

Title Examination: Curing Title With Affidavits

By Terry E. Hogwood

A special thanks to Kanes Forms, Midland, Texas, <http://kanesforms.com> for furnishing to the author a complete set of affidavit forms for use in this article.

Title opinions and affidavits

Both title attorneys and landmen have long used and relied on affidavits to "cure" title defects found in the examination of fee simple title to lands located in Texas. This article examines the legal and practical underpinnings of affidavits and attempts to answer the question: Can an affidavit, by itself, "cure" or resolve a title issue raised in a title opinion? (Hint: Of course not. The affidavit is only as good as the truth and veracity of the underlying facts, if any, set forth therein.)

Definition of Affidavit

Statutory Definitions

The following definitions will be used throughout this article unless otherwise noted:

Affidavit: The Texas Government Code, § 312.011. Definitions (1) provides the following:

Affidavit means a statement in writing of a fact or facts signed by

the party making it, sworn to before an officer authorized to administer oaths and officially certified to by the officer under his seal of office.

Jurat: Black's Law Dictionary defines the term as: The clause written at the foot of an affidavit stating when, where and before whom such affidavit was sworn.

Acknowledgment: Texas Civil Practice and Remedies Code, Miscellaneous Provisions provides in part the following:

(a) To acknowledge a written instrument for recording, the grantor or person who executed the instrument must appear before an officer and must state that he executed the instrument for the purposes and consideration expressed in it.

(b) The officer shall:

(1) make a certificate of the acknowledgment;

(2) sign the certificate; and

(3) seal the certificate with the seal of office.

Form of Affidavit

The following is the form of affidavit that will be referred to throughout this article with the terms "jurat" and "acknowledgment" identified in bold, capital letters.

AFFIDAVIT

The State of Texas §
 §
County of Harris §

BEFORE ME, the undersigned authority, on this day personally appeared ____, known to me to be the person whose name is subscribed hereto, who after having been first duly sworn, deposed and under oath stated:

"Statements of fact and conclusions based on those facts personally within knowledge of affiant."

Further affiant saith not.

AFFIANT:

(JURAT) Subscribed and sworn to before me, the undersigned authority, by ____ on this the ____ day of ____, ____.

Notary Public, State of Texas

(ACKNOWLEDGMENT)

The State of Texas §
 §
County of Harris §

This instrument was acknowledged before me by ____ on the ____ day of May, ____.

Notary Public, State of Texas

About the Author

Terry E. Hogwood worked as in-house counsel for four oil companies for 14 years before going into private practice in 1985. He was admitted to the Texas Bar Association in 1973. Hogwood is a member of AAPL and

the Houston Association of Petroleum Landmen. He served as founder and first chairman of the Oil, Gas and Mineral Law Section of the Houston Bar Association. He received a B.A. in economics from Texas A&M University and his J.D. from Baylor University School of Law.

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Case Law Interpretation

The author could find no "law of affidavits" that stands alone and defines the proper form and substance of an affidavit. Rather, appeals of the granting/denial of summary judgments and the admissibility of affidavits as evidence in various causes of action constitute the framework and legal background for the following conclusions regarding the drafting of and resultant admissibility/nonadmissibility of affidavits. So that it will be clear to the reader, the context of each case will follow the citation in italics. For example, if the case originated as an appeal of the granting/denial of a summary judgment, the context will appear as *Summary judgment*.

There is one statute that is utilized in more recent decisions when the issue of the validity of an affidavit is presented. It is set forth in full above (Texas Government Code, § 312.011) and is part of the definition provision for words that appear in statutes promulgated in Texas. Texas courts routinely refer to this definition as a starting place for determining the validity of affidavits. *Trimble v. Gulf Paint & Battery Inc.*, 728 S.W.2d 887 (Tex.App. —Houston [1 Dist.] 1987) — *Summary judgment* — and *Goggin v. Grimes*, 969 S.W.2d 135, 138 (Tex.App. —Houston [14 Dist.] 1998) — *Summary judgment*.

Jurat/Acknowledgment

Texas courts have made a very clear distinction in documents containing an acknowledgment only, documents containing a jurat only and documents containing both. Form of Affidavit, previously discussed, is the most accurate form of affidavit that, in the absence of any of the objections hereinafter discussed, would pass legal muster. An affidavit containing an acknowledgment only (and no jurat) does not appear to be a legally acceptable form of affidavit.

An acknowledgment (that an instrument was executed for the purposes therein expressed) does not purport to be a certification that the person acknowledging it

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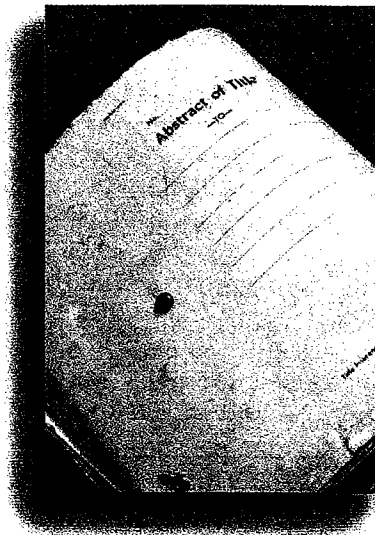
swears to the truth of the matter set out. It does not, at least within the spirit of Rule 166-A, constitute an "affidavit" so as to constitute a "sworn or certified" copy. *Perkins v. Crittenden*, 462 S.W.2d 565, 567 (Tex. 1970) — *Summary judgment*.

The absence of a jurat is a *substantive* defect that cannot be waived by failing to bring its absence to the court by proper objection. Likewise, a document with a jurat only and no acknowledgment does not appear to qualify as an affidavit.

An "affidavit" is defined as "a statement in writing of a fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths and officially certified to by the officer under his seal of office." Tex. Gov't Code Ann. § 312.011 (Vernon Supp. 1987). Without the notarization, the unsworn statement is not an affidavit, *Failing v. Equity Management Corp.*, 674 S.W.2d 906, 909 (Tex.App.—Houston [1st Dist.] 1984, no writ), and is not competent summary judgment proof. *Perkins v. Crittenden*, 462 S.W.2d at 568; *Sturm Jewelry Inc. v. First Nat. Bank, Franklin*, 593 S.W.2d 813 (Tex.Civ.App.—Waco 1980, no writ). While it is true that purely formal deficiencies in an affidavit can be waived if not raised in the trial court, Tex.R.Civ.P. 166-A(e), the absence of a jurat is substantive, and not a "purely formal defect" and cannot be waived by failing to bring it to the attention of the trial court. 593 S.W.2d at 814. *Trimble v. Gulf Paint & Battery Inc.*, 728 S.W.2d 887, 889 (Tex.App. — Houston [1 Dist.] 1987) — *Summary judgment*.

Why is the Affidavit Being Taken/Given?

Affidavits are used for various purposes in connection with the rendering of title opinions and the satisfying of title requirements as found in those opinions. In addition to supplying valuable and important information to the rendering title attorney and landman, affidavits and the information contained within



them are also routinely recorded in the official public records of the pertinent county to stand as notice to the world of their contents as well as potential evidence in various trial matters. The author — as well as many of the readers of this article — have probably at one time or another found themselves needing to use an affidavit for purposes other than "in-house" curative matters. The problem is that far too often the affidavit, perfect for review and use in title

curative matters, may not be usable for any other purpose.

If, and only if, the purpose of the affidavit is to furnish to the title examiner/landman facts sufficient to deem a title requirement satisfied, then the form of the affidavit and its potential use for other purposes becomes secondary. In fact, if no further use of the affidavit is intended, other than forcing the affiant to pay attention to the facts enumerated, an affidavit is not necessary at all. Just because a set of facts is bundled into an affidavit does not make them any more accurate. The correct preparation and understanding of the pitfalls in affidavit use only becomes significant if the affidavit is to be used as evidence in trial matters or is to be recorded as notice to third parties.

Response to Title Requirement

In today's title examination practice, qualified landmen run the pertinent county records and submit to the examining attorney copies of the documents and/or a run sheet from which the examining attorney may review all of the documents in the chain of title and thereafter prepare a title opinion for the lands under examination. In addition to a statement of ownership, most title opinions — especially those prepared for



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oil and gas development purposes — contain qualifications to the title ("title requirement(s)"). A typical title requirement identifies the particular problem with the title and then calls for curative materials to be gathered and furnished to the examining attorney for review and comment (either satisfaction of the title requirement or a call for additional curative materials). (Note: The waiver of a title requirement, as distinguished from a declaration by the examining attorney that, based on the curative materials furnished, it has been satisfied, is a risk decision to be made by management with the expert advice of the title attorney).

After the completion of the review of the "law of affidavits" — such as the same pertains to secondary uses of affidavits — the author is convinced that the accuracy and potential use of affidavits is a direct result of full, complete and accurate title requirements. For instance, every title opinion should have a title requirement concerning the furnishing of a use and occupancy affidavit. The first question that usually is asked by the landman attempting to satisfy the title requirement found in the title opinion is what the examining attorney wants in the affidavit of use and occupancy. Answer: Usual and customary items — how long has the present owner resided on the land, unusual surface features such as rivers, lakes, streams and any other pertinent facts.

It is the author's opinion that the examining attorney has the primary responsibility to fully and completely set forth all items he/she needs to deem the affidavit of use and occupancy (or any other affidavit) to fully and completely satisfy the title requirement as well as be of potential use for secondary purposes if the need arises. The starting place for a satisfactory affidavit is the title requirement itself. To that end, the author has attempted to not only provide a framework for the three most called for affidavits in title opinions but also to identify the facts that the affiant will need to testify to. It must be kept in mind that each title requirement will require facts specific to the lands under examination. There is no usual and customary item to

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be included in an affidavit. Rather, there is only an outline for what facts need to be gathered and a form to put the facts into, which can be supplied by the examining attorney. That is, the affidavit will only be as good as what facts are called for by the examining attorney to be put into it.

Notice to Third Parties of Facts Contained in Affidavit

Often, a client oil company will want to have an affidavit placed of record to stand as notice to third parties of the facts and circumstances as disclosed therein. The following is a discussion of the basic requirements necessary to be met before an affidavit may be recorded in a particular county's official records.

What May Be Recorded in the County Official Records

The pertinent Texas statute governing the recordation of instruments is as follows:

Instruments Concerning Property
(Texas Property Code) § 12.001

- (a) An 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.
- (b) An instrument conveying real property may not be recorded unless it is signed and acknowledged or sworn to by the grantor in the presence of two or more credible subscribing witnesses or acknowledged or sworn to before and certified by an officer authorized to take acknowledgments or oaths, as applicable.

Thus, any instrument "concerning real or personal property" may be recorded if it is properly acknowledged. The first legal hurdle to recordation is whether the instrument concerns or affects real property. Do heirship affidavits concern real property? Yes, see *Turrentine Lasane*, 389 S.W.2d 336, 337 (Tex. Civ.App. —Waco 1965) — *Mandamus*.

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How about affidavits of adverse possession? Probably. See *Stone v. Brown*, 621 S.W.2d 182 (Tex.Civ.App. —Texarkana 1981) — *Trespass to try title*. It will be up to the examining attorney to initially determine if an affidavit sought to be recorded concerns real property and thus meets statutory compliance. Although not discussed here, it should be noted that there are other statutes that authorize the recording of specific instruments that may/should be consulted prior to sending a document to record. If a document was not entitled to be recorded — but is accepted by the county clerk and recorded — its recordation is NOT constructive notice to third persons. *Sweeney v. Vasquez*, 229 S.W.2d 96 (Tex. Civ.App. — San Antonio 1950) — *Appeal from instructed verdict*. Regrettably,

whether a document was legally entitled to recordation and thus stands as notice to third parties (in the chain of title) is only conclusively determined when that document is offered into evidence as such in a legal proceeding dealing with title to the lands under examination.

It is absolutely incumbent on the examining attorney to confirm, prior to recordation, that the affidavit sought to be recorded contains a proper acknowledgment. Without a proper acknowledgment, any instrument concerning real property may not be recorded. *Onwuteaka v. Cohen*, 846 S.W.2d 889, 894 (Tex.App. —Houston [1 Dist.] 1993) — *Sufficiency of evidence*.

Tex. Prop. Code Ann. § 12.001 (b)(Vernon 1984 and Supp.1997). As stated by the court in *Boswell v. Farm & Home Savings Ass'n*, "An instrument that is properly recorded in the proper county is notice to all persons of the existence of the instrument. Tex. Prop. Code Ann. § 13.002 (Vernon 1987). However, an instrument conveying real property is not even eligible for recording unless it is signed and acknowledged by the grantor in the presence of two or more subscribing witnesses or a notary. Tex. Prop. Code Ann. § 12.001(b)(Vernon Supp.1994)." 894 S.W.2d 761, 766-67 (Tex. App.—Fort Worth 1994, writ denied). The general purpose of an acknowledgment is to authenticate an instrument as being the act of the person executing the instrument. *Onwuteaka v. Cohen*, 846 S.W.2d 889, 895 (Tex.App.—Houston [1st Dist.] 1993, writ denied), citing *Punchard v. Masterson*, 100 Tex. 479, 101 S.W. 204, 205 (1907); *Shelton v. Swift Motors Inc.*, 674 S.W.2d 337, 342 (Tex.App.—San Antonio 1984, writ ref'd n.e.). In order to be recorded in the real property records, an acknowledgment is necessary. *Cohen*, 846 S.W.2d at 895, citing Tex. Prop. Code Ann. § 12.001 (Vernon Supp.1997). A contract for the sale and purchase of real estate that is not acknowledged by the grantor is not notice to subsequent purchasers, though it be acknowledged by the purchaser and recorded. *Sweeney v. Vasquez*, 229 S.W.2d 96, 97 (Tex.Civ.App.—San Antonio 1950, writ ref'd); *Grossman v. Jones*, 157 S.W.2d 448 (Tex.Civ.App.—San Antonio 1941, writ ref'd w.o.m.). *Sanchez v. Telles*, 960 S.W.2d 762, 767 (Tex.App. — El Paso 1997) — *Summary judgment*.

If properly acknowledged and pertaining to and concerning real property, an affidavit will be entitled to recordation and will stand as constructive notice to third parties (in the chain of title). *Sanchez v. Telles*, 960 S.W.2d 762, 767 (Tex.App. — El Paso 1997) — *Summary judgment*.

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How Records Are Indexed

The following is a short note on the filing of affidavits not only as constructive notice to third parties but also as help or assistance for future title examiners in curing the problem(s) addressed by the affidavit. Texas county clerks have two indexes in which they note the filing of an instrument alphabetically: Direct and Reverse Indexes. § 193.003. (Index to Real Property Records, Local Government Code.) The Direct Index is filed on the basis of grantor/mortgagor, and the Reverse Index is filed on the basis of grantee/mortgagee. In the case of affidavits relating to real property, unless the affiant (grantor) is somehow related to and has the same last name as one of the owners of the real property in the chain of title, the instrument will not be found in the chain of title to that particular tract of land unless all instruments filed under "Public" (or some similar nomenclature — different county clerks have different terminology such as General Public where the key word is General) are examined to see if they pertain to the lands under examination. This can be more than a daunting task, both from a sheer number of instruments to review as well as whether the examiner has located all catchall words used by county clerks over time in that county as synonyms for "Public."

All that being said, the filing of the document, even if indexed properly but very hard to find, will be constructive notice of its contents to third parties in the chain of title. *Sanchez v. Telles*, 960 S.W.2d 762 (Tex.App.—El Paso 1997) —Summary judgment.

Use of Affidavit in Litigation: Case Law Analysis of Construction of Affidavits

The validity/invalidity of a particular affidavit, depending on the circumstances under which the relying party is attempting to use same (admission into evidence; basis for summary judgment; reliance upon for title purposes, etc.), very often turns on the use of "magic words" — the absence of which can lead to less than a desirable result. The following is a discussion of a sampling of Texas case law on various clauses and phrases as well as legal issues that arise

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from the use or lack of certain "magic words" in affidavits. The rules of evidence and admissibility of affidavits are numerous and varied. What the author has tried to do is summarize the major flaws in affidavit drafting that could lead directly to the inadmissibility of any affidavit in a subsequent title suit. Stated another way: Why take what will be an inadmissible affidavit when, with a little work and forethought, a "title curative affidavit" can stand *in futuro* as an admissible affidavit in a litigation setting if and when needed.

"Personal knowledge," "True and correct" ("Magic Words")

The failure to use the term as found in the sample affidavit form ("personally within knowledge of affiant") is, in a trial setting, a defect in form that must be objected to and the objection preserved for appeal if the affidavit sought to be admitted into evidence is objected to by the opposing side. Failure to object to the affidavit's admission for use of the words "on information and belief," "verily believes," etc. and the admission of the affidavit into evidence without such objection will cause the objection to be waived. *Choctaw Properties LLC v. Aledo*

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is subscribed to and sworn before a notary public, is not defective. *Fed. Fin. Co. v. Delgado*, 1 S.W.3d 181, 184 (Tex. App.—Corpus Christi 1999, no pet.); *Goggin v. Grimes*, 969 S.W.2d 135, 138 (Tex. App.—Houston [14th Dist.] 1998, no pet.). Here, the affidavit meets these requirements, and the trial court abused its discretion in ruling to the contrary. *Churchill v. Mayo*, 080306 TXCA1, 01-04-00787 — Summary judgment.

And finally, it is well settled law in Texas that a controverting affidavit containing such words as “on information and belief,” “knowledge and belief,” “verily believes,” “good reason to believe” and “believes to be true” are fatally defective. However, no court has ever condemned the use of the phrase “to his best knowledge.” The phrase “within my knowledge” was approved in *Coker v. Audas Inc.*, 385 S.W.2d 862 (Tex.Civ.App., Texarkana, 1964, no writ). See also *Knipe v. Rector*, 463 S.W.2d 769 (Tex.Civ.App., Fort Worth, 1971, no writ) and *Rice v. Tucson Credit Union*, 413 S.W.2d 833 (Tex.Civ.App., Texarkana, 1967, no writ). It is the use of the word “believe” that is found to be objectionable by our appellate courts. The words “believe” and “knowledge” or “best knowledge” do not have the same meaning. *Industrial State Bank of Houston v. Wylie*, 493 S.W.2d 293, 295 (Tex.Civ.App. —Beaumont 1973) — *Plea of privilege*.

Magic words indeed. Apparently, for an affidavit to be admitted into evidence, the test for its admissibility is whether it is based on the personal knowledge of the affiant such that, if the facts have been deliberately misrepresented, the affiant could be liable for perjury.

Unless authorized by statute, an affidavit is insufficient unless the allegations contained therein are

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direct and unequivocal and perjury can be assigned upon it. *Burke v. Satterfield*, 525 S.W.2d 950 (Tex.1975). This affidavit, however, does not positively and unqualifiedly represent the "facts" as disclosed in the affidavit to be true and within his personal knowledge. The statements made in the affidavit lack the necessary factual specificity. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984) — Summary judgment.

However, the courts seem to waiver in the use of magic words in some cases. Even though the personal knowledge of the affiant is not shown specifically in the affidavit, sometimes courts are willing to accept a lesser express level of personal knowledge.

An affidavit that does not positively and unqualifiedly represent the facts as disclosed in the affidavit to be true and within the affiant's personal knowledge is legally invalid. *Humphreys v. Caldwell*, 888 S.W.2d 469, 470 (Tex.1994). An affidavit that states that it is based on "personal knowledge and/or knowledge acquired upon inquiry" does not unequivocally show that it is based on personal knowledge, and therefore cannot serve as evidence. *Id.* at 470-71. However, where the affidavit does not specifically recite that the facts set forth there are true, but does set out that it is based on personal knowledge and is subscribed to and sworn before a notary public, it is not defective if, when considered in its entirety, its obvious effect is that the affiant is representing that the facts stated therein are true and correct. *Federal Financial Co. v. Delgado* 1 S.W.3d 181 (Tex.App. —Corpus Christi 1999) — Summary judgment.

And the lesson to be learned from these cases: Use the form language recommended previously in this article every time, and the issue of admissibility of any affidavit in any subsequent trial where reliance on same is important will

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not arise for failure of the affiant to state that the information set forth in the affidavit is based on his/her personal knowledge.

Competency of the Affiant — How the Affiant Came to Know the Facts

It is not enough that an affidavit shows that the facts are within the personal knowledge of the affiant. In addition, the affiant must demonstrate how and under what circumstances he/she obtained knowledge of the facts and why he/she is qualified to make such an affidavit. For instance, many affidavits of use and occupancy reviewed by the author for curative purposes contain a metes and bounds description of the property under examination and/or a plat of same. Nowhere in the affidavit is it stated that the affiant surveyed the property or caused the plat to be made, nor does it say how the affiant can state that both or either is accurate. Only the surveyor could swear/testify as to the accuracy of a metes and bounds description/survey plat, thus raising a substantive issue of admissibility of the entire affidavit into evidence. It should be noted that failure to object to the admissibility of an affidavit due to a lack of competency on the part of the affiant results in the waiver of the defect.

Rule 166a(f) requires an affidavit to show it is made by a person who is *competent* to testify on the matter. *Radio Station KSCS v. Jennings*, 750 S.W.2d 760, 761-62 (Tex.1988); *Box v. Bates*, 162 Tex. 184, 346 S.W.2d 317, 319 (1961). If no objection to the competence of the witness is made, the defect is waived. *Woods Exploration & Producing Co. v. Arkla Equip. Co.*, 528 S.W.2d 568, 570-71 (Tex.1975). Because defendant did not object to the plaintiff's competence, he waived this defect. *Rizkallah v. Conner*, 952 S.W.2d 580, 586 (Tex.App. —Houston [1 Dist.] 1997) — *Summary judgment*.

The above affidavit form utilizes the following statement: "Statements of fact and conclusions are based on

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those facts personally within knowledge of affiant." Almost all of the affidavits whose admissibility was controverted reviewed by the author contained an identical or very similar provision. The provision is an attempt to establish competency of the affiant as to the facts and conclusions recited in the affidavit by the affiant. Such statement, standing alone, will **not** establish competency of the affiant.

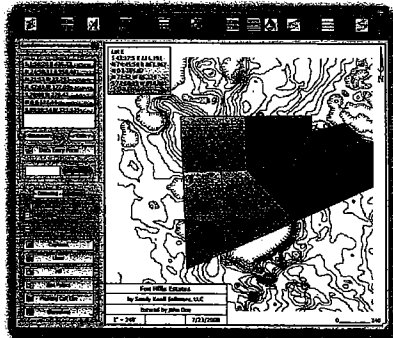
This provision clearly shows that the mere statement that affiant has personal knowledge of every statement made is not sufficient because it is further provided: "and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The statements made by

affiants that they were competent to testify to the matters stated are nothing more than conclusions of affiants. There must be something in the affidavits to show affirmatively what makes the affiant competent to testify. A reading of the affidavits makes it obvious that the statements are not so worded that if given on the witness stand they would be admissible in evidence. The affidavits would not be admissible without showing as to how affiants could possibly have such knowledge except by hearsay. *Tobin v. Garcia*, supra; *Gaines v. Hamman*, 163 Tex. 618, 358 S.W.2d 557 (1962); *Heien v. Grabtree*, 364 S.W.2d 271 (Tex.Civ.App.—Amarillo, 1962, affirmed 369 S.W.2d 28). *Murfee v. Oquin*, 423 S.W.2d 172, 174 (Tex.Civ.App. —Amarillo 1967) — *Summary judgment*.



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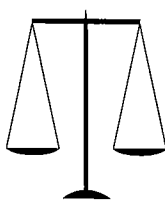
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An affidavit must affirmatively show how the affiant became personally familiar with the facts so as to testify as a witness, and a self-serving recitation of such does not satisfy the requirement. *Villacana v. Campbell*, 929 S.W.2d 69, 74 (Tex.App.—Corpus Christi 1996, writ denied), *Goggin v. Grimes*, 969 S.W.2d 135, 138 (Tex.App.—Houston [14 Dist.] 1998) — *Summary judgment*.

The establishment of competency is a function of the facts being recited, the actual knowledge of the affiant, how that knowledge came into the possession of the affiant and, ultimately, whether the knowledge qualifies the affiant to state the facts/conclusions. For example, A is claiming fee simple title to Blackacre. An affiant gives an affidavit detailing the adverse possession of Blackacre. The affiant makes the following statements of “fact”:

Statement No. 1 - “Blackacre was fenced by A, said fence following the metes and bounds description of the land as found in instrument dated July 1, 1963, by and between John Jones, Grantor, and A, Grantee (DR 235/714).”

Statement No. 2 - “There were no other claimants to Blackacre claiming an interest therein from and after 1963.”

Statement No. 3 - “The possession of A was adverse as against the world.”

The true facts are as follows:

The fence does not follow the fence line (from a plat prepared by a surveyor showing the discrepancies).

John Jones had two siblings. Each inherited an undivided one-third interest in Blackacre per probated will. Each is claiming an undivided one-third interest.

A admitted to other neighbors in the past that he was farming Blackacre with John Jones’ siblings’ permission.

Who is the affiant? How did he/she come into possession of the “facts” found in the affidavit? As will be seen later in the article, the affiant was not a family member (this is good). He/she had no interest in the outcome of the litigation whereby A is attempting to claim title to Blackacre by adverse possession. Unfortunately, the affiant also had no firsthand knowledge of the family history of A’s grantor, John Jones. The affiant had no knowledge of location of the fence relative to the actual metes and bounds description of Blackacre and was too young to have ever talked with any of John Jones’ neighbors. The true affiant is the examining attorney or the field/in-house landman or a title company representative. If an affidavit is to be relied on for title purposes, it simply must be based on facts personally ascertained by the affiant. Otherwise, as in our example, the affidavit will not be admitted into evidence for the purposes for which it was taken.

Conclusive Statements: Defect of Substance

One of the most often raised (and granted) objections to the introduction of an affidavit into evidence is that the affiant stated conclusions of law/fact and did not state or premise any such conclusions on the actual facts at issue. A conclusory statement, either of the facts or the law, where there are no underlying facts to support the conclusion, is a defect of substance and may be raised for the first time on appeal. This is to be distinguished from a defect in form where the objection is deemed waived if it is not raised at the time the affidavit is sought to be admitted into evidence.

In this appeal, an additional challenge to the affidavit is asserted for the first time on the ground that it contains conclusory statements. Although this objection was not presented to the trial court, we address it because conclusory statements in an affidavit are defects of substance that may be raised for the first time on appeal. *Churchill v. Mayo*, 224 S.W.3d 340, 347 (Tex.App.—Houston [1st Dist.] 2006) — *Summary judgment*.

“A conclusory statement is one that does not provide the underlying facts to support the conclusion.” *Rodriguez v. Wal-Mart Stores Inc.*, 52 S.W.3d 814, 823 (Tex.App.—San Antonio 2001), rev’d on other grounds, 92 S.W.3d 502 (Tex.2002); *Dolcefino*, 19 S.W.3d at 930; *Rizkallah*, 952 S.W.2d at 587. A “conclusory” statement may set forth an unsupported legal conclusion or an unsupported factual conclusion. See *Rizkallah*, 952 S.W.2d at 587. *Choctaw Properties LLC v. Aledo ISD*, 127 S.W.3d 235, 242 (Tex.App.—Waco 2003) (emphasis added) — *Summary judgment*.

The rationale for such a rule is premised on the theory that, if an actual trial were being held, and the affiant testified with conclusions only — wholly omitting from his/her testimony any facts upon which the conclusion(s) were based — a court would have no choice but to disallow such testimony.

... Affidavits consisting only of conclusions are insufficient to raise an issue of fact. *Life Ins. Co. of Virginia v. Gar-Dal Inc.*, 570 S.W.2d at 381. By stating that the contractual obligation had been modified, it asserted nothing more than a legal conclusion. The affidavit did not set forth such facts as would be admissible in evidence, as required by Rule 166A(e), Tex.R.Civ.P. If this had been a trial on the merits and the only thing to which was testified was that the obligation had been modified, the trial court would have been required to instruct a verdict against. The affidavit opposing the motion for summary judgment should have gone further and specified factual matters such as the time, place and exact nature of the alleged modification. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984) — *Summary judgment*.

A legal conclusion in an affidavit is one with no factual underpinnings. The affiant boldly makes a conclusion of law such as:

Example 1: “The land was held by A in adverse possession as against the world.”

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Example 2: "The Sun Oil Co. lease dated June 15, 1985, recorded in Volume 144 at Page 215 of the Panola County Deed Records, automatically terminated on June 15, 1998."

Missing from such conclusions of law are the facts:

Example 1: What did A do to adversely possess Blackacre? Did he fence the land? Did he pay taxes on the land? Did he live on the land or merely farm the same? Did anyone else in the immediate area know of A's ownership? How long did A adversely possess the land?

Example 2: Was production established under the lease? On what date did it cease? How does the affiant know the actual date of last production? What lease provision is the affiant relying on to state that the lease automatically terminated?

Conclusions of fact in an affidavit cause the same admissibility problems as conclusions of law. The following statements have been found by the author in affidavits submitted in satisfaction of title requirements. There were no additional supporting facts contained in the affidavits.

Example 1: "Mary Lou Jones is one and the same person as Mary Lou Benson."

Example 2: "There are no lakes, rivers, streams, roads or railroads located on Blackacre."

Missing from such conclusions of fact are the underlying facts:

Example 1: How did the affiant come to know Mary Lou Jones? Did Mary Lou Jones marry and take the name Benson after her marriage? If so, is there a marriage license available that would better serve to prove who Mary Lou Jones is? Did the name change take place while the affiant knew and was in actual contact with Mary Lou Jones?

Example 2: Did the affiant actually walk the land? On what date? Are there any pictures confirming the affiant's conclusions?

The law is clear: Conclusions are permitted by affiants. However, they must be premised on full and complete facts that lead logically to the conclusion, especially if the conclusion is one of law.

The objection that a statement is "conclusory" is an objection that is frequently made to challenge affidavits in summary judgment cases. *Johnson v. Bethesda Lutheran Homes & Servs.*, 935 S.W.2d 235, 239 (Tex. App. — Houston [1st Dist.] 1996, no writ.) (Hedges, J., concurring). There is much confusion about what this objection means. *Id.* It does not mean that logical conclusions based on stated underlying facts are improper. That type of conclusion is proper in both lay and expert testimony. What is objectionable is testimony that is nothing more than a legal conclusion. *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991); *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984). To allow such testimony is to reduce to a legal issue a matter that should be resolved by relying on facts. Statements of legal conclusions amount to little more than the witness choosing sides on the outcome of the case. *Mowbray v.*

State, 788 S.W.2d 658, 668 (Tex. App. — Corpus Christi 1990, pet. ref'd). 952 S.W.2d 580 (Tex. App. — Houston [1 Dist.] 1997). *Rizkallah v. Conner*, 952 S.W.2d 580, 587 (Tex. App. — Houston [1 Dist.] 1997) — *Summary judgment.*

Interested Person: Defect of Substance

The first instruction the author received from his mentors in writing title opinions and requesting curative documents was to never, ever allow a family member or interested party to give the affidavit in the absence of a corroborating affidavit by a disinterested third party. The "why" had a two-part answer. First, and foremost, in the absence of a corroborating affidavit, the family member/affiant — especially in heirship/family history affidavits — is probably an interested party. As such, the affidavit, and its contents, may very well be inadmissible in later cases where the heirship or family history is an issue. Second, family members tend to see "heirship" in a less than legal fashion. For example, in one case, the family member only listed three children in the heirship affidavit as being the intestate heirs-at-law of the deceased fee simple mineral owner of the drillsite tract. Of

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course, after the well was drilled and completed, making 2 million cubic feet a day, the fourth "child" came forth. When confronted, the affiant stated that he just knew his mother would not have wanted his sibling to have any interest in the "old homestead." Thus, no mention was made in the affidavit of an undivided one-fourth unleased interest under the drillsite tract. Ultimately, the issue becomes whether the affiant is an interested party in the subject matter of the affidavit. If so, a self-serving affidavit is inadmissible on a trial of the matter for which it was issued under the hearsay rule. *Fenley v. Ogletree*, 277 S.W.2d 135, 144 (Tex.Civ.App.—Beaumont 1955) — *Dismissal of suit*.

In this state of the record, we think the appellants' contention that the evidence at least showed Fenley and Faulkner to be joint owners with the plaintiffs of the land in controversy is without merit. The testimony given by the defendant Fenley was inadmissible hearsay. The declaration which was attributed to L.C. Adams, his claim that he was a son of Joseph

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Adams, deceased, was not admissible under the exception to the hearsay rule which in proper circumstances permits the introduction of hearsay to prove pedigree. The applicable rule is thus expressed in Texas Law of Evidence (McCormick & Ray) Sec. 601, p. 762: "Bias or prejudice would be fatal to the trustworthiness of the declaration. To guard against it, the courts have established the rule that the declarant must have been disinterested, i.e., had no interest or motive to deceive, at the time when the declaration was made. Under this rule, declarations as to the declarant's heirship or relationship to a certain person, made after descent cast upon him as to property belonging to such person are not admissible on behalf of the declarant or persons claiming that property under him." The declaration by Adams was made after descent had been cast as to the property of Joseph Adams, deceased, and at a time when he himself was

endeavoring to sell or was in process of selling his asserted interest in the land in controversy; it was a self-serving declaration, was hearsay in the form in which it was introduced in evidence and was inadmissible. *Byers v. Wallace*, 87 Tex. 503, 28 S.W. 1056, 29 S.W. 760; *Jamison v. Dooley*, 98 Tex. 206, 82 S.W. 780; *Wolf v. Wilhelm*, Tex.Civ.App., 146 S.W. 216, error refused. *Fenley v. Ogletree*, 277 S.W.2d 135, 144 (Tex.Civ.App.—Beaumont 1955) — *Dismissal of suit*.

Many corroborating affidavits are often flawed as well in that they only deliver conclusory statements. (See 3.) That is, the affidavit issued by the corroborating affiant usually states that the affiant personally knows the facts and conclusions made in the main affidavit to be true and correct. Without a full rendition of the facts and circumstances of why and how the affiant knows the facts contained in the main affidavit to be true, the corroborating affidavit is of no importance and will not serve to make admissible the affidavit of the interested



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party. More importantly, if the party giving the corroborating affidavit is familiar with the facts such that he can confirm the main affidavit, why isn't that party giving the main affidavit to the exclusion of the interested party?

Over the years it has become apparent to the author that, in many instances, only a family member has the knowledge to be able to give an affidavit on family history. There simply are no third parties available with the requisite family knowledge. Given that the affidavit will be taken from a potentially interested party — and that no corroborating affidavit will be available — does the affidavit have any use?

Of course it does. However, that use is only to answer the immediate question raised by the examining attorney concerning family history. Even when used for that purpose, it is also only as accurate as the facts contained in it. That is, ultimately the client will be faced with the business decision of whether or not to accept the facts as set forth in the affidavit as being accurately stated. No affidavit is any better than the truth of the facts sworn to be the affiant. Further, the affidavit will probably not be admissible if the question of heirship has to be tried. Or can it?

If there is a passage of more than five years after the filing of the affidavit in the pertinent deed records in "any county in this state in which such real or personal property is located at the time the suit is instituted, or in the deed records of any county of this state in which the decedent had his domicile or fixed place of residence at the time of his death..." the affidavit may very well stand as prima facie evidence of the facts stated therein. § 52. Recorded Instruments As Prima Facie Evidence, Texas Probate Code. See also *Wood v. Paulus*, 524 S.W.2d 749 (Tex.Civ.App.—Corpus Christi 1975) — *Directed verdict*.

How Does an Affidavit "Cure" Title?

The author debated where this part of the article should be placed. The title of this article is "Curing Title With Affidavits." It fits quite nicely at the beginning of the article but, after reading, could easily negate the reader's interest in understanding the uses and pitfalls of affidavits. An affidavit is, in the end, the client and title examiner's

last hope of bringing into focus the facts and circumstances surrounding a title requirement made in a title opinion. Most title examiners assume (often with the dreaded negative result of "assuming") that the abstractor has looked into all possible documents of record or otherwise available in an attempt to find out the pertinent facts and circumstances raised by the title examiner. The affidavit obtained from a person with knowledge of the important facts and circumstances can rise no higher than the true knowledge of the affiant coupled with their interest in revealing the full and complete truth.

It is the author's opinion that no affidavit "cures" a title problem. It presents to the examiner a set of facts which, if true and accurate, may be made the basis of advice from the examiner that the particular title requirement is deemed satisfied. However, the decision to accept the facts as accurate is one to be made NOT by the examiner but by the client. It may be, depending on the significance of the title requirement, a very serious risk decision that could have dire consequences if the affidavit is not correct. The author has seen numerous affidavits that, in light of subsequent litigation, have proved to be

totally incorrect but were relied upon when "curing" the title to the drillsite tract. Juries, the penalty of actual perjury, a judge's ruling, the availability of additional people with knowledge, etc., all play a role where the facts as initially set forth in an affidavit are distinguished or overruled.

In the end, affidavits are an aid to the title examiner/client in evaluating title requirements. There is only one "cure" — trespass to try title litigation. Anything short of a trespass to try title case places risk on the client that the facts set out in the affidavit are not correct. It is appropriate, in the author's opinion, to always place that risk in writing in any supplemental title opinion that analyzes the submitted affidavit(s) and renders a decision of whether a particular title requirement has been satisfied.

Selected Affidavits and Their Title Requirement Antecedents

The following are the three affidavits commonly used by landmen/title examiners to satisfy specific title requirements. Perhaps one of the most significant failings with title attorneys today is the failure to fully and completely set forth the precise facts that the affidavit must contain. For example, in a situa-

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tion where reliance on adverse possession will be necessary, it is not unusual for the title attorney to request "an affidavit of adverse possession showing the use and occupancy of the lands under examination for the past 10 years."

What facts and circumstances does the examining attorney want/need to deem the requirement satisfied? "Your usual adverse possession affidavit" is not an answer. There is no such thing!

What facts and circumstances does the title attorney need to develop such that a risk decision can be made to accept the title, subject to a reasonable expectation that, if the title is ever questioned, it can be affirmed via proof of adverse possession by the party(ies) leased by the client? While no form of title requirement or affidavit can ever set forth all of the facts and circumstances that could be encountered, the author has attempted to set forth those matters which can be used as a starting point for the development of both the title requirement and affidavit. The author has crafted an initial set of title requirements and a possible affidavit that responds to the title requirements. The form of affidavit contains checklists that the landman can use as a starting point in developing the final affidavit. Given the status of today's computer technology, all unused or nonchecked boxes can be deleted, leaving only the actual factual framework to inquire of the affiant in the preparation of the affidavits.

The Unwaivable Title Requirement: Affidavit of Use and Occupancy

Opinions vary on whether there is any title requirement that can never be waived. The author believes that there is one — the affidavit of use and occupancy. It simply must be obtained prior to the drilling of each and every well. The client is charged with all defects in the title that are visible on the surface of the lands — oil and gas wells, rivers, lakes, streams, structures, roads, railroads, cemeteries, etc. Lands under examination simply must be inspected and the results of the findings reported since, reported or not, the client is charged with their existence.

The following is a suggested title requirement for an affidavit of use and occupancy. It is followed by a suggested form of affidavit of use and occupancy. The suggested form of affidavit is in checklist format. It allows the landman/affiant to think about each area of interest that the examining attorney has pointed out in the title requirement that needs to be addressed. It is intended that the affiant note with specificity the facts that lead to the decision to check the particular box. The alternative provisions not utilized may be deleted from the final form of affidavit for easier reading by the examining attorney. At the end of the suggested form is a place for the landman/affiant to note additional facts not encompassed by the specific areas of inquiry.

Suggested Title Requirement

Requirement: You should secure an affidavit from one or more people personally familiar with examined lands for the past 25 years, giving the names and addresses of such persons and reciting the manner in which they are acquainted with the facts surrounding the property insofar as they relate to possession, use and occupancy. If the primary affiant is from one of the owners of the surface/minerals set out herein, you should also secure a corroborating affidavit from a disinterested third party that confirms the factual statements of the primary affiant based on personal knowledge of that corroborating affiant. Suggested affidavit/corroborating affidavit forms are attached to this opinion as Exhibit "A" and "A-1" respectively. Without intending to limit the breadth and scope of the affidavit of use and occupancy, please address with particularity the following:

Boundaries: Ascertain whether or not definitive corners and boundaries of the property have been established and if so, then address in what manner — i.e., fences, markers, blaze lines, etc. — such boundaries and

corners are marked and set. Determine if fences were constructed, paying special attention to the dates of construction and whether the fences follow the metes and bounds description of the lands. Address whether or not such corners and boundaries, if having been established, are recognized by contiguous landowners. If such corners and boundaries have not been established, then ascertain whether or not there are any existing boundary or corner disputes. Submit any survey plats that reflect the surveyed outline of examined lands.

Surface: Address the topographical features of the property, in particular as to whether or not there are any navigable waters or lakes upon the property or in the immediate vicinity thereof, and whether or not in recent history the property has constituted a portion of a lake bottom or been traversed by any navigable streams.

Land Use: Discuss whether or not any agricultural activities have taken place upon the property, if so giving dates and nature of such activities and names of parties conducting same. Discuss whether or not there has been any timber harvested from the property, and, if so, set forth dates of such harvesting and names of parties conducting same. State whether or not there have been any forestry enhancement activities on the properties. Address whether or not there have been any hunting leases, grazing leases, agricultural leases or any other like and similar agreements entered into.

Structures and Improvements: Determine whether or not there are or have been any houses, churches, cemeteries, schools, public buildings, barns, silos, equipment sheds, mobile homes or other like and similar structures on the property, and if so, determine who constructed same, whether or not they are presently occupied or in use, and if so, by whom, for what purpose and under whose authority. Please furnish a plat of the lands showing the location of any such structures.

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Possession: If anyone other than the record title owners as set forth above are in possession of the surface of examined lands, then address who, the type of possession, dates of possession and whether or not they are claiming adverse to the record owners. In the event there is a person who claims title to the property, either past or present, through adverse possession, then inquire as to those parties in the chain of record title as to whether or not there have been any conveyances of the surface, minerals or royalties by such record title holders to other parties, and whether or not to their knowledge such conveyances have not been placed of record.

Rights of Way and Servitudes:

Address whether or not there are any roads, pipelines, utility lines, microwave towers or other like and similar rights of way or servitudes on the examined lands. Address with particularity the dates they were constructed, whether or not they are in use and if so by whom.

Exploration and Production

Facilities: Determine whether or not there are any present oil and gas operations being conducted on examined lands and whether or not there have been any oil and gas operations in the past including, but not limited to, any old locations or facilities that have been plugged and abandoned or locations temporarily abandoned but not plugged.

When applicable to any of the above, please address with detail the history surrounding the matters, including names, years and dates.

Affidavit of Adverse Possession

An affidavit of adverse possession is somewhat similar to the affidavit of use and occupancy by the underlying facts requested in the title requirement. However, the title examiner needs to alert the landman/affiant which statute

will be relied on (five, 10 or 25-year statute — see Texas Statutes and Code (2008), Civil Practice and Remedies Code, Title 2. Trial, Judgment and Appeal, Subtitle B. Trial Matters, Chapter 16. Limitations). The nature of the possession will be developed from the facts set forth by the affiant much in the same way as those set forth in the use and occupancy affidavit. It has become the recent practice of the author, where an affidavit of adverse possession is called for, to also call for an affidavit of use and occupancy since the focus of these two affidavits is somewhat dissimilar. The affidavit of use and occupancy calls for an inspection of the lands noting any use of the surface that may lead to additional questions concerning ownership of all or part of the lands under examination. The affidavit of adverse possession is focused solely on the nature of the possession of the party(ies) noted by the title examiner to be the apparent fee simple owner (of the surface and/or mineral estate) vis-à-vis all other potential claimants to the title.

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TITLE EXAMINATION

Key to the suggested title requirement for an affidavit of adverse possession is the insertion of the applicable number of years the title examiner believes that will be necessary to rely on for adverse possession to be proved coupled with the exact date those years are to commence. It is not unusual for adverse possession to develop some time earlier than the present in a chain of title, thus necessitating an older, longer resident in the area familiar with the use and possession of the lands under examination.

Suggested Title Requirement

Requirement: You should secure an affidavit of adverse possession from one or more people personally familiar with examined lands for the past five, 10 or 25 years from and after the ____ day of _____, _____, giving the names and addresses of such people and reciting the manner in which they are acquainted with the facts surrounding the property insofar as they relate to possession, use and occupancy. If the primary affiant is one of the owners of the surface/minerals set out herein, you should also secure a corroborating affidavit from a disinterested third party that confirms the factual statements of the primary affiant.

Without intending to limit the breadth and scope of the affidavit of adverse possession, please address with particularity the following:

Boundaries: Ascertain whether or not definitive corners and boundaries of the property have been established, and if so, then address in what manner — i.e., fences, markers, blaze lines, etc. — such boundaries and corners are marked and set. Determine if fences were constructed, paying special attention to the dates of construction and whether the fences follow the metes and bounds description of the lands. Address whether or not such corners and boundaries, if having been established, are recognized by contiguous landowners. If such corners and boundaries have not been estab-

lished, then ascertain whether or not there are any existing boundary or corner disputes. Submit any survey plats that reflect the surveyed outline of examined lands.

Land Use: Discuss whether or not any agricultural activities have taken place upon the property, if so giving dates and the nature of such activities and names of parties conducting same. Discuss whether or not there has been any timber harvested from the property, and if so, set forth dates of such harvesting and names of parties conducting same. State whether or not there have been any forestry enhancement activities on the properties. Address whether or not there have been any hunting leases, grazing leases, agricultural leases or any other like and similar agreements entered into.

Structures and Improvements:

Determine whether or not there are or have been any houses, churches, cemeteries, schools, public buildings, barns, silos, equipment sheds, mobile homes or other like and similar structures on the property, and if so, determine who constructed same, whether or not they are presently occupied or in use, and if so, by whom, for what purpose and under whose authority. Please set forth the dates of construction of any structures as the same relate to the time period identified herein. Please furnish a plat of the lands showing the location of any such structures.

Possession: During the time period set out above, determine if anyone other than _____ were ever in possession of the surface of examined lands, then address who, the type of possession, dates of possession and whether or not they are/were claiming adverse to _____. In the event there is a person who claims title to the property, either past or present, through adverse possession, other than _____, then inquire as to those parties in the chain of record title as to whether or not there have been any conveyances

of the surface, minerals or royalties by such record title holders to other parties, and whether or not to their knowledge such conveyances have not been placed of record.

Exploration and Production

Facilities: Determine whether or not there were any oil and gas operations being conducted on examined lands during the above time period including, but not limited to, any old locations or facilities that have been plugged and abandoned or locations temporarily abandoned but not plugged. Ascertain the dates these operations took place.

When applicable to any of the above, please address with detail the history surrounding the matters, including names, years and dates.

Affidavit of Heirship

Suggested Title Requirement

Requirement: You should secure from a disinterested third party an affidavit of heirship that sets out the heirs at law of _____ (or, if affidavit is from a family member with a potential interest in the examined lands, you should also secure a corroborating affidavit from a disinterested third party that confirms the factual statements of the primary affiant).

Without intending to limit the breadth and scope of the heirship affidavit, please address with particularity the following:

1. How long the affiant knew and degree of the family relationship, if any.
2. Names of children, if any, their dates of birth and, if deceased, their dates of death and names and dates of birth of their children, if any.
3. If no surviving children or grandchildren, names of brothers/sisters, dates of death and if survived by children, their names, dates of birth and, if deceased, dates of death.

Appendix "A"

(Suggested Form of) Affidavit of Use and Occupancy

The State of Texas §
 §
County of Harris §

BEFORE ME, the undersigned authority, on this day personally appeared ____, known to me to be the person whose name is subscribed hereto, who after having been first duly sworn, deposed and under oath stated:

The statements of fact and conclusions based on those facts are personally within knowledge of affiant to wit:

My name is _____. I have lived in _____ county for the last ____ years. I reside on a tract of land which is contiguous to the _____ Tract, which _____ Tract contains _____ acres and is more particularly described in deed found at Volume ____, Page ____ of the _____ County Deed Records, a copy of which is attached to this affidavit as Exhibit "A" and made a part hereof. I am personally acquainted with all of the facts as hereinafter set forth, having lived on the lands due east of the lands made the basis of this affidavit. I personally walked all of said lands on the ____ day of _____, _____ and, as a result of my inspection, found the following:

_____ Fence
Type of fence
Known boundary disputes
Date fence constructed
Whether kept in repair

_____ No Fence
_____ Survey Plat — Who prepared and date of preparation
_____ No Survey Plat
_____ River, lake, stream, tank — Describe
_____ No river, lake, stream, tank
_____ Land under cultivation — For how long and what grown — Cultivated by whom
_____ Land not under cultivation
_____ Timber harvested — Dates and by whom
_____ Timber not harvested
_____ Hunting leases — Dates and to whom
_____ No hunting leases
_____ Grazing Leases — Dates and to whom

_____ No grazing leases
_____ Agricultural leases — Dates and to whom
_____ No agricultural leases
_____ Man-made structures on lands - Describe, including dates constructed
_____ No man-made structures on lands
_____ Cemetery on lands — Describe, including sampling of dates on headstones, if any
_____ No cemetery on lands
_____ Lands in possession of other than record title owners — Give names, dates and circumstances of possession
_____ Lands never in possession of other than record title owners
_____ Rights of way — Describe with dates same were constructed and by whom and if still in use
_____ No rights of way on lands
_____ Wells (abandoned or still in production), production facilities or other oil and gas structures on lands — Give dates and company names
_____ No wells (abandoned or still in production), production facilities or other oil and gas structures on lands

ADDITIONAL FACTS — List as appropriate.

Further affiant saith not.

AFFIANT:

Subscribed and sworn to before me, the undersigned authority, by ____ on this the ____ day of _____, _____.

Notary Public, State of Texas

The State of Texas §
 §
County of Harris §

This instrument was acknowledged before me by _____ on the ____ day of _____, _____.

Notary Public, State of Texas

Appendix "B"

(Suggested Form of) Affidavit of Adverse Possession

The State of Texas §
 §
County of Harris §

BEFORE ME, the undersigned authority, on this day personally appeared ____, known to me to be the person whose name is subscribed hereto, who after having been first duly sworn, deposed and under oath stated:

The statements of fact and conclusions based on those facts are personally within knowledge of affiant to wit:

My name is _____. I have lived in _____ county for the last _____ years. I reside on a tract of land which is contiguous to the _____ Tract, which _____ Tract contains _____ acres and is more particularly described in deed found at Volume ___, Page ___ of the _____ County Deed Records, a copy of which is attached to this affidavit as Exhibit "A" and made a part hereof. I am personally acquainted with all of the facts as hereinafter set forth, having lived on the lands due east of the lands made the basis of this affidavit. I personally know that the following acts of possession have taken place from the ___ day of _____, _____ down to _____ (5, 10 or 25 years thence):

_____ Fence
Type of fence _____
Does/does not follow metes and bounds description _____
Known boundary disputes _____
Date fence constructed _____
Whether kept in repair _____

_____ No Fence

_____ Survey Plat — Who prepared and date of preparation _____

_____ No Survey Plat

_____ Land under cultivation — For how long and what grown — Cultivated by whom _____

_____ Land not under cultivation

_____ Timber harvested — Dates and by whom _____

_____ Timber not harvested

_____ Grazing Leases — Dates and to whom _____

_____ No grazing leases

_____ Agricultural leases — Dates and to whom _____

_____ No agricultural leases

_____ Man-made structures on lands — Describe, including dates constructed _____

_____ No man-made structures on lands

_____ Lands in possession of other than _____ during the period of (5, 10 or 25) years from _____ — Give names, dates and circumstances of possession _____

_____ Lands never in possession of other than _____ during the period of (5, 10 or 25) years from _____

_____ Wells (abandoned or still in production), production facilities or other oil and gas structures on lands drilled during period of time of (5, 10 or 25) years from _____ — Give dates and company names _____

_____ No wells (abandoned or still in production), production facilities or other oil and gas structures on lands _____

ADDITIONAL FACTS, including nature of possession — Describe reputation in the community, including whether _____ was considered the owner of the lands under examination and what acts, if any, other than the above took place to demonstrate his/her ownership.

Further affiant saith not.

AFFIANT:

Subscribed and sworn to before me, the undersigned authority, by _____ on this the ___ day of _____, ____.

Notary Public, State of Texas

The State of Texas §
 §
County of Harris §

This instrument was acknowledged before me by _____ on the ___ day of _____, ____.

Notary Public, State of Texas

Appendix "C"
(Suggested Form of) Affidavit of Heirship

The State of Texas §
 §
County of Harris §

BEFORE ME, the undersigned authority, on this day personally appeared name of affiant, known to me to be the person whose name is subscribed hereto, who after having been first duly sworn, deposed and under oath stated:

"My name is _____ and I am well and personally acquainted with _____ (Decedent) and I am knowledgeable of his lifetime events, having (here detail how know the decedent, years knew decedent giving starting and ending date) been acquainted with the Decedent for _____ years.

Decedent and _____ were married only once during their lifetimes and that to each other. They were married prior to their acquisition of the hereinafter described property; to wit:

Property Description

To them were born _____ children (detail family tree beginning with children); _____ and _____. No other children were born to or adopted by Decedent or his wife during their lifetimes.

_____ predeceased (state facts of status of wife) Decedent. She died on or about _____. All of her estate consisted of community property accumulated by her and Decedent. She died leaving a will (intestate — leaving the following heirs at law: _____, _____, etc.), a copy of which is attached hereto and which left all of her estate to Decedent. Her will was/was not probated.

Decedent died intestate. His child/children, either predeceasing him or surviving him are:

_____ Age, marital statue and, if predeceased father, names and ages of children, if any.

The size of the estate was of insufficient size to be subject to taxation and no taxes are due.

All debts of the estate have been paid.

Further affiant saith not.

AFFIANT

Subscribed and sworn to before me, the undersigned authority, by _____ on this the _____ day of _____, _____.

Notary Public, State of Texas

The State of Texas §
 §
County of Harris §

This instrument was acknowledged before me by _____ on this the _____ day of _____, _____.

Notary Public, State of Texas