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RD-0186-GA

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February 18, 2004

Honorable Greg Abbott
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

RECEIVED
FEB 20 2004
COUNTY CLERK'S OFFICE

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FEB 24 2004
OPINION COMMITTEE

VIA U.S. CERTIFIED MAIL
Return Receipt Requested

FILE # ML-43521-D4
I.D. # 43521

Re: Opinion Request from the Williamson County
Attorney's Office Concerning
Uniform Electronic Transactions Act (UETA)

Dear General Abbott:

In 2001, the 77th Texas Legislature passed the Uniform Electronic Transactions Act (UETA) as Chapter 43 of the Business and Commerce Code. With its passage, Texas joined several states as well as the federal government who have adopted laws based on the original Uniform Electronic Transactions Act promulgated by the National Conference of Commissioners on Uniform State Laws in 1999. The UETA sets out the uniform requirements for conducting electronic transactions in Texas and across the country, but it leaves some issues unclear regarding the shift from paper documents to electronic documents. It is obvious from Local Government Code §191.009, passed in 1999, as well as the UETA itself that a County Clerk is not required to accept real estate filing by electronic means or equip their office to accept electronic transactions. However, the passage of the UETA has led to situations where the parties to a real estate transaction prepare the documents in electronic form using electronic signatures and then attempt to submit paper versions of the "electronically generated" documents for filing with the County Clerk. This opinion request concerns the requirements for a paper document, whether manually or electronically generated since the origin of the document cannot be determined from its face, to be recorded.

The real estate records division of the Williamson County Clerk's Office requires real estate filings to contain original signatures and notary stamps or seals rather than photocopied or faxed documents. The signatures and stamps or seals are preferably done in contrasting colored ink to the text of the document for ease of verification. Only paper documents are accepted for filing since the

County Clerk's Office is unable to accept electronic filing at this time. Some people have submitted real estate filings which they claim to be paper versions of documents which were "electronically generated." Rather than containing original pen and ink signatures, these documents contain printed representations of signatures captured as digital images. These signatures resemble the "microdot" portraits on the front page of the Wall Street Journal. Likewise, the notary seals on these documents are computer generated rather than stamped or embossed. These "electronically generated" real estate filings have been submitted in person, by mail, and by fax. The sponsors of these documents point to the UETA and the Federal law 15 U.S.C. 7006 *et seq.* as support for their position. Furthermore, the sponsors of these documents claim that a County Clerk can be charged with a civil penalty pursuant to Property Code §11.004(b) if the Clerk refuses to accept the documents.

QUESTIONS PRESENTED:

QUESTION 1:

Does Chapter 43 of the Business & Commerce Code (UETA) or 15 U.S.C. 7006 *et seq.* require a County Clerk to accept real estate filings which contain printed images of signatures rather than original pen and ink signatures?

QUESTION 2:

Does Chapter 43 of the Business & Commerce Code (UETA) and/or Government Code §406.013 require a County Clerk to accept real estate filings which contain a printed image of a notary seal rather than an original stamped or embossed seal?

QUESTION 3:

Does Chapter 43 of the Business & Commerce Code (UETA) and/or Government Code §406.013 require a County Clerk to accept real estate filings which are faxed? Is this requirement limited to paper documents purporting to be electronically generated or may any real estate filing be faxed?

QUESTION 4:

Is a County Clerk subject to the civil penalty provisions of Property Code §11.004(b) for refusing to accept an "electronically generated" real estate filing?

Comments:

In simplest terms, Business and Commerce Code §43.005(a) would seem to grant authority to a County Clerk to refuse to accept real estate filings which have been "electronically generated." That section reads:

TEX. BUS. & COM. CODE ANN. § 43.005.

Use of Electronic Records and Electronic Signatures; Variation by Agreement

(a) This Chapter does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

Recording or filing a real estate document is a form of “receiving” which is discretionary on the part of the County Clerk under this statute. Comments to the UETA by the Business Law Section of the State Bar of Texas are presented along with the law in Vernon’s Texas Codes Annotated. In the comment accompanying Business and Commerce Code §43.003 “Scope” there is a discussion of recording real estate records:

State Bar Committee Comments

2. Electronic Records and Signatures in Real Estate Transactions.

[...]However, as the discussion of real estate transactions in the Official Comment of Section 43.003 [Comments from the National Conference of Commissioners on Uniform State Laws] suggests, such an electronic conveyance, effective between the parties, would not be recordable in the deed records of the particular county until the county had adopted an electronic filing system in accordance with Chapter 195, Local Government Code. Any electronic filing must comply with rules adopted by the Texas State Library and Archives Commission and must be made by an authorized filer as defined in Section 195.003, Local Government Code. Thus, until electronic filing of real estate conveyances in the proper records becomes possible, conveyances written on paper or other tangible, permanent medium suitable for recording under current practices will be preferable so that the purchaser’s rights against third parties can be protected through the filing system. TEX. BUS. & COM. CODE ANN. §43.003 (Vernon Cumulative Annual Pocket Part 2004).

While these comments do not carry the force of law, they are instructive in determining the intent of the law as well as the interaction between the Texas version of the UETA and the original uniform law. The comments support the application of traditional filing requirements to “electronically generated” documents in the interest of protecting the integrity of the filing system.

Sponsors of “electronically generated” documents argue that Business and Commerce Code §43.005 only applies between the parties to a transaction and does not authorize a County Clerk to refuse “electronically generated” paper documents. In support of their argument, they point to Business and Commerce Code §43.007 which reads:

TEX. BUS. & COM. CODE ANN. § 43.007.

Legal Recognition of Electronic Records, Electronic Signatures, and Electronic Contracts

- (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
- (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
- (c) If a law requires a record to be in writing, an electronic record satisfies the law.
- (d) If a law requires a signature, an electronic signature satisfies the law.

Similar language is found in the Federal law under 15 U.S.C. 7001:

Section 7001. General Rule of Validity

a) In general

Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II of this chapter), with respect to any transaction in or affecting interstate or foreign commerce -

- (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and
- (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation[...]

The County Clerk's position is that the submitted documents are not in "electronic form" but rather paper form and do not comply with accepted standards for paper filing. The software protocols and protections which make electronic filing safe and effective are not present when submitting "electronically generated" real estate documents in paper form.

The law concerning electronically transmitted notary seals is contained in Government Code §406.013(d):

TEX. GOV'T CODE ANN. § 406.013. Seal

[...](c) The seal must be affixed by a seal press or stamp that embosses or prints a seal that legibly reproduces the required elements of the seal under photographic methods. An indelible ink pad must be used for affixing by a stamp the impression of a seal on an instrument to authenticate the notary public's official act.

(d) Subsection (c) does not apply to an electronically transmitted authenticated document, except that an electronically transmitted authenticated document must legibly reproduce the required elements of the seal.

The use of the term "electronically transmitted authenticated document" limits this statute to real estate documents which are electronically filed since an "electronically generated" paper filing has no indication that the document has been "electronically transmitted" or "authenticated" in any way. On the face of the documents, there would be no way for a County Clerk to determine how a document was created.

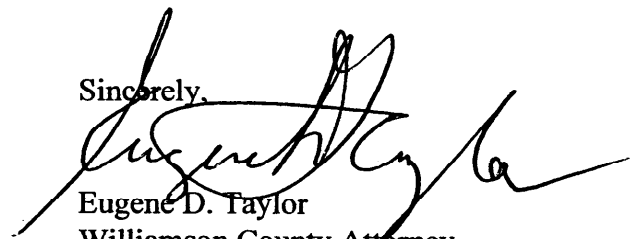
According to Property Code §12.001, a County Clerk may record a document concerning real or personal property if the document has been "acknowledged, sworn to with a proper jurat, or proved according to law." County Clerks confronted with "electronically generated" paper documents have no way of knowing whether the document was actually created using electronic

signatures as defined by Business and Commerce Code §43.002(8). The document could have been created by someone using a scanned image of a signature and a word processing program. In the case of an “electronically generated” paper document which is faxed to the County Clerk, it is possible that the document and the signatures contained therein were literally “cut and pasted” with scissors from another document and sent through the fax machine. Interpreting the UETA to allow delivered, mailed, and even faxed real estate documents such as these would render the real estate filing process little more than a time stamp with no protections against fraud or abuse.

Some individuals have submitted “electronically generated” documents along with a notice alerting the County Clerk to the civil penalty provisions of Property Code §11.004(b) which would subject a County Clerk to a civil penalty of up to \$500 for refusing to record “any instrument authorized or required to be recorded in that clerk’s office that is proved, acknowledge, or sworn according to law.” It would be patently unfair to subject a County Clerk to this civil penalty provision for attempting to preserve the integrity of the filing system when the statutes concerning the issue are open to argument.

With these comments, I respectfully request your opinion regarding the applicability of these statutes with regard to the questions submitted.

Sincerely,



Eugene D. Taylor
Williamson County Attorney
Williamson County Texas