# UPDATE ON OKLAHOMA REAL PROPERTY TITLE AUTHORITY: STATUTES, REGULATIONS, CASES, ATTORNEY GENERAL OPINIONS & TITLE EXAMINATION STANDARDS: REVISIONS FOR 2012-2013

**(Covering July 1, 2012 to June 30, 2013)**

BY:

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EDUCATION: University of Oklahoma [B.A. (PoliSci-Urban Admin.) 1971];
State Univ. of N.Y. at Stony Brook [M.S. (Urban and Policy Sciences) 1974]; &
Oklahoma City University [J.D. (Law) 1978].

PRACTICE: Receivership, Arbitration, Mediation, Appeals, and Expert Consultation and Testimony
Oil/Gas & Real Property Title Opinions and Litigation;
Condo/Home Owners Association Creation & Representation; and
Condemnation and Inverse Condemnation.

MEMBERSHIPS/POSITIONS:

OBA Title Examination Standards Committee (Chairperson: 1992-Present);
OBA Nat'l T.E.S. Resource Center (Director: 1989 - Present);
OBA Real Property Law Section (current member, former Chairperson);
OKC Real Property Lawyers Assn. (current member, former President);
OKC Mineral Law Society (current member); and
*BSA: VC & Chair, Baden-Powell Dist., Last Frontier Council (2000-2007); former Cubmaster, Pack 5, & Asst SM, Troop 193, All Souls Episcopal Church*
*Kiwanis: Downtown OKC Club; Member 2009-present; President 2012-2013*

SPECIAL EXPERIENCE:

Court-appointed Receiver for 5 Abstract Companies in Oklahoma
Oklahoma City University School of Law adjunct professor: "Oklahoma Land Titles" course (1982 - Present);
Vernons 2d: Oklahoma Real Estate Forms and Practice, (2000 - Present) General Editor and Contributing Author;
Basye on Clearing Land Titles, Author : Pocket Part Update (1998 – 2000); Contributing Author: Pocket Part Update (2001-Present)
Oklahoma Bar Review faculty: "Real Property" (1998 - 2003);
Chairman: OBA/OLTA Uniform Abstract Certif. Committee (1982);
In-House Counsel: LTOC & AGT/Old Republic (1979-1981);
Urban Planner: OCAP, DECA & ODOT (1974-1979).

SELECTED PUBLICATIONS:

*"The Real Estate Mortgage Follows the Promissory Note Automatically Without an Assignment: The Lesson of BAC Home Loans", 82 OBJ 2938 (December 10, 2011);*
*"Oklahoma's Marketable Record Title Act: An Argument for its Application to Chains of Title to Severed Minerals after Rocket Oil and Gas Co. v. Donabar", 82 The Oklahoma Bar Journal 622 (March 12, 2011);*
*"Well Site Safety Zone Act: New Life for Act", 80 OBJ 1061 (May 9. 2009).*

SPECIAL HONORS: Okla. Bar Assn. 1997 Maurice Merrill *Golden Quill Award*;
Okla. Bar Assn. 1990 Earl Sneed *Continuing Legal Education Award*;
Okla. Bar Assn. 1990 Golden Gavel Award: *Title Exam. Standards Committee.*

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## I. INTRODUCTION

The determination of the existence and the holder of "valid" title (i.e., enforceable between the parties), and "marketable" title (i.e., determinable "of record", and relied upon by third party grantees and lenders) to a parcel of real property, requires the application of the current law of the State where the land is located. (60 O.S.§21)

The following materials reflect a listing of selected changes in the law of Oklahoma related to real property title issues, arising over the 12 months following June 30, 2012, including any (1) statutes enacted during the most recent State legislative session, (2) new regulations (if any), (3) cases from the Oklahoma Supreme Court and the Court of Civil Appeals, (4) opinions from the Oklahoma Attorney General (if any), and (5) Oklahoma Title Examination Standards adopted (or proposed) during that period.

## II. STATUTORY CHANGES

(see: www.lsb.state.ok.us)

(PREPARED BY JASON SOPER)

2013-2014 LEGISLATIVE TERM

1ST SESSION OF THE 54TH LEGISLATURE

PENDING BILLS AND LAWS THAT MAY EFFECT REAL PROPERTY & TITLE EXAMINATION STANDARDS

AMENDED & UPDATED FOR JUNE 15, 2013 TES COMMITTEE MEETING

### NEW LAWS ESTABLISHED IN THE 2012 SESSION

**HB1087** Liens: Amending Okla. Stat. tit. 42 §§ 141 and 143
Sponsor: Representative Grau & Senator Crain

**Status: Approved by the Governor on April 22, 2013.**

Law amends the current statute(s) to allow a mechanic or materialman to add lost profit and overhead costs to the sum claimed owed at the time of the lien's filing.

**HB1265** Revenue and taxation: Amending Okla. Stat. tit. 68 §§ 2817, 2863, 2871 & 2874
Sponsor: Representative Moore & Senator Holt

**Status: Approved by the Governor on April 26, 2013.**

Law amends the current statute(s) to allow for the reassessment of real property ad valorem taxes in the current calendar year if the cash value of the reality is significantly reduced due to some natural disaster.

**HB1547** Probate procedure: Amending Okla. Stat. tit. 58 §§ 245 & 246
Sponsor: Representative McCullough & Senator Sykes

**Status: Approved by the Governor on April 24, 2013.**

Law amends the current statute(s) to allow for the probate summary administration jurisdiction to be increased from the current $175,000.00 maximum level to $200,000.00 and amends the current notice procedure.

**HB1767** Insurance: Amending Okla. Stat. tit. 36 § 5001

Sponsor: Representative Russ & Senator Newberry

**Status: Approved by the Governor on April 22, 2013.**

Law amends the current statute by removing the requirement for an attorney or abstractor to countersign a title insurance policy which would allow for a duly appointed agent to be able to execute title insurance commitments and policies.

**SB191** Oil and Gas: Amending Okla. Stat. tit. 52 § 318.3
Sponsor: Senator Fields & Ivester and Representative Jackson

**Status: Approved by the Governor on May 20, 2013.**

Law amends the current statute to allow for the delivery of the notice of an intent to drill via private process server in addition to certified mail.

**SB292** Oil and Gas: Amending Okla. Stat. tit. 68 § 3129
Sponsor: Senator Crain and Representative Sanders

**Status: Approved by the Governor on April 24, 2013.**

Law amends the current statute to require the Oklahoma Health Care Authority to release any lien it may have on a blighted property facing tax sale so that the real property can be sold without being subject to such liens.

**SB440** Judgments: Amending Okla. Stat. tit. 12 § 1031.1
Sponsor: Senator Rob Johnson and Representative Grau

**Status: Approved by the Governor on April 10, 2013.**

Law amends the current statute to allow a District Court to vacate or modify its judgment, decree or appealable order after thirty (30) days have passed since the judgment's entry if all parties who have entered an appearance in the lawsuit agree to allow said modification or vacation.

## ACTIVE HOUSE BILLS INTRODUCED IN THE 2013 SESSION

**HB1884** Insurance: New law to be codified as Okla. Stat. tit. 36 § 5021
Sponsor: Representative Armes & Senator Rob Johnson

**Status: Measure passed the House by a vote of 80 – 11 on March 14, 2013. An amended version of the measure passed the Senate by a vote of 43 – 0 on April 16, 2013 and has been sent back to the House for reconsideration. No further action has been taken on this measure. The measure will carry over to the 2014 session for further consideration.**

Measure would establish a new law requiring persons providing real estate settlement services to be licensed & establish a continuing education requirement. The measure would also require an annual audit and maintenance of certain accounts and records.

## ACTIVE SENATE BILLS INTRODUCED IN THE 2013 SESSION

**SB355** Guardianship: Amending Okla. Stat. tit. 30 §§ 1-123 & 4-307
Sponsor: Senator Anderson and Representative McCullough

**Status: Measure passed the Senate by a vote of 43 - 0 on February 27, 2013. An amended version of the measure passed the House by a vote of 85 – 2 on April 2, 2013 and has been sent to the Senate for reconsideration. The Senate rejected the House amendments and requested a conference. On May 23, 2013 the Conferees reported unable to agree. The measure will carry over to the 2014 session for further consideration.**

Measure would amend the current statute(s) to state that letters of guardianship are valid for no longer than fifteen (15) months, unless renewed by the court via order at each annual report.

## III. REGULATORY CHANGES

(NONE)

## IV. CASE LAW

### LIST OF CASES

| NO. | TOPIC | CASE | OKLAHOMA CITATION | DECIDED | MANDATE |
|---|---|---|---|---|---|
| A. OKLAHOMA COURT OF CIVIL APPEALS | | | | | |
| 1 | Sovereign Immunity | JMA Energy Company, LLC v. State ex rel. Dept. of Transportation | 2012 OK CIV APP 55 | 03/013/12 | 06/01/12 |
| 2 | Guaranty of Mortgage | AVB Bank v. Hancock | 2012 OK CIV APP 68 | 06/08/12 | 07/09/12 |
| 3 | Condemnation | State ex rel. Dept. of Transportation v. K & L Leasing, Inc. | 2012 OK CIV APP 71 | 06/28/12 | 07/31/12 |
| 4 | Mechanic's Lien And Lis Pendens | Dee v. Horton | 2012 OK CIV APP 80 | 05/03/12 | 08/17/12 |
| 5 | Adverse Possession and Acquiescence | WRT Realty, Inc. v. Boston Investment Group II, L.L.C. | 2012 OK CIV APP 82 | 07/31/12 | 08/30/12 |
| 6 | Appointment of Receiver for Trust | Fansler v. Fansler | 2012 OK CIV APP 95 | 06/29/12 | 10/19/12 |
| 7 | Ad Valorem Taxes | Thornton Family, L.L.C. v. Yazel | 2013 OK CIV APP 2 | 07/26/12 | 01/15/13 |
| 8 | Mortgage Foreclosure Jury Instructions | Country Place Mortgage, Ltd. v. Brown | 2013 OK CIV APP 3 | 11/30/13 | 01/15/13 |
| 9 | Condemnation Award of Costs | State ex rel. Dept. of Transportation v. Sutherland Lumber and Home Center, Inc. | 2013 OK CIV APP 9 | 01/04/13 | 02/07/13 |
| 10 | Standing to Foreclose a Mortgage and Note | MidFirst Bank v. Wilson | 2013 OK CIV APP 15 | 11/07/12 | 02/07/13 |
| 11 | Economic Duress Through Demand Notes | Richards v. Banc-First Shawnee | 2013 OK CIV APP 16 | 11/19/12 | 02/15/13 |
| 12 | Application for Attorney Fees | Stillwater National Bank & Trust Co. v. Cook | 2013 OK CIV APP 17 | 11/30/12 | 03/05/13 |
| 13 | Special Assessment Districts Constituionality | Bacon & Son, Inc. v. City of Tulsa | 2013 OK CIV APP 20 | 01/18/13 | 03/12/13 |
| 14 | Condemnation Procedures | State ex rel. Dept. of Transportation v. Metcalf | 2013 OK CIV APP 28 | 02/13/13 | 03/14/13 |

| | | | | | |
|---|---|---|---|---|---|
| 15 | Trust Assets Division and Distribution | In The Matter of the Estate of Rozell | 2013 OK CIV APP 35 | 11/30/12 | 04/24/13 |
| 16 | Attorneys Fees in Mortgage Foreclosure | HSRE-PEP I, LLC v. HSRE-PEP CRIMSON PARK LLC | 2013 OK CIV APP 38 | 02/08/13 | 05/02/13 |
| 17 | Mortgage Lien Priorities | HSRE-PEP I, LLC v. HSRE-PEP CRIMSON PARK LLC | 2013 OK CIV APP 40 | 02/08/13 | 05/09/13 |
| 18 | Partition Proceeding | Noble V. Noble | 2013 OK CIV APP 41 | 01/31/13 | 05/09/13 |
| 19 | Surety Bond Exoneration | City of Oklahoma City v. First American Title & Trust Company | 2013 OK CIV APP 42 | 10/11/12 | 05/09/13 |
| 20 | Misrepresentation of Square Footage of Residence | Lopez v. Rollins | 2013 OK CIV APP 43 | 02/08/13 | 05/09/13 |
| 21 | Special Assessment Districts | E & F Cox Family Trust v. City of Tulsa | 2013 OK CIV APP 45 | 01/18/13 | 05/22/13 |
| 22 | Special Assessment Districts | E & F Cox Family Trust v. City Of Tulsa | 2013 OK CIV APP 47 | 01/18/13 | 05/22/13 |
| B. OKLAHOMA SUPREME COURT | | | | | |
| 23 | Probate as to Pretermitted Heir and Proper Personal Representative | In The Matter of the Estate of Dicksion | 2011 OK 96 | 11/15/11 & 06/25/12 & 07/09/12 | 10/02/12 |
| 24 | Ad Valorem Tax Exemption of Charitable Use Property | AOF/Shadybrook Affordable Housing Corporation v. Yazel | 2012 OK 59 | 06/19/12 & 07/16/12 | 08/10/12 |
| 25 | Copying Land Records | County Records, Inc. v. Armstrong | 2012 OK 60 | 06/19/12 & 04/08/13 | 05/02/13 |
| 26 | Adverse Possession | Akin v. Castleberry | 2012 OK 79 | 09/18/12 | 10/11/12 |
| 27 | Separate Marital Estate | Smith v. Villareal | 2012 OK 114 | 12/18/12 | 04/11/13 |
| 28 | Service of Summons Deadline | Cornett v. Carr | 2013 OK 30 | 04/23/13 | 06/11/13 |

A. OKLAHOMA COURT OF CIVIL APPEALS

1. **JMA ENERGY COMPANY, LLC v. STATE EX REL. DEPT. OF TRANSPORTATION (2012 OK CIV APP 55)**

TOPIC: SOVEREIGN IMMUNITY

HOLDING: STATE IS NOT IMMUNE AS A SURFACE OWNER TO PROCEEDINGS UNDER THE SUFACE DAMAGES ACT

FACTS: Drilling operator intended to commence operations on land owned by the State of Oklahoma (DOT). Negotiations with DOT failed and, when operator filed petition to appoint commissioners to determine the amount of damages under the Surface Damages Act, ODOT filed Motion to Dismiss based on sovereign immunity.

TRIAL COURT RULING: Trial Court held that the State is not immune from the Surface Damages Act.

COURT OF CIVIL APPEALS RULING: The Court of Appeal initially denied an Application and Petition, and, after the trial court denied several additional motions by ODOT (Motion to Dismiss for delay and exception to Report of Commissioners), Court of Appeals affirmed the trial court and held (1) sovereign immunity was totally abrogated as to all matters (both tort and contract) by Vanderpool v. State, 1983 OK 82, (2) limited sovereign immunity was reinstated in 1984 by adoption of the Governmental Torts Claims Act (51 O.S. §151 et seq.) and only provides the ability to sue the State as to all claims except "Tort" claims, (3) the damages to be determined and paid under the Surface Damages Act (52 O.S. §§318.2-318.9) ("SDA") are not related to a tort, and (4) there in no express exemption in the SDA for the State (although Indian lands are exempt).

[Author's Note: This is a good general discussion of the history and current status of "sovereign

immunity."]

2. **AVB BANK v. HANCOCK (2012 OK CIV APP 68)**

TOPIC: GUARANTY OF MORTGAGE

HOLDING: A GUARANTY AGREEMENT, WAIVING THE ANTI-DEFICIENCY DEFENSE, IS NOT DEFEATED BY ASSERTION THAT GUARANTOR ENTITY IS ALTER EGO OF DEBTOR

FACTS: In a mortgage foreclosure action, debtor admitted all facts concerning execution of a Note and Mortgage, and guarantor admitted execution of guaranty as a LLC, both admitted default on note and mortgage. LLC as guarantor tried to deny liability under Guaranty claiming the agreement was unenforceable because the individual debtors who signed the note and mortgage were the "partners" of the LLC. The State of California courts have allowed a defense where the guaranty is not enforceable where the lender forces the debtor to create an entity to give a guaranty which waives the debtor's statutory anti-deficiency rights.

TRIAL COURT RULING: Guarantor was liable.

COURT OF CIVIL APPEALS RULING: Affirmed, stating:

> "¶10 Oklahoma has a well-developed line of authority affirming a guarantor's right to waive most statutory protections, pursuant to the parties' freedom to contract as they wish. See *Founders Bank, supra; JP Morgan Chase Bank v. Specialty Restaurants, Inc.*, 2010 OK 65, 243 P.3d 8. We are not prepared to adopt a rule from another state which would mark an abrupt departure from Oklahoma authority."

3. **STATE EX REL. DEPT. OF TRANSPORTATION v. K & L LEASING, INC. (2012 OK CIV APP 71)**

TOPIC: CONDEMNATION

HOLDING: LANDOWNER IS NOT LIABLE FOR ATTORNEY FEES IF WITHDREW DEMAND FOR JURY TRIAL

FACTS: ODOT and landowner both demanded jury trial over amount of damages to be awarded in a condemnation action. Landowner withdrew demand for jury trial shortly before trial (5 days), but ODOT proceeded to trial anyway. Jury award granted the landowner less than from the commissioners' award ($116,250 v. $196,733). ODOT requested attorney fees as the prevailing party.

TRIAL COURT RULING: Trial Court granted attorney fees to ODOT.

COURT OF CIVIL APPEALS RULING: Reversed; because landowner withdrew demand for jury trial before trial, such landowner is not liable for attorney fees even when the award was below the commissioners' award.

4. **DEE v. HORTON (2012 OK CIV APP 80)**

TOPIC: MECHANIC'S LIEN AND LIS PENDENS

HOLDING: ORDER RELEASING A MECHANIC'S AND MATERIAL LIEN, AND RELATED LIS PENDENS IS NOT "APPEALABLE BY RIGHT"

FACTS: Mechanic filed Mechanic's Lien and related lis pendens, but no foreclosure action. Landowner filed suit to quiet title, for breach of contract, negligence, and other claims. Mechanic filed answer, but no counterclaim to foreclose its Mechanic's Lien. Trial Court was requested to issue, at landowner's request, an emergency order to remove lien and lis pendens.

TRIAL COURT RULING: Trial Court granted landowner's motion and issued an emergency order removing the lien and lis pendens.

COURT OF CIVIL APPEALS RULING: When mechanic lien claimant filed an appeal of the trial court's emergency order, the Court of Civil Appeals dismissed the appeal and remanded it for further proceedings because (1) the emergency order was interlocutory (12 O.S. §952 (b)(3)), (2) was not certified for immediate appeal, and (3) was not appealable by right (12 O.S. §952

(b)(2)), as either (a) an "attachment" (12 O.S. §993(A)(1)), or (b) a provisional remedy (12 O.S. §993(A)(3)).

5. **WRT REALTY, INC. v. BOSTON INVESTMENT GROUP II, L.L.C. (2012 OK CIV APP 82)**

TOPIC: ADVERSE POSSESSION AND ACQUIESCENCE

HOLDING: CITY VACATION OF STREET, BEFORE STATUTE WAS ENACTED ALLOWING REOPENING, VESTED TITLE IN ADJACENT OWNERS

FACTS: In 1902, City vacated 9 platted streets to provide a right of way easement to a railroad. The railroad abandoned the right of way in the late 1970s or early 1980s. Prior to 1984, the owner of one side of the abandoned ROW installed a six-foot tall metal chain link fence on the roadway 20 feet past the center line of the roadway, adding 20 feet to their one half of the ROW. Appellee occupied such disputed property over 15 years. In 2007, the City again vacated the streets. In 2008, the City's right to reopen the street was foreclosed in a court action. In 2008, the two owners of the lands on either side of the street sold the property, including the disputed property, to a third party, and it was agreed that a court proceeding would be instituted to determine who owned the disputed property and, therefore, was entitled to that portion of the sale proceeds.

TRIAL COURT RULING: On cross summary judgment motions, the Trial Court ruled Appellees proved they fenced and occupied the 20-foot strip for over 15 years and thereby proved adverse possession.

COURT OF CIVIL APPEALS RULING: Because the street was vacated in 1902, before the statute was enacted to allow the City to reopen the street (after being initially closed by ordinance), and because the railroad right of way easement was abandoned, and then the fence

was built and the fenced property was occupied for over 15 years, (1) all elements of adverse possession were proven, except for proof of "hostility," and (2) acquiescence was not proven because no evidence was presented of the parties' agreement in the construction of the fence. The trial court was accordingly partially affirmed, and partially remanded to establish either hostility in the occupancy, or mutual agreement in construction of the fence.

6. **FANSLER v. FANSLER (2012 OK CIV APP 95)**

TOPIC: APPOINTMENT OF RECEIVER FOR TRUST

HOLDING: WHERE TRUSTEES (DIVORCED PARTIES) ARE DEADLOCKED AND UNWILLING TO CARRY OUT PURPOSE OF TRUST WHICH WAS TO SELL DIVORCED PARTIES' HOUSE, APPOINTMENT OF RECEIVER IS PROPER

FACTS: Parties got divorced and, under a settlement agreement, placed residence in trust, with former husband and wife as trustees. Wife was given possession of the house. The express purpose of the trust was to sell the house and split the proceeds. 10 years went by and no sale occurred, but wife collected rent on the house in the interim. Husband filed suit to remove wife as trustee or appoint receiver. Wife asserted that trial court lacked jurisdiction over the trustees because the suit was styled and the parties were served as individuals and not as trustees.

TRIAL COURT RULING: Court assumed control of trust and directed parties to cooperate and sell the residence. 10 months later, with no sale occurring, the court appointed a receiver to control and sell the house. Wife appealed.

COURT OF CIVIL APPEALS RULING: Affirmed Trial Court, and held that parties were properly joined as trustees although only named as individuals.

7. **THORNTON FAMILY, L.L.C. v. YAZEL (2013 OK CIV APP 2)**

TOPIC: AD VALOREM TAXES

HOLDING: THERE IS NO AD VALOREM TAX DUE ON INCOMPLETE STRUCTURES

FACTS: Landowner bought land in 2003 and removed structures from it. During 2008, landowner began construction of a car dealership service and sales building. It was assessed on January 1, 2009 at $3 million as raw land.

In 2010, before construction was complete, the County Assessor gave notice of an Assessed value of $14 million. Land owner informally protested and the amount was lowered to $8 million. The landowner formally protested and the County Board of Equalization sustained the County Assessor's valuation of $8 million. Landowner filed suit in the District Court.

TRIAL COURT RULING: On cross motions for summary judgment, the trial court ruled the value of the raw land was $2.7 million, and an existing warehouse was worth $400,000, for a total value of $3.1 million.

COURT OF CIVIL APPEALS RULING: Affirmed, saying the statute implied taxes were only due on completed structures, agreeing with the result (but not the precise holding) of an Attorney General Opinion which said "A plain reading of" this statute shows only a completed building adds value for tax purposes.

8. **COUNTRY PLACE MORTGAGE, LTD. v. BROWN (2013 OK CIV APP 3)**

TOPIC: MORTGAGE FORECLOSURE JURY INSTRUCTIONS

RULING: JURY INSTRUCTIONS WHICH FAIL TO INCLUDE "BALANCE DUE" ON THE NOTE IN THE MEASURE OF DAMAGES ARE IN ERROR

FACTS: At trial on an action to enforce a note and to foreclose on a mortgage, with a counterclaim by the debtors for fraud, the initial proposed jury instructions submitted by the lender provided that "the amount of the damages should be determined as the balance due under the note." The lender sought to amend its own instructions to add "taxes, insurance and other

expenses" to the instructions. The instruction that the court finally gave the jury provided "you must then fix the amount of its damages, the taxes, insurance and expenses." Thus, the court dropped the language about "the balance due under the note".

TRIAL COURT RULING: The trial court received a verdict from the jury for $18,000, which only covered the $18,171.18 for taxes, insurance, and attorney fees, but not the balance due under the note, which balance was $153,044.61. The verdict gave nothing for the debtors' fraud claim. The lender sought a new trial or a judgment notwithstanding the verdict, and lost. The lender appealed.

COURT OF CIVIL APPEALS RULING: Reversed and remanded "for new trial solely on the issue of [lender's] damages" to include the balance due on the note. The jury sent questions to the judge asking "What amount is the Plaintiff asking for and how is that broken down? Is there an Exhibit that shows this?" and "If we find for the Plaintiff, does that allow their foreclosure? Then we will put sum of ___ for anything in addition to the foreclosure?" There is no transcript or record showing the court's responses to the jury's questions. The appellate court found that the instruction was contrary to law, and "probably resulted in a miscarriage of justice."

9. **STATE EX REL. DEPT. OF TRANSPORTATION v. SUTHERLAND LUMBER AND HOME CENTER, INC. (2013 OK CIV APP 9)**

TOPIC: CONDEMNATION AWARD OF COSTS

RULING: AWARD OF COSTS IN A CONDEMNATION PROCEEDING, INCLUDING ATTORNEY FEES, IS NOT JUSTIFIED IF THE LOSING PARTY DID NOT DEMAND A JURY TRIAL

FACTS: Only ODOT, as the condemning party, demanded a jury trial and the jury awarded a lesser amount than the commissioners' report ($427,280 v. $180,802). ODOT sought

recovery (a) for "deposition preparation and deposition testimony of the Department's witnesses" and (b) for "expenses for the service of subpoenas, costs for copying papers necessarily used at trial, and reasonable expense for taking and transcribing deposition testimony."

TRIAL COURT RULING: ODOT requested and was awarded an amount for each of the two sets of expenses. The landowner had stipulated and agreed to pay the first category of expenses, but not the second. The landowner appealed saying neither amount was justified by law, because, according to statute, such costs are awarded only if the losing party demanded the jury trial. In this case, it was ODOT who demanded the jury trial, and was the winner, not the loser.

COURT OF CIVIL APPEALS RULING: The appellate court affirmed the granting of the costs which the landowner had agreed to pay, and reversed as the other costs, because, by statute, no costs are to be awarded unless the party requesting the jury trial loses at trial.

10. **MIDFIRST BANK v. WILSON (2013 OK CIV APP 15)**

TOPIC: STANDING TO FORECLOSE A MORTGAGE AND NOTE

RULING: FAILURE TO ATTACH AN AUTHENTICATED AND PROPERLY ENDORSED NOTE TO A MORTGAGE FORECLOSURE PLEADING IS FATAL

FACTS: MidFirst sued to foreclose a note and mortgage which was initially issued to Harry Mortgage and endorsed to Washington Mutual Bank. No endorsement to MidFirst was ever shown. In response to a Motion to Dismiss, MidFirst claimed the note contained an endorsement "in blank" (i.e., to bearer), but the note attached to such response failed to show such endorsement. The response also included an affidavit asserting that MidFirst was the holder of the note, but no note was attached to the affidavit. The Motion to Dismiss was not decided. MidFirst filed a Motion for Summary Judgment and the debtors failed to respond.

TRIAL COURT RULING: MidFirst's Motion for Summary Judgment for foreclosure was

granted. The debtors sought to vacate such judgment, but such motion was denied. The debtors appealed.

COURT OF CIVIL APPEALS RULING: The order denying the debtors' motion to vacate is reversed; the judgment in favor of MidFirst is vacated; and the case is remanded for further proceedings to determine who held the note.

*[AUTHOR'S NOTE: This case continues to remind foreclosing attorneys to properly document IN THE RECORD their claim to "Standing" by showing they held the note when the foreclosure petition was filed.]*

11. **RICHARDS v. BANC-FIRST SHAWNEE (2013 OK CIV APP 16)**

TOPIC: ECONOMIC DURESS THROUGH DEMAND NOTES

RULING: A THREAT TO CALL DUE A DEMAND LOAN IS NOT SUFFICIENT EVIDENCE OF ECONOMIC DURESS, TO TOLL A STATUTE OF LIMITATION TO SUE FOR BREACH OF CONTRACT BY BANK

FACTS: A demand note and construction mortgage were converted to a permanent loan, but only after borrower was allegedly denied certain credits towards the construction loan, and was allegedly threatened with the note being called due if he protested the lack of such credit. Ten years later the loans were paid off and the debtor then sued for breach of contract, breach of fiduciary duty, and duress. Lender asserted statute of limitations.

TRIAL COURT RULING: At trial, after the debtors presented their evidence, the lender moved for a directed verdict which was granted. Debtors appealed.

COURT OF CIVIL APPEALS RULING: Affirmed. Because the threat to call the note due was reasonable, since the note was a demand note, there was not other evidence sufficient to establish economic duress.

12. **STILLWATER NATIONAL BANK & TRUST CO. v. COOK (2013 OK CIV APP 17)**

TOPIC: APPLICATION FOR ATTORNEY FEES

RULING: THE FILING OF AN APPLICATION FOR ATTORNEY FEES IN AN ACTION ON A MECHANICS AND MATERIALMAN'S LIEN PRIOR TO THE DECISION DENYING THE ARCHITECT'S MOTION TO RECONSIDER JUDGMENT IN FAVOR OF THE LENDER IS NOT PREMATURE

FACTS: Lender made a construction loan, and, in anticipation of construction, an architect prepared plans, and, upon the developer's failure to pay for such plans, the architect filed a mechanics and materialman's lien. Before any construction began, the developer defaulted on the loan and gave the lender a deed in lieu of foreclosure. The lender sued to quiet title against the architect.

TRIAL COURT RULING: The title was quieted in favor of the lender, who filed an application for attorney fees. Such application was filed between the date the architect filed its motion for reconsideration and the date the court denied such motion for reconsideration. The denial of the motion for consideration denied attorneys fees, but stated they would be reconsidered "upon application." Without re-application for attorney fees, the matter was set for hearing on such fees and the original application granted. Architect appeals the adverse rulings concerning the lien and the attorney fees.

COURT OF CIVIL APPEALS RULING: Court of Civil Appeals affirmed the order denying the existence and priority of the architect's lien, and the Supreme Court denied Cert. Architect again disputed the grant of attorney fees, due to allegedly being applied for prematurely and then not reapplied for. Court of Civil Appeals affirmed saying statute does not prevent early

application for attorney fees, just late (over 30 days) application, and, therefore, the initial "early" application (i.e., prior to the judgment on the motion to reconsider the lien matter) was timely and proper, and must be granted to lender as the prevailing party.

13. **BACON & SON, INC. v. CITY OF TULSA (2013 OK CIV APP 20)**

TOPIC: SPECIAL ASSESSMENT DISTRICTS CONSTITUTIONALITY

RULING: SPECIAL ASSESSMENT NOTICE PROCEDURES AND ALLOCATION OF BENEFITS AND SHARE OF COSTS ARE CONSTITUTIONAL

FACTS: Landowner challenged constitutionality of the special assessment statutes due to alleged lack of due process in the assessment district creation process, and the allocation of estimated benefits and allocation of share of costs. Two hearings were held and landowner waited until later than 30 days after the first hearing to file this action.

TRIAL COURT RULING: Trial Court granted summary judgment to City and held that the statutory due process which was provided was constitutionally adequate in that affected parties received notice including two hearings (for creation of a district and then separately for approval of assessments) and a notice that they could review the allocation information at the City offices, concerning estimated benefits and costs. Also it was held that the landowner failed to protest within 30 days of the first hearing, and is therefore, by statute, barred from such protest.

COURT OF CIVIL APPEALS RULING: Affirmed.

14. **STATE ex rel. DEPT. OF TRANSPORTATION v. METCALF (2013 OK CIV APP 28)**

TOPIC: CONDEMNATION PROCEDURES

RULING: STATUTORY PROCEDURES CALLING FOR AN APPRAISAL BEFORE MAKING AN OFFER TO PURCHASE ARE NOT MANDATORY BEFORE COMMENCING

CONDEMNATION PROCEEDING

FACTS: ODOT made a offer to purchase land based on an appraisal, and then, at the request of the landowner reduced its taking from a full taking of the parcel (2 acres; $130,650) to a partial taking (0.28 acres; $11,000). The first offer for a full taking was based on an appraisal but the second offer concerning a partial taking just relied on the original appraisal to compute a new offer. The offers were not accepted, and no counteroffer was made. The proceeding was commenced.

TRIAL COURT RULING: Trial court dismissed the proceeding due to ODOT's failure to procure an appraisal for the smaller tract, thereby making the offer invalid, because it was not based on an appraisal. Such appraisal is called for in 27 O.S. Section 13.

COURT OF CIVIL APPEALS RULING: Reversed and remanded for determination of appropriate amount of compensation. The steps provided in 27 O.S. Section 13 are relegated by Section 15 to being nothing more than "policies", and are not mandatory. "Based on the above [statutes and cases], the condemnor is required to make a bona fide offer to purchase the land before bringing its condemnation action. This is the only jurisdictional prerequisite. Although such offers may customarily be based on an appraisal, the statute does not require it."

[*It will be interesting to see if the recent legislative enactment (described below) affects this issue:*

**HB1562** Landowners Bill of Rights Act
Sponsors: Representatives Jordan and Kay of the House, and Senators Treat, Marlatt, Shortey, and Brecheen of the Senate

**Status: Signed into Law on April 30, 2012**

The measure directs the Attorney General to “prepare a written statement that includes a ‘Landowner’s Bill of Rights’ for a property owner whose real property

may be acquired…through the use of…eminent domain authority…".]

15. **IN THE MATTER OF THE ESTATE OF ROZELL (2013 OK CIV APP 35)**

TOPIC: TRUST ASSETS DIVISION AND DISTRIBUTION

RULING: TRUST DIVIDING ASSETS BETWEEN BENEFICIARIES AT TRUSTOR'S DEATH VESTS IN BENEFICIARY AND IF NOT DISTRIBUTED BY THE BENEFICIARY DEATH, THEN GOES TO BENEFICIARY'S ESTATE, RATHER THAN LAPSING

FACTS: Trust provided for Trustor/Mother's Trust assets to be divided between 7 children's sub-trusts on her death, and to be distributed within 3 years thereafter. Such distribution goes to living children of deceased beneficiary, if beneficiary is not alive on division date (i.e., on death of trustor). No other provision is provided in case beneficiary dies before distribution date and has no living children, as happened here. A suit ensued between the estate of the deceased (childless) beneficiary and the trustee of the trust.

TRIAL COURT RULING: The trial court ruled the beneficiary was not alive when distribution was made, and because he had no children, the bequest to him lapsed. Beneficiary's personal representative appealed.

COURT OF CIVIL APPEALS RULING: Reversed and remanded. The trust "provides for a beneficiary's share to be divested upon the conditions subsequent that the beneficiary is deceased and has living children. With respect to [this beneficiary's] share, both conditions were not met. [This beneficiary] was deceased but he had no children. Therefore, his interest, which vested upon [his mother's] death, was never divested. It passed to his estate upon his death."

16. **HSRE-PEP I, LLC v. HSRE-PEP CRIMSON PARK LLC (2013 OK CIV APP 38)**

TOPIC: ATTORNEYS FEES IN MORTGAGE FORECLOSURE

RULING: JUNIOR LIENHOLDER CAN UNSUCCESSFULLY CONTEST THE

PRIORITY OF THE LIEN OF THE PRIMARY MORTGAGE HOLDER AND STILL NOT OWE ATTORNEYS FEES

FACTS: First lender sought to foreclose using the non-judicial foreclosure procedure, and, even though it achieved a settlement with the debtor, it was forced into a regular court foreclosure action where it incurred attorney fees, due to the assertion by the second lender that its lien was ahead of the first lender.

TRIAL COURT RULING: Trial court determined that first lender had the first and prior mortgage lien ahead of second lender. First lender elected not to pursue an award of attorney fees against the mortgagor, but, instead, sought to recover attorney fees from second lender for asserting and losing on the lien priority issue.

COURT OF CIVIL APPEALS RULING: Affirmed. The American Rule dictates that in the absence of contractual right to attorney fees or specific statutory language allowing attorney fees, no fees are allowed to the prevailing party. In addition, the case-law rule is that junior lienholders and other incidental foreclosure parties, who resist in good faith, are not subject to attorney fees because it is the mortgagor who really caused the parties to incur legal fees, and consequently it is the mortgagor and the res which must bear that burden. This is true even if the mortgagor defaults.

17. **HSRE-PEP I, LLC v. HSRE-PEP CRIMSON PARK LLC (2013 OK CIV APP 40)**

TOPIC: MORTGAGE LIEN PRIORITIES

RULING: ACCEPTANCE OF A DEED IN LIEU OF FORCLOSURE WITH FORGIVENESS OF ONLY IN PERSONAM LIABILITY WITH THE INTENT TO FORECLOSURE JUNIOR LIENHOLDERS DOES NOT MERGE LIEN WITH TITLE

FACTS: First lender accepted a deed in lieu of foreclosure (a special warranty deed

"subject to" specified liens and interests), and forgave the debtor's in personam liability, but retained in rem liability (anticipating a future foreclosure action), while acknowledging that its mortgage was "subject to" specified other mortgages and claims. Second lender filed a foreclosure action seeking foreclosure of its mortgage against the mortgagors, and also asking that the court determine that the first lender's mortgage lien had merged into its fee title.

TRIAL COURT RULING: "The trial court determined it was not the intent of the parties to the settlement agreement to subordinate [first lender's] first mortgage to [second lender's] second mortgage. The trial court granted summary judgment in favor of [firs lender]. [Second lender] appeals.

COURT OF CIVIL APPEALS RULING: Affirmed. The appellate court considered (a) the language of the special warranty deed making it "subject to" the listed interests, (b) the retention of in rem liability by the first lender, and (c) the Restatement (Third) of Property comment that "The doctrine of merger does not apply to mortgages or affect the enforceability of a mortgage obligation." It concluded the first lender's mortgage lien was still senior.

18. **NOBLE v. NOBLE (2013 OK CIV APP 41)**

TOPIC: PARTITION PROCEEDING

RULING: PARTY TO A PARTITION ACTION DOES NOT HAVE A RIGHT OF REDEMPTION THAT LASTS UNTIL CONFIRMATION OF SHERIFF'S SALE

FACTS: Two siblings received 80 acres by inheritance from their grandfather. They could not agree to a partition in kind. One sibling filed for a partition. After the commissioners' appraisal/report was given ($528,000), and neither sibling elected to buy at that price, a sheriff's sale was held and one of the siblings purchased the land for less than the commissioner's award ($378,400). Before the hearing on the confirmation of sale, the other non-buying sibling sought

to "redeem" the property at the commissioners' value.

TRIAL COURT RULING: Trial court denied the attempted "redemption", and a sheriff's deed was issued. The losing sibling filed an appeal

COURT OF CIVIL APPEALS RULING: Affirmed. There is no statutory right of redemption, and there is not an analogy to a mortgage foreclosure or tax sale redemption setting where the party stands to lose the entire interest. In a partition, neither party has a senior right, and each party will receive a proportional payment.

[AUTHOR'S COMMENT: There is, in effect, a statutory right of "redemption" provided in the partition statute, which arises at the time of the commissioners' report/appraisal when either owner can elect to purchase and thereby "redeem" the property from the forced sale. Such right expires when the election period passes.]

19. **CITY OF OKLAHOMA CITY v. FIRST AMERICAN TITLE & TRUST COMPANY (2013 OK CIV APP 42)**

TOPIC: SURETY BOND EXONERATION

RULING: CHANGES IN AN AGREEMENT BETWEEN THE PRINCIPAL AND THE SUBCONTRACTOR DOES NOT EXONERATE THE SURETY, SINCE THE CHANGES WERE NOT TO THE AGREEMENT BETWEEN THE PRINCIPAL AND THE OBLIGEE

FACTS: Principal/developer gave a surety bond from the obligee (First American) to the City insuring that it would complete its efforts to construct a subdivision, including paving the streets. Principal became insolvent and stopped its development, including halting payments to the subcontractor which was paving the streets. City sued surety to pay to complete the development, principally the streets. Principal and subcontractor were also joined. Surety argued that it was exonerated because the principal and subcontractor modified their subcontract.

TRIAL COURT RULING: Trial court granted summary judgment to surety declaring that the bond was exonerated by the contract modifications. Obligee/City appealed.

COURT OF CIVIL APPEALS RULING: Reversed and remanded. Exoneration only occurs when the contract between the principal and the obligee is altered without the surety's consent, which is not present here. The matter was reversed and remanded to determine all the parties' respective obligations and breaches.

20. **LOPEZ v. ROLLINS (2013 OK CIV APP 43)**

TOPIC: MISREPRESENTATION OF SQUARE FOOTAGE OF RESIDENCE

RULING: REPRESENTATION OF SQUARE FOOTGAGE OF RESIDENCE BY SELLER AND REALTORS SUBJECT THEM TO TRIAL, INSPITE OF RESIDENTIAL PROPERTY CONDITION DISCLOSURE ACT (RPCDA), AS TO WHETHER SUCH REPRESENTATIONS WERE MADE REASONABLY, RECKLESSLY, OR WITH INTENTIONAL DISHONESTY.

FACTS: County assessor showed the square footage of the residence to be 4,614 of livable space. An appraiser for the seller found the house to contain 5,053 square feet. The sellers claimed they had added an addition and that the real square footage was 5,053. The realtors (a) listed the house as having 5,053 square feet "per court house", and (b) prepared marketing materials showing 5,053 sf "per appraisal" and "per court houses". The listing and marketing information contained disclaimers as to accuracy of the information. The buyers' appraiser relied on the earlier appraiser's sf when preparing an appraisal for the lender. After buying the house, the buyers learned when the county assessor reassessed the house that it contained 4,130 sf, not 5,053 sf. The buyer had its own appraisal done and was told there was 4,383 sf. The buyers sued the sellers and realtors for fraud and negligent misrepresentation, sued sellers for breach of

contract, sued the realtors for violations of the Real Estate License Code, and sued the lender's appraiser for negligence.

TRIAL COURT RULING: Trail court granted summary judgment to the sellers, realtors and lenders appraiser, because the buyers failed to sue under the RPCDA, which was "the exclusive vehicle for recovery where misinformation is communicated in the sale residential property." In addition, the trial court gave summary judgment to the lender's appraiser, "because there was no evidence that Buyers relied on the square footage reported in [lender's appraiser's] appraisal before purchasing the house." Buyers appealed.

COURT OF CIVIL APPEALS RULING: Reversed and remanded, as to the sellers and realtors, for the trier of fact to determine whether the misrepresentation of square footage was "reasonable, reckless, or intentionally dishonest." The appellate court found (a) the RPCDA does not require the disclosure of square footage, and, therefore, is not the sole remedy for related misrepresentations, and (b) the waivers and disclaimers did not protect the realtors. The appellate court quoted the earlier Oklahoma Supreme Court opinion (Bowman v. Presley, 2009 OK 48): "Representations of the size of real property are statements of material fact, not expressions of opinion, and a buyer need not conduct a separate investigation to ascertain their truth." The Appellate affirmed the summary judgment in favor of the lender's appraiser because the buyers did not know of or rely on such appraisal.

21. **E&F COX FAMILY TRUST v. CITY OF TULSA (2013 OK CIV APP 45)**

TOPIC: SPECIAL ASSESSMENT DISTRICTS

RULING: FAILURE TO FILE WRITTEN OBJECTION TO PROPOSED SPECIAL DISTRICT DURING PUBLIC HEARING ENDS ABILITY TO CHALLENGE CREATION OF DISTRICT

FACTS: When City of Tulsa proposed a special assessment district to build the multi-purpose facility in downtown Tulsa, now known as ONEOK Field, there was a public hearing before the City Council to consider the $60 million assessment. None of the parties who subsequently filed this lawsuit appeared and filed a written protest, although they variously filed pre-hearing written protests, and email protests during the hearing, and an individual, as an individual, (rather than for a related trust, which trust later sued) appeared and protested verbally but failed to file a written protest. When the district was approved, the various protestants filed a declaratory action to halt the creation of the assessment district.

TRIAL COURT RULING: Trial court dismissed all but one of the protestants because they failed to file a written objection during the public hearing, as required by the statute. Strict enforcement of the statute was justified because its language is clear. Trial court allowed one protestant to proceed. Motions for summary judgment were denied and at trial the protestant lost. Both the dismissed protestants and the continuing protestant all appealed.

COURT OF CIVIL APPEALS RULING: Affirmed. Strict compliance with the protest process is required and the protestants failed to comply. The continuing protestant objected in the appeal to various discovery disputes and to lack of adequate time to conduct discovery and to prepare for a non-jury trial. Such continuing protestant failed to identify any facts or authority regarding the core issue: "whether City Council had a rational basis upon which to determine property in District was reasonably expected to increase in value as a result of the creation of District..."?

22. **E & F COX FAMILY TRUST v. CITY OF TULSA (2013 OK CIV APP 47)**

TOPIC: SPECIAL ASSESSMENT DISTRICTS

RULING: FAILURE TO FILE SUIT TIMELY TO OBJECT TO CREATION OF SPECIAL

ASSESSMENT DISTRICT AND TO BENEFITS TO ONE'S TRACT BARS SUIT

FACTS: Creation of special assessment district entails two steps/hearings, including (a) a first stage hearing to consider "the advisability of construction of an improvement and the amount to be assessed against the tract of land to pay for it", and (b) the second stage hearing to approve the "determination of the actual assessments levied on properties...". The protestants failed to file a legal action within the 30 day period after the first state hearing, and instead waited until after the second stage hearing and filed a suit within the 15 day period after the second stage hearing. However, their challenge only related to the subject matter of the first stage hearing: "attacking the amount of benefit, or lack of it to their tracts...".

TRIAL COURT RULING: Trial court granted summary judgment to City of Tulsa declaring the suit was untimely.

COURT OF CIVIL APPEALS RULING: Affirmed. "Plaintiffs had the opportunity within 30 days after City created District to file an action attacking the amount of benefit, or lack of it to their tracts. [11 O.S.] §39-108(D) Failing to avail themselves of such a remedy bars them from a right of action thereafter."

B. OKLAHOMA SUPREME COURT

23. **IN THE MATTER OF THE ESTATE OF DICKSION (2011 OK 96)**

TOPIC: PROBATE AS TO PRETERMITTED HEIR AND PROPER PERSONAL REPRESENTATIVE

RULING: PATERNITY OF ILLEGITIMATE SON, AS PRETERMITTED HEIR, CAN BE DETERMINED DURING PROBATE, AND PERSONAL REPRESENTATIVE CANNOT BE BUSINESS PARTNER OF DECEDENT IN INTESTATE PROCEEDING

FACTS: Probate was filed by son of decedent and he was appointed as personal representative. Illegitimate son sued to be determined to have paternity confirmed and to receive a share of the estate. Illegitimate son sought to challenge the holographic will, and, once the personal representative of the estate revealed that he was a business partner of the decedent, the illegitimate son sought the personal representative's removal.

TRIAL COURT RULING: Trial court held: Powell was an unintentionally omitted (illegitimate) child from the will being probated, and was entitled to his statutory share of the estate; and the holographic will was admitted over Powell's objections and the personal representative was allowed to serve even though he was the business partner of the decedent, based on the objections being untimely.

COURT OF CIVIL APPEALS RULING: Reversed and remanded on all issues, determining that the trial court erred when it allowed post-death determination of paternity. Powell sought certiorari.

SUPREME COURT RULING: Affirmed in part, and reversed and remanded in part. Reversed the trial court decision that his contest of the admission of the holographic will was not timely filed. The form of the objection was improperly titled "Objection to Application for Sale

of Real Estate", but the substance was adequate and was timely.

Affirmed that paternity can be determined in the probate of the deceased parent, rather having to be done before death. Cases to the contrary are overruled.

Reversed as to the trial court allowing the decedent's business partner as the personal representative. Such prohibition applies in intestate proceedings or when the business partner is not named as personal representative in a will. Also, there was no delay in objecting to such appointment.

24. **AOF/SHADYBROOK AFFORDABLE HOUSING CORPORATION v. YAZEL (2012 OK 59)**

TOPIC: AD VALOREM TAX EXEMPTION OF CHARITABLE USE PROPERTY

RULING: APARTMENT COMPLEX FUNDED WITH PROCEEDS FROM SALE OF FEDERALLY TAX EXEMPT BONDS IS EXEMPT FROM AD VALOREM TAXATION (PRIOR CASE OVERRULED)

FACTS: An apartment complex was funded with proceeds from sale of federally tax exempt bonds, and provided low cost units "almost exclusively to persons of little financial means who were either disabled or over the age of sixty-two (62)." The complex was treated as being exempt from ad valorem taxation from 1998 to 2003, and then started taxing them. The complex paid taxes under protest from 2004 to 2006, when it was sold. The reason for the exemption was due to the Oklahoma Constitutional exemption for charitable purposes (Art. 10, Section 6). However, in 2004 the legislature removed the exemption from properties purchased with federally tax exempt bonds. The complex sued to recover the taxes paid under protest.

TRIAL COURT RULING: Trial court ruled for the apartment complex, initially and on remand, holding that it "was 'physically dedicated to a charitable purpose' under Article 10, §6 of

the Oklahoma Constitution and that Shadybrook's use of the property during 2004, 2005, and 2006 did not fall under the rule announced by this Court in London Square Village."

COURT OF CIVIL APPEALS RULING: The Court of Civil Appeals reversed and remanded the case to the "trial court to determine the factual issue of whether Shadybrook's use of the property was for charitable purposes under Article 10, §6, 'so as to overcome the Supreme Court's ruling in London Square...".

SUPREME COURT RULING: Affirmed. "We find that Shadybrook has overcome its burden of providing the existence of an exemption and has demonstrated that its operation of the low-income housing complex was a charitable use entitling it to the ad valorem tax exemption in §6. London Square Village is overruled. The statutory language in 68 O.S. 2887(8)(a)(2)(b) excluding property funded with proceeds from the sale of federally tax-exempt bonds from ad valorem exemption is unconstitutional. We affirm the trial court's order in all respects."

25. **COUNTY RECORDS, INC. v. ARMSTRONG (2012 OK 60)**

TOPIC: COPYING LAND RECORDS

RULING: THIRD PARTY CANNOT HAVE COPY OF TRACT INDEX FOR PURPOSES OF SALE FOR PROFIT

FACTS: "Company, in business of operating a website that provides land records to on-line subscribers, requested electronic copies of the official tract index and land documents from the Rogers County [sic] Court Clerk. The requests were denied and the company brought an action for declaratory judgment asserting a right to the documents under the Open Records Act and a determination of the appropriate fee."

TRIAL COURT RULING: Summary judgment was granted for the company.

SUPREME COURT RULING: The Supreme Court "retained the appeal on its own motion,

and reverses and remands with instructions to enter judgment for the Rogers County Clerk." The Open Records Act and the Oklahoma Abstractor's Act prohibit the county clerk from providing copies of the land documents or index (either paper or electronic) to anyone who seeks to resell such information. However, "Rogers County contracts with KellPro, Inc. to create and maintain a website for the purpose of publishing text information entered by the County Clerk's Office into the KellPro software along with images of documents stored electronically at the clerk's office. Rogers County pay KellPro a fee based on the volume of data stored and KellPro makes copies of the images of land documents accessible for a fee payable to the County Clerk. ... The contract between Rogers County Clerk and KellPro specifically provides that the electronic data remain the property of the County while KellPro retains its intellectual property rights to its software." The difference between KellPro and the plaintiff's operations is that KellPro maintains the website for the County for a charge to the county, but all proceeds from sale of the information goes to the Count, but the plaintiff seeks access to the information solely for its own profit.

26. **AKIN v. CASTLEBERRY (2012 OK 79)**

TOPIC: ADVERSE POSSESSION

HOLDING: MIXED OR DUAL POSSESSION IS ALWAYS FATAL TO A CLAIM OF ADVERSE POSSESSION

FACTS: Mr. and Mrs. McKinney owned title to a landlocked set of three parcels (Government Lots 1, 2 & 3) They sold, at auction, and deeds were give to the Akins (father and son) covering only Lot 1. The widowed McKinney gave a deed to a third party Castleberry covering Lots 2 & 3. The Castleberry's paid taxes on the two lots thereafter. The three lots are landlocked with Akin owning land on two sides, a third person owning the land on a third side,

with a river on the fourth side. The land was only good for cattle grazing, and recreational uses, such as hunting. The Akins had fenced the perimeter of the 3 lots and had a locked gate controlling access to it. Castleberry's claimed to have a key to such gate. The Castleberry's did not live in that county. Akins and Castleberry's both claimed they used the property for recreational purposes. Akins gave a right of way easement for an oil and gas pipeline. The Castleberry's had an agreement drawn up for the Akins to sign, giving the Castleberry's access to the three lots for cattle grazing, hunting and access to the river. The Akins did not sign the agreement. The Akins filed suit to confirm their ownership of the disputed two lots relying on the deed from the auction only giving them one of the three lots, plus allegations of adverse possession.

TRIAL COURT RULING: Initially, after trial, the trial court granted title to the Akins based on adverse possession, and after the Court of Civil Appeals reversed and remanded it for the trial court to hear certain excluded evidence from the Castleberry's, the trial court granted title to the Akins based on adverse possession.

COURT OF CIVIL APPEALS RULING: On the second appeal, the Court of Civil Appeal reversed and remanded it.

SUPREME COURT RULING: The Supreme Court granted cert. and vacated the Court of Civil Appeals latest decision, and affirmed the Trial Court's decision in favor of the Castleberry's, confirming title to the two lots in the Castleberry's. The appellate court discussed the law concerning the requirements to prove adverse possession, emphasizing that adverse possession is not favored, and that all presumptions favor the record owner. The court focused on the "mixed or dual possession (shared use)", holding that such shared "possession can never ripen into exclusive dominion".

27. **SMITH v. VILLAREAL (2012 OK 114)**

TOPIC: SEPARATE MARITAL ESTATE

HOLDING: PRESUMPTION THAT PROPERTY TITLED TO BOTH SPOUSES AS JOINT TENANTS MUST BE TREATED AS PROPERTY OF THE MARITAL ESTATE IN A DIVORCE CAN BE REBUTTED BY CLEAR AND CONVINCING EVIDENCE, SUCH AS THE AFFIDAVIT OF THE LENDER THAT THE INCLUSION OF THE OTHER SPOUSE'S NAME WAS ERROR, AND THE PURCHASE WAS MADE WITH ONLY ONE SPOUSE'S FUNDS

FACTS: Husband remarried, and, during a divorce of the second wife, he purchased two rental properties for his two daughters from his first marriage. The two purchases were made before the divorce was final, and were made with his own separate funds, although the deeds showed the husband and wife as joint tenants. The presumption is that property placed in joint tenancy showing husband and wife as joint tenants is presumed to be a gift to the marital estate, even if the land are purchased with the separate funds of one spouse. The lender on each of the two loans used to purchase the two properties provided affidavits that their verbal instructions and notes showed that the deeds were to have the husband as the sole grantee. An officer of one of the lenders testified that the placement of the wife's name on the deed was an error, contrary to the husband's verbal instructions.

TRIAL COURT RULING: Trial court ruled for the wife, finding that the placement of both the wife's and the husband's names on the deeds as joint tenants created a rebuttable presumption that the conveyance was a gift to the marital estate. The trial court determined that the presumption was not rebutted. The husband appealed.

COURT OF CIVIL APPEALS RULING: The court of civil appeals affirmed.

SUPREME COURT RULING: The supreme court reversed the trial court and the court of civil appeals, and held that the rebuttable presumption that the deed was a gift to the marital estate was overcome by clear and convincing evidence supported by not only the testimony of the husband, but by testimony of the lenders' staff that the instructions to the closer and lender from the husband were to place the title in his sole name.

28. **CORNETT v. CARR (2013 OK 30)**

TOPIC: SERVICE OF SUMMONS DEADLINE

HOLDING: RULE 9(A) OF THE RULES FOR DISTRICT COURTS' (MUST ISSUE SUMMONS IN 90 DAYS) IS STRICKEN AS BEING IN CONFLICT WITH 12 O.S.§2004(1) (MUST SERVE SUMMONS IN 180 DAYS)

FACTS: Husband sued to challenge a fraudulent sale of the divorced parties' property due to a side agreement to pay the wife additional funds ($8,000) outside closing. The divorce court ordered the wife to sell the property for the highest possible price and to split the proceeds. The case was initially dismissed without prejudice, and the husband refiled the lawsuit. The husband's lawyer failed to reissue summons within the 90 days required by Rule 9(a)

TRIAL COURT RULING: The trial court, on its own motion, dismissed the case a second time, again without prejudice to refiling.

COURT OF CIVIL APPEALS RULING: Court of Civil Appeals affirmed. Supreme Court granted Cert.

SUPREME COURT RULING: Supreme court vacated Court of Civil Appeals decision, and reversed Trial Court, and remanded to the Trial Court. Rule 9(a) requires that the Summons be issued within 90 days of the case being commenced, or the trial court may dismiss it without

notice to the plaintiff. 12 O.S.§2004(1) provides that if Service is not made within 180 days of the commencement of the case, the trial court may dismiss the case without prejudice. The Supreme noted that the Rule 9(a) was adopted 20 years before the Pleading Code was adopted, including 12 O.S. §2004(1). It also noted that the public policy being implemented by Rule 9(a) was superseded by the adoption of 12 O.S.§2004(1). Therefore, after considering similar federal rules and related federal cases on service, the Supreme Court ruled "To the extent the two conflict, the statute must prevail." (¶6) It further concluded: "Today's decision renders Rule 9 unnecessary, and it is hereby stricken from the Rules for the District Courts of Oklahoma."

There was a dissent, joined in by 4 of the 5 justices. The dissent argued that the Rule 9 pertained to the issuance of Summons and not the Service of Summons. The dissent further argued that the purpose of Rule 9 was to allow the trial court to control its docket by forcing plaintiffs to promptly issue Summons or face a dismissal. Therefore, they argued, the public policy, of allowing the trial to control its docket, was still useful in promoting a positive goal.

## V. ATTORNEY GENERAL OPINIONS

(NONE)

## VI. TITLE EXAMINATION STANDARDS CHANGES

## A. EXAMINING ATTORNEY'S RESPONSIBILITIES

### 1. GENERAL RESPONSIBILITY

According to the Oklahoma Attorney General, only a licensed attorney can issue an "opinion on the marketability of title" regarding title to real estate. This issue arose during the process of interpreting the Oklahoma Statute requiring the examination of a duly-certified abstract of title before a title insurance policy can be issued. 36 O.S. § 5001 (C) provides:

> *Every policy of title insurance or certificate of title issued by any company authorized to do business in this state shall be countersigned by some person, partnership, corporation or agency actively engaged in the abstract of title business in Oklahoma as defined and provided in Title 1 or by an attorney licensed to practice in the State of Oklahoma duly appointed as agent of a title insurance company, provided that no policy of title insurance shall be issued in the State of Oklahoma except after examination of a duly-certified abstract of title prepared by a bonded and licensed abstractor as defined herein.* (underlining added).

The Attorney General opined (1983 OK AG 281, ¶6-7) as follows:

> *Your second question raises the issue of whether the title examination for purposes of issuing a title policy must be done by a licensed attorney. A previous opinion of the Attorney General held:*
>
> > *"All such examinations of abstract .. . shall be conducted by a licensed attorney prior to issuance of the policy of title insurance." A.G. Opin. No. 78-151 (June 6, 1978).*
>
> *This opinion was based on the assertion that a title insurance policy "expresses an opinion as to the marketability of title." A.G. Opin. No. 78-151, supra. In reality, title insurance simply insures the policyholder against defects in the title. It does not express an opinion that the title is marketable. Land Title Company of Alabama v. State ex rel. Porter, 299 So.2d 289,295 (Ala.1974). While the rationale of the previous opinion is incorrect, we adhere to the conclusion expressed in that opinion that the examination of the abstract pursuant to 36 O.S. 5001(C) (1981) must be done by a licensed attorney. We reach this conclusion because the examination required by statute would only be useful if the examiner expressed an opinion on the marketability of the title. This constitutes the practice of law by the examiner. Land Title Company of Alabama v. State ex rel . Porter, supra at 295; Kentucky State Bar Association v. First Federal Savings & Loan, 342 S.W.2d 397 (Ky.App. 1961). The theory that the*

> *corporation is actually examining the title for itself through an agent or employee and thus not engaged in the practice of law is invalid since laypersons or nonprofessionals cannot perform legal services for their employers. Kentucky State Bar Association v. Tussey, 476 S.W.2d 177 (Ky.App. 1972). There is no prohibition, however, against licensed staff attorneys furnishing title opinions for the company as long as these opinions are not sold or given to third parties. The Florida Bar v. McPhee, 195 So.2d 552 (Fla. 1967); Steer v. Land Title Guarantee & Trust Co., 113 N.E.2d 763 (Ohio Com.Pl. 1953).* (underlining added)

As noted above, under the discussion of new Statutes, 36 O.S. § 5001 was amended, effective July 2007, to specifically require the examination described in that Section to be conducted by a licensed Oklahoma attorney, thereby prohibiting laymen and non-Oklahoma licensed attorneys from undertaking title exams for title insurance purposes.

### 2. LIABILITY OF TITLE EXAMINERS TO NON-CLIENTS

While there is no foolproof way to avoid liability to non-clients, it is usually a good practice to have both the inside address of the title opinion (i.e., the addressee) and limiting language, elsewhere in the opinion, expressly designate the sole person or company expected to rely on the opinion.

However, even where the opinion is addressed to a specific person or entity, it is possible that due to the particular circumstances surrounding the transaction, the attorney who is representing one party, such as the lender -- and rendering an opinion directed solely to that lender -- might be held to be liable to the opposing party, such as the borrower, as well.

As noted in an Oklahoma case considered by the 10th Circuit U.S. Court of Appeals, Vanguard Production, Inc. v. Martin, 894 F.2d 375 (10th Cir. 1990):

> *The Oklahoma Supreme Court replied that the pledgee's complaints stated a cause of action under Oklahoma law. Privity of contract does not apply to tort actions under Oklahoma law. See Keel v. Titan Constr. Corp., 639 P.2d 1228, 1232 (Okla. 1981). The Bradford court stated that to determine an attorney's negligence the jury must determine whether the attorney's conduct was "the conduct of an ordinarily prudent man based upon the dangers he should*

*reasonably foresee TO THE PLAINTIFF OR ONE IN HIS POSITION in view of all the circumstances of the case such as to bring the plaintiff within the orbit of defendant's liability." Id. at 191 (emphasis in original).*

***

*In our view a contract for legal services is a contract for services giving rise to the duty of workmanlike performance. The record in this case reveals extensive communications between the attorneys [for the lender], Martin and Morgan, and the purchaser, Vanguard [the borrower], concerning the [lender's] title opinion. The record also shows that all parties, including Martin, Morgan, [the borrower] Vanguard, and [the lender] Glenfed, were concerned about the Texas Rose Petroleum suit. Thus, we find that an ordinarily prudent attorney in the position of the defendants would reasonably have apprehended that[the borrower] Vanguard was among the class of nonclients which, as a natural and probable consequence of the attorneys' actions in preparing the title opinion for Glenfed, could be injured. Thus, we hold that the defendants owed a duty of ordinary care, Bradford, 653 P.2d at 190, and workmanlike performance, Keel, 639 P.2d at 1231, to Vanguard in the performance of their contract for legal services with Glenfed. We stress that our holding only addresses the question of the duty of the defendants owed to Vanguard and not the question of whether Martin's, Morgan's and Ames, Ashabranner's acts were the proximate cause of Vanguard's injuries. See Bradford, 653 P.2d at 190-91; Keel, 639 P.2d at 1232. (underlining added)*

An interesting Oklahoma Court of Appeals case was decided in 1991, American Title Ins. v. M-H Enterprises, 815 P.2d 1219 (Okl. App. 1991). Therein it was held that a buyer of real property can sue (i.e., via counter claim) the title insurer for negligence in the preparation of a title policy, even if the title insurance policy was issued only in favor of the buyer's lender. This rule was applied where: (1) no abstract was prepared, (2) an attorney's title examination was not undertaken, and (3) the insurer/abstractor missed a recorded first mortgage. The facts of the case showed that, after the buyer/borrower lost the house through a foreclosure of the missed first mortgage, the insurer paid the insured second mortgage holder to settle under the terms of the title insurance policy and had such lender assign the worthless second note and mortgage to the insurer. The insurer then sued the buyer/borrower under the warranty of title in the second mortgage. The appellate court held that while the buyer/borrower was not a named insured, the insurer's own negligence (i.e., no abstract and no examination) caused the loss, and that the

insurer did not buy the note and mortgage as a holder in due course, because (1) no value was paid for the acquisition of the note and mortgage (i.e., the payment was to settle its obligations under the policy) and (2) the note and mortgage were already in default when the insurer took an assignment of them.

The message in these two cases appears to be that a party that conducts either the examination or insures the title, can be held liable for an error in such effort to a third party. This is true even where the title examiner and title insurer had not expressly entered into any contractual relationship with such third party. Based upon these two cases, it appears that this liability might arise even where the attorney or insurer specifically directed his opinion or policy to only one of the multiple participants in the transaction.

### 3. STATUTE OF LIMITATIONS ON TITLE OPINIONS

In terms of the nature of (i.e., tort vs. contract), and the statute of limitations on, attorneys' errors in examination of title, it should be noted that in 1985 the Oklahoma Supreme Court held:

> *In Oklahoma, an action for malpractice, whether medical or legal, though based on a contract of employment, is an action in tort and is governed by the two-year statute of limitations at 12 O.S.A. 1981, § 95 Third. (Seanor v. Browne, 154 Okl. 222, 7 P.2d 627 (1932)). This limitation period begins to run from the date the negligent act occurred or from the date the plaintiff should have known of the act complained of. (McCarroll v. Doctors General Hospital, 664 P.2d 382 (Okl. 1983)). The period may be tolled, however, by concealment by the attorney of the negligent acts which injured the client. This Court has previously held, in Kansas City Life Insurance Co. v. Nipper, 174 Okl. 634, 51 P.2d 741 (1935) that:*
>
> > *One relying on fraudulent concealment to toll the statute of limitation must not only show that he did not know facts constituting a cause of action, but that he exercised reasonable diligence to ascertain such facts.*

(underlining added)

(Funnell v. Jones, 737 P.2d 105 (Okla. 1985))

However, in 1993 the Oklahoma Supreme Court "clarified" their holding in Funnell by declaring:

> *Appellees argue the instant case should be controlled by Funnell v. Jones, 737 P.2d 105 (Okla. 1985), cert. denied, 484 U.S. 853, 108 S.Ct. 158, 98 L.Ed.2d 113 (1987), a case where we applied the two year tort limitation period to a legal malpractice case. Appellees' reliance on Funnell is misplaced. The opinion in Funnell gives no indication a separate contract theory was alleged there or that the plaintiffs there attempted to rely on the three year limitation period for oral contracts. Thus, our statement in Funnell to the effect an action for malpractice, whether legal or medical, though based on a contract of employment, is an action in tort, must be taken in the context it was made, to wit: determining whether the two year limitation for torts was tolled based on allegations of fraudulent concealment on the part of defendant attorneys and that no acts alleged against defendants occurred within the two years immediately preceding filing of the lawsuit. Id. at 107-108. We did not decide in Funnell a proceeding against a lawyer or law firm is limited only to a proceeding based in tort no matter what the allegations of a petition brought against the lawyer or law firm. We have never so held and, in fact, to so rule would be tantamount to treating lawyers differently than we have treated other professions, something we refuse to do.*
>
> *We have held a party may bring a claim based in both tort and contract against a professional and that such action may arise from the same set of facts. Flint Ridge Development Company, Inc. v. Benham-Blair and Affiliates, Inc., 775 P.2d 797, 799-801 (Okla. 1989) (architectural, engineering and construction supervision services). In essence, the holding of Flint Ridge is if the alleged contract of employment merely incorporates by reference or by implication a general standard of skill or care which a defendant would be bound independent of the contract a tort case is presented governed by the tort limitation period. Id. at 799-801. However, where the parties have spelled out the performance promised by defendant and defendant commits to the performance without reference to and irrespective of any general standard, a contract theory would be viable, regardless of any negligence on the part of a professional defendant. Id. As pertinent here, the specific promise alleged or reasonably inferred from the petition and documents attached thereto was to search the records of the County Clerk for an approximate nine (9) year period and report those records on file affecting the title for loan purposes. Simply, if this was the promised obligation a contractual theory of liability is appropriate which is governed by the three year limitation period applicable to oral contracts.* (underlining added)

(Great Plains Federal Savings & Loan v. Dabney, 846 P.2d 1088, 1092 (Okla. 1993))

[See: Article #227 at www.Eppersonlaw.com: "The Elusive Legal Malpractice Statute of Limitations for Attorney Title Opinions."]

## B. NEED FOR STANDARDS

### 1. BACKGROUND AND AUTHORITY OF STANDARDS

The first set of Statewide Standards was adopted in 1938 by the Connecticut Bar Association. On November 16, 1946 the General Assembly and House of Delegates of the Oklahoma Bar Association ("OBA") approved 21 Title Examination Standards ("Standards") for the first time in state history. 17 O.B.J. 1751. Of these 21, there were 10 without any specific citation of authority expressly listed. There are currently over 100 Standards in Oklahoma, and about 13 of these have no specific citation of authority (i.e., no citation of supporting Oklahoma statutes or case law).

In Oklahoma, new and revised Standards are developed and considered each year at 9 monthly Title Examination Standards Committee ("Standards Committee") meetings held from January to September. These proposals are then presented annually by the Standards Committee to the OBA Real Property Law Section ("Section") at the Section's annual meeting, usually held in November of each year. Immediately thereafter, the Section forwards to the OBA House of Delegates ("House"), for the House's consideration and approval, on the day following the Section meeting, any new or revised Standards which were approved at the Section's meeting.

All Oklahoma Supreme Court opinions are binding and must be followed by all trial court judges, meaning that such decisions are “precedential”. However, an opinion of one of the multiple intermediate 3-judge panels of Courts of Civil Appeals is only “persuasive” on future trial judge’s decisions, and not binding.

Oklahoma’s set of Standards have received acceptance from the Oklahoma Supreme Court which has held:

*While [the Oklahoma] Title Examination Standards are not binding upon this Court, by reason of the research and careful study prior to their adoption and by reason of their general acceptance among members of the bar of this state since their adoption, we deem such Title Examination Standards and the annotations cited in support thereof to be persuasive.* (underlining added)

Knowles v. Freeman, 649 P.2d 532, 535 (Okla. 1982).

The Standards become binding between the parties:

(1) IF the parties' contract incorporates the Standards as the measure of the required quality of title, for example:

(a) Standard 2.2 REFERENCE TO TITLE STANDARDS provides: *"It is often practicable and highly desirable that, in substance, the following language be included in contracts for a sale of real estate: 'It is mutually understood and agreed that no matter shall be construed as an encumbrance or defect in title so long as the same is not so construed under the real estate title examination standards of the Oklahoma Bar Association where applicable;'"* (emphasis added) and

(b) the Oklahoma City Metropolitan Board of Realtors standard contract provides*: "7. TITLE EVIDENCE: Seller shall furnish Buyer title evidence covering the Property, which shows marketable title vested in Seller according to the title standards adopted by the Oklahoma Bar Association. . .",* (emphasis added) or

(2) IF proceeds from the sale of oil or gas production are being held up due to an allegedly unmarketable title [52 O.S. 570.10.D.2a; also see: Hull, et al. v. Sun Refining, 789 P.2d 1272 (Okla. 1990) ("Marketable title is determined under §540 [now §570.10] pursuant to the Oklahoma Bar Association's title examination standards.")].

In these above instances, the parties might be subject to suits to specifically enforce or to rescind their contracts, to seek damages, or to pay increased interest on the withheld proceeds (i.e., 6% vs. 12%), with the Court's decision being based on the "marketability" of title as measured, where applicable, by the Standards.

However, it should be noted that *"It is, therefore, the opinion of the Attorney General that where there is a conflict between a title examination standard promulgated by the Oklahoma Bar Association and the Oklahoma Statutes, the statutory provisions set out by the Legislature shall prevail."* Okl. A.G. Opin. No. 79-230.

## 2. IMPETUS FOR STANDARDS: PROBLEMS WITH SEEKING PERFECT TITLE

The title examiner is required, as the first step in the examination process, to determine what quality of title is being required by his client/buyer or client/lender before undertaking the examination.

According to Am Jur 2d:

> *An agreement to sell and convey land is in legal effect an agreement to sell a title to the land, and in the absence of any provision in the contract indicating the character of the title provided for, the law implies an undertaking of the part of the vendor to make and convey a good or marketable title to the purchaser. A contract to sell and convey real estate ordinarily requires a conveyance of the fee simple free and clear of all liens and encumbrances. There is authority that the right to the vendee under an executory contract to a good title is a right given by law rather than one growing out of the agreement of the parties, and that he may insist on having a good title, not because it is stipulated for by the agreement, but on his general right to require it. In this respect, the terms "good title," "marketable title," and "perfect title" are regarded as synonymous and indicative of the same character of title. To constitute such a title, its validity must be clear. There can be no reasonable doubt as to any fact or point of law upon which its validity depends. As is sometimes said, a marketable title must be one which can be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence.* (underlining added)
> (77 Am Jur 2d §115 Title of Vendor: Generally; Obligation to furnish good or marketable title)

*While, in the absence of any provisions in a contract for the sale of land indicating the character of the title to be conveyed, the law implies an obligation or undertaking on the part of the vendor to convey or tender a good and marketable title, if the contract expressly stipulates as to the character of the title to be furnished by the vendor, the courts give effect thereto and require that the title offered conform to that stipulation, it is immaterial that it may in fact be a good or marketable title. A contract to convey a specific title is not fulfilled by conveying another and different title. On the other hand, when the title which the vendor offers or tenders conforms to the character of title stipulated in the contract of sale, the vendee is bound to accept it although the title may not be good or marketable within the meaning of the obligation or undertaking to furnish such a title which the law would have implied in the absence of any stipulation. Refusal to accept title tendered in accordance with the terms of sale constitutes a breach by the purchaser of land of his contract to purchase. If a contract for the purchase of real estate calls for nothing more than marketable title, the courts cannot substitute a different contract therefor.* (underlining added)
(77 Am Jur 2d §123 Special Provisions as to character of title: Generally.)

The terminology which is used to define the quality of title to real property has apparently changed over time. Patton notes:

*In the early law courts, titles as between vendor and purchaser were either good or bad; there was no middle ground. No matter how subject to doubt a purchaser might prove the title to be, he was under obligation to take it, unless he could prove that it was absolutely bad. But the courts of equity coined the expression "marketable title," to designate a title not necessarily perfect, or even good, in the law sense, but so free from all fair and reasonable doubts that they would compel a purchaser to accept it in a suit for specific performance. Conversely, an unmarketable title might be either one that was bad, or one with such a material defect as would cause a reasonable doubt in the mind of a reasonable, prudent, and intelligent person, and cause him to refuse to take the property at its full or fair value. Therefore the term "unmarketable title" includes both "bad titles" and "doubtful titles." Though originally there might have been a difference between a "good title" and a "marketable title," now the terms are used interchangeably. Other equivalent terms appear in the notes. A perfect record title may not be marketable, because of apparent defects, which cause reasonable doubts concerning its validity, and a good or marketable title may be far from perfect, because of hidden defects. In fact, under either the English system of unrecorded conveyances, or under the system afforded by our recording acts, "it is impossible in the nature of things that there should be a mathematical certainty of a good title." While examiners should be cautious in advising clients as to the acceptance of a title, neither should they frighten them by advertising these relatively infrequent dangers; and they must remember that a purchaser cannot*

*legally demand a title which is absolutely free from all suspicion or possible defect. He may require only such a title as prudent men, well advised as to the facts and their legal bearings, would be willing to accept. Many courts further hold that a doubt sufficient to impair the character of marketableness must be such as will affect the selling value of the property or interfere with the making of a sale.*

*If unmarketable, the doubt which makes it so may be based upon an uncertainty either as to a fact or as to the law. If objection is made because of doubt upon a question of law, this does not make the title unmarketable unless the question is fairly debatable -- one upon which the judicial mind would hesitate before deciding it. Likewise as to a question of fact, there must be a real uncertainty or a difficulty of ascertainment if the matter is to affect marketability. A fact which is readily ascertainable and which may be readily and easily shown at any time does not make title unmarketable. For instance, where a railway company reserved a right of way for its road as* ***now*** *located and constructed or hereafter to be constructed, the easement depended on the fact of the* ***then*** *location of the line; and as the evidence showed that no line had then been located, and as the matter could be easily and readily proved at any time, the clause did not make plaintiff's title unmarketable. But where there are known facts which cast doubt upon a title so that the person holding it may be exposed to good-faith litigation, it is not marketable.*

*Recorded muniments form so generally the proofs of title in this country, that the courts of several jurisdictions hold not only that a good or marketable title must have the attributes of that term as used by the equity courts, but also that it must be fairly deducible of record. This phase of the matter will be considered further in the ensuing section.*

*Determination of questions as to the marketability of titles is peculiarly within the province of counsel for buyer or mortgagee. Counsel for the owner will not only endeavor to remedy the condition of the title as to any requirements which he concedes to be proper, but usually finds it easier to do so than to contest the matter, even as to matters not so conceded. In the main it is only when compliance is impossible or when time for compliance is lacking or has passed that the question reaches the courts. Even then a decision is not always possible. This is because courts usually will not undertake to determine doubtful questions involving the rights of others who are not parties to the action.* (underlining) (**§**46. Classification of Vendor Titles)

Title insurance, like most types of insurance, insures against loss due to certain conditions. One of these conditions which triggers liability is “unmarketability of title”. Such term is defined in such policy as: “an alleged or apparent matter affecting the title to the land, not

excluded or excepted from coverage, which could entitle a purchaser of the estate or interest described in Schedule A to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title." (ALTA Owner's Policy (10-21-87)) Such definition is sufficiently circular to require the interpretation of the applicable State's law in each instance to determine whether specific performance would be enforced in such jurisdiction.

In summary, it appears that "marketable title" means (1) the public record affirmatively shows a solid chain of title (i.e., continuous and uninterrupted) and (2) the public record does not show any claims in the form of outstanding unreleased liens or encumbrances. This "good record title" can be conveyed and backed up by the delivery of a deed to the vendee containing sufficient warranties to ensure that the vendor must make the title "good in fact", if non-record defects or non-record liens and encumbrances surface later.

However, to the extent that a contract provision -- providing that the vendor must convey "marketable title" -- is interpreted to require title to be free from "all reasonable doubt", it opens the door to differences of opinion between persons of "reasonable prudence". As noted in Bayse:

> *Time cures certain errors in conveyancing by means of statutes of limitations. The healing effect of curative legislation removes other defects of conveyancing. But operation of these kinds of legislation neither defines nor declares what constitutes a marketable title. The usual definition of a marketable title is one which is free from all reasonable doubt. This negative approach is not now satisfactory, for it is a rare title concerning which an examiner cannot entertain some doubt with respect to some transaction in its history.* (underlining added) (Paul E. Bayse, Clearing Land Titles (herein "Bayse"): §8. Legislation)

It is this focus on looking for a defect -- any defect -- whether substantive or merely a technical one, that can cause the system to bog down. If there is more than a single title examiner within a community, there is also the possibility of there being a wide range of

examination attitudes resulting in differing conclusions as to the adequacy of the title.

In "Increasing Land Marketability Through Uniform Title Standards", 39 Va.L.Rev. 1 (1953), John C. Payne, (herein "Increasing Marketability") the problems caused by each examiner exercising unbridled discretion are noted:

> *When the examiner, upon the basis of these decisions, has found that the present vendor can convey a title which is good in fact, he must then ask whether the title has the additional characteristic of marketability. What constitutes a marketable title? Here again legal definitions are subordinate to functional meaning. What the purchaser of land wants is a title which not only can be defended but which can be presented to another examiner with the certainty that it will be unobjectionable. It is small comfort to the owner that he has not been disseized if he is unable to sell or mortgage. If one and the same examiner passed all titles in a given locality, the title which the examiner considered good as a practical matter would, of course, also be merchantable. But such is not the case, and the present examiner must anticipate that his client will in the future attempt to either sell or mortgage and that the same title will come under the scrutiny of some other examiner. In each of the decisions which an examiner has made in determining the validity of a title he has had to exercise sound legal and practical judgment. Will a second examiner, vested with the same wide discretion, reach the same conclusion? If his conclusion is different and he rejects the title, the professional reputation of the first examiner will be impaired and his client may suffer substantial financial loss. Faced with this uncertainty, many examiners have adopted a solution which emphasizes individual security rather than the general facility of land transfers. This is the practice known as "construing against title," or more picturesquely, as "flyspecking." These terms indicate that the examiner indulges in a minimum of presumptions of law and fact, demands full search of title in every instance, and places no reliance upon the statute of limitations. As a consequence he considers all errors of record as substantial. The result of even a **single examiner** in a community adopting this practice is to set up titles which are practically good in fact. Examiner **A** rejects a title on technical grounds. Thereafter, Examiner **B**, to whom the same problem is presented, feels compelled to reject any title presented to him which exhibits a similar defect. Examiner **A** is thereupon confirmed in the wisdom of his initial decision, and resolves to be even more strict in the future. It is sometimes said that the practice of construing against title reduces an entire bar to the standards of its most timorous member. This is an understatement, for the net effect is an extremity obtained only by mutual goading.*
>
> *The consequences of construing against title are iniquitous, and the practice itself is ridiculous in that it is predicated upon a theoretical perfection unobtainable under our present system of record land titles. Many titles which are practically*

*unassailable become unmarketable or the owners are put to expense and delay in rectifying formal defects. Examiners are subjected to much extra labor without commensurate compensation, and the transfer of land is retarded. As long as we tolerate periodic re-examination of the same series of non-conclusive records by different examiners, each vested with very wide discretion, there is no remedy for these difficulties. However, some of the most oppressive results may be avoided by the simple device of agreements made by examiners in advance as to the general standards which they will apply to all titles which they examine. Such agreements may extend to: (1) the duration of search; (2) the effect of lapse of time upon defects of record; (3) the presumptions of fact which will ordinarily be indulged in by the examiner; (4) the law applicable to particular situations; and (5) relations between examiners and between examiners and the public. Where agreements are made by title examiners within a particular local area having a single set of land records, such agreements may extend even further and may embrace the total effect of particular specific records. For example, it may be agreed that certain base titles are good and will not thereafter be examined or that specific legal proceedings, normally notorious foreclosures and receivership actions, will be conclusively deemed effective. Although such agreements may not be legally binding upon the courts, they may go far toward dispelling the fear that if one examiner waives an apparent defect of title it may be deemed a cloud upon the title by a subsequent examiner. The result is an increase in the marketability of land and a reduction of the labor imposed upon the proponent of the title. The obvious utility of such an arrangement has led to the adoption of uniform standards for the examination of titles by an increasing number of bar associations.* (underlying added)

The problems resulting from this quest for perfect title can impact the examiner and his clients in several ways:

1. The legal fees charged to the public are higher because each examination for a parcel must always go back all the way to sovereignty (or, in some states, back to the root of title);
2. The costs to cure minor defects are often relatively large compared to the risk being extinguished;
3. The unexpected costs to remedy problems already existing when the vendor came into title, which were waived by the vendor's attorney, are certainly not welcomed by the public; and
4. The prior examiner looks inept and/or the subsequent examiner looks unreasonable, when a preexisting defect is waived by one attorney and "caught" by the next.

(John C. Payne, "The Why, What and How of Uniform Title Standards", 7 Ala.L.Rev. 25 (1954) (herein "The Why of Standards")).

In addition, friction and lowering of professional cooperation increase between the title examining members of the bar as they take shots at each other's work. This process of adopting an increasingly conservative and cautious approach to examination of titles creates a downward spiral. As noted in Bayse:

> *Examiners themselves are human and will react in different ways to the same factual situation. Some are more conservative than others. Even though one examiner feels that a given irregularity will not affect the marketability of a title as a practical matter, he is hesitant to express his opinion of marketability when he knows that another examiner in the same community may have occasion to pass upon the title at a later time and would undoubtedly be more conservative and hold it to be unmarketable. Under these circumstances he is inclined to be more conservative himself and declare the title to be unmarketable. People do not like to be required to incur expense and effort to correct defects which do not in a practical sense jeopardize a title when they have already been advised that their title is marketable. The public becomes impatient with a system that permits such conservative attitudes.*
>
> *If the same examiner passed judgment upon all title transactions, this situation would remain dormant. Unfortunately such is not the case. Or if all examiners would hold the same opinion as to specific irregularities in titles, this complication would not arise. But this also is not the case. The result in many communities has been greatly depressive, sometimes tragic.* (underlining added) (Bayse: **§**7. Real Estate Standards)

The State of Oklahoma used to have one of the most strict standards for "marketable title" which was caused by the interpretation of the language of several early Oklahoma Supreme Court cases. The current title standard in Oklahoma has been changed, as of November 10, 1995, to be less strict. It now provides:

> ***1.1 MARKETABLE TITLE DEFINED***
>
> *"A marketable title is one free from apparent defects, grave doubts and litigious uncertainty, and consists of both legal and equitable title fairly deducible of record."*

In response to this obvious need to avoid procedures that alienated the public and caused distance to grow between examiners, a movement began and mushroomed in a couple of decades

throughout the country to adopt uniform title examination standards. Such standards were adopted first in local communities by the practicing bar and then on a statewide basis. Although there is some competition among local bars for the place of honor, it appears that the local bar of Livingston County, Illinois adopted a set of 14 standards on April 7, 1923. Thereafter, in 1933 or 1934, the Gage County Nebraska Bar Association formulated 32 title standards. The Connecticut Bar, in 1938, became the first state to have statewide standards by adopting a set of 50. ("Increasing Marketability")

Over the years, since 1938, a total of 31 States have adopted statewide sets of Standards. Of these, there are currently 19 States which have sets of Standards which have been updated in the last 5 years. In the recent past, 4 States have adopted their first sets of Standards including: Vermont (1995), Arkansas (1995), Texas (1997) and Louisiana (2001). See the attached National Title Examination Standards Resource Center Report, and see my web site at www.eppersonlaw.com for more details on the status of Standards in other States.

## C. NEWEST CHANGES TO TITLE STANDARDS

The revised Standards and new Standards, discussed below, were considered and approved by the Standards Committee during the most recent January-September period. The proposed changes and additions were then published in the Oklahoma Bar Journal in October, and were then considered and approved by the Section at its annual meeting in November. They were thereafter considered and approved by the OBA House of Delegates in November. These changes and additions became effective immediately upon adoption by the House of Delegates. A notice of the House's approval of the proposed new and revised Standards was thereafter published in the Oklahoma Bar Journal. The new "TES Handbook", containing the updated versions of these Standards, is printed and mailed to all Section members by January.

The following sections display and discuss the Proposals which were submitted to the Section and the House of Delegates for their approval. The text for the discussion is taken from the Annual Report published in the Oklahoma Bar Journal in October. This text was prepared by the Title Examination Standards Handbook Editor for the OBA Real Property Law Section, Jack Wimbish, a Committee member from Tulsa. Note that where an existing standard is being revised, a "legislative" format is used below, meaning additions are underlined, and deletions are shown by [brackets].

A brief explanatory note precedes each Proposed Standard, indicating the nature and reason for the change proposed.

**ATTACHED IS A SET OF REVISED TITLE EXAMINATION STANDARDS: THE FOLLOWING 2012 T.E.S. REPORT WAS SUBMITTED TO THE NOVEMBER 15, 2012 ANNUAL REAL PROPERTY LAW SECTION MEETING AND THE NOVEMBER 16, 2012 OBA HOUSE OF DELEGATES MEETING AND HAS BEEN APPROVED. THESE STANDARDS ARE EFFECTIVE IMMEDIATELY UPON THEIR APPROVAL BY THE HOUSE OF DELEGATES.**

2012 REPORT OF THE TITLE EXAMINATION STANDARDS COMMITTEE
OF THE REAL PROPERTY LAW SECTION

*Proposed Amendments to Title Standards for 2011, to be presented for approval by the House of Delegates, Oklahoma Bar Association at the Annual Meeting, November 16, 2012. Additions are underlined, deletions are indicated by ~~strikeout~~.*

The Title Examination Standards Sub-Committee of the Real Property Law Section proposes the following revisions and additions to the Title Standards for action by the Real Property Law Section at its annual meeting in Oklahoma City on Thursday, November 15, 2012.

Proposals approved by the Section will be presented to the House of Delegates at the OBA Annual Meeting on Friday, November 16, 2012. Proposals adopted by the House of Delegates become effective immediately.

An explanatory note precedes each proposed Title Standard, indicating the nature and reason for the change proposed.

**Proposal No. 1**

*The Committee recommends a new Standard No. 14.3.1 to establish what is required to document the delegation of authority by the Manager of a limited liability company.*

**14.3.1. Delegation of Manager's Authority**

The execution of an instrument affecting real estate on behalf of a limited liability company by a person in a capacity other than manager shall, in the absence of recorded evidence to the contrary, be deemed sufficient regarding the authority of such person to bind the limited liability company if an acknowledged document executed by a manager of the limited liability company delegating authority to such person is recorded in the office of the county clerk in the county in which the real estate is located. The document shall clearly evidence the delegation of the manager's rights and powers to the person in such person's individual, agent or officer capacity, as applicable, for the purpose of execution of the instrument or instruments on behalf of the limited liability company.

| | |
|---|---|
| Authority: | Title 18 O.S. Sections 2013 & 2016 |
| Comment: | In the event no manager has been appointed, the member or members of the limited liability company shall act as manager. |

**Proposal No. 2**

*The Committee recommends that Title Standard 23.1 D be amended to accurately reflect the provisions of 12 O.S. §735 as to the commencement point from which the initial five year term for the enforceability of a judgment is measured.*

**23.1. D. Duration of a Judgment Lien.**
The lien of a judgment, which is dependent upon the enforceability of the judgment as detailed in 12 O.S. §735, ~~pursuant to 12 O.S. §706~~ runs from the date the judgment lien is created under 12 O.S. §706, until the judgment lien is extinguished by the failure to extend the lien of the judgment pursuant to 12 O.S. §759.

Authority: U.S. Mortgage v. Laubach, 2003 OK 67, 73 P.3d 887.

Comment: In the absence of completion of one of the listed actions under 12 O.S. §735, the endpoint of the initial term for the enforceability of the judgment is as follows:

Prior to November 1, 2002 - Five (5) years after the date the judgment is rendered in any court of record in this state.

On and after November 1, 2002 - Five (5) years after the date the judgment is filed in any court of record in this state.

**Proposal No. 3**

*The Committee recommends adding additional authority to Standard 23.2. (E) to make the examiner aware of the holding in Dilbeck v. Dilbeck.*

**23.2 (E). Duration of Decree-Ordered Lien for Property Division or Support Alimony**
An examiner shall disregard a lien for the payment of either property division or support alimony in a divorce decree as extinguished by operation of law within the following time frames:

1. A lien payable in a single lump sum with no stated due date is extinguished five (5) years after the date of pronouncement of the lien by the court in a divorce case;

2. a lien payable in a single lump sum with a stated due date is extinguished five (5) years after the due date of the lump sum obligation as set out in the divorce decree;

3. a lien payable in installments is incrementally extinguished as to each installment five (5) years after the due date of each installment, and the examiner shall disregard the lien, as extinguished, five (5) years after the due date of the final installment; and

4. a lien payable in a single lump sum which is due upon the occurrence of a designated event (e.g., sale of real property) is extinguished five (5) years after the designated event occurs. For constructive notice, evidence of the occurrence of the designated event must appear in the record.

Authority: First Community Bank of Blanchard v. Hodges, ~~907 P.2d 1047 (Okla. 1995)~~ 1995 OK 124; Record v. Record, ~~816 P.2d 1139 (Okla. 1991)~~ 1991 OK 85; Dilbeck v. Dilbeck, 2012 OK 1; 12 O.S. § 95; 42 O.S. § 23; and 12 O.S. § 696.2

Comment: The title examiner should confirm that the divorce decree has been filed with the court clerk in order to determine whether the time for appeal has run.

Authority: 12 O.S. § 696.2(E).

**Proposal No. 4**

*The Committee proposes to amend Standard No. 25.6 B to accurately reflect the provisions of the latest amendments to 68 O.S. §§ 231 and 234.*

**25.6 B. Warrants Issued by the Oklahoma Tax Commission**

The filing of a warrant issued by the Oklahoma Tax Commission in the county clerk's office on or after October 1, 1979, or in the court clerk's office before October 1, 1979, shall constitute and be evidence of the state's lien upon the title to any real property in that county owned by the taxpayer against whom such warrant is issued.

This lien shall remain in effect upon the title to any interest in real property until released or for a maximum of ten (10) years from the date of its filing. However, the liens created by the filing of tax warrants filed prior to November 1, 1989, will remain valid until November 1, 2001.

Prior to the release or extinguishment of any such tax warrant, the Oklahoma Tax Commission may refile the tax warrant ~~one time~~ in the office of the county clerk. A tax warrant so refiled shall constitute and be evidence of the state's lien upon the title to any interest in real property until released or for a maximum of ten (10) years from the date of the refiled tax warrant.

Comment: 68 O.S. §§ 231 and 234 were last amended effective ~~November 1, 1999,~~ July 1, 2003, ~~limiting the duration of liens created by the filing of tax warrants by the Oklahoma Tax Commission to a period of 10 years from the date of its filing.~~ and the limitation of a one time filing by the Oklahoma Tax Commission has now been removed. Consequently, as long as the Oklahoma Tax Commission refiles the tax warrant in the office of the county clerk prior to the expiration of the ten (10) year period created by

the original filing or any proper refiling, the lien shall continue for an additional ten (10) years after the date upon which the warrant was refiled by the county clerk.

~~Caveat Tax Warrants filed prior to October 1, 1979, were required to be filed in the court clerk's Office, and on or after that date in the county clerk's Office.~~

Examples: The Oklahoma Tax Commission ("OTC") filed a tax warrant on October 30, 1989. The lien created thereby is valid until only November 1, 2001 (because the tax warrant was filed prior to November 1, 1989), unless it is refiled prior to November 1, 2001.

The OTC filed a tax warrant on November 2, 1989. The lien created thereby is valid only until November 2, 1999, unless it is refiled prior to November 2, 1999.

The OTC filed a tax warrant on January 2, 1992. The lien created thereby is valid only until January 2, 2002, unless it is refiled prior to January 2, 2002.

**Proposal No. 5**

*The Committee proposes to change Standard 29.2.1 to add a caveat to alert examiners to the holding in Davis v. Mayberry, 2010, OK CIV APP 94 in situations where there are tax deeds affecting restricted members of the Five Civilized Tribes.*

**29.2.1. Reliance on Certificate Tax Deed or Resale Tax Deed**

A title examiner may rely, without further requirement, on a certificate tax deed or resale tax deed as a conveyance of the real property described in such deed, provided;

A. title to such real property is, or has been, held of record by a purchaser for value who acquired such title from or through the grantee in such tax deed; and,

B. such certificate tax deed or resale tax deed has been of record in the county in which the land is situated for a period of not less than ten years.

Caveat: The title acquired via a certificate tax deed or resale tax deed may be subject to the interest of any person in possession of the land claiming title adversely to the title acquired through such deed. 16 O.S. Section 62(d). Also see the following unpublished case: Johnson v. August, 2005 OK CIV APP 97.

Caveat: See Davis V. Mayberry, 2010 OK CIV APP 94, which applies to tax deeds affecting restricted members of the Five Civilized Tribes.

**Proposal No. 6**

*The Committee recommends that Standard 29.6 be amended to provide what needs to be shown in the abstract concerning certain court proceedings to make the standard consistent with the provisions of the Simplification of Land Titles Act.*

**29.6. Abstracting**

Abstracting relating to court proceedings under the Simplification of Land Titles Act, 16 O.S. § 62(b), (c) & (d), when the instruments have been entered or recorded for ten (10) years or more, as provided in the statute, shall be considered sufficient when there is shown the following in the abstract:

A .In sales by guardians or personal representatives, the deed and order confirming the sale.

B. In probate and partition proceedings in district court, the final decree and estate tax clearance unless not required by 58 O.S. § 912 or 68 O.S. § 815(d) or unless the estate tax lien is barred.

C. In general jurisdiction court sales under execution~~, the petition and other instruments, if any, showing defendants sued, the service upon defendants or their entry of appearance,~~ the judgment, the deed~~,~~ ~~and~~ the court order directing the delivery thereof and proof of service of the notice of the pendency of such action on the Superintendent of the Five Civilized Tribes~~ or the Regional Director of the Eastern Oklahoma Region, Bureau of Indian Affairs,~~ now Area Director of the Five Civilized Tribes and Election Not to Remove, if any.

D. In general jurisdiction court partitions, or adjudications of ownership, ~~the petition and other instruments, if any, showing defendants sued, the service upon defendants or their entry of appearance,~~ the final judgment, any deed of partition, ~~and~~ any court order directing the delivery thereof and proof of service of the notice of the pendency of such action on the Superintendent of the Five Civilized Tribes~~ or the Regional Director of the Eastern Oklahoma Region, Bureau of Indian Affairs,~~ now Area Director of the Five Civilized Tribes and Election Not to Remove, if any.

E. Any pleading in which an attorney's lien is claimed by the attorney for a party that is awarded an interest in the property.

The Abstractor can make in substance the following notation: "other proceedings herein omitted by reason of 16 O.S.A. § 61 et seq.,and Title Examination Standards Chapter 29.

**Proposal No. 7**

*The Committee recommends replacing Standard 30.14 to reflect what an examiner needs to have included in the abstract to be able to accurately render an accurate opinion on the status of title.*

**30.14. Federal Court Proceedings**

~~The absence of certification as to federal district court and bankruptcy court matters should not be deemed a deficiency in the title evidence for the real property under examination.~~
~~Authority: 28 U.S.C.A. § 1964; 28 U.S.C.A. § 1962; 28 U.S.C.A. § 3201.~~

~~Comment:~~ ~~Title 28 U.S.C.A. § 1964 requires lis pendens notice as to federal district court actions to be filed in same manner as required by state law, (i.e., with the county clerk where the real property is located) 12 O.S. § 2004,2 (A)(1). Title 28 U.S.C.A. §§ 1962 and 3201 requires any judgment of a federal district court to be filed in the same manner as required by state law to create a lien on real property, (i.e., with the county clerk where the real property is located), 12 O.S. §706; See also 68 O.S. § 3401 et seq.~~

~~Caveat:~~ ~~The automatic stay of a federal bankruptcy proceeding is not subject to the requirements of Title 28 U.S.C.A. § 1964. The automatic stay is generally effective without filing notice and regardless of where the bankruptcy is filed, 11 U.S.C.A. § 362(a); See Chapter 34, infra, regarding bankruptcy proceedings~~.

A. Pre-1958: For lands under examination which are located in any of the counties located in the multicounty jurisdiction of a federal district court, there must be a federal district court certificate covering from inception of title (i.e., Sovereignty) to August 19, 1958.

B. 1958-1977: For lands under examination which are located in the same county where the federal district court is located, there must be a federal district court certificate covering from August 20, 1958 to September 30, 1977.

C. Post-1977: For any lands under examination, there is no need for a separate federal district court certification for the period after September 30, 1977.

Comment: Although the 30-year Marketable Record Title Act (16 O.S. §§ 71 to 79) may eliminate the impact of some of the matters in the federal district court arising in the earlier period of time (i.e., pre-1977), the express exceptions to the extinguishing effect of the MRTA (e.g., “easements,” and “any right, title or interest of the United States”) cause such matters (such as judgments) to continue to impact the title in the present.

Authority: 12 O.S. §2004.2: (A); 16 O.S. §76(A); 28 U.S.C.A. §1964;

Guaranty State Bank of Okmulgee v. Pratt, **1919 OK 120**, 180 P. 376; Orton v. Citizens State Bank, 1929 OK 332, 291 P.15; Bowman v. Bowman, 1949 OK 70, 206 P.2d 582; Hart v. Pharoh, 1961 OK 45, 359 P.2d 1074; Mobbs v. City of Lehigh, 1982 OK 149, 655 P.2d 547; McClaskey v. Barr, 48 F. 130, 7 Ohio F. Dec. 55, (November 10, 1891); Stewart v. Wheeling & Lake Erie Ry., 53 Ohio St. 151, 41 N.E. 247 (1895); City of Mankato v. Barber Asphalt Paving Co., 142 F. 329 (Eighth Cir. 1905); United States v. Calcasieu Timber Co., 236 F. 196 (5th Cir. 1916); Wilkin v. Shell Oil Company, 197 F. 2d 42 (10 Cir. 1951); Tilton v. Cofield, 93 U.S. 163 (1876); Erie R.R. v. Thompkins, 304 U.S. 64 (1938); Astle, Dale L., 32 Oklahoma Law Review 812 (1979), "An Analysis of the Evolution of Oklahoma Real Property Law Relating to Lis Pendens and Judgment Liens."

**Proposal No. 8**

*The Committee recommends a change in Standard 35.3 C to clarify that the plan referred to in the standard is a joint city-county plan as is provided for in the governing statute.*

**35.3 C. Endorsement upon Deeds of Lot Split Approval (Minor Subdivisions) by Zoning and Land Use Regulating Body.**

C. Within a county in which there is no city or incorporated town having a population more than 200,000 and in which a ~~municipality~~ city or incorporated town and the county ~~has~~ have adopted a comprehensive plan as authorized by 19 O.S. § 866.1 *et seq.*, any deed of a tract within the jurisdictional territory of the cognizant planning agency, recorded after the adoption of such city-county plan, ~~of a tract within the jurisdictional territory of the cognizant planning agency~~, which deed:

1. conveys a tract of less than one entire platted lot, or

2. conveys an unplatted tract described by federal survey or metes and bounds, consisting of ten (10) acres or less, shall not be considered valid unless filed for record before January 1, 1963, or unless

a. the deed bears a certificate of approval for lot split purposes by the cognizant planning agency, or

b. the legal description contained in the deed was previously approved by the cognizant planning agency and endorsed upon the first deed of record creating such lot split, or upon a certified copy thereof, or

c. the legal description contained in the deed was the subject of a prior deed, which prior deed was filed for record before the date of

the adoption of such comprehensive plan, or

d. the tract is situated within a municipality in such county which had not adopted a comprehensive plan at the time the first deed creating the lot split was filed for record, or

e. the tract consists of more than two and one-half acres, such county is adjacent to a county which has adopted a master plan as authorized by 19 O.S. § 863.1 *et seq.*, and the cognizant planning agency has adopted its order or rule implementing the 1968 amendment to 19 O.S. § 866.13, providing for lot split approval of conveyances of tracts of two and one-half acres or less, if the deed was filed before April 8, 1992, or

f. the deed has been of record for at least five years, or

g. the legal description contained in the deed constitutes a "remainder tract" consisting of the balance of (i) a platted lot, or (ii) an unplatted tract previously held under common ownership with the original severed portion of such unplatted tract as hereinafter described, and

(1) a deed appearing of record describing the original severed portion of such lot or tract either

(a) bears a certificate of approval for lot split purposes by the cognizant planning agency or

(b) has been of record for at least five years or

(2) the original severed portion of such lot or tract was taken or created in fee by dedication, conveyance or condemnation as a public way.

**D. LATEST TES COMMITTEE AGENDA**

**TITLE EXAMINATION STANDARDS COMMITTEE**
**of the**
**Real Property Law Section of the O.B.A.**

***"FOR THE PURPOSE OF EDUCATING***
***AND GUIDING TITLE EXAMINATION ATTORNEYS"***

## 2013 AUGUST AGENDA

**(As of August 13, 2013)**

***[NOTE: SEE MEETING DATES AND LOCATIONS AT THE END]***

***AUG 17/STROUD***

| Speakers (Sub-Comm.) | Standard# | Status | Description |
|---|---|---|---|

## *BUSINESS/GENERAL DISCUSSION OF CURRENT EVENTS*

**9:30 a.m. – 10:00 a.m.**

**Hot Topics: General Questions from Attorneys and Other Title Industry Members (Epperson)**

**Approval of Previous Month's TES Committee Minutes (Munson)**

| | | | |
|---|---|---|---|
| **Soper** | **NA** | **July Report** | ***LEGISLATIVE UPDATE*** ***Brief presentation concerning proposed or pending legislation affecting real property titles (including Dynasty Trusts/Rule Against Perpetuities).*** |

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| **Wittrock Epperson** | **NA** | **July Report** | ***STANDING*** ***We will be discussing any new developments(see table containing list of "Standing" cases at www.eppersonlaw.com)*** |

## ***PRESENTATIONS***

**==========PENDING==========**

**10:00 a.m. – 10:45 a.m.**

| | | | |
|---|---|---|---|
| **Astle<br>Noble<br>Elliott<br>Keen** | **6.7** | **Aug Draft** | ***DURABLE POWER OF ATTORNEY***<br>***The question has arisen as to whether the existing standard should be revised to show that a durable power of attorney terminates automatically upon appointment of a guardian?*** |

**10:45-11:00 a.m. BREAK**********

## ***PRESENTATIONS (CONT'D)***

**11:00 a.m. – 12:00**

| | | | |
|---|---|---|---|
| **Carson<br>Evans** | **8.1(B)(2)(b)** | **July Draft** | ***TERMINATION OF JOINT TENANCY***<br>***The question has been raised as to whether the Affidavit being used under 16O.S. Sections 82-84 ahs to be on personal knowledge or information and belief, especially in the context of determining the termination of a joint tenancy in a mortgagor foreclosure?*** |

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| **Astle<br>Wimbish<br>Keen** | **???** | **Aug Report** | ***QUIET TITLE AS TO ALLOTEE***<br>***The question has been raised (by Steve Schuller) as to whether 84 Section 257 can be used to determine heirs for non-restricted Indian chains of title?*** |

********** END OF PRESENTATIONS **********

***SEP21/TULSA***

***UNSCHEDULED***

| | | | |
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| **(Astle??)** | **???** | **??? Report** | ***NON-OKLAHOMA PERSONAL REPRESENTATIVE AUTHORITY TO RELEASE OKLAHOMA REAL ESTATE MORTGAGE***<br>***The question has arisen as to whether the practice of accepting releases of mortgages by non-Oklahoma personal representatives is allowed by Oklahoma law. (per Dale Astle)*** |

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| **(Astle??)** | **???** | **??? Report** | ***DHS LIEN EXTENSION*** ***The question has arisen as to the process and authorization for DHS to extend their liens. (per Dale Astle)*** |
| **Munson McEachin Epperson** | **30.1 et seq** | **??? Report** | ***MRTA/Severed Minerals*** ***Due to the holding in the Rocket case, can it be concluded that the MRTA does affect severed mineral chains of title? (see Epperson's published article on the issue at www.eppersonlaw.com)*** |
| **(Astle??)** | **???** | **??? Report** | ***SERVICE MEMBERS CIVIL RELIEF ACT*** ***Due to recent changes in this Act, it appears that the related Standards need to be reconsidered.*** |
| **Astle** | **24.14** | **??? Report** | ***INCOMPLETE FORECLOSURE*** ***The question has arisen on how to handle attorney liens when there is an incomplete foreclosure, such as when the attorney's lien is claimed but the case is dismissed due to a deed in lieu of foreclosure?*** |
| **(Epperson?)** | **30.14** | **??? Report** | ***FEDERAL BANKRUPTCY COURT PROCEEDINGS*** ***In 2012 the Committee repealed 30.14 covering both Federal District Court and Bankruptcy Proceedings, and replaced it with a revised Standard covering only Federal District Court matters, but not Bankruptcy matters. We need to adopt a new Standard covering bankruptcy matters.*** |
| **Munson& McEachin& <u>Reid</u> Epperson** | **30.9 & 30.10** | **??? Report** | ***MRTA/Deed as Root: All Right, Title and Interest; & Co-Tenancy Termination*** ***(1) What quantity of title is included in either a warranty or quit claim deed, using this language: "All grantor's right, title and interest" or "All my right, title and interest"? What impact, if any, does such language have on that instrument acting as a "root of title" under the MRTA? See Reed v. Whitney, 1945 OK 354 (warranty limited to interest actually owned) . If such a deed can be a root for the interest conveyed, how far back does the examiner need to go to ascertain what interest the grantor owns and thereby conveys?*** |

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| | | | ***Should this Standard on the MRTA have a comment added, explaining this issue?***<br>***AND***<br>***(2) One of the comments to this standard refers to the possibility of there being two roots of title creating two marketable record titles, with each being subject to the other. The sample fact pattern is (1) decree of Blackacre to wife and two sons with decree filed 35 years ago, and (2) wife deeds Blackacre (without specifying a quantum of interest) to one of two sons, with deed filed 31 years ago. Since wife's deed is more than 30 years old, does the MRTA establish title in the grantee son, and extinguish the omitted son's claim? (See Bennett v. Whitehouse)*** |

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| **Epperson** | **NEW** | **???**<br>**Report** | ***JUDGMENTS/DECREES & CONSTRUCTIVE NOTICE***<br>***Under the MRTA, the SLTA, and under the terms of the Uniform Abstractors Certificate, do documents that are <u>not</u> filed with the County Clerk (e.g., divorce and probate proceedings) constitute constructive notice and become part of the official chain of title. Also, if a judgment or decree – affecting title to real property -- is required by statute to be placed in the county clerk's land records in order to constitute constructive notice, but has not been filed there, does the inclusion of such document in an abstract give to the examiner and the client actual notice of the same liens and ownership changes? If so, as of what date? Can you rely upon a decree as part of a chain of title, if it was never recorded in the land records?*** |

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| **McEachin** | **24.12**<br>**&**<br>**24.13** | **???**<br>**Report** | ***MERS***<br>***This issue has become a national topic and ongoing out of state cases will be monitored and reported on.*** |

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| **<u>Noble</u>**<br>**Astle**<br>**Keen**<br>**Epperson** | **17.4** | **???**<br>**Report** | ***"TRANSFER ON DEATH" DEED***<br>***Further clarifications are needed for the existing Standard due to 2013 anticipated statutory amendments.*** |

**==========APPROVED==========**

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| **Wimbish** | **7.2 & 7.3** | **Mar APP'D** | ***MARITAL INTERESTS AND MARKETABLE TITLE***<br>***The cite needs to be corrected for Thomas (to 1921 OK 414, 202 P. 499), and we should consider adding Hawkins v. Corbit, 1921 OK 345, 201 P. 649, as additional authority. In addition, we need to consider adding a new 7.3 discussing "purchase money mortgages".*** |

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| **Doyle Keen Astle** | **34.2 (E)(2)(c)** | **June APP'D** | ***(1) ADEQUACY OF NOTICE OF BKCY MOTION TO AVOID LIEN TO JUDGMENT CREDITOR'S PRIOR ATTORNEY & (2) SURVIVAL OF A JUDGMENT LIEN AFTER DISCHARGE OF DEBT AND POSSIBILITY OF ITS POST-DISCHARGE FORECLOSURE***<br>***The questions have arisen (1) as to whether a title examiner should make a requirement due to inadequate notice where the only <u>notice</u> of a bankruptcy Motion to Avoid Judgment Lien is delivered to the judgment creditors' prior attorney in the underlying case giving rise to the lien, rather than giving notice to the creditor, and (2) whether a non-avoided judgment lien survives the discharge of the debt and is such judgment lien subject to being foreclosed by the creditor on pre- or post-petition property?*** |

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| **Evans & Tinney Kempf** | **3.2** | **APP'D July** | ***MINERAL AFFIDAVITS AND RECITALS***<br>***The Standard provides that affidavits and recitals "cannot substitute for a conveyance or probate of a will."(except in circumstances covered in 16 O.S. Section 83 and other statutes). 16 O.S. Section 67 provides that an affidavit filed of record for 10 years, without challenge, establishes marketable title as to <u>severed minerals</u>, in lieu of a probate. These inconsistencies need to be addressed.*** |

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| **Reid Sullivan Keen Astle** | **4.1** | **APP'D July** | ***<u>OUT OF STATE TITLE MATTERS</u>***<br>***(1) GUARDIANSHIP***<br>***The issue has arisen concerning whether a guardian appointed by a court in another state can convey or*** |

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| **Schomp** | | | ***encumber real property in Oklahoma without the supervision and involvement of an Oklahoma court?***<br>***AND***<br>***(2) DIVORCE DECREES***<br>***Can a non-Oklahoma divorce court distribute Oklahoma real property?***<br>***AND***<br>***(3) PROBATE***<br>***AND***<br>***(4) DURABLE POWER OF ATTORNEY*** |

**==========TABLED TO 2014==========**

**==========TABLED INDEFINITELY==========**

***COMMITTEE OFFICERS:***

**Chair: Kraettli Q. Epperson, OKC (405) 848-9100 fax: (405) 848-9101**
**kqe@meehoge.com**

**Comm. Sec'y: Luke Munson, OKC (405) 513-7707**
**lmunson@munsonfirm.com**

# 2013 Title Examination Standards Committee

(Third Saturday: January through September)

Time: 9:30 a.m. to 12 noon

| Month | Day | City/Town | Location |
|---|---|---|---|
| January | 19 | Tulsa | Tulsa County Bar Center |
| February | 16 | Stroud | Stroud Conference Center |
| March | 16 | OKC | Oklahoma Bar Center |
| April | 20 | Stroud | Stroud Conference Center |
| May | 18 | Tulsa | Tulsa County Bar Center |
| June | 15 | Stroud | Stroud Conference Center |
| July | 20 | OKC | Oklahoma Bar Center |
| August | 17 | Stroud | Stroud Conference Center |
| September | 21 | Tulsa | Tulsa County Bar Center |

**Tulsa County Bar Center**
**1446 South Boston**
**Tulsa, Oklahoma 74119-3612**

**Stroud Conference Center**
**218 W Main St.**
**Stroud, Oklahoma 74079**

**Oklahoma Bar Center**
**1901 N. Lincoln Blvd.**
**Oklahoma City, OK 73152-3036**

## APPENDICES

1. OKLAHOMA T.E.S. COMMITTEE MEMBERS (FOR PRIOR YEAR)

2. NATIONAL TITLE EXAMINATION STANDARDS RESOURCE CENTER REPORT

3. LIST OF THE LATEST 10 ARTICLES, BY KRAETTLI Q. EPPERSON (AVAILABLE ON-LINE)

## APPENDIX 1

## OKLAHOMA T.E.S. COMMITTEE MEMBERS (FOR PRIOR YEAR)

### 2012 Title Examination Standards Committee

| | Name | City | Office |
|---|---|---|---|
| | Kraettli Q. Epperson | Oklahoma City | Chair |
| | Luke Munson | Oklahoma City | Secretary |
| 1. | Dale L. Astle | Tulsa | |
| 2. | Scott Byrd | Tulsa | |
| 3. | Barbara L. Carson | Tulsa | |
| 4. | Alice Costello | Edmond | |
| 5. | William Doyle | Tulsa | |
| 6. | Alan Durbin | Oklahoma City | |
| 7. | Kraettli Q. Epperson | Oklahoma City | |
| 8. | Larry Evans | Tulsa | |
| 9. | Melvin Gilbertson | Sapulpa | |
| 10. | Alex Haley | Oklahoma City | |
| 11. | Gary Heinen | Oklahoma City | |
| 12. | J. Fred Kempf | Oklahoma City | |
| 13. | Scott McEachin | Tulsa | |
| 14. | Luke Munson | Oklahoma City | |
| 15. | Jeff Noble | Oklahoma City | |
| 16. | D. Faith Orlowski | Tulsa | |
| 17. | O. Saul Reid | Oklahoma City | |
| 18. | Henry P. Rheinburger | Oklahoma City | |
| 19. | Bonnie Schomp | Seminole | |
| 20. | Chris Smith | Edmond | |
| 21. | Lisa Stanton | Tulsa | |
| 22. | Jason Soper | Oklahoma City | |
| 23. | Scott Sullivan | Oklahoma City | |
| 24. | Mike Tinney | Oklahoma City | |
| 25. | Charis L. Ward | Oklahoma City | |
| 26. | Robert White | Oklahoma City | |
| 27. | Monica Wittrock | Oklahoma City | |
| 28. | John B. Wimbish | Tulsa | |

**APPENDIX 2**

# THE NATIONAL TITLE EXAMINATION STANDARDS RESOURCE CENTER

*(Effective June 26, 2013)*

## STATUS REPORT

| State | | Last Revised | | Standards | | |
|---|---|---|---|---|---|---|
| | | Pre-2007 | 2007+ | #Ch. | #Stands. | #Pgs. |
| 1. | Arkansas | - | 01-01-13 | 22 | 133 | 54 |
| 2. | Colorado | - | 05-00-13 | 15 | 136 | 72 |
| 3. | Connecticut | - | 01-12-09 | 30 | 151 | 471 |
| 4. | Florida | - | 06-00-12 | 21 | 143 | 187 |
| 5. | Georgia | 08-18-05 | - | 39 | 194 | 144 |
| 6. | Idaho | c. 1946 | - | - | - | - |
| 7. | Illinois | 01-00-77 | - | 14 | 26 | 35 |
| 8. | Iowa | - | 06-00-11 | 16 | 108 | 90 |
| 9. | Kansas | 00-00-05 | - | 23 | 71 | 122 |
| 10. | Louisiana | 00-00-01 | - | 25 | 233 | 99 |
| 11. | Maine | - | 10-17-12 | 09 | 72 | 90 |
| 12. | Massachusetts | - | 05-05-08 | N/A | 74 | 103 |
| 13. | Michigan | 05-00-07 | - | 29 | 430 | 484 |
| 14. | Minnesota | - | 11-10-12 | N/A | 97 | 86 |
| 15. | Mississippi | 10-00-40 | - | - | - | - |
| 16. | Missouri | 05-15-80 | - | N/A | 26 | 17 |
| 17. | Montana | c. 1955 | - | N/A | 76 | 78 |
| 18. | Nebraska | - | 01-30-09 | 16 | 96 | 99 |
| 19. | New Hampshire | - | 12-31-12 | 13 | 184 | 38 |
| 20. | New Mexico | 00-00-50 | - | 06 | 23 | 05 |
| 21. | New York | 01-30-76 | - | N/A | 68 | 16 |
| 22. | North Dakota | - | 00-00-10 | 18 | 191 | 231 |
| 23. | Ohio | - | 05-13-09 | N/A | 53 | 45 |
| 24. | Oklahoma | - | 11-16-12 | 23 | 125 | 115 |
| 25. | Rhode Island | - | 04-28-09 | 14 | 78 | 78 |
| 26. | South Dakota | 06-21-03 | - | N/A | 66 | 58 |
| 27. | Texas | - | 06-30-12 | 16 | 90 | 80 |
| 28. | Utah | 06-18-64 | - | N/A | 59 | 13 |
| 29. | Vermont | - | 10-00-10 | 28 | 43 | 61 |
| 30. | Washington | 09-25-42 | - | N/A | 29 | 09 |
| 31. | Wisconsin | 02-00-46 | - | N/A | 15 | 08 |
| 32. | Wyoming | 07-01-80 | - | 22 | 81 | 99 |
| **Total** | | **16** | **16** | | | |

## APPENDIX 3

## LIST OF THE LATEST 10 SELECTED ARTICLES, AUTHORED BY KRAETTLI Q. EPPERSON (AVAILABLE ON-LINE)

266. "Update on Oklahoma Real Property Title Authority: Statutes, Regulations, Cases, Attorney General Opinions & Title Examination Standards: Revisions for 2012-2013", Boiling Spring Legal Institute, Boiling Springs State Park, Woodward County, Oklahoma (September 17, 2013)

265. "Oil and Gas Title Examination Basic Terms", Oil & Gas Title Examination, The Oklahoma Bar Association, Tulsa, Oklahoma (September 12, 2013), and Oklahoma City, Oklahoma (September 13, 2013)

262. "Update on Oklahoma Real Property Title Authority: Statutes, Regulations, Cases, Attorney General Opinions & Title Examination Standards: Revisions for 2011-2012", Tulsa Title and Probate Lawyers Association—Monthly Lunch Program, Tulsa, Oklahoma (February 14, 2013)

256. **"The Need for a Federal District Court Certificate in All Title Examinations: A Reconsideration", 83 OBJ 2367 (November 3, 2012)**

255. "Oklahoma Real Property Partition: Procedure and Forms", The Oklahoma Bar Association Real Property Law Section, Oklahoma City, Oklahoma (October 25, 2012), and Tulsa, Oklahoma (October 26, 2012)

254. "Update on Oklahoma Real Property Title Authority: Statutes, Regulations, Cases, Attorney General Opinions & Title Examination Standards: Revisions for 2010-2011", Oklahoma Bar Association Real Property Law Section Cleverdon Round Table, Tulsa, Oklahoma (May 4, 2012), and Oklahoma City, Oklahoma (May 11, 2012)

248. **"The Real Estate Mortgage Follows the Promissory Note Automatically Without an Assignment: The Lesson of BAC Home Loans", 82 OBJ 2938 (December 10, 2011)**

244. "Nontestamentary Transfer of Property Act: An Update on Oklahoma's Use of the Transfer-on-Death Deed (2011)", 2011 Boiling Springs Legal Institute, Boiling Springs Park, Woodward, Oklahoma (September 20, 2011)

240. "Update on Oklahoma Real Property Title Authority: Statutes, Regulations, Cases, Attorney General Opinions & Title Examination Standards: Revisions for 2009-2010", The 2011 Cleverdon Roundtable Seminar, Tulsa, Oklahoma (May 6, 2011), and Oklahoma City, Oklahoma (May 13, 2011)

239. **"Oklahoma's Marketable Record Title Act: An Argument for its Application to Chains of Title to Severed Minerals after *Rocket Oil and Gas Co. v. Donabar*", 82 The Oklahoma Bar Journal 622 (March 12, 2011)**