

DISPUTING THE BOUNDARY OF THE DECLARATORY JUDGMENTS ACT

Philip Thomas Segura*

I. TRESPASS TO TRY TITLE OR DECLARATORY JUDGMENTS ACT

Texas state law provides that “[a] trespass to try title action is the method of determining title to lands, tenements, or other real property.”¹ In Texas, this is the only method of resolving property disputes when questions of title exist.² The Uniform Declaratory Judgments Act (DJA) provides that a person interested under a deed may have determined any question of construction or validity arising under the instrument and obtain a declaration of rights, status, or other legal relations thereunder.³ When a land dispute does not involve questions of title, parties often attempt to proceed under the DJA. So why would a party prefer the DJA over the trespass to try title cause of action? The answer to this question comes down to pleading and proof requirements, attorney’s fees, and costs. The trespass to try title statute requires a procedure that is onerous and expensive and does not provide for the prevailing party to recover costs.⁴ The DJA is the exact opposite of the trespass to try title suit. The burdens of proof are significantly smaller and the act provides for the recovery of attorney’s fees and costs.⁵ As such, many suits that involve land are often brought under the DJA. In a sense, parties tend to “artfully plead” their case so that they may recover under the DJA.

With this, the boundary between the DJA and the trespass to try title suit becomes increasingly important.⁶ This note addresses the issue of

*J.D. Candidate; 2015, Baylor University School of Law. I would like to thank Professor Bridget Fuselier for inspiring this topic. Additionally, I would like to thank the Baylor Law Review for all of their hard work in editing this article. Finally, I would like to thank my family for their endless love and support.

¹TEX. PROP. CODE ANN. § 22.001(a) (West 2014).

²See *Martin v. Amerman*, 133 S.W.3d 262, 267 (Tex. 2004).

³TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a) (West 2008).

⁴TEX. PROP. CODE ANN. § 22.001(a) (West 2014); see *Martin*, 133 S.W.3d at 264–65.

⁵CIV. PRAC. & REM. § 37.009; *Martin*, 133 S.W.3d at 265.

⁶*I-10 Colony, Inc. v. Chao Kuan Lee*, 393 S.W.3d 467, 474 (Tex. App.—Houston [14th Dist.] 2012, pet. denied).

determining when claims impacting title to property can be brought as a declaratory judgment action and distinguishes such claims from those impacting title that must be brought as a trespass to try title action.

II. THE TRESPASS TO TRY TITLE SUIT

A trespass to try title suit is a statutory action to determine title to property in Texas.⁷ The suit creates a procedure where parties with rival claims to title in land can have their rights adjudicated.⁸ The suit is not limited to cases merely involving title disputes. A trespass to try title suit is also a suit to recover possession of land wrongfully withheld from an owner.⁹ The suit is so prominent in litigation over title or possession that “this procedure is employed to test almost all manner of conflicting claims.”¹⁰ The text of the trespass to try title statute provides: “A trespass to try title action is the method of determining title to lands, tenements, or other real property.”¹¹

A. *Proof and Pleading Requirements Under the Trespass to Try Title Action*

First off, a party wishing to maintain an action of trespass to try title must have title to the land sought to be recovered.¹² In order to prevail in a trespass to try title suit, a plaintiff is required to recover on the strength of his own title rather than on the weakness of the defendant’s title.¹³ In other words, a plaintiff cannot point to a defendant and declare that he should prevail because the defendant’s title to the land is weak and questionable. A plaintiff must affirmatively show that his title is superior to that of the defendant’s.

⁷TEX. PROP. CODE ANN. § 22.001(a) (West 2014); 5A LEOPOLD, ALOYSIUS A., TEXAS PRACTICE: LAND TITLES AND LAND EXAMINATION § 42.4 (3d ed.2005).

⁸Wall v. Carrell, 894 S.W.2d 788, 796 (Tex. App.—Tyler 1994, writ denied).

⁹LEOPOLD, *supra* note 7, at § 42.4; *Martin*, 133 S.W.3d at 265; *Standard Oil Co. of Tex. v. Marshall*, 265 F.2d 46, 50 (5th Cir. 1959); *I-10 Colony*, 393 S.W.3d at 475.

¹⁰Wall, 894 S.W.2d at 796.

¹¹TEX. PROP. CODE ANN. § 22.001(a) (West 2014).

¹²Wall, 894 S.W.2d at 796; *Brownlee v. Sexton*, 703 S.W.2d 797, 800 (Tex. App.—Dallas 1986, writ ref’d n.r.e.).

¹³*Rogers v. Ricane Enters., Inc.*, 884 S.W.2d 763, 768 (Tex. 1994); *Halbert v. Green*, 293 S.W.2d 848, 852 (Tex. 1956).

From the defendant's perspective, he is not required to demonstrate that he has superior title over the plaintiff in order to successfully defend his case.¹⁴ A defendant may defend his case by showing that the plaintiff failed to comply with the statutory pleading and proof requirements or by showing that the plaintiff does not possess superior title. Even if a defendant in a suit counters and affirmatively pleads that he has title in the disputed property and fails to meet his burden of proof, the plaintiff is not entitled to recover.¹⁵ This is because a plaintiff will only succeed on his claim when he has proven his own title.

A plaintiff wishing to succeed in a trespass to try title suit must prove the strength of his title using one of four statutory options. A plaintiff may prove his title "(1) by proving a regular chain of conveyances from the sovereign, (2) by proving a superior title out of a common source, (3) by proving title by limitations, or (4) by proving prior possession and that the possession has not been abandoned."¹⁶ If a plaintiff fails to prove superior title by any means then the court trying the case must enter a take nothing judgment which "operates to divest the plaintiff of all its title to its interest in the lands in controversy and to vest the same in the defendant."¹⁷

The proof and pleading requirements can be quite onerous. For example, in many cases, the only method of proving title is by proving a regular chain of conveyances from the sovereign.¹⁸ Such a case will often involve dozens of conveyances.¹⁹ The plaintiff must demonstrate proof of each conveyance no matter how remote in order to prevail on his claim.²⁰ If evidence of even one link is missing, the plaintiff fails to meet his burden of proof and is barred from recovery.²¹

This proof and pleading requirement is particularly onerous in the oil and gas context. Interested parties in the oil and gas lease can be quite numerous.²² Often times, oil and gas rights are fractionalized and held by

¹⁴ *Wall*, 894 S.W.2d at 797.

¹⁵ *Id.*

¹⁶ *Rogers*, 884 S.W.2d at 768.

¹⁷ *Glenn v. Lucas*, 376 S.W.3d 268, 274 (Tex. App.—Texarkana 2012, no pet.).

¹⁸ *See, e.g., Kilpatrick v. McKenzie*, 230 S.W.3d 207, 211 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (suit involving eleven conveyances).

¹⁹ *See id.*

²⁰ *Id.* The plaintiff provided evidence of nine conveyances but failed to provide evidence of the original patent from the state of Texas and a division judgment. *Id.*

²¹ *Id.*

²² *See* 55A TEX. JUR. 3D *Oil and Gas* § 343 (2014).

several different parties.²³ A suit in trespass to try title may require naming several parties holding an interest in the oil and gas related to the plaintiff's chain of title.²⁴ Additionally, proving title can become quite burdensome in this context because tracking down evidence of each conveyance in the chain of title will require finding evidence of each conveyance of each interest.²⁵ This is quite different from other property disputes that involve far less parties and far fewer rights in the property. The complexity of oil and gas interests is a large issue when determining title to oil and gas.²⁶

A plaintiff who loses his suit is barred from recovery even if he had true title but simply failed to provide evidence of each link in their chain of title at trial.²⁷ Also, persons subsequently claiming title through the loser of the litigation are barred from recovery even if they manage to provide evidence of the links missing at trial in the original litigation.²⁸ This is the harsh result of the proof and pleadings requirement of the trespass to try title action.

The defendant in a trespass to try title suit is only required to enter a not-guilty plea.²⁹ His response simply functions as a general denial of the plaintiff's claim. Despite the statute expressly providing that the defendant must enter a not-guilty plea, the courts have been very lax with this

²³ *See id.*

²⁴ William V. Dorsaneo III, Texas Litigation Guide § 251.04 (2014).

²⁵ *Kilpatrick*, 230 S.W.3d at 211.

²⁶ 55 TEX. JUR. 3D *Oil and Gas* § 45 (2014).

The statutory action of trespass to try title is a legal as distinguished from an equitable remedy, and is not to be confused with a suit to quiet title to an oil and gas interest, a suit to establish an interest in an oil and gas lease, or a suit in equity for an injunction to restrain a defendant from trespassing on mineral property.

Id.

²⁷ *Kilpatrick*, 230 S.W.3d at 211 n.1. The court notes in a footnote that it appears that the plaintiff discussed at trial an exhibit that would have proven one of the missing links. *Id.* However, the exhibit was never admitted into evidence. *Id.*

²⁸ *See Permian Oil Co. v. Smith*, 107 S.W.2d 564, 582 (Tex. 1937).

²⁹ TEX. R. CIV. P. 788. The rule in its entirety states:

The defendant in such action may file only the plea of "not guilty," which shall state in substance that he is not guilty of the injury complained of in the petition filed by the plaintiff against him, except that if he claims an allowance for improvements, he shall state the facts entitling him to the same.

Id.

requirement.³⁰ Texas courts have held that a defendant's failure to enter a not-guilty plea does not result in an immediate victory for the plaintiff.³¹ Instead, a general denial is sufficient in itself.³² A defendant need not prove his own title in order to win, though it may be advisable to do so if he wishes to establish title in himself.³³

B. Recovery of Fees

Generally, attorney's fees are not recoverable in a trespass to try title suit.³⁴ However, the legislature permits the recovery of attorney's fees in a narrow set of trespass to try title suits.³⁵ In order to recover fees, the plaintiff must claim record title and win against a person claiming adverse possession.³⁶ In other words, a plaintiff must recover against a squatter in order to recover fees.

The plaintiff must still comply with a few statutory procedures before recovery is permitted.³⁷ The party seeking possession must give the party unlawfully in possession a written demand at least ten days in advance.³⁸ The demand must be sent by registered mail or certified mail.³⁹ The demand itself need only state that the party in possession has ten days to vacate or else the party seeking possession may file a claim and the court may enter in reasonable costs and attorneys' fees.⁴⁰

³⁰ *Cox v. Olivard*, 482 S.W.2d 682, 685 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).

³¹ *See id.*

³² *Id.* The court in *Cox* stated:

Our courts have repeatedly held that a defendant in a trespass to try title action is not required to file a plea of 'not guilty' but that a plea of general denial has the effect of putting the plaintiff upon proof of his right to recover the land in controversy.

Id.; *Brinkley v. Brinkley*, 381 S.W.2d 725, 727 (Tex. Civ. App.—Houston 1964, no writ) ("Rule 788 merely provides that the defendant *may* file a plea of not guilty.") (emphasis in original).

³³ *See Brinkley*, 381 S.W.2d at 725.

³⁴ *LEOPOLD*, *supra* note 7, at § 42.14; *Kennesaw Life & Accident Ins. Co. v. Goss*, 694 S.W.2d 115, 118 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.); *Teon Mgmt., LLC v. Turquoise Bay Corp.*, 357 S.W.3d 719, 723 (Tex. App.—Eastland 2011, pet. denied).

³⁵ TEX. CIV. PRAC. & REM. CODE ANN. § 16.034 (West 2012).

³⁶ *Id.*

³⁷ *See id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

If a plaintiff is seeking recovery from the right kind of party and the plaintiff complies with the additional statutory requirements, he may recover attorney's fees. However, absent such a unique case, a plaintiff may not recover attorney's fees in a trespass to try title action.

C. Defendant's Claim for Improvements

Generally, a mistaken improver is not entitled to recover for the value of his improvements.⁴¹ However, a defendant in a trespass to try title action, despite losing his title dispute, may make a claim for the value of any permanent improvements he made while in possession of the land.⁴² This claim may offset part of the damages the defendant owes at the end of his suit or may be awarded in excess of any damages actually owed.⁴³ This means that should a defendant successfully plead and prove his claim for improvements, despite losing on the title issue, the plaintiff with superior title would actually have to pay him prior to recovering possession of land.

In order to recover for improvements, the defendant must have adversely possessed the land in good faith.⁴⁴ The term "good faith adverse possessor" is generally interpreted to mean that the person wrongfully in possession of the land had reasonable grounds for believing that he was actually the true owner of the property in question.⁴⁵ This type of situation seems rare. This scenario is likely to only occur in disputes involving the location of boundaries, surveying errors, or misbeliefs regarding the passage of property at death. In addition to being a "good faith adverse possessor," the defendant must have been in possession of the land for at least one year prior to the suit.⁴⁶ However, a defendant may only recover for the improvements he identifies.⁴⁷ Any recovery is limited to the value of those improvements.⁴⁸

The claim for improvements actually has more bite to it than it seems at first glance. If a defendant successfully makes a claim for the value of his

⁴¹ 75 AM. JUR. 3D, *Proof of Facts* § 1 (2003).

⁴² TEX. PROP. CODE ANN. § 22.021(a)(1)–(2) (West 2013).

⁴³ *See id.*

⁴⁴ *Id.*

⁴⁵ *Mayfield v. de Benavides*, 693 S.W.2d 500, 504 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) ("To be in good faith . . . one must have both an honest and a reasonable belief in the superiority of one's title.") (*citing* *Gulf Prod. Co. v. Spear*, 84 S.W.2d 452, 457 (Tex. 1935)).

⁴⁶ TEX. PROP. CODE ANN. § 22.021(c)(1) (West 2013).

⁴⁷ *Id.* § 22.021(c)(4).

⁴⁸ *Id.* § 22.021(d).

improvements, then the court cannot award the plaintiff a writ of possession until the plaintiff pays the clerk the judgment plus interest or until the first anniversary of the judgment.⁴⁹

The claim for improvements route even offers the defendant a method of obtaining permanent possession of the land. If the plaintiff does not pay the judgment awarded to the defendant before the first anniversary of the judgment and the defendant pays the value of the property minus any improvements before six months from the first anniversary of the judgment, the plaintiff is barred from obtaining a writ of possession.⁵⁰ Additionally, the plaintiff is barred from maintaining any proceeding against the defendant for the property in question.⁵¹ In the event that the plaintiff fails to pay for the improvements, the defendant essentially gets to keep the property anyways.

In the event that the defendant made improvements to the land and does not seek recovery for their value, the defendant may plea for the removal of the improvements.⁵² The defendant must meet a few statutory requirements prior to winning his plea for removal of improvements. First, the defendant must have made permanent and valuable improvements to the property.⁵³ Second, the defendant must have made those improvements without the intent to defraud.⁵⁴ Third, the improvements must be capable of being removed without substantial and permanent damage to the property.⁵⁵ Additionally, the defendant must meet a few basic pleading requirements. The defendant is required to include in his pleading a statement alleging he possessed the property and made improvements without the intent to defraud and an identification of the improvements made to the property in question.⁵⁶ If the defendant wins his plea for removal of improvements he is required to post a surety bond.⁵⁷ Additionally, the court is required to appoint a referee to supervise the removal of the improvements.⁵⁸ However, the actual removal itself may be conditioned on the defendant satisfying any

⁴⁹ *Id.* § 22.022.

⁵⁰ *Id.* § 22.023.

⁵¹ *Id.*

⁵² *Id.* § 22.041.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* § 22.042.

remaining judgment in favor of the plaintiff arising out of the original trespass to try title action.⁵⁹

III. SUITS FOR DECLARATORY JUDGMENT OF TITLE

The Declaratory Judgments Act (DJA) sets forth the parameters for seeking declaratory relief in regard to real estate controversies.⁶⁰ The Texas Legislature passed the act with the intention that the act be used to “settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.”⁶¹ Since its inception, parties have attempted and sometimes succeeded in convincing courts that the act could be used to settle real estate controversies.⁶²

Parties are often tempted to use the act in resolving their disputes because the act provides the court with the specific power to award costs and attorney’s fees.⁶³ With regard to real estate controversies, parties are often tempted to utilize the DJA for another reason as well. The act “provides an efficient vehicle for parties to seek a declaration of rights under certain instruments.”⁶⁴ Contrasted with the common trespass to try title action, the DJA provides pleading and proof requirements that are much more relaxed.⁶⁵

Despite these temptations, the vast majority of real estate controversies impacting title cannot be brought under the DJA. The Texas Legislature has expressly provided that the sole method of “determining title to lands, tenements, or other real property” is the trespass to try title action.⁶⁶ However, the Texas Legislature, in response to the *Martin* opinion, carved

⁵⁹ *Id.* § 22.044.

⁶⁰ TEX. CIV. PRAC. & REM. CODE ANN. § 37.004 (West 2008).

⁶¹ *Id.* § 37.002.

⁶² *Richmond v. Wells*, 395 S.W.3d 262, 267 (Tex. App.—Eastland 2012, no pet.) (holding that purchasers of real property properly brought action under DJA against prior owners in suit to establish ownership of mineral interests under a deed); *Cadle Co. v. Ortiz*, 227 S.W.3d 831, 838 (Tex. App.—Corpus Christi 2007, pet. denied) (holding that a lien’s validity is properly brought under the DJA.); *Roberson v. City of Austin*, 157 S.W.3d 130, 137 (Tex. App.—Austin 2005, pet. denied) (holding that claims regarding the validity of an easement were proper under the DJA).

⁶³ TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (West 2008).

⁶⁴ *Martin v. Amerman*, 133 S.W.3d 262, 265 (Tex. 2004).

⁶⁵ *Id.*

⁶⁶ TEX. PROP. CODE ANN. § 22.001 (West); *Martin*, 133 S.W.3d at 267; *Ely v. Briley*, 959 S.W.2d 723, 727 (Tex. App.—Austin 1998, no pet.) (stating that the trespass to try title action is the “exclusive remedy by which to resolve competing claims to property”); *Tex. Parks & Wildlife Dep’t v. Sawyer Trust*, 354 S.W.3d 384, 389 (Tex. 2011).

out an exception with regard to boundary dispute cases, providing that such cases may be brought under the DJA.⁶⁷ With this, the question then arises as to what exactly is a boundary dispute.

The *Plumb v. Stuessy* opinion provides that a case is a boundary dispute “when there would have been no case but for the question of boundary.”⁶⁸ Thus, although the *Martin* opinion was partially superseded by the 2007 amendment to the DJA, the case still remains viable due to its language attempting to clarify what actually qualifies as a boundary dispute.⁶⁹ Despite the guidance of the Court, the distinction between true boundary dispute cases and cases that merely implicate boundary has not been an easy one to make. The Court seemed to recognize this when it added that “boundary cases . . . may involve questions of title.”⁷⁰ Courts have often had trouble in applying the *Martin* standard, noting that “construing the terms of contracts and deeds frequently implicates the ultimate issue of title.”⁷¹

The trespass to try title distinction does not end there. Courts look to the substance of a pleading and not just the form of it for determining what is actually being litigated.⁷² A litigant may not “artfully plead a title dispute as a declaratory judgment action” for the sole purpose of obtaining attorney’s fees.⁷³ The court in the *Lile v. Smith* opinion articulated that “[o]ne must look to determine if the heart of the controversy is to determine a boundary or whether its true aim is to determine the title to land.”⁷⁴ The *Lile* case grappled with the difficulty in applying the standard set forth in *Plumb*.⁷⁵ The controversy in the case arose when the receiver in a partition suit attempted to convey additional property in the receiver’s deed that was not

⁶⁷TEX. CIV. PRAC. & REM. CODE ANN. § 37.004 (West 2008); *Sawyer Trust*, 354 S.W.3d at 389.

⁶⁸617 S.W.2d 667, 669 (Tex. 1981); *Martin*, 133 S.W.3d at 268.

⁶⁹*Martin*, 133 S.W.3d at 266; see *Plumb*, 617 S.W.2d at 669.

⁷⁰*Martin*, 133 S.W.3d at 266.

⁷¹*Cadle Co. v. Ortiz*, 227 S.W.3d 831, 837 (Tex. App.—Corpus Christi 2007, pet. denied); see *Roberson v. City of Austin*, 157 S.W.3d 130, 135 (Tex. App.—Austin 2005, pet. denied) (describing the post-*Martin* law as “contradictory and confused”).

⁷²*I-10 Colony, Inc. v. Chao Kuan Lee*, 393 S.W.3d 467, 475 (Tex. App.—Houston [14th Dist.] 2012, pet. denied).

⁷³*Meekins v. Wisnoski*, 404 S.W.3d 690, 695 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *I-10 Colony*, 393 S.W.3d at 475.

⁷⁴291 S.W.3d 75, 78 (Tex. App.—Texarkana 2009, no pet.).

⁷⁵*Id.*

included in the court's order to sell.⁷⁶ The additional land conveyed ran along the border between the properties owned by the parties in the case.⁷⁷ The parties shared the cost of constructing a fence along the boundary line in the location purported by the receiver's deed.⁷⁸ However, upon discovery of the receiver's mistake, Lile demanded that the Smiths cease using the property and the Smiths sued in response.⁷⁹ The court concluded that the action was truly a trespass to try title suit because the Smith's pleadings did not concern a location of boundary and instead sought a declaration that they were owners of the land in question.⁸⁰ The court concluded that the case was not one of boundary but instead dealt solely with the question of determining title "to a well-defined parcel of land."⁸¹ Although the two parties disputed the location of their own respective boundaries, the court found that the heart of the controversy was a trespass to try title action because ownership of the land in question was sought to be determined over a well-defined strip of land.⁸² The court appears to give much weight to the "well-defined parcel of land" idea.⁸³ The court seems to define a boundary dispute as one where two parties truly wonder at where their property line ends.⁸⁴ This case falls out of this definition of boundary dispute because the parties weren't trying to locate their property line but instead asserted competing claims to a piece of land that was already specifically defined.⁸⁵

IV. DIFFERING STANDARDS

The distinctions between which cases may be brought under the DJA and the cases that must be brought as a trespass to try title suit have been described as "contradictory and confused."⁸⁶ This confusion arises largely

⁷⁶*Id.* at 76.

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰*Id.* at 78.

⁸¹*Id.*

⁸²*Id.*

⁸³*See id.*

⁸⁴*See id.*

⁸⁵*Id.*

⁸⁶*I-10 Colony, Inc. v. Chao Kuan Lee*, 393 S.W.3d 467, 475 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); see *Roberson v. City of Austin*, 157 S.W.3d 130, 135 (Tex. App.—Austin 2005, pet. denied) (discussing application of Martin in easement context); see also *Cadle*

“because construing the terms of land contracts and deeds often implicates the issue of title, whether or not title is awarded in a particular case.”⁸⁷ This section covers competing views used to analyze when cases may be brought under the DJA.⁸⁸

A. *The “Prospectively Implicating Title” Standard*

While the *Martin* opinion brushed boundary disputes into the realm of the trespass to try title cause of action, prior to the 2007 amendments to the DJA, courts still drew distinctions in an attempt to utilize the DJA in many other disputes.⁸⁹ One court noted that the construction of a deed, regardless of what statute it is brought under, often implicates the issue of title but “that does not indicate that all such cases are trespass to try title suits.”⁹⁰ Courts following this school of thought have found it necessary to read *Martin* as just laying a framework for examining title disputes:

This is the type of analysis that courts undertook before *Martin*, and we see no indications that the *Martin* holding changed this. *Martin* does not hold that all property disputes are trespass to try title suits; it merely clarifies the analytical framework that courts must apply when deciding whether a suit is a trespass to try title.⁹¹

Many courts make the distinction between what may be brought under the DJA versus what must be brought as a trespass to try title suit by examining whether the resolution of the dispute requires determining which party owned title to land at a particular time.⁹² “[I]n other words, if the

Co. v. Ortiz, 227 S.W.3d 831, 837 (Tex. App.—Corpus Christi 2007, pet. denied) (quoting Roberson).

⁸⁷ *I-10 Colony*, 393 S.W.3d at 475.

⁸⁸ This is different from the notion “that when the defendant objects to the form of the action, a declaratory judgment is not available in a deed or contract construction case if the claim ultimately requires a determination of disputed title.” Dorsaneo III, supra note 24, § 251.01[2][a] (2012). Thus, the focus in these cases is not whether or not the suit involves title so much as it is to whether or not the opposing party was watchful enough to object to the form of the action.

⁸⁹ See Roberson, 157 S.W.3d at 135; see also Cadle Co., 227 S.W.3d at 837.

⁹⁰ Cadle Co., 227 S.W.3d at 837.

⁹¹ *Id.* at 838.

⁹² *I-10 Colony*, 393 S.W.3d at 475.

determination only prospectively implicates title, then the dispute does not have to be brought as a trespass-to-try-title action.⁹³

The first court to fully utilize the prospectively implicating title standard was the Fourteenth Court of Appeals in Houston in *I-10 Colony, Inc. v. Chao Kuan Lee*.⁹⁴ In the case, Henry Wu owned a company called I-10 Colony which partnered with Chao Kuan Lee to form a partnership called South Territory, Ltd.⁹⁵ The partnership purchased the hotel real estate that was the subject of the dispute in 1995.⁹⁶ In 1997, South Territory effectuated a plan to sell the property to Blue Bonnet Hospitality, Inc.⁹⁷ The sale was arranged such that South Territory would convey a 50-percent interest in the property to both Wu and Lee.⁹⁸ Subsequently, Wu conveyed his interest back to I-10 Colony and Lee along with I-10 Colony conveying the property to Blue Bonnet.⁹⁹ Blue Bonnet took out a loan from Metro Bank and executed notes in favor of Lee and I-10 Colony in the amount of \$150,000, both of which it later defaulted on.¹⁰⁰ Following the default, I-10 Colony foreclosed on the property without Lee and purchased it at the foreclosure sale.¹⁰¹ Lee later brought suit seeking under the DJA seeking declaratory relief establishing his interest in the foreclosed hotel property.¹⁰² I-10 argued that the foreclosure of the property extinguished Lee's lien because I-10 was first to foreclose—an argument that the court quickly rejected.¹⁰³ The court held that the liens were of equal dignity and that the foreclosure of one would not extinguish the other.¹⁰⁴

The court then moved on to the issue of whether or not the lower court erred when it determined property ownership via the DJA.¹⁰⁵ In evaluating

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 471.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 472.

¹⁰⁴ *Id.* at 474.

¹⁰⁵ *Id.* at 474–75. The court noted the issues that other courts have had with determining ownership under the DJA, noting that:

whether or not the suit was properly brought under the DJA the court formulated a rule by which to determine what cases may be brought under the DJA as opposed to what cases must be brought under the trespass to try title suit:

[I]f resolution of a dispute does not require a determination of which party owned title at a particular time, the dispute could properly be raised in a declaratory judgment action; in other words, if the determination only *prospectively* implicates title, then the dispute does not have to be brought as a trespass-to-try-title action.¹⁰⁶

At least two other courts have applied this rule or a similar one.¹⁰⁷ However, the *I-10 Colony* court, despite going to great lengths in order to fashion this new test, failed to apply it in a clear-cut manner that actually gave context to the test itself. The analysis given hardly explains how the determination only prospectively impacted title.¹⁰⁸

Perhaps the “prospectively impacting title” standard is intended to differentiate between claims that require investigating the deed records in order to trace title back (the traditional trespass to try title suit) from claims that require determining title out of some sort of independent means (in this case it would be via the notes and foreclosures).¹⁰⁹ However, this test misses the point of the trespass to try title suit. Here, the court merely

The uncertainty originates with two legislative directives that appear to overlap to some degree. Section 22.001(a) of the Property Code mandates that “[a] trespass to try title action is the method of determining title to lands, tenements, or other real property.” The Uniform Declaratory Judgments Act (“DJA”), however, provides that “[a] person interested under a deed . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status, or other legal relations thereunder.”

Id. (internal citations omitted).

¹⁰⁶ *Id.* at 475 (emphasis in original); *Fair v. Arp Club Lake, Inc.*, 437 S.W.3d 619, 624 (Tex. App.—Tyler 2014, no pet.).

¹⁰⁷ *Fair*, 437 S.W.3d at 624 (Tex. App.—Tyler 2014, no pet.); *Cadle Co. v. Ortiz*, 227 S.W.3d 831, 838 (Tex. App.—Corpus Christi 2007, pet. denied) (holding that a lien’s validity is properly brought under the DJA).

¹⁰⁸ *See I-10 Colony*, 393 S.W.3d at 475.

¹⁰⁹ *Id.* The court noted that “if resolution of a dispute does not require a determination of which party owned title at a particular time, the dispute could properly be raised in a declaratory judgment action.” *Id.*

swapped the deed records for a history of notes.¹¹⁰ In doing so, the court afforded itself the opportunity to award attorney's fees under the DJA.¹¹¹ Also, the test itself does not differ from the trespass to try title proof requirements. In this case, the parties were still bound to prove their ownership via the notes and the trustee's deed.¹¹² This proof requirement is akin to proving title out of a common source—one of the methods of proving title in a trespass to try title suit.¹¹³ It appears that this court, while attempting to set a new standard, merely applied the trespass to try title common source rule without requiring the formal pleading requirements.¹¹⁴ The end result was merely an award of attorney's fees and a lessened pleading requirement.

B. *The Non-Possessory Interest Standard*

In *Roberson v. City of Austin*, the court looked into the implications of the *Martin* opinion on the status of the trespass to try title suit.¹¹⁵ The court in this case was faced with determining the validity of an unrecorded easement.¹¹⁶ Specifically, the court was faced with determining whether or not the suit was properly brought under the DJA instead of the trespass to try title action.¹¹⁷ The court begins its analysis by noting that the *Martin* opinion was confined to determining title in regard to possessory interests in property.¹¹⁸ The court pointed out that easements are non-possessory interests that are not required to be brought under the trespass to try title action.¹¹⁹ Indeed, the court notes that in many cases, disputes regarding easements have often been settled by the trespass to try title action.¹²⁰ Regardless of whether or not the trespass to try title action is an alternate means of resolving an easement dispute, the court held that the DJA may be

¹¹⁰ *Id.* at 476.

¹¹¹ *Id.* at 477.

¹¹² *Id.* at 476.

¹¹³ *See infra* Part II.A.

¹¹⁴ *See I-10 Colony*, 393 S.W.3d at 476.

¹¹⁵ *See generally* 157 S.W.3d 130 (Tex. App.—Austin 2005, pet. denied).

¹¹⁶ *Id.* at 133.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 136.

¹¹⁹ *Id.* (citing *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002) (“Unlike a possessory interest in land, an easement is a nonpossessory interest that authorizes its holder to use the property for only particular purposes.”)).

¹²⁰ *Roberson*, 157 S.W.3d at 136.

utilized.¹²¹ Most importantly, the court noted that “[p]ut simply, an easement does not divest fee ownership of the property.”¹²² The court concluded that easements may be brought under the DJA and that to hold otherwise would be to render the DJA’s language regarding the validity of deeds meaningless.¹²³

In essence, the *Roberson* opinion advocates that non-possessory interest disputes may be resolved under the DJA, while possessory interest disputes are required to be brought as a trespass to try title suit. In drawing the line at “possessory interests,” the court distinguished itself from *Martin*, giving it the freedom to allow the case under the DJA.¹²⁴ Put together, *I-10 Colony* and *Roberson* give two conflicting views on when the DJA may be utilized to resolve disputes involving land.

C. Comparing and Contrasting Standards

The “prospectively implicating title” standard applied to the *Roberson* easement problem does not appear as if it would alter the end result in that particular case, but may have a further reaching impact in other cases. Under the test, the validity of the easement in *Roberson* was readily determined without examining who owned property at a particular time.¹²⁵ However, this is because the case dealt with a utility easement running through property.¹²⁶ Many other cases involving easements will in fact require determining who held title to a parcel of land at a particular time. It is well settled in Texas property law that if a party holds an easement in a parcel of land and later becomes the owner of the burdened land, the easement terminates by means of merger.¹²⁷ In other words, the validity of the easement does revolve around determining who holds title to property at a particular time because if the party claiming the easement owned the

¹²¹ *Id.* at 137.

¹²² *Id.* at 136.

¹²³ *Id.* at 137.

¹²⁴ *Id.* at 136 (“[A] boundary dispute inherently concerns title and possession of property.”).

¹²⁵ *I-10 Colony, Inc. v. Chao Kuan Lee*, 393 S.W.3d 467, 475 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). The court noted that “if resolution of a dispute does not require a determination of which party owned title at a particular time, the dispute could properly be raised in a declaratory judgment action” *Id.*

¹²⁶ *Roberson*, 157 S.W.3d at 133.

¹²⁷ 31A TEX. JUR. 3D *Easements & Licenses in Real Property* §§ 2, 74 (2007) (“One cannot have an easement in his or her own land . . .”).

encumbered land at the same time he claimed the easement, then the easement ceased to exist.

The “non-possessory interest” standard applied to *I-10 Colony* seems to not change the result. In that case, the issue centered around whether or not Lee’s mortgage interest was extinguished whenever I-10 Colony foreclosed on the property.¹²⁸ The validity of the mortgage did not depend in any way on whether or not either party held a possessory interest.¹²⁹ Indeed, mortgages are non-possessory.¹³⁰ A mortgage only becomes possessory if and when a debtor on the property defaults, fails to cure his default, and is subsequently foreclosed on.¹³¹ However, the validity of the mortgage itself does not depend on whether or not the mortgagor or the mortgagee has a possessory interest.¹³²

V. CONCLUSION

In Texas, a party may have his deed tested under the DJA but must have his title tried under the trespass to try title statute. With a lessened pleading requirement and the possibility of recovering attorney’s fees, the DJA often tempts litigants to “artfully plead” their case. The case law regarding what actions may be brought under the DJA and what cases are required to be tried as a trespass to try title are “contradictory and confused.” A few cases have tried to clean up this confusion by inventing new standards to determine which cases qualify for DJA treatment and which do not. However, these attempts have not been very clear and yield surprising results when applied to facts outside of their own cases. Despite this confusion, parties will continue to attempt to bring their case under the DJA as long as attorney’s fees and costs may be recovered.

¹²⁸ *I-10 Colony*, 393 S.W.3d at 471.

¹²⁹ *See id.*

¹³⁰ 30 TEX. JUR. 3D *Deeds of Trust and Mortgages* § 183 (2007).

¹³¹ *Id.*

¹³² *Id.*