.3d at 606 (Tex. 2001) (citing *Flack v. First Nat'l Bank*, 226 S.W.2d 628, 631 (Tex.1950); *American Surety Co. v. Bache*, 82 S.W.2d 181, 183 (Tex. Civ. App.—Fort Worth 1935, writ ref'd)).

133. *See* Hexter v. Pratt, 10 S.W.2d 692, 693 (Tex. Comm'n App. 1928).

134. *Id.* at 694 (citations omitted).

135. *Id.* at 693–94.

136. Tuggle v. Cooke, 277 S.W.2d 729, 731 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.) (citing Henningsmeyer v. First State Bank of Conroe, 192 S.W. 286 (Tex. Civ. App.—Beaumont 1916), writ dismissed, 109 Tex. 116, 195 S.W. 1137 (1917)).

137. *E.g.*, *Madison*, 39 S.W.3d at 606.

fact . . . ."[138] However, actual notice may also be established by a duty of inquiry imposed upon the party.[139]

> In law whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand, which if pursued by the proper inquiry the full truth might have been ascertained. Means of knowledge with the duty of using them are in equity equivalent to knowledge itself. Where there is a duty of finding out and knowing, negligent ignorance has the same effect in law as actual knowledge. So that, in legal parlance, actual knowledge embraces those things of which the one sought to be charged has express information, and likewise those things which a reasonably diligent inquiry and exercise of the means of information at hand would have disclosed.[140]

The issue then becomes when does an inquiry duty arise, which is summarized as follows:

> In other words, whatever fairly puts a person upon inquiry is actual notice of the facts which would have been discovered by reasonable use of the means at hand. . .
>
> Whatever puts a person on inquiry ordinarily amounts in law to notice, provided inquiry has become a duty and would lead to knowledge of the facts by the exercise of ordinary diligence and understanding. In other words, one who has knowledge of such facts as would cause a prudent [person] to make further inquiry, is chargeable with notice of the facts which, by use of ordinary intelligence, [they] would have ascertained.[141]

To further complicate the equation, actual notice also includes implied notice, which is as follows:

> [K]nowledge will be imputed and may be implied from circumstances where the circumstances known to one concerning a matter in which [they are] interested are sufficient to require him, as an honest and prudent person, to investigate concerning the rights of others in the same matter, and diligent investigation will lead to discovery of any right conflicting with [their] own.[142]

138. *Hexter*, 10 S.W.2d at 693.
139. *Id.* at 694.
140. *Id.* at 693.
141. Flack v. First Nat. Bank of Dalhart, 226 S.W.2d 628, 631–32 (Tex. 1950) (citations omitted).
142. *Id.* at 632.

b. Constructive Notice

"Constructive notice is notice the law imputes to a person not having personal information or knowledge."[143] In other words, constructive notice may apply when actual notice is absent.[144]

> Constructive notice is as effectual and binding as actual notice, but it is the very opposite of actual notice and would not exist but for statute. It is the legal effect prescribed by law of certain things most frequently illustrated by registration statutes, lis pendens notices, and the like. Unlike actual notice, the inference is not rebuttable.[145]

However, as previously discussed, regarding purchases from an estate, the Texas Estates Code provides specific limitations of the general notice rules of law for third-party purchasers.[146] The effect of notice upon a purchaser from estates is even further muted by a split among Texas courts as to whether probate records, despite being publicly available, are considered "recorded" or "of record" for notice purposes and the BFP defense.[147]

2. Recording as Notice

In terms of real property, the primary forms of notice are actual notice, which is based on the knowledge of the parties, and constructive notice, established through recorded documents in the public records.[148] An instrument that is properly recorded is: "(1) notice to all persons of the existence of the instrument; and (2) subject to inspection by the public."[149] However, notice established by recording is limited to the county in which the recording occurs.[150] The purpose of the property records—and recording within them—is to provide notice and establish the chain of title.[151]

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143. *E.g.*, *Madison*, 39 S.W.3d at 606 (discussing constructive notice in relation to possession).

144. *Id.*

145. *Hexter*, 10 S.W.2d at 693.

146. TEX. EST. CODE ANN. § 402.053(a).

147. *See* Archer v. Tregellas, 566 S.W.3d 281, 292–93 (Tex. 2018); *see also* Blocker v. Davis, 241 S.W.2d 698, 702 (Tex. Civ. App.—Fort Worth 1951, writ ref'd n.r.e).

148. TEX. PROP. CODE ANN. § 13.001.

149. *Id.* § 13.002.

150. *Id.*§§ 11.001(a), 13.003 ("The original or a certified copy of a conveyance, covenant, agreement, deed of trust, or mortgage, relating to land, that has been recorded in a county of this state other than the county where the land to which the instrument relates is located, is valid as to a creditor or a subsequent purchaser who has paid a valuable consideration and who does not have notice of the instrument only after it is recorded in the county in which the land is located. Recording a previously recorded instrument in the proper county does not validate an invalid instrument.").

151. 77 AM. JUR. 2D, *Vendor and Purchaser* § 383 (2025).

> Chain of title refers to the documents which show the successive ownership history of the land. The chain of title is the successive conveyances, commencing with the patent from the government, each being a perfect conveyance of the title down to and including the conveyance to the present holder.[152]

Generally, unrecorded documents are void as to creditors or subsequent purchasers of property unless they have otherwise received notice.[153] However, the instrument is still binding on the parties to the instrument, the parties' heirs, and to subsequent purchasers who did not pay valuable consideration or who otherwise had notice of the instrument.[154] Some commercial paper and financing documents are exempt from these instruments.[155]

Not all public records are equivalent to recorded notice.[156] For example, the existence of a legal proceeding, although a public record, does not constitute notice equivalent to a recorded document; hence, the need for filing a *lis pendens* to provide such notice.[157] It has been similarly argued that probate proceedings do not constitute recorded notice, although some courts disagree.[158]

3. Court Split—Wills & Probates Constitute Notice

Many courts have found that the probate records, although not recorded like a deed in the property records, do constitute notice regarding lands which are assets of the estate.[159] Many of these cases rest upon the arguments that the probate records provide adequate notice, and title to the estate asset immediately vests in the devisees, subject only to the liabilities of the estate itself.[160] "[I]t is definitely settled by the Texas decisions that domestic wills are properly and effectively filed for notice when recorded *in the probate*

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152. *E.g.*, Sides v. Saliga, No. 03-17-00732-CV, 2019 WL 2529551, at *7 (Tex. App.—Austin June 20, 2019, pet. denied) (mem. op., not designated for publication) (quoting Munawar v. Cadle Co., 2 S.W.3d 12, 20 (Tex. App.—Corpus Christi 1999, pet. denied)).

153. TEX. PROP. CODE ANN. § 13.001(a).

154. *Id.* § 13.001(b).

155. *Id.* § 13.001(c).

156. *Id.*§ 13.004(b).

157. *See id.*

158. *See* First Properties, L.L.C. v. JPMorgan Chase Bank, Nat. Ass'n, 993 So.2d 438, 445 (Ala. 2008).

159. *See* Blocker v. Davis, 241 S.W.2d 698, 702 (Tex. Civ. App.—Fort Worth 1951, writ ref'd n.r.e.).

160. *E.g.*, *id.*; TEX. EST. CODE ANN. §§ 101.001, 101.051; Lynch v. Baxter, 4 Tex. 431, 444 (1849); Glover v. Coit, 81 S.W. 136, 139–40 (Tex. Civ. App. 1904, no writ); Perdue v. Perdue, 208 S.W. 353, 357 (Tex. App.—Texarkana 1918), aff'd 217 S.W. 694 (Tex. 1920); Hardin v. Hardin, 66 S.W.2d 362, 363 (Tex. Civ. App.—Fort Worth 1933, no writ).

records of the county where the will is probated, and though they *may be, they do not have to be recorded as deeds are*."[161]

"A decree probating a will and the proceedings thereunder is at least in the nature of a decree in rem, which concludes the whole world."[162] When the order admitting a will to probate has been recorded in the probate records of the county in which the probate proceeding occurred, "any person dealing with the legal title of property bequeathed under said will is in privy with such proceedings, regardless of whether the property involved is located in another county, or regardless of whether said will and its probate have been recorded in the county where the land lies."[163]

"The law in Texas, however, is that when a testator dies the title to the property [they] bequeath[] passes immediately into [their] devisees," subject to the liabilities of the estate for debts.[164]

It is common practice, particularly when the probate proceeding occurred in the same county as the subject property, for attorneys and others to rely upon the probate records to document the passage of title:

> It seems to be the assumption of most attorneys that when probate orders and decrees are recorded in the judge's probate docket, they give constructive notice of their contents with respect to land located in the county in which the proceedings are had, and no further recording in the deed records of the particular county is necessary. Evidence of this supposition is found in the almost universal practice of abstracters to cover within their certificates all matters affecting title that appear in the probate records in the particular county. . .
>
> Additional recording in the deed records in the same county is certainly not expressly required, nor is such recording specifically authorized by any statute. It should follow that the judge's probate docket should give constructive notice with respect to claims revealed therein as to all land located within the county where the proceedings are had.[165]

The Texas Estates Code's only provisions regarding the recordation of wills are in the context of other counties beyond the county in which the will is admitted to probate and the recording of foreign testamentary

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161. Howth v. Farrar, 94 F.2d 654, 657 (5th Cir. 1938) (citing W.C. Belcher Land Mortgage Co. v. Clark, 238 S.W. 685 (Tex. Civ. App.—Fort Worth 1922, writ ref'd) (emphasis added).

162. *Clark*, 238 S.W. at 688 (citing *Freeman on Judgments* (4th ed.) § 618; 15 R. C. L. p. 637, § 80).

163. *Blocker*, 241 S.W.2d at 702 (regarding a conveyance from a devisee of the Estate) (citing Hunter v. Hodgson, 95 S.W. 637 (Tex. Civ. App. 1906, writ ref'd)); *see also Clark*, 238 S.W. at 688; *But see* Winchester v. Boggs, 112 S.W.2d 207, 208 (Tex. Civ. App.—Eastland 1937, no writ); Williams v. Slaughter, 42 S.W. 327 (Tex. Civ. App. 1897, no writ); Boswell v. Farm & Home Sav. Ass'n, 894 S.W.2d 761, 763 (Tex. App.—Fort Worth 1994, writ denied) (regarding records in different counties).

164. *Blocker*, 241 S.W.2d at 702; TEX. EST. CODE ANN. §§ 101.001, 101.051.

165. M.K Woodward, Ernest E. Smith, III, & Gerry W. Beyer, *Probate Records as Notice*, 17 TEX. PRAC., *Prob. & Decedents' Estates* § 87; *But see* TEX. PROP. CODE ANN. § 12.013 (regarding the recording of judgments generally); TEX. PROP. CODE ANN. § 12.001 (regarding recording of instruments concerning property generally).

instruments.[166] Only foreign testamentary instruments are provided an express statutory authority regarding recording for notice purposes.[167] Arguably, the lack of such an express provision for domestic wills is because such wills are already made public record by their inclusion in the probate records, but some courts disagree.[168]

The Texas Property Code permits recording of probate orders, but the only recording expressly required (in the Texas Estates Code) in relation to the probate record is deposition testimony, and such requirement is that the testimony be recorded in the probate record itself—not the real property records or any other records of the county.[169] A similar argument could be made regarding a ROFR or Option contained in a will.[170]

> [A] person who purchases property with actual or constructive notice of a right of first refusal takes the property subject to that right. And courts are in agreement that such a purchaser stands in the shoes of the original seller when specific performance is sought and may be compelled to convey title to the [holder of the right of first refusal].[171]

4. Court Split—Wills & Probates Do Not Constitute Notice

Conversely, other courts have found a distinction remains between a probate proceeding record and instruments "recorded" in the public records.[172]

> Within the meaning and purpose of the registration laws, the probate records, in our opinion, do not constitute constructive notice of the recitations therein, except, of course, to the parties and privies to such actions or proceedings . . . . Such judgments are themselves subject to registration. In the absence of such registration, they are no more effective as constructive notice than an unrecorded deed would be.[173]

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166. TEX. EST. CODE ANN. § 256.201 (recording in other counties); TEX. EST. CODE ANN. §§ 503.001, 503.051, 503.052 (regarding the recording of foreign testamentary instruments).

167. TEX. EST. CODE ANN. §§ 503.001, 503.051, 503.052.

168. *See infra* Section III.D.4

169. TEX. PROP. CODE ANN. § 12.013 (regarding the recording of judgments generally); TEX. PROP. CODE ANN. § 12.001 (regarding recording of instruments concerning property generally); TEX. EST. CODE ANN. § 52.052(c) (regarding deposition testimony in probate proceedings).

170. Archer v. Tregellas, 566 S.W.3d 281, 287 (Tex. 2018).

171. *Id.* at 287 (internal quotations omitted).

172. *E.g.*, Winchester v. Boggs, 112 S.W.2d 207, 208 (Tex. Civ. App.—Eastland 1937, no writ).

173. *Winchester*, 112 S.W.2d at 208; *see also* Williams v. Slaughter, 42 S.W. 327, 328 (Tex. Civ. App. 1897, no writ) ("There was nothing in the record of deeds or of mortgages or of judgment liens that would in any way lead to any inquiry as to any lien that might be held by some deceased person on the land, and we cannot subscribe to the proposition that it was the duty of appellee to go to the record of wills in the probate court, and search them all, to see if any testator had said anything about a lien in his will.").

Additionally, some courts have found that even if a probate record does constitute notice, or at least falls within the duties of a title examination, such records may not contain the information necessary to establish knowledge in the purchaser to defeat a BFP defense.[174]

The case of *Boswell v. Farm & Home Sav. Ass'n* regarded the sale of the Ponderosa Ranch in Denton County following a dissolution of a joint venture.[175] Mr. Field executed a gift deed attempting to transfer a fractional interest in the ranch to a trust established for his children, but the deed was neither acknowledged nor recorded.[176] Upon Mr. Field's death, the ranch was included in the residue of the estate and was distributed into a testamentary trust for his children.[177] The inventory, appraisement, and list of claims of the estate disclosed the attempted prior fractional conveyance to the first trust.[178] The probate occurred in Dallas County, and the will and order probating the will were recorded in Denton County.[179]

Later, the Ponderosa Ranch was conveyed without reference to or reservation of the fractional interest, and was then conveyed several times thereafter.[180] In February 1985, Farm and Home purchased the ranch, and then subsequently sold the ranch three months later to Denton Creek Ranch Partnership.[181] Farm and Home took a lien on the property as part of the sale and later foreclosed the lien and purchased the property back at the foreclosure sale.[182]

Thereafter, in 1988, Mr. Boswell learned of the prior fractional conveyance and obtained a copy of the inventory from the original probate.[183] In 1990, Mr. Campbell, as trustee of a trust, entered a contract to purchase the Ponderosa Ranch but subsequently assigned the contract to Mr. Boswell.[184]

The title commitment for the sale initially included Mr. Field's fractional conveyance to the children's trust as an exception to coverage, but

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174. *Williams*, 42 S.W. at 328 ("However, had the recital of the will been brought directly under the consideration of appellee, we do not believe that it would have been sufficient to put any reasonable man upon inquiry. The language is very indefinite. It fails to designate the land, or indicate how James A. Williams succeeded in getting a vendor's lien on land sold by John T. Slaughter to T. J. Slaughter."); *see also* Boswell v. Farm & Home Sav. Ass'n, 894 S.W.2d 761, 767 (Tex. App.—Fort Worth 1994, writ denied) (explaining that the gift deed was valid as to bona fide purchasers since it was unacknowledged and improperly recorded).

175. *Boswell*, 894 S.W.2d at 764. This case would also be a great subject for the requirements for executing, recording, and effectuating an instrument of conveyance, but those items—although significant issues in the case—are not the matters at hand for our discussion.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

after disputes with Mr. Boswell, the exception was removed.[185] At closing, a special warranty deed was tendered, as required by the contract, but Mr. Boswell refused to close, claiming that the deed was insufficient to convey him clear of title.[186] Stewart Title Company filed an interpleader action to determine ownership of the initial $50,000 earnest money under the contract, but the other parties to the contract were later realigned, and their claims became the crux of the matter.[187]

There were numerous claims of fraud, partition, quiet title, and breach of contract.[188] The trial court found Farm and Home had neither actual or constructive notice of Mr. Field's fractional conveyance to the children's prior trust, and it found that Farm and Home held a fee simple title at closing.[189] Mr. Boswell argued that the title company had constructive and inquiry notice of the prior conveyance because the will and order of the probate were recorded in Denton County.[190]

Mr. Boswell's argument was that a title examiner would have found the recorded will and order, followed the trail to Dallas County's probate records, obtained a copy of the inventory, and discovered the fractional conveyance; therefore, he was on constructive or inquiry notice to do so.[191] The court ruled against Mr. Boswell on this issue, primarily because the gift deed from Mr. Field was inadequate and unrecorded.[192] However, the court addressed Boswell's arguments regarding constructive and inquiry notice.[193]

> A search of the Dallas probate records would only lead the title examiner back to Denton County to search for a recorded gift deed. The gift deed was ineligible for recording in Dallas County. To provide effective notice, the gift deed must have been recorded in Denton County. We conclude there was no constructive notice of the gift deed.[194]

Although the court agreed that the duty of the title examiner may have included the requirement to review the probate record, the court found those records did not contain any information that would have constituted knowledge or established less than a fee simple title in *Boswell*.[195]

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185. *Id.* (explaining that Mr. Boswell claimed he had taken steps to acquire this outstanding interest and would ultimately hold fee simple title).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 765.

190. *Id.* at 766.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 767 (internal citations omitted).

195. *Id.* at 768–69.

5. The Texas Government Code—"Pick a System, Any System—Organizational Roulette"

It all comes down to the records.[196] Was the will or court order notice?[197] Was it part of the records?[198] Or more particularly, which records?[199]

Under Texas law, county clerks may either divide their records into the following seven classes: (1) Official Public Records of Real Property; (2) Official Public Records of Personal Property and Chattels; (3) Official Public Records of Probate Courts; (4) Official Public Records of County Civil Courts; (5) Official Public Records of County Criminal Courts; (6) Official Public Records of Commissioners Courts; (7) Official Public Records of Governmental, Business, and Personal Matters, or they may combine all records into a single Official Public Records.[200]

All probate records are statutorily required to be maintained in a publicly available index.[201] All real property records are similarly statutorily required to be maintained in a publicly available index.[202] Additionally, if a grantor is an executor, administrator, or guardian, the real property index "must contain the name of that person and the name of the person's testator, intestate, or ward."[203] The purpose of this requirement is to: (1) provide the public notice that the granting party is an executor, administrator, or guardian; (2) provide enough information for the public to identify the related cause of action; and (3) inform the parties that the property being conveyed is being transferred subject to the authority of the executor, administrator, or guardian's official capacity and pursuant to the estate or guardianship matter.[204]

It has been argued that each category index as provided by law would serve as equivalent notice of their contents, regardless of the type of index named and maintained by the county recorder.[205] If the Official Public Records of Real Property provide notice of property transactions, whether separate and apart from the other indexes or when combined into a singular Official Public Records index, then each of the other six indexes, likewise, must be considered to provide equivalent notice of their contents.[206]

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196. *See* TEX. PROP. CODE ANN. § 13.001(a).
197. *Id.* § 13.002.
198. *Id.* § 11.001(a).
199. *Id.* § 11.001.
200. TEX. LOC. GOV'T CODE ANN. §§ 193.002, 193.008(b), (d).
201. TEX. EST. CODE ANN. § 52.053.
202. TEX. LOC. GOV'T CODE ANN. § 193.003; *see also* TEX. PROP. CODE ANN. § 11.004.
203. TEX. LOC. GOV'T CODE ANN. § 193.003.
204. *Id.* § 193.009(c); *see also* TEX. PROP. CODE ANN. § 13.002.
205. *See* TEX. LOC. GOV'T CODE ANN. § 193.009(c); *see also* TEX. PROP. CODE ANN. § 13.002.
206. W.C. Belcher Land Mortgage Co. v. Clark, 238 S.W. 685 (Tex. Civ. App.—Fort Worth 1922, writ ref'd) (citing *Freeman on Judgments* (4th ed.) § 618, 15 R.C.L.P.).

However, many courts do not agree, and they reason that each category of records serves its individual purpose, and filing in a probate is distinct and apart from recording in the property records (whether separate or combined in a single Official Public Records).[207]

IV. THE TEXAS TITLE EXAMINATION STANDARDS

A. More Ethics—The [Title Examination] Golden Rule

The cornerstone standard of a title examination is as follows:

> It is well settled that a purchaser is bound by every recital, reference and reservation contained in or fairly disclosed by any instrument which forms an essential link in the chain of title under which [they] claim[] . . . .[208]

The rationale of the rule is that any description, recital of fact, or reference to other documents puts the purchaser upon inquiry, and [they are] bound to follow up this inquiry, step-by-step, from one discovery to another and from one instrument to another, until the whole series of title deeds is exhausted and a complete knowledge of all the matters referred to and affecting the estate is obtained.[209]

B. Purpose

The Texas Title Examination Standards (Examination Standards) are intended to foster uniformity in title document drafting and review among title examiners.[210] They are the result of cooperation between the Real Estate, Probate, and Trust Law, and Oil, Gas, and Energy Resources Law Section of the State Bar of Texas, and began with the first publication of the Examination Standards in 1997.[211]

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207. *See* Winchester v. Boggs, 112 S.W.2d 207 (Tex. Civ. App.—Eastland 1937, no writ).

208. Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903, 908 (Tex. 1982) (quoting Wessels v. Rio Bravo Oil Co., 250 S.W.2d 668 (Tex. Civ. App.—Eastland 1952, writ ref'd) (citing Williams v. Harris Cnty. Hou. Ship Channel Navigation Dist., 99 S.W.2d 276 (Tex. 1936); Texas Co. v. Dunlap, 41 S.W.2d 42 (Tex. Comm'n App.1931, judgm't adopted); Guevara v. Guevara, 280 S.W. 736 (Tex. Comm'n App.1926, judgm't adopted); Tuggle v. Cooke, 277 S.W.2d 729 (Tex. Civ. App.—Fort Worth 1955 writ ref'd n.r.e.); Abercrombie v. Bright, 271 S.W.2d 734 (Tex. Civ. App.—Eastland 1954, writ ref'd n.r.e.)); Lange, *Land Titles and Title Examination* § 816 at 259 (1961) (emphasis added).

209. *Westland Oil Dev. Corp.*, 637 S.W.2d at 908 (citing Loomis v. Cobb, 159 S.W. 305, 307 (Tex. Civ. App.—El Paso 1913, writ ref'd)); *see also* W. T. Carter & Bro. v. Davis, 88 S.W.2d 596, 598 (Tex. Civ. App.—Beaumont 1935, writ dism'd) (emphasis added).

210. TEX. PROP. CODE ANN. TIT. 2—APP. TITLE EXAMINATION STANDARDS, Disclaimer and Introduction.

211. *Id.*

> Standards for real estate title examinations are statements that declare an answer to a question or a solution for a problem that is commonly encountered in the process of a title examination. Their purpose is to alleviate disagreements among members of the bar regarding real estate transactions and to set forth propositions (standards) with which title lawyers can generally agree concerning title documents to promote uniformity in the preparation, use, and meaning of such documents. In other words, title standards can be viewed as a reference that can be consulted in the preparation and examination of title documents. Although standards do not, by themselves, impose compulsory legal requirements, they do establish guidelines upon which a reasonable and practical examination can be based. And although standards should state fundamental and enduring principles, they are subject to amendment as required by changes in governing law and in title and conveyancing practice.[212]

Although not directly part of the ethics rules, the Examination Standards do represent the general consensus of title examiners for the standard of representation and diligence in a matter regarding title to real property.[213]

> **Proposed Standard 1.10. Objective of the Title Examiner**
>
> An examiner examines and opines on title to advise the client of the status of title and of material irregularities, defects, and encumbrances that may reasonably be expected to affect materially the value or use of the property or that may expose the owner to litigation or adverse claims even if the litigation or adverse claims can reasonably be expected to be successfully defended. Nevertheless, an examiner does not ordinarily determine the outcome of disputable matters but should advise how a particular matter may be cured so that the client may secure marketable title.[214]

C. Limitations

However, it is critical to note that the Examination Standards do not apply to title companies for the purpose of issuing title insurance policies.[215]

> Because statutory law prohibits title insurance companies from insuring against loss by reason of unmarketable title, these standards do not apply to title examination for purposes of title insurance. Moreover, these standards do not apply to the exercise of discretion by a title insurance company in determining the insurability of title. Title insurance is a contract of indemnity.[216]

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212. *Id.*
213. *Id.*
214. TEX. PROP. CODE ANN. TIT. 2—APP. TITLE EXAMINATION STANDARDS 1.10.
215. TEX. PROP. CODE ANN. TIT. 2—APP. TITLE EXAMINATION STANDARDS, Introduction.
216. *Id.*; *see also* TEX. INS. CODE ANN. § 2502.002(a) ("An insurance company may not insure against loss or damage by reason of unmarketability of title.") (internal citations omitted).

Instead, title insurance companies are subject to, among other authorities, the Texas Title Insurance Act of the Texas Insurance Code (particularly Title 11. Title Insurance (Section 2501.001 to Section 2751.104)) and the Title Insurance Basic Manual published by the Texas Department of Insurance.[217]

Notably, neither the Texas Title Insurance Act or the Basic Manual impose any direct obligation to review estate or probate documents upon the title insurance company.[218] However, the examination of title, except for examinations conducted by attorneys, is considered part of the "Business of Title Insurance."[219]

D. Application to Estates & Probates

The Examination Standards include measures to ascertain the existence or non-existence of a probate proceeding as well as the authority of the executor or administrator to convey property, and those measures include review of public records beyond the property records alone.[220]

The most relevant standards for this discussion are: (1) Standard 11.20. Estate Proceedings and (2) Standard 11.30. Conveyances by an executor or an independent administrator.[221]

> **Standard 11.20. Estate Proceedings**
>
> If an owner of property dies, the examiner should determine whether the owner left a will, whether there is a probate proceeding or administration pending, and whether a personal representative is acting.
>
> Comment:
>
> Absent information to the contrary, the affidavit of a person who has knowledge of the facts is usually accepted as satisfactory evidence that no probate proceeding is pending. However, a probate proceeding may be filed and a personal representative appointed at any time within four years of the owner's death. Thus, such an affidavit does not affect any

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217. TEX. INS. CODE ANN. §§ 2501.001–2751.104 ("Texas Title Insurance Act"); *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*, TEX. DEP'T OF INS., https://www.tdi.texas.gov/title/titleman.html#title11[https://perma.cc/3LA7-UV8E] (last visited Apr. 14, 2025).

218. *See, e.g.*, TEX. INS. CODE ANN. § 2704.001(2) (requiring a policy or contract to be written after an examination of title "from title evidence prepared from an abstract plant owned, or leased and operated by a title insurance agent or direct operation for the county in which the real property is located, except as provided by Section 2704.002 . . . .").

219. TEX. INS. CODE ANN. § 2501.005(a)(2)(B), (3); *see also* TEX. INS. CODE ANN. § 2551.001(e) ("This title does not regulate the practice of law by an attorney. The actions of an attorney in examining title, in examining records regarding an interest insured under Chapter 2751, or in closing a real property or personal property transaction, regardless of whether a title insurance policy is issued, does not constitute the business of title insurance, unless the attorney elects to be licensed as an escrow officer.").

220. TEX. PROP. CODE ANN. TIT. 2—APP. TITLE EXAMINATION STANDARDS 11.20, 11.30.

221. *Id.*

probate proceeding that was commenced within four years of the decedent's death. TEXAS ESTATES CODE § 256.003.[222]

Standard 11.30. Conveyances By An Executor Or An Independent Administrator

Before accepting a deed from an executor or an independent administrator, an examiner should be satisfied that all statutory requirements were met in the appointment of the representative, that the representative is qualified to execute the deed, and that the representative's act is authorized by the will or by law.

Comment:

If a representative (an executor or an independent administrator) executes a deed to the decedent's property, then the examiner should determine the representative's qualifications to have done so. The examiner should examine the will, the order probating the will and appointing the executor, the representative's bond (if required), and recent letters testamentary or of administration or other documentation that the representative's authority had not terminated. In addition to the above, the examiner should examine other relevant documents that may be of record, including the application for the representative's appointment. If the probate proceedings took place in another county, the examiner should require the filing of certified copies of the order appointing the representative and any will and any codicils in the county where the land is located. Tex. Estates Code § 256.201.

A qualified executor, even one under court order, may convey real property belonging to the estate if authorized to do so by the will. Tex. Estates Code § 356.002. If authenticated copies (both attested by the court clerk and including the certification by the court's judge or magistrate that the attestation is in proper form) of a foreign will and the order admitting it to probate in another jurisdiction have been recorded, and if the will gives an executor or trustee the power to sell property in Texas, the foreign executor or trustee may sell the estate's Texas property in accordance with the will without an order of a Texas court. Tex. Estates Code § 505.052. It is questionable whether a purported sale by a foreign executor who has not yet filed the required documentation is effective even if it is filed later. See Mills v. Herndon, 60 Tex. 353 (1883).

If the owner of real property died intestate, or if a will does not give the authority to convey real property, a qualified independent executor or a qualified independent administrator may convey real property with the consent of the decedent's distributees in the application for independent administration or in their consent to the independent administration and if authorized by the order of appointment. Tex. Estates Code § 401.006.

Unless limited by the terms of a will, an independent executor or an independent administrator has the power of sale, without court approval, to:

222. TEX. EST. CODE ANN. § 256.003(a).

> (1) Pay expenses of administration, funeral expenses and expenses of last illness, and allowances and claims against the estate of a decedent. Tex. Estates Code § 356.251(1) and 402.002.
> (2) Dispose of any interest in real property "if selling the interest is considered in the estate's best interest." Tex. Estates Code § 356.251(2).

Unless the will or court order provides otherwise, an independent executor, in distributing property not specifically devised that the executor is authorized to sell, may make distributions in divided or undivided interests and allocate particular assets in proportionate or disproportionate shares. Tex. Estates Code § 405.0015.

A person who is not a devisee or an heir is not required to look into the power of sale or the propriety of a sale by an independent executor or independent administrator or to obtain the joinder of the decedent's distributees if the person deals in good faith and:

> (1) the sale is by an independent executor and a power of sale is granted to the independent executor in the will;
> (2) effective September 1, 2011, a power of sale is granted under Tex. Estates Code § 401.006 in the order appointing the independent executor or independent administrator; or
> (3) effective September 1, 2011, the independent executor or independent administrator provides an affidavit, recorded in the deed records of the county where the land is located, stating that the sale is necessary or advisable for any of the purposes described in Tex. Estates Code § 356.251(1).

Tex. Estates Code § 402.053.

A sale of estate property by an executor to an innocent purchaser, for a valuable consideration, in good faith, and without notice of any illegality in the sale continues to be valid notwithstanding that the acts or the authority under which the acts were performed is later set aside. Tex. Estates Code § 307.001.

The powers of an independent executor continue until there is no longer any necessity for the executor to act, typically when all debts of the estate have been paid and the assets of the estate have been distributed. Although Tex. Estates Code §§ 405.003–405.009 provide methods of closing an independent administration, the procedures are rarely followed. This practice presents problems for the examiner, because there frequently is no convenient way to determine conclusively that an executor no longer has authority to act. In case of doubt as to whether the executor continues to act, the examiner should require the joinder of the devisees in any conveyance of estate property.

An examiner may rely upon a will that has been duly admitted to probate and that has not been challenged. See Steele v. Renn, 50 Tex. 467 (1878). However, during the two-year period after the date of the order admitting the will to probate, the order is subject to contest by any interested person. Moreover, any interested person may institute suit to cancel a will for forgery or other fraud within two years after the discovery of the forgery or fraud, and persons non compos mentis and

minors have two years after the removal of their disabilities within which to commence such a suit. Tex. Estates Code § 256.204.

During the two-year period after an order or judgment of a court in which probate proceedings were held, the order or judgment is subject to revision or correction on a showing of error by bill of review filed in the same court by an interested person. Tex. Estates Code § 55.251.

Caution:
If the order of appointment of an independent administrator did not give authority to sell real property, the examiner should require the joinder of the parties who would have otherwise received the property. A good-faith, third-party purchaser who relies upon an affidavit described in Tex. Estates Code § 402.053 is protected only if the sale was made for the reasons set out in Tex. Estates Code § 356.251(1), that is, for administrative expenses, funeral and last-illness expenses, allowances, and claims. There is no similar protection regarding a sale made because it was deemed by the representative to be in the best interest of the estate.

An examiner should question an apparent delegation of authority by the executor because, while an executor may delegate ministerial duties, an executor may not delegate discretionary authority. Terrell v. McCown, 43 S.W. 2 (Tex. 1897).

If a will does not give an executor the power of sale or if the executor is not given the power of sale in the order of appointment, then the executor must follow the same procedure for a sale as is prescribed for an administrator. See Tex. Estates Code § 356.001.[223]

V. A FEW WAYS FORWARD—THIS AUTHOR'S THOUGHTS

A. Public Records Are Public Records—Stored Like a Record? Stamped Like a Record? Available Like a Record? It's a Record

1. Ayes

The BFP defense, whether under Texas Estates Code Section 307.001, the Texas Property Code's recording provisions, or common law, should not apply when probate records disclose a cloud on title, and all such authorities should be amended or otherwise superseded by statute clarifying that probate records constitute notice, and clarifying that recording includes probate records which are publicly available.[224] This should apply regardless of whether the County Clerk has deemed to separate records or unify records under the Local Government Code.[225]

Additionally, the limitation upon the inquiry by purchasers established by Texas Estates Code Section 402.053 should be reduced, and the inquiry

223. TEX. PROP. CODE ANN. TIT. 2—APP. TITLE EXAMINATION STANDARDS 11.30.
224. Hahn v. Love, 321 S.W.3d 517, 532 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).
225. Hooten v. Enriquez, 863 S.W.2d 522, 530–31 (Tex. App.—El Paso 1993, no writ).

should include the obligation to review the applicable probate documents to establish the authority of the executor or administrator to execute the conveyance instrument.[226]

"Means of knowledge, with the duty of using them, are thus deemed the equivalent of knowledge itself."[227] Purchasers from an estate know that an executor, administrator, or personal representative is executing the deed.[228] Purchasers have likely negotiated the purchase terms with such representatives.[229] The purchaser is fully aware that the seller of the property is an estate, and "[they are] not warranted in shutting [their] eyes against the lights before [them]."[230]

The Texas Estates Code should not provide the sand for a purchaser to bury their head and claim an ostrich defense equivalent to the BFP defense regarding the estate representative's authority to sell property, particularly when a publicly available probate record would disclose if such power exists and any other limitations on such power (such as a ROFR or Option).[231]

Would these facts not establish knowledge "as would cause a prudent man to make further inquiry[?]"[232] Would not an honest and prudent person know that there are likely heirs of the estate who would inherit the property being sold?[233] Would that not lead them to "investigate concerning the rights of others in the same matter[?]"[234]

Purchasers of estates should be charged with inquiry and implied notice of all matters which are reflected in the public records, whether recorded, filed, or such records are severed or unified.[235]

This would only re-establish the standard for title examination and would still require that probate records themselves contain enough information to establish notice of a claim.[236] But, it would provide the deceased with the dignity that their wishes may be carried out and would effectuate the purpose of the Texas Estates Code's provisions regarding wills (wills are to be followed).[237]

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226. *See* TEX. EST. CODE ANN. § 402.053.

227. Flack v. First Nat. Bank of Dalhart, 226 S.W.2d 628, 632 (Tex. 1950).

228. Harper v. Swoveland, 591 S.W.2d 629, 631 (Tex. App.—Dallas 1979, no writ).

229. Pogue v. Williamson, 605 S.W.3d 656, 667 (Tex. App.—Houston [1st Dist.] 2020, no pet.).

230. *Flack*, 226 S.W.2d at 632 (quoting *Brown v. Hart*, 43 S.W.2d 274, 278 (Tex. Civ. App.—Amarillo 1931, writ ref'd).

231. Mooney v. Harlin, 622 S.W.2d 83, 85 (Tex. 1981).

232. *Flack*, 226 S.W.2d at 631–32.

233. Collum v. Sanger Bros., 82 S.W. 459, 460 (Tex. 1904).

234. *Flack*, 226 S.W.2d at 632.

235. *Id.*

236. *See* Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903, 908 (Tex. 1982) (quoting Wessels v. Rio Bravo Oil Co., 250 S.W.2d 668 (Tex. Civ. App.—Eastland 1952, writ ref'd) (citing Williams v. Harris Cnty. Hou. Ship Channel Navigation Dist., 99 S.W.2d 276 (Tex. 1936)); *see* Boswell v. Farm & Home Sav. Ass'n, 894 S.W.2d 761, 764 (Tex. App.—Fort Worth 1994, writ denied).

237. TEX. EST. CODE ANN. § 101.001

2. Nays

The likely—and in many ways current—opposition to a change in law which would impose the legal effects of notice from public records (not just real property records) comes from lienholders and title companies.[238] The less these stakeholders are aware, the better it is for their liability exposure and bottom line.[239]

On one hand, the standard for title examination already imposes a duty upon an examiner to "[i]nquir[e], and [they are] bound to follow up this inquiry, step by step, from one discovery to another and from one instrument to another, until the whole series of title deeds is exhausted and a complete knowledge of *all the matters referred* to and affecting the estate is obtained."[240]

But some courts have found that a potentially limitless search of property records would be beyond the duties of examination.[241] What about prior sales from an estate that are within the chain of title?[242] Would a purchaser need to investigate those estate transactions?[243]

We are left to navigate the power of sale, Texas Estates Code's BFP defense and limitations on inquiry, and conflicting court positions of Texas law.[244]

B. Limitations on the Power of Sale

A perhaps more surgical alteration to the law, which would provide greater protection, would be to limit the power of sale granted to executors and administrators in relation to the sale of real property.[245] This would address the issue at its root.[246]

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238. Sec. State Bank & Tr. v. Bexar Cnty., 397 S.W.3d 715, 721–22 (Tex. App.—San Antonio 2012, pet. denied), *abrogated in part by* Mitchell v. MAP Res., Inc., 649 S.W.3d 180 (Tex. 2022).

239. *Id.*

240. *Westland Oil Dev. Corp.*, 637 S.W.2d at 908 (citing Loomis v. Cobb, 159 S.W. 305, 307 (Tex. Civ. App.—El Paso 1913, writ ref'd); *see also* W. T. Carter & Bro. v. Davis, 88 S.W.2d 596 (Tex. Civ. App.—Beaumont 1935, writ dism'd) (emphasis added)).

241. Williams v. Slaughter, 42 S.W. 327, 328 (Tex. Civ. App. 1897, no writ) ("There was nothing in the record of deeds or of mortgages or of judgment liens that would in any way lead to any inquiry as to any lien that might be held by some deceased person on the land, and we cannot subscribe to the proposition that it was the duty of appellee to go to the record of wills in the probate court, and search them all, to see if any testator had said anything about a lien in his will.").

242. Cooksey v. Sinder, 682 S.W.2d 252, 253 (Tex. 1984).

243. Myre v. Meletio, 307 S.W.3d 839, 843 (Tex. App.—Dallas 2010, pet. denied).

244. *See* discussion *infra* Section V.B.

245. TEX. EST. CODE ANN. § 402.052.

246. *Id.*

1. Ayes

Texas Estates Code Sections 356.002(b) and 402.052 should be amended to limit the power of sale regarding real property and require one of the following:

> (1) an express statement in the Will—for independent executors—that the power of sale may be exercised regarding real property without the consent of the devisees or the approval of the Court;[247]
> (2) compliance with Texas Estates Code section 401.006 (requiring written consent of the devisees vested with title upon the death of the decedent and entitled to receive the real property);[248]
> (3) by execution of the conveyance instrument by all devisees who are to receive any interest in the property under the terms of the will;[249] or
> (4) court application and approval as is required in supervised administrations.[250]

Regarding consent by the devisees, this process is already addressed by Texas Estates Code Section 401.006 when the will fails to establish a sufficient power of sale:

> In a situation in which a decedent does not have a will, or a decedent's will does not contain language authorizing the personal representative to sell property or contains language that is not sufficient to grant the representative that authority, the court may include in an order appointing an independent executor any general or specific authority regarding the power of the independent executor to sell property that may be consented to by the distributees who are to receive any interest in the property in the application for independent administration or for the appointment of an independent executor or in their consents to the independent administration or to the appointment of an independent executor. The independent executor, in such event, may sell the property under the authority granted in the court order without the further consent of those distributees.[251]

Texas Estates Code Section 401.006 should be amended to: (1) clarify that its provisions apply in all instances in which the will does not expressly state the power of sale may be exercised regarding real property *without the*

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247. Author's original thought; *see generally* 28 TEX. JUR. 3D, *Decedents' Estates* § 165 (2025) (changing the referenced section to exclude court consent).

248. Author's original thought; *see generally* TEX. EST. CODE ANN. § 401.006 (referencing granting the power of sale by agreement).

249. Author's original thought; *see generally* TEX. EST. CODE ANN. § 401.006 (changing the code section to include express consent of sale of property even with court approval).

250. Author's original thought; *see generally* TEX. EST. CODE ANN. § 402.052 (discussing court approval).

251. TEX. EST. CODE ANN. § 401.006.

consent of the devisees or the approval of the court, and (2) that in independent administrations, the execution of the conveyance instrument by all devisees entitled to receive the property under the will's terms is sufficient for compliance with the requirements of the provision, without the need for court order.[252]

Texas Estates Code Section 402.053(a)(3) and (b) should be struck and replaced with a provision establishing reliance upon an instrument executed by the devisees entitled to receive the property under the will's terms.[253]

> These changes would:
> (1) create certainty in the chain of title;[254]
> (2) honor the wishes of decedents and continue to provide them with the power to draft their will and control their estate, subject to reasonable administration, as they see fit;[255]
> (3) provide purchasers of estate property with greater certainty of title;[256]
> (4) reduce title disputes regarding estate property and provide liability protection for independent executors and independent administrators;[257]
> (5) ensure that real property is being sold for an administrative purpose and necessity or with the consent of the devisees entitled to receipt of the property post-administration;[258] and
> (6) preserve what is commonly the most valuable asset—monetarily and sentimentally—of the estate, decedent, and devisees.[259]
>
> There would be four means by which to establish a power of sale over real property:
>
> (1) expressly stated in the will (state the power of sale may be exercised regarding real property without the consent of the devisees or the approval of the court);[260]
> (2) by compliance with Texas Estates Code Section 401.006;[261]
> (3) by execution of the conveyance instrument by all devisees who are to receive any interest in the property under the terms of the will;[262] or
> (4) by court application and approval as is required in supervised administrations.[263]

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252. Author's original thought.
253. TEX. EST. CODE ANN. §§ 402.053(a)(3), (b).
254. Author's original thought; *see* Sides v. Saliga, No. 03-17-00732-CV, 2019 WL 2529551, at *7 (Tex. App.—Austin June 20, 2019, pet. denied) (mem. op., not designated for publication).
255. Author's original thought; TEX. EST. CODE ANN. § 356.002(b).
256. Author's original thought*; see Vendor and Purchaser*, *supra* note 151.
257. Author's original thought*; see Westland Oil Dev. Corp.*, 637 S.W.2d at 908.
258. Author's original thought*; see* TEX. EST. CODE ANN. § 356.251.
259. Author's original thought*; see* Couts & Daniel, *supra* note 1.
260. *See* TEX. EST. CODE ANN. § 402.052.
261. *Id.* § 401.006.
262. *Id.* § 356.002(b).
263. *Id.* § 402.052.

2. Nays

This would certainly increase the administrative burden placed upon independent executors and independent administrators.[264] Regarding potentially requiring court approval of a sale, it is also counter to the initial aspects of the fiduciary operating independently from the court in the administration of the estate.[265]

However, by accepting the position of authority over the estate, the independent executor and independent administrator also accepted the responsibility and liability that accompany such fiduciary duties.[266] Requiring the fiduciary to follow procedures that will protect the estate assets and empower those who are vested with title to those assets with the ability to ensure the fiduciary duties owed to them are being met, is a burden rightfully placed on the independent executor or independent administrator, and should be the law of this state.[267]

VI. MORE ETHICS—DO'S AND DON'TS

In practical terms, here are some dos and don'ts for addressing the conundrum when dealing with ROFR or Options in leases or wills, and when using or combating the power of sale in estates.[268]

A. When Drafting ROFR or Option—Generally

1. **Choose Wisely**. Discuss with the client their goals and ensure that the proper tool is implemented. It's worth the time and effort to compare and contrast the two tools to ensure the client fully understands which one provides them with the intended goals. The client should understand the distinctions between the functioning of the two tools.[269]

2. **Use your drafting "tools."** If a client has specific requirements, draft them. The terms of the ROFR or Option can greatly impact the duties and obligations of the parties, establish timelines, or generally alter the functioning of the rights. Remember that you cannot draft so extensively as to alter the nature of the right. A ROFR should still function like a ROFR, and an Option should function as an Option. Names will not alter the substance of the rights you are granting with the document.[270]

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264. *Id.* § 351.001.
265. *Id.* § 402.001.
266. *Id.* § 351.101.
267. *Id.*
268. Irons v. Fort Worth Sand & Gravel Co., 260 S.W.2d 629, 631 (Tex. Civ. App.—Fort Worth 1953, writ ref'd n.r.e.).
269. *See* discussion *supra* Section II.C.1.
270. *See* discussion *supra* Section II.C.2.

3. **Be Clear**. Avoid conflating or commingling a ROFR or Option. Be clear and distinctly express whether you are creating a ROFR or an Option, and that clarification should be established not just by the nomenclature you proscribe to the rights but by the terms you draft for how the rights function.[271]

B. When Drafting ROFR or Option in a Lease

Record a memorandum of the lease that contains the language of the ROFR or Option. I would also encourage this when you are negotiating any lease for a client—regardless of which side of the transaction you are on.[272]

C. When Drafting a Will Containing a ROFR or Option

1. **Same Song, Different Verse.** The same rules for ROFRs and Options apply here.[273]

2. **Carrots and Sticks.** Additionally, know that although the will contains these provisions, they are not guaranteed to make their way into the order from the court, the property records, or frankly anywhere beyond the will itself.[274]

a. Consider including obligations on the executor to not only comply with the terms, but also to ensure they are evidenced of record. Rather than drafting a generic or blanket power of sale, consider expressly stating that the power of sale is subject, not only to applicable law, but to the restrictions in the will, including but not limited to the ROFR or Option. This will increase the chances that the language filters down into other records and documents—although that is not a guarantee.[275]

b. You might even limit the power of sale in relation to real property and require the written consent of all devisees entitled to receipt of the property under the will.[276]

D. When Probating an Estate with a ROFR or Option or Selling Estate Land

1. **Record.** Record the will and order in all counties in which the estate holds real property, including the county in which the probate occurred.[277]

2. **"Say What You Need to Say."** Most court orders simply state that the executor was granted the power of sale. Instead, include in the order, subject to the court's consent, the exact language of the ROFR or Option from the

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271. *See* discussion *supra* Section II.C.2.
272. Author's original thought.
273. *See* discussion *supra* Section III.B.
274. *Hicks*, 313 S.W.3d at 883.
275. *Id.*
276. *Id.*
277. TEX. EST. CODE ANN. § 402.053 (emphasis added).

will qualifying the limitation on the granted power of sale. Additionally, consider including—if possible—property descriptions much like an order in a muniment of title.[278]

3. **Sunshine**. Consider requiring the devisees to sign off on the Deed—if possible. Although perhaps an unnecessary step, it will create a great deal of protection for your executor or administrator client in the transaction. The devisees will have made a public record of their awareness and consent to the sale.[279]

E. When Representing a Purchaser of Estate Property

1. **Review**. Obtain the probate record, whether recorded or not, and review it. While your client may be able to claim a BFP defense, you should advise them of the general risks of purchasing an estate property.[280]

2. **Require the Affidavit (Texas Estates Code Section 402.053(a)(3))**. If you feel the estate documents do not provide your client with enough evidence of signatory authority for the executor or administrator, consider requiring the executor or administrator to execute and record an affidavit under Texas Estates Code Section 402.053(a)(3), and require that the affidavit specifically describe for which purpose the sale is being conducted (under Texas Estates Code Section 356.251(1)).[281]

3. **Follow the [Standards] Brick Road.** Follow the Title Examination Standards regarding review of estate property title.[282]

4. **Why?** While your client may be able to rely upon the Estates Code limitations on their inquiry obligations (Texas Estates Code Section 402.053(a)), for now, the more compliance with that code provision the better. As the estate will be the seller in the transaction, it would be prudent to understand the authority of the party (executor or administrator) signing the deed or instrument of conveyance and/or to establish as many portions of Texas Estates Code Section 402.053(a) as possible.[283]

5. **The Force Field.** Although perhaps an extreme measure, requiring the devisees to sign the deed would provide the greatest protection. Additionally, if included as grantors, it would ensure that any interests which immediately vested in those grantor devisees upon the death of the decedent are now conveyed to your client as grantee (subject to any prior actions of the administration in the process—paying off creditors, etc.).[284]

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278. *See* discussion *supra* Section III.D.
279. *See* discussion *supra* Section V.B.1.
280. *See* discussion *supra* Section III.C.
281. *See supra* notes 125–30 and accompanying text.
282. *See* discussion *supra* Section IV.A.4.
283. *See* discussion *supra* Section V.B.1.
284. *See supra* note 206.

VII. CONCLUSION

In sum, Texas law has enabled rogue executors and administrators to wield the power of sale and convert real property owed to (and owned by) the devisees of estates, and has codified an ostrich defense equivalent in the BFP defense for the purchasers of estate property while some courts have provided the sand.[285]

If executors and administrators are fiduciaries, they should be held accountable for the conversion of land and breach of their duties.[286] Devisees deserve greater justice and recompense for loss of their family lands, rather than the gamble of suing a fiduciary in the hopes that the proceedings do not drain the remainder of the inheritance, and that the fiduciary is not themself judgment proof.[287]

If rulings of courts regarding real property or estates are to have any effective meaning for a chain of title, and if the wishes and commands of decedent's are to be honored and enforced, then probate records are due equal value as afforded to any recorded instrument.[288] Purchasers of such property should not be provided a BFP defense when publicly available probate records would disclose the interest of devisees or others in and to the property to be conveyed.[289] Purchasers should not be rewarded for "shutting [their] eyes against the lights before [them.]"[290]

Texas law and public policy demand that a probate record be given equal dignity and effect as those of recorded instruments.[291] The practical effect of disregarding probate records—and holding that a will or probate record provides no notice of the ownership of assets passing through an estate or the applicable restrictions—is that every order from every probate ever conducted in the State of Texas, that was not also recorded in the real property records, would have no legal effect upon the passage of title to such assets.[292] Every probate record would be of no legal significance.[293] Every probate court and proceeding would serve no legal purpose and provide no legal effect upon the assets of an estate.[294] Every order signed by a judge presiding over probate proceedings would serve only as notice to those present in the courtroom or participating in the proceeding, and would have no effect upon the ownership of the assets regarding any other party.[295] Furthermore,

285. Author's original thought.
286. *See* discussion *supra* Section III.B.
287. *See* discussion *supra* Section III.B.
288. *See* discussion *supra* Section V.A.
289. *See supra* note 233.
290. *See* discussion *supra* Section III.D.3.
291. *See supra* notes 162–65 and accompanying text.
292. *See supra* notes 162–65 and accompanying text.
293. *See supra* notes 162–65 and accompanying text.
294. *See* discussion *supra* Section V.A.
295. *See* discussion *supra* Section V.A.

probating a will as a muniment of title would be wholly ineffective to affect title to the real property of the decedent or testator, which is completely antithetical to the entire purpose of the muniment of title probate process.[296] These are each an outcome that is counter to every probate proceeding, procedure, and protocol of this state.[297]

296. *See* discussion *supra* Section V.A.
297. *See* discussion *supra* Section V.A.