

# WFG Underwriting Bulletin



To: All Texas Policy Issuing Agents of WFG National Title Insurance Company  
From: WFG Underwriting Department  
Date: September 6, 2017  
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Subject: 2017 Legislative Update – 85th Session

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The 85<sup>th</sup> Session of the Texas Legislature passed several laws which affect real estate and the title insurance industry. This is a synopsis of the legislation that most significantly impacts our business. The complete text of each referenced bill can be found on the Texas Legislature web site: [www.capitol.state.tx.us](http://www.capitol.state.tx.us).

## **Date of Non Judicial Foreclosure Sales and Tax Foreclosure Sales**

**Effective September 1, 2017, HB 1128 amended Sect. 51.002 of the Property Code and Sect. 34.01 of the Tax Code to address the situation when the first Tuesday of a month is January 1 or July 4.**

1. If the first Tuesday of a month falls on January 1 or July 4, the sale shall instead be held between 10:00 a.m. and 4:00 p.m. on the first Wednesday of the month.
2. The change applies only to non-judicial sales and tax sales for which notice is given on or after September 1, 2017.

## **Delegation of Authority to an Agent by a Trustee**

**Effective September 1, 2017, SB 617 amended Sect. 113.018 of the Property Code to give trustees broad authority to employ agents and delegate authority to perform various tasks involving real property transactions.**

1. The types of powers which a trustee may delegate have been significantly enlarged by these amendments. A trustee is allowed to delegate these powers unless the trust agreement explicitly prohibits the trustee from hiring agents.

**Note:** Examiners must review the trust document to verify that the delegating of powers by a trustee to an agent is not prohibited.

2. A delegation by a trustee of any of these powers must be in writing and acknowledged.

**Note:** Attached to this Bulletin is a sample “Delegation of Power” that you can use in these situations. The form should be recorded.

**Note:** These revisions do not replace the requirement that you should obtain a Certification of Trust from the trustee whenever you are dealing with a trust.

3. A trustee may grant an agent powers to act for the trustee in any lawful manner for purposes of real property transactions involving trust property. A trustee may delegate any or all of the duties and powers to:
  - A. execute and deliver any legal instruments relating to the sale and conveyance of the property, including affidavits, notices, disclosures, waivers, or designations or general or special warranty deeds binding the trustee with vendor's liens retained or disclaimed, as applicable, or transferred to a third-party lender;
  - B. accept notes, deeds of trust, or other legal instruments;
  - C. approve closing statements authorizing deductions from the sale price;
  - D. receive trustee's net sales proceeds by check payable to the trustee;
  - E. indemnify and hold harmless any third party who accepts and acts under a power of attorney with respect to the sale;
  - F. take any action, including signing any document, necessary or appropriate to sell the property and accomplish the delegated powers;
  - G. contract to purchase the property for any price on any terms;
  - H. execute, deliver, or accept any legal instruments relating to the purchase of the property or to any financing of the purchase, including deeds, notes, deeds of trust, guaranties, or closing statements;
  - I. approve closing statements authorizing payment of prorations and expenses;
  - J. pay the trustee's net purchase price from funds provided by the trustee;
  - K. indemnify and hold harmless any third party who accepts and acts under a power of attorney with respect to the purchase; or
  - L. take any action, including signing any document, necessary or appropriate to purchase the property and accomplish the delegated powers.
  
4. A delegation of authority to an agent terminates six months from the date of the acknowledgment of the written delegation unless terminated earlier by:
  - A. the death or incapacity of the trustee;
  - B. the resignation or removal of the trustee; or
  - C. a date specified in the written delegation.
  
5. A trustee may delegate powers even if the trust instrument does not affirmatively permit the trustee to hire agents.
  
6. The changes in the statute apply to any POA executed on or after September 1, 2017, and to any delegation of authority to an agent made on or after September 1, 2017 in a pre-existing POA.

### **Duties of a Texas Notary**

**Effective September 1, 2017, SB 1098 amended Sect. 406.014(a) and (c) of the Government Code to provide that the book of record maintained by a Texas notary shall contain the mailing address of the person whose signature was notarized.**

This represents a change from the prior requirement to make a record of the “residence or alleged residence” of the person signing.

### **Transfers on Death Deeds**

**Effective September 1, 2017, SB 2150 amended Sect. 114.103(a) of the Texas Estates Code to address the situation where a designated beneficiary fails to survive the transferor by 120 hours.**

1. The TODD rules have been changed to provide that if a designated beneficiary fails to survive the transferor by 120 hours, the designated beneficiary's share passes in accordance with Chapter 255 of the Estates Code (this is the anti-lapse statute), the same as if the proposed transfer were a devise made in a will, regardless of whether there was more than one designated beneficiary.
2. The TODD form contained in the statute has been substantially revised. It now contains specific instructions and provisions relating to situations where: (1) at least one primary beneficiary survives the transferor; (2) no primary beneficiary survives the transferor; or (3) one or more of multiple beneficiaries does not survive the transferor.
3. The revisions to the statute apply only to a TODD executed on or after September 1, 2017.

### **Adverse Possession Against a Co-Tenant**

**Effective September 1, 2017, SB 1249 amended the Texas Civil Practice and Remedies Code by adding Section 16.0265 to establish a procedure for acquiring title by adversely possessing against a co-tenant.**

For many years, Texas case law held that a co-tenant could not establish title by adverse possession against another co-tenant. This new statute sets up a procedure by which that can now be done. Some of the requirements are:

1. The co-tenants must be 2 or more persons who simultaneously acquired identical, undivided ownership interests in, and rights to possession of, the same real property by operation of the laws of intestate succession, or be a successor in interest to a qualified co-tenant.
2. The co-tenant seeking to establish title by adverse possession must hold the property for a period of 10 continuous, uninterrupted years in peaceable and exclusive possession, by cultivating, using or enjoying the property and by paying all property taxes on the property not later than 2 years after the date the taxes become due.

3. The other co-tenant(s) must not have taken any of the steps set out in subsection (b) (2) of the statute which would contest or repudiate the claim of possession.
4. The claiming co-tenant must file an affidavit of heirship and an affidavit of adverse possession in the deed records of the county where the land is located. The affidavits cannot be filed until the conclusion of the 10 year period of possession. The affidavits may be combined into one document.
5. Once the affidavits are filed any other co-tenant has 5 years to file a controverting affidavit. If no controverting affidavit is filed before the 5 year deadline, and if the claiming co-tenant has complied with all statutory requirements, title vests in the adversely possessing co-tenant.

**Note:** The affidavit claiming title by adverse possession must be on file for at least 5 years before it can be used to establish title. This means the earliest you should be presented with a transaction invoking this statute would be September 1, 2022.

**Effective September 1, 2017, SB 1955 amended Section 12.0071(f) of the Texas Property Code to extend the protection which arises from an order expunging a notice of *lis pendens*.**

1. In 2017, the Texas Supreme Court held that an order expunging a notice of *lis pendens* did not operate to negate any actual knowledge of the law suit which a party had otherwise acquired. SB 1955 was enacted to overrule the Supreme Court decision.
2. Once a certified copy of an order expunging a notice of *lis pendens* has been recorded:
  - A. The notice and any information derived or that could be derived from the notice of *lis pendens* does not constitute constructive or actual notice of any matter contained in the notice of *lis pendens* or of any matter relating to the action in connection with which the notice was filed. (Underlined passages were added to the statute by SB 1955) And,
  - B. An interest in the real property may be transferred or encumbered free of all matters asserted or disclosed in the notice and all claims or other matters asserted or disclosed in the action in connection with which the notice was filed. (Entire section was added to the statute by SB 1955)

**Note:** The new legislation applies only when a certified copy of the order expunging the notice of *lis pendens* was recorded on or after September 1, 2017.

**Note:** The new legislation does not change the requirements set out in WFG Underwriting Newsletter No. 11-06 regarding *lis pendens*.

**Effective September 1, 2017, HB 1974 amended various sections of the Estates Code that deal with durable powers of attorney. WFG does not believe the amendments will result in a wholesale change of how we handle powers of attorney. Below are a few specific items which we believe should be noted.**

1. Throughout the revised Act, the term “agent” is substituted for the term “attorney in fact.”
2. A POA may be signed by an adult principal or in the adult principal’s conscious presence by another adult directed by the principal to sign the principal’s name on the instrument. (Underlined passage was added to the statute by HB 1974)

**Note:** Contact underwriting if you are presented with a POA which was not personally signed by the principal but was signed by someone else at the direction of the principal.

3. A principal may designate 2 or more persons to act as co-agents. Unless the POA provides otherwise, each co-agent may exercise authority independent of the other co-agent. Sect. 751.021

**Note:** If the POA appoints the agents “jointly” or states they are to act “jointly” then both must act together and not individually.

4. PREVIOUS DURABLE POWER OF ATTORNEY CONTINUES IN EFFECT UNTIL REVOKED. The execution of a durable power of attorney does not revoke a durable power of attorney previously executed by the principal unless the subsequent power of attorney provides that the previous power of attorney is revoked or that all other durable powers of attorney are revoked. Sect. 751.135 (Entire section is new)

**Note:** Contact underwriting if you have a situation where the principal has more than one POA in effect.

5. Someone who is presented with a POA may request an agent’s certification under Section 751.203.

**Note:** WFG requires that all agents/attorneys in fact execute a “Certification of Durable Power of Attorney by Agent” in the form attached to this Bulletin. The Certification can be executed at or before closing. Notify Underwriting immediately if an agent refuses to execute the Certification.

**Note:** The agent’s certification must be requested within 10 days after we receive the POA. You should establish a practice of requesting the certification immediately upon receiving notice that a party intends to use a POA, even if you have yet to receive the actual POA.

6. The statutory definition of “Real Property Transaction” has been expanded to include the following as an optional power: The power to mortgage and encumber real property provided by this section includes the power to execute documents necessary to create a lien against the principal's homestead as provided by Section 50, Article XVI, Texas Constitution, and to consent to the creation of a lien against property owned by the principal's spouse in which the principal has a homestead interest. Sect. 752.102(b) (Entire section is new)

7. Even though the legislation allows a durable power of attorney to be used to execute documents in connection with a home equity loan, we still require independent proof that the POA was signed at the Texas office of a title company, lender or attorney.

**Note:** The Certification form which is attached contains a statement that if the POA is to be used for a home equity loan, it was executed at the office of a lender, an attorney, or a title company.

**Effective July 1, 2018, HB 1217 amended Section 121.006 of the Texas Civil Practice and Remedies Code, by adding Subsections (c) and (d) relating to appointment of and performance of notarial acts by an online notary public and online acknowledgment and proof of written instruments.**

Note that the effective date of this legislation is almost a year away, so as to give the Texas Secretary of State time to draft rules regarding the regulation of e-notaries. WFG Underwriting will issue a detailed Bulletin on this legislation at a later date.

**Both houses adopted SJR 60 which, if approved by Texas voters in November, 2017, will take effect on January 1, 2018.**

1. The constitutional amendments would make significant changes regarding home equity loans and reverse mortgages.
2. WFG Underwriting will issue a Bulletin on this subject if the voters pass the constitutional amendment in November.

**Effective September 1, 2017, SB 499 amended the Property Code by adding new Chapter 23A titled the Uniform Partition of Heirs Property Act.**

1. The Uniform Partition of Heirs Property Act contains detailed provisions that limit its applicability to certain specific situations.
2. The purpose of the Act is to protect individuals who the Legislature felt often lost valuable property rights under the conventional partition rules.
3. Just as with any partition action, in order to insure we must have a final judgment of partition issued by a court of competent jurisdiction. Any questions regarding insuring after a partition judgment should be directed to Underwriting.

[Delegation by Trustee  
POA Certification](#)

NOTE: The information contained in this Bulletin is intended solely for the use of employees of WFG National Title Insurance Company, its title insurance agents and approved attorneys. Disclosure to any other person is expressly prohibited unless approved in writing by the WFG National Title Insurance Company's Underwriting Department.

**The Agent may be held responsible for any loss sustained as a result of the failure to follow the standards set forth**