"THE CONTINUED NEED TO USE THE CORPORATE ATTEST
AND SEAL ON REAL PROPERTY DOCUMENTS IN OKLAHOMA"
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Since the enactment in 1986 of the Oklahoma General Corporations Act (18 O.S. §1001 et seq), the question has arisen as to whether the signature of the corporate president or vice president standing alone -- without the inclusion of an attest and corporate seal -- has become sufficient for the execution of an instrument affecting Oklahoma real property, such as a contract, deed or mortgage. The short answer is that, absent a future change in the Oklahoma corporate execution statutes found in the Title on Conveyancing (i.e., 16 O.S. §§92-95), these statutes still specifically make an attest and a corporate seal an essential part of the execution process. The absence of either the attest or the seal destroys both the validity of the instrument between the parties and the constructive notice to third parties which arises through recordation of the document in the land records.

In ancient England, the transfer of title to real property was evidenced by a clod of dirt being dropped from one landowner's hand to another in front of a crowd of local townspeople, and this ceremony required that a recipient's hand be available to catch the descending piece of earth. Consequently, before the various state legislatures enacted statutes overturning the Common Law by creating and recognizing the status of non-natural persons as legal entities, only a natural person -- an individual -- could act as the recipient of the clod of dirt, known as a grantee, who would subsequently also be able to act as a grantor. The associations that have received such approval in Oklahoma as legal entities are well known and include such groups as: Partnerships, Corporations, Public Trusts, and Express Private Trusts. (It should be noted that the adequacy of the statutory

language (60 O.S. §175.6a) establishing an express private trust's independent status as an entity -- separate from its Trustees -- is subject to continuing debate in professional title circles.) However, Joint Ventures and Unincorporated Associations (with a few statutory exceptions, such as for church groups) are still not recognized in Oklahoma as legal entities and, therefore, are not capable of holding title to real property [See: Oklahoma Title Examination Standard 10.8 and W. B. Johnston Grain Company v. Self, 344 P.2d 653 (1959) concerning Joint Ventures; and see: Jones v. Alpine, 764 P.2d 513 (Okl. 1987) concerning Unincorporated Associations].

Along with the granting of recognition to these associations as having legal status to hold and convey title to real property came the dilemma of how to establish execution procedures for documents that the public could follow and rely on, or, more correctly, that could be relied upon by the title professionals upon whom the public usually rely on. The concern about proper execution arises because the grantee in the deed and the mortgagee on the mortgage want their instrument to be valid and enforceable both against the party giving it and against subsequent third party purchasers and encumbrancers.

As between the parties to the instrument there are probably three worries: (1) the association will not be bound because the wrong person within the organization (e.g., a limited partner instead of a general partner) signed the document, (2) while the right person signed it, she exceeded her authority in doing so, and (3) the signature was forged.

During a transaction, steps can be taken to ensure that the alleged representative holds the office that she claims to hold. For instance, if a Partnership which holds title as "Smith and Jones, a partnership" attempts to convey partnership real property through the signature of Phyllis Kawalski, an interested party can review either a Fictitiousness Name Certificate for "Smith and Jones" filed

in the office of the local county clerk, or, if appropriate, a Limited Partnership Certificate filed with the Secretary of State, showing Phyllis Kawalski is a general partner. (54 O.S. §81-86 and T.E.S. 10.2 and 10.3) Similarly, the names of the individuals holding corporate offices, who are about to sign a corporate conveyance of real property, are authenticated by having the corporate Secretary execute and seal a corporate incumbency certificate. This certificate identifies the name of the current officer, or officers, of the corporation. The officer who is responsible for the safe keeping and use of the seal is, by statute, the corporate Secretary or the Assistant Secretary, or a Clerk, and, in the case of a bank, a Cashier or the Assistant Cashier. The incumbency certificate usually lacks an acknowledgment and a legal description, and, therefore, is not in a form to be recorded in the land records.

The determination of the limits on the authority of the legal entity's representative is a separate issue. For instance, there are statutes and two T.E.S.'s allowing any party, and their title examiner, to assume that any person who is a general partner has the necessary authority to execute any real property document. (54 O.S. §§209-210, and T.E.S. 10.4 and 10.5) The measures to ensure that the corporate grantor/mortgagor does not later try to avoid its liabilities under the conveyance, by claiming the signature was unauthorized and therefore beyond the authority of the officer executing the instrument, include conducting proper due diligence during a transaction by getting and reviewing a copy of the corporate resolution certified (i.e., signed and sealed) by the corporate Secretary. The resolution will need to authorize either in a general way, or specifically, the subject transaction and the actions of the corporate officers in consummating the transaction. Like the incumbency certificate, this certificate is not usually in recordable form and, therefore, is not recorded. However, because getting a copy of such resolution after the transaction is sometimes

difficult, there are steps which can be taken during the closing which will result in a presumption that the transfer was authorized which later parties can then rely on. Specifically, 16 O.S. §92 provides that every deed or mortgage, executed by a corporation in substantial compliance with Sections 93 through 95, will be "valid and binding upon the grantor, notwithstanding any omission or irregularity in the proceedings of such corporation or any of its officers or members, and without reference to any provision of its constitution or by laws".

These important subsequent sections (§§93-95) declare that such deeds and mortgages:

(1) must have the name of such corporation subscribed thereto either by an attorney-in-fact or by the president or a vice-president of such corporation (§93),

(2) must be attested by the Secretary, Assistant Secretary or Clerk of such corporation, with the corporate seal attached (§94) (Note: 6 O.S. §414 F., provides that the attest by a Bank may also be by a Cashier or Assistant Cashier), and

(3) must be acknowledged by the officer or person subscribing the name of the corporation thereto (§95).

The case of Downing v. Young Men's Christian Association of University of Oklahoma, 61 P.2d 859 (Okl. 1936) held that, as between the parties, the absence of the corporate seal made a real estate contract invalid. This occurred even though the grantor corporation itself failed to obtain the seal. As noted by the court at page 861

> It is therefore manifestly not within our power to provide such legislative exception to the plain terms of the statute [now 16 O.S. §94], and there would be no better reason for our holding the instrument valid merely because the corporation did not have a seal than there would be for our holding an individual's unsigned contract to convey real estate valid because he did not have a pen.

This court also held, at page 861, that the president's signature, the attest and the seal, "are all

placed upon a priority of importance and are essential to the validity of the instrument."

Before November 1, 1986, when the Oklahoma Business Corporations Act was still in effect, 18 O.S. §1.242 provided that:

> Contracts, conveyances, . . . and other instruments purporting to be executed by a corporation . . . and bearing a seal which purports to be the corporate seal, . . . shall be deemed prima facie evidence that any such instrument is the act of the corporation, that it was duly executed and signed by persons who were officers or agents of the corporation acting by authority duly given by the board of directors, and that the seal is the duly-adopted corporate seal of the corporation, and that it has been affixed as such by a person duly authorized so to do, and such instrument shall be admissible in evidence without further proof of execution.

On or after November 1, 1986, when the Oklahoma General Corporations Act became effective, §1.242 (described above) was repealed and some attorneys suggest that 18 O.S. §1018 took its place. §1018 provides, in pertinent part:

> No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer, ...

(also see TES 9.2)

However, this Section 1018 speaks about "the corporation" being "without capacity or power" and does not address corporate officers who act without authority.

There are also statutory protections against grantors/mortgagors backing out of transactions. These protections come in the form of strong presumptions in favor of the validity of the transaction, if some consideration has been received by the corporate grantor. (16 O.S. §11)

Concerning forgeries, the use of a notary public is a statutorily recognized means to positively identify a person and to force the signing party to declare their intentions to undertake a real rather than a sham transaction. The statute 49 O.S. §113.A. provides:

> In taking an acknowledgment, the notarial officer must determine, either from personal knowledge or from satisfactory evidence, that the person appearing before the officer and making the acknowledgment is the person whose true signature is on the instrument.

and 49 O.S. §112(2) provides:

> "Acknowledgment" means a declaration by a person that the person has executed an instrument for the purposes stated therein and, if the instrument is executed in a representative capacity, that the person signed the instrument with proper authority and executed it as the act of the person or entity represented and identified therein.

It should be noted there is at least one pre-1986 Oklahoma Supreme Court case which states that, in addition to the attest and seal, the acknowledgment is an essential element in the corporate execution process. (Bentley v. Zelma Oil, 76 Okl. 116, 184 P.131 (1919)) The importance of the acknowledgment in creating a valid instrument between the parties appears to arise due to the language of 16 O.S. §95 which provides that "every deed or other instrument affecting real estate, executed by a corporation must be acknowledged by the officer or person subscribing the name of the corporation thereto . . .". The absence of any one of these three items, including the attest, seal or acknowledgment, renders the deed or mortgage unenforceable as between the parties to the transaction.

The separate question about how to give to third parties constructive notice of the corporate conveyance or encumbrance is answered by following the recording requirements which apply equally to all deeds and mortgages relating to real property. For the instrument to be constructive notice to subsequent parties attempting to acquire an interest in the same real property, the statutes clearly require that the instrument be filed in the County Clerk's land records where the land is situated. (16 O.S. §§15-16, 26; 46 O.S. §§6-7)

It should be noted that the placement of an acknowledgment by a grantee on a real property

document, such as a deed or mortgage, is necessary in order for the instrument to be accepted by the County Clerk and, once placed in the county land records, to give constructive notice of its contents to third parties. (16 O.S. §§15-16, 26) If the document does not have an acknowledgment on it (or has a defective one), but nevertheless is accepted for recordation and is actually recorded, it still does not constitute constructive notice to subsequent purchasers and encumbrancers. [Carroll v. Holliman, 336 F.2d 425 (CA 1964), cert. denied 85 S. Ct. 889, 380 U.S. 907, 13 L.Ed. 2d 795]

Also, if a document is recorded and it omits either the attest or the seal, its recording does not give constructive notice to subsequent purchasers. [Bentley v. Zelma Oil, 76 Okl. 116, 184 P.131 (1919)] This is pursuant to a statute (16 O.S. §26) which provides:

> No deed, mortgage or other instrument affecting the real estate shall be received for record or recorded unless executed and acknowledged in substantial compliance with this chapter; and the recording of any such instrument not so executed and acknowledged shall not be effective for any purpose.

In summary, grantees/mortgagees who are in the midst of a transaction which involves the acquisition of a real property interest from a corporation should ensure that they review the certificate of incumbency and the resolution of authorization, and secure the proper corporate signature, attest, seal and acknowledgment on the document, and follow this up with a prompt recording. Title examiners and similar persons reviewing the transaction later as shown in the public land records after-the-fact can rely on the shorter list of steps found in T.E.S. 9.2 which states, in part: "A corporate instrument executed, attested, sealed and acknowledged in proper form on or after November 1, 1986, should be presumed, in the absence of actual or constructive knowledge to the contrary, to have been duly authorized, signed by authorized officers and affixed with the genuine seal by proper authority."

It has been suggested by several Oklahoma attorneys that the repeal in 1986 of the

Oklahoma Business Corporations Act (including the repeal of 18 O.S. §1.242) and the enactment of the Oklahoma General Corporations Act (including the enactment of 18 O.S. §1018) has eliminated the need for the use of an attest and seal when executing a real estate document. The two principal arguments which are advanced in support of this position are that (1) the seal is unneeded because of the elimination of the generous presumptions created under 18 O.S. §1.242 arising from the use of the seal, and (2) the attest by the corporate Secretary is superfluous because of the ability, under the new 18 O.S. §1028, for the same person to hold any number of corporate offices, allowing the President to also be the corporate Secretary. This ability of the same person to simultaneously hold two offices make the attesting (i.e., witnessing) of the President's signature redundant, at least when the President is also the Secretary.

While it is possibly true that certain favorable presumptions disappeared with the repeal of 18 O.S. §1.242 and that attestations made by the same person who is signing for the corporation will be redundant, nothing has changed the existing requirements to have the attest and seal. Therefore, the basic response to these two arguments is that the authority in all of the cases cited above, which required the attest and seal be used in order to have valid transactions and in order to give constructive notice, was solely based on statutes found within Titles 6, 16 and 46, which Titles were unaffected by any of the 1986 changes to Title 18. In addition, the changes in Title 18 become even less relevant in the face of the age old rule that "special statutes", such as Title 16 on Conveyancing, prevail over "general statutes", like Title 18.

Until the legislature changes Titles 6, 16 and 46, to make the simple signature of a president or vice president, affixed to an instrument affecting real property, binding on the Corporate grantors/mortgagors and on third parties through constructive notice, it will still be necessary for

real property professionals to continue to meet the existing statutory requirements. By meeting the requirements to secure not only a corporate signature, but an attest and seal as well, the presumption will be established that the individual signing the document is both the corporate President and is authorized to undertake this transaction.

If there is widespread interest, it might be appropriate for the Real Property Section of the Oklahoma Bar Association and the Oklahoma Bankers Association to consider undertaking a joint effort to review and to address this issue by means of additional educational efforts and/or by seeking modification of existing legislative and industry standards.

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