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OPINION COMMITTEE

JOSEPH D. BROWN
GRAYSON COUNTY CRIMINAL DISTRICT ATTORNEY

March 16, 2017

RQ-0155-KP

Office of the Attorney General of Texas
Attention Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Re: Whether Affidavits of Adverse Possession must be filed by a County Clerk.

Dear Sir or Madam:

The Grayson County Criminal District Attorney's Office seeks an opinion as to whether affidavits that purport to set forth facts to establish ownership of real property by adverse possession concern real property for the purposes of Section 12.001(a) of the Texas Property Code and, therefore, must be filed by the county clerk.

Authority to Request Opinion

The Grayson County Criminal District Attorney's Office has criminal and civil jurisdiction in Grayson County. At the request of Wilma Blackshear Bush, the Grayson County Clerk, the Grayson County Criminal District Attorney's Office requests an opinion from the Texas Attorney General's Office regarding whether affidavits that purport to set forth facts to establish ownership of real property by adverse possession concern real property and must be filed of record by the county clerk's office.

Background Facts.

The Grayson County Clerk's Office periodically receives documents for filing that purport to establish facts that, theoretically, may establish ownership of real property in Grayson County by adverse possession. Such documents typically are in the form of affidavits and contain properly acknowledged jurats. These documents also are often, but not always, entitled as "Affidavits of Adverse Possession" or some variation on that title. The Grayson County Clerk recently learned at a seminar for Texas county clerks that such documents should not be filed because they have been misused in the past by some people to obtain title to vacant homes. However, further investigation into this issue by the Grayson County Clerk indicated that there was not a uniform consensus among Texas county clerk's offices to reject the filing of such affidavits. As a result, the Grayson County Clerk sought the advice of the Grayson County Criminal District Attorney's Office as to whether such affidavits of adverse possession constituted recordable documents for the purposes of Section 12.001(a) of the Texas Property Code that must be filed by the county clerk's office.

The District Attorney's Office researched this issue in light of the County Clerk's request for advice on how to proceed. Ultimately, such affidavits of adverse possession were determined by this office to not be recordable instruments for the purposes of Section 12.001(a) of the Texas Property Code, and subsequent affidavits of adverse possession were rejected for filing. One such Affidavit of Adverse Possession was submitted for filing in April 2016 by Robert Minshew, an attorney in Grayson County, on behalf of his client, Margaret Booker. That affidavit initially was rejected for filing by the Grayson County Clerk's Office, based on the advice of counsel.

On or about January 19, 2017, Mr. Minshew submitted a letter to the Grayson County Criminal District Attorney and to the Grayson County Clerk, in which he disagreed with the county clerk's refusal to file such affidavits of adverse possession. A true and correct copy of Mr. Minshew's letter of January 19, 2017, is attached hereto as Exhibit "A." Attached hereto as Exhibit "B" is a true and correct copy of the Affidavit of Adverse Possession Claimant that Mr. Minshew asserts must be filed by the Grayson County Clerk.

On behalf of the Grayson County Clerk, the Grayson County Criminal District Attorney requests that the Texas Attorney General issue an opinion regarding whether affidavits that purport to set forth facts that may establish ownership of real property by adverse possession and that contain a proper jurat must be filed by the county clerk's office.

Brief in Support of Request for Opinion on Compliance with Open Records Request.

A county clerk shall file and record all deeds, mortgages or other documents that are required or permitted by law to be filed. Therefore, county clerks have a ministerial duty to accept documents for filing and recording if a statute authorizes, requires or permits the document to be filed or recorded. Tex. Loc. Gov't Code Ann., Sec. 192.001. *See also* Tex. Att'y Gen. Op. JC-0156 (1999). If no statute authorizes, requires or permits a document to be filed or recorded, the clerk may *not* accept such a document for filing. If a clerk is unsure whether an particular paper should be filed or recorded, the clerk should consult the county attorney and request a written opinion. Ms. Bush, after attending a county clerk's seminar, learned that Tarrant County and Dallas County refuse to accept affidavits of adverse possession for filing due to several highly-publicized incidents involving squatters obtaining title to vacant houses. After learning this information, Ms. Bush asked the District Attorney's Office, approximately one year ago, to review a similar affidavit that had been presented for filing with her office.

According to Section 12.001(a) of the Texas Property Code, any "instrument concerning real or personal property may be recorded if it has been acknowledged, sworn to with a proper jurat, or proved according to law." Therefore, if the purported affidavit of adverse possession is an "instrument *concerning* real or personal property," the county clerk would be obligated to file the instrument.

Section 16.021, *et seq.*, of the Texas Civil Practices & Remedies Code contains the statutory framework for asserting a claim of adverse possession. Section 16.026(c), which relates specifically to a claim of adverse possession with a 10-year statute of limitations, states that "[p]eaceable possession of real property under a duly registered deed or other memorandum of title that fixes the boundaries of the possessor's claim extends to the boundaries specified in the instrument." In other words, the scope of the real property in a claim for adverse possession will extend only to the boundaries cited, in writing, in a deed or *other memorandum of title*. The Civil Practices & Remedies Code does not define what constitutes a "memorandum of title" for purposes of Section 16.026(c), nor does the statute identify any

other role of a "memorandum of title" in an adverse possession action. Rather, there does not appear to be any recognition of an affidavit in a claim for adverse possession unless it constitutes a memorandum of title that sets the boundaries of the claimed estate.

No authority has been found that addresses what constitutes a memorandum of title for purposes of Section 16.026(c). Additionally, there is no authority stating that an affidavit of adverse possession should be filed with the county clerk's office because it concerns real or personal property under Section 12.001(a) of the Texas Property Code. In fact, no case has been located in which a party seeking to establish ownership by adverse possession satisfied any element of his or her claim with an affidavit of adverse possession. Therefore, such affidavits typically constitute nothing but hearsay statements regarding a person's purported residence or control over a particular parcel of real property.

Additionally, the Texas County Clerk's Manual, which is published by the Texas Judicial Branch ([www.txcourts.gov/publications & training/training materials/manuals and bench books](http://www.txcourts.gov/publications&training/trainingmaterials/manualsandbenchbooks)), explains the various duties of a county clerk with respect to filing recordable documents that concern real property. Section D(1) contains an exhaustive list of documents that can be categorized as deed records (and, therefore, must be filed by the county clerk). The list does include "affidavits" of various types, but nowhere does the County Clerk's Manual identify affidavits of adverse possession as documents that concern real property and must be filed by the county clerk.

Despite this dearth of evidence regarding whether an affidavit of adverse possession must be filed among the deed records by the county clerk's office, attorney Robert Minshew, on behalf of his client, Margaret Booker, argues that such an affidavit must be filed among the deed records by the Grayson County Clerk, and that failure to file such an affidavit of adverse possession constitutes a violation of Texas Penal Code Section 39.09, official oppression. *See Exhibit "A," pp. 2-3.*

Based on the assertion by Mr. Minshew that the refusal of the Grayson County Clerk to file an affidavit of adverse possession submitted for filing by Mr. Minshew on behalf of Ms. Booker could result in violations of the Texas Penal Code, the Grayson County Criminal District Attorney's Office respectfully requests the Texas Attorney General to review this question and determine whether affidavits that purport to set forth facts that may establish ownership of real property by adverse possession and that contain a proper jurat must be filed by the county clerk's office.

Sincerely,



Joseph D. Brown
Grayson County
Criminal District Attorney

Craig M. Price
Assistant Criminal District
Attorney for Grayson County

Cc: Wilma Blackshear Bush, Grayson County Clerk
Cc: Robert Minshew, Esq.