

# OKLAHOMA TITLE EXAMINATION STANDARDS AND CURATIVE ACTS RELATING TO OIL AND GAS INTERESTS

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## I. INTRODUCTION

The purpose of this article is to bring together the intellectual reasoning behind Title Examination Standards<sup>1</sup> and the practical aspects of oil and gas title examination.

### A. *Reasons for Examination of Title*

In the practice of oil and gas law, many situations may arise which necessitate that an attorney conduct a title examination. The circumstances requiring title examination vary. Although this is not purported to be an exhaustive list, oil and gas titles may be examined for the following purposes: (1) the client has acquired oil and gas leases and has a certain number of days to approve payment of lease bonuses (Lease Acquisition or Original Title Opinion); (2) the client is proposing to drill a well and is preparing to pool other leasehold owners and unleased mineral owners and allocate costs for the well (Drilling Opinion); (3) the client, as operator, has completed a well and is preparing to disburse proceeds (Division Order Title Opinion); (4) the client, as first purchaser, is preparing to disburse proceeds (Division Order Title Opinion); (5) the client is purchasing producing or non-producing property (Purchase Opinion); or (6) the bank client is lending money secured by producing or non-producing property (Mortgagee Title Opinion).

1. Hereafter, the Title Examination Standards will be referred to as "Standards" and a specific Title Examination Standard will be referred to as "Standard" followed by the section number.

### B. *Distinctions Between Various Opinions*

The Standards do not distinguish between the various types of opinions, and it is unnecessary for the title examiner to make such a distinction. A defect is a defect regardless of the purpose of the opinion. Therefore, the proper distinction is determining the curative steps necessary to solve a particular problem. However, it may be practical to know the purpose of the opinion in order for the title examiner's comments and requirements to be worded accordingly. For example, it is not unusual to preface a requirement with the words, "For the purpose of this Lease Acquisition Opinion, you may be willing to rely on an affidavit of death and heirship." This serves both the practical need of the client and warns the client that more curative steps may be required at a later time. The title examiner should feel uncomfortable not mentioning a problem during the lease acquisition stage of the drilling program knowing that later, curative steps must be taken before allowing the payment of proceeds. The purpose of the lease acquisition is the eventual economic realization of the leases taken. Thus the client may not understand why a requirement not mentioned earlier is made only at the division order title opinion stage.

#### 1. Lease Acquisition or Original Title Opinion

In the normal sequence of events, the client acquires oil and gas leases based on an ownership done by a landman or lease broker. Subsequently, abstracts are gathered and the client must first be advised whether to honor the money drafts which have been sent for the payment of lease bonuses. Normally, the client will ask if there are any "big title problems" connected with a person's interest. In answering this question, it is appropriate to take into consideration the amount of acreage involved on a particular lease as well as the degree of the problem involved. It is unusual for the landman or lease broker to completely miss the ownership of a potential lessor, but the possibility should always be considered. Additionally, the client should be made aware of any encumbrances, liens, or mortgages which affect his lessor's title. This is the best time to obtain subordinations of mortgages, affidavits of possession, and tenant disclaimers. It is also a good time to inquire as to the status of previous oil and gas leases which may have expired in the absence of production. Although there is usually not time to do judicial determinations of death and heirship, probate proceedings, or quiet title suits, this

is a good time to determine whether the facts are such that these proceedings could be concluded successfully.

## 2. Drilling Opinion

The lease bonuses have been paid, and the client is now proposing to drill a well. The client is also preparing to pool other leasehold owners and unleased mineral owners and to allocate the costs of the well. Normally, a pooling application list will be taken from the original title opinion. One concern is to advise the client whether all potential owners of the right to drill are included on his list of pooling applicants. For purposes of precautionary pooling, it is also advisable to include a list of parties whose interests may be in doubt and unsettled. In addition, the client should be interested in the mortgagees of various working interest owners as a consideration for pooling.

It is also important to take into consideration problems involving the ownership of the surface at the proposed well location including easements and rights-of-way. The client will also begin providing specific curative materials for the requirements connected with his own interest or that of his lessor.

## 3. Division Order Title Opinion (For Operator or First Purchaser)

The true nightmare of a title examiner has taken place. The well has been successfully completed and is producing in paying quantities. Any mistake made by the title examiner will not be cured by a "dry hole." The payment of proceeds from the sale of oil and gas production is now governed by Section 540 of Title 52 of the Oklahoma Statutes. Section 540 imposes time limitations for payment of proceeds and provides for interest on proceeds that cannot be paid because the title thereto is not marketable. Furthermore, Section 540 states that the marketability of title shall be determined in accordance with the then-current title examination standards of the Oklahoma Bar Association.<sup>2</sup>

Suddenly, an entirely different standard of title is used. No longer

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2. OKLA. STAT. tit. 52, § 540.A (Supp. 1988). Section 540.A provides:

The proceeds derived from the sale of oil or gas production from any oil or gas well shall be paid to persons legally entitled thereto, commencing no later than six (6) months after the date of first sale, and thereafter no later than sixty (60) days after the end of the calendar month within which subsequent production is sold . . . Provided, however, that in those instances where such proceeds cannot be paid because the title thereto is not marketable, the purchasers of such production shall cause all proceeds due such interest to earn interest at the rate of six percent (6%) per annum, until such time as the title to such interest has

are affidavits and suppositions to be substituted for properly executed and recorded disclaimers and quit claim deeds. Affidavits of heirship no longer are substituted for judicial determinations of death and heirship, or proper probate or administration proceedings. The then-current Title Examination Standards of the Oklahoma Bar Association will be used as the guide for the proper determination of title. This statute is the only place in the Oklahoma Statutes where the Standards are mentioned. Section 540 seems to incorporate not only the existing Standards as a benchmark of title, but also allows for the criteria of marketability to be changed by the adoption of future Standards.

This discussion must then closely parallel that of Standard 4.1 (Marketable Title Defined) in the discourse as to what constitutes marketable title. However, from a practical standpoint, especially where the operator is the entity disbursing proceeds of production, many of the same presumptions made at other stages of title examination are applicable here. Affidavits of death and heirship are often accepted by the operator in the place of judicial proceedings. Long possession histories are substituted by the operator for quiet title decrees. In many cases, indemnifying language in division orders is substituted for potential title defects. Additionally, liberal use is made of the Marketable Record Title Act and Simplification of Land Titles Act to determine the marketability of title. These decisions are matters involving the business judgment of the client.

Other matters are considered for the first time. Mortgages from lessors which were subordinated to leases must be reconsidered with regard to payment of proceeds. Mortgages from leasehold owners must be considered. Operating agreements, well completion reports, and pooling elections must be considered in order to make determinations about the final disbursement of proceeds. Although not required by the statutes or the Standards, most clients also require executed division orders before disbursing proceeds.

#### 4. Purchase Opinion

When the client is purchasing producing property, special consideration should be given to the type of purchase which is taking place. Often there is a large number of leases and/or producing properties which have different degrees of value to the client. It is advisable to

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been perfected. Marketability of title shall be determined in accordance with the then current title examination standards of the Oklahoma Bar Association.

*Id.*

break down the allocation of the purchase price into three or four categories of properties. While a full examination of title may be important in one category, it may well be that a less strict examination will be desired for a different category of property. Proper inquiry may reveal that the purchase price is justified by the inclusion of only certain properties and many of the other properties carry little or no allocated weight to the entire purchase price. The cost of examination of a low priority property may be more than that property is actually worth. One advantage in the purchase of producing properties is that there are usually fairly recent title opinions available which can be examined and updated through abstract examination or tract index examination.

There is another consideration for the purchase opinion. Commonly, upon the acceptance of a purchase offer, the purchaser will have a certain number of days to examine title and notify the seller in writing of any objections or title defects. Normally the standards to be used are the then-existing Standards. However, another criteria which can be employed is what a reasonable and prudent person engaged in the business of ownership, development, operation, or production of oil and gas properties, or the purchase of production therefrom would use in order to disburse revenues in accordance with the title which has been offered. This may be a more appropriate standard for the purchase of producing properties. The most important issue for the purchasing client is whether the seller is receiving revenue. If so, it must be that the title is acceptable to the current purchaser of production and is probably going to be acceptable to the purchaser-client. There is even some argument that a lesser standard can be forced upon a purchaser even when a strict "marketable title" standard is used in the purchase agreement.

#### 5. Mortgage Title Opinion

Situations where the bank client has been offered oil and gas property (usually leasehold interests) to secure a promissory note ordinarily fall into two categories, and the scope of examination depends upon the category.

In the first category, the borrower is purchasing oil and gas leases (producing) and has asked the bank to finance all or part of the transaction. The title examination will be similar to that of a Purchase Opinion with consideration being given to the weight of various categories of property. Examination may involve updating previous title opinions and determining who is actually receiving revenue. The bank should have its

own standards of acceptable title, and should not rely on the standards which may be acceptable to the purchaser. It is not uncommon for a conflict to develop between the bank and the borrower, especially where the borrower has agreed to pay for the expenses of the examination of title on behalf of the bank. Since the purchase will often involve a distressed seller, special consideration should be given to mortgages, liens, and lawsuits which may affect the seller's interest.

In the second category, the borrower is offering additional collateral to further secure an existing loan which has fallen into arrears. Normally, the bank prefers not to pay additional expenses of title examination and will often rely upon the representations of the borrower as to the amount of monthly revenue from various properties. A bank client should categorize the property offered, and at least do a limited examination of the high priority properties. The property is usually offered to the bank in return for the bank's forbearance of an immediate foreclosure, and the bank takes the property knowing that an eventual foreclosure is probably going to be necessary. It is not uncommon to find that the interest of this borrower is heavily encumbered and may be subject to the priorities of third parties.

## II. AUTHORITATIVENESS OF THE STANDARDS

The discussion below briefly highlights the reasons for the substantial weight given by Oklahoma's real property title attorneys to the Standards. The development of these Standards is carried out in order to: (1) facilitate title transfers by resolving issues upon which there may be a difference of opinion within the Bar<sup>3</sup> by adopting the customary position followed by the vast majority of practicing title attorneys,<sup>4</sup> and (2) collect title curative authority in one place.

After extensive research and discussion, the Title Examination Standards Committee ("Committee") of the Real Property Section ("Section") of the Oklahoma Bar Association ("OBA") revises or develops new standards which are submitted to the Section at its annual meeting held at the same time and location as the annual meeting of the OBA. After the Section and the OBA House of Delegates approve the revised or new Standards, they are officially published in the Appendix to Chapter 1 of Title 16 (Conveyances) of the Oklahoma Statutes.

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3. Promulgation of Standards is necessary when differences of opinion cannot be resolved by a review of the current law.

4. Customary positions are adopted if they are not contrary to existing law.

In order to encourage pre-adoption comment by the members of the OBA, the proposed revised and new Standards are published in the end-of-the-month issue of the *Oklahoma Bar Journal* one to two months prior to the annual meeting of the OBA. After the annual OBA meeting, those revised and new Standards that received final approval from both the Section and the OBA House of Delegates are incorporated into the existing Standards and published in the Section's *Title Examination Standards Handbook*. The *Handbook* contains all of the Standards including recent revisions or additions. It is published annually by the Section as soon as possible after the annual OBA meeting. The handbook is provided free of charge to all Section members and is sold for a nominal price to others. The Oklahoma Statutes Annotated will include the most recent Standards in the next revised pocket part. The development, notice, and approval process promotes vigorous analysis, discussion, and debate on the Standards before adoption so that once they are adopted the Standards can reasonably be called the official "custom" or "standard" in Oklahoma.

The Standards are developed and founded on an exhaustive analysis of existing statutes, case law, major treatises, other states' statutes and cases, and uniform national "standards." Such authorities are studied, discussed, and then set out in the "Authority" part of each Standard. Consequently, a title attorney can begin research on a title question by reviewing the language of a particular Standard itself, and then reviewing the cited authority. The Standards can thus act as a mini-brief or mini-treatise. To the extent that a particular Standard is based directly on the express wording of existing Oklahoma Statutes or Oklahoma cases, it is obviously controlling on all parties.

As previously mentioned, the state legislature has clearly expressed its confidence in the Standards by enacting Section 540, which states that marketability of title shall be determined in accordance with the then-current title examination standards of the OBA.<sup>5</sup> It should be noted, however, that the state legislature has expressly provided for such Standards to apply only to the payment of proceeds. Therefore, it cannot be presumed that the courts will find that there was legislative intent to automatically apply the Standards to every surface or other mineral conveyance or transaction.

The Oklahoma Supreme Court has also expressed its confidence in the Standards. In *Knowles v. Freeman*, the court found that although

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5. See *supra* note 2.



they were not binding, the standards and the annotations cited in support were persuasive.<sup>6</sup> The persuasiveness of the Standards, according to Justice Lavender, is based on the careful research and study prior to their adoption as well as their general acceptance among the members of the bar.<sup>7</sup>

The Attorney General's Office stated that "[t]itle examination standards are not state statutes and, are not promulgated by the Legislature."<sup>8</sup> However, the same opinion also stated that "[t]he title examination standards are uniform interpretations for the application of the law that attorneys should use when examining titles."<sup>9</sup>

The Standards may also apply to a real estate or oil and gas transaction in which the parties agree that the Standards will be used in determining the acceptability of the title being offered.

Although the Standards are useful and authoritative, there are dangers that can be avoided only by the conscientious efforts of the examining attorney. The title examiner must be careful to completely review the body and especially the notes of the Standard. The examiner must also keep abreast of changes in statutes and cases since the last revisions to a Standard were made.

### III. STANDARDS AND CURATIVE ACTS

Several current Standards and several Oklahoma curative acts are addressed below. The Standards are treated in numerical order. The actual language of the particular Standard is given, followed by a discussion of the Standard's background and authority as well as the practical aspects of applying the particular Standard.

#### A. *Standard 3.3. Affidavits (adopted 1986, no amendments)*

While an affidavit recorded after October 31, 1985, which satisfies the conditions of 16 O.S.A. § 82 is not a substitute for a judicial proceeding or any other statutory procedure, it does give notice and may be relied upon for interpretation or clarification purposes in determining the marketability of title, unless the examiner has reason to suspect the personal knowledge, competency or veracity of the affiant.<sup>10</sup>

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

7. *Id.*

8. 11 Op. Att'y Gen. 370 (1979).

9. *Id.*

10. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 3.3 state:

Comment: In the course of examination of titles, there are frequently matters which create some doubt in the mind of the title examiner but are not of a nature which would

### 1. Background

For many years, affidavits setting forth facts about title matters were filed in the land records without authority allowing their filing or making filing constructive notice of their contents.<sup>11</sup> In fact, any taking of an affidavit without specific statutory authority was a crime.<sup>12</sup> However, on November 1, 1985, Title 16, Sections 82-85 of the Oklahoma Statutes became effective, providing the authority for filing of record an affidavit in the local land records.<sup>13</sup> The statute also provides that when an affidavit is acknowledged and recorded it serves as notice (i.e., constructive notice) of the matters covered therein.<sup>14</sup> However, the affidavit does not take the place of a judicial proceeding, judgment, decree, or title standard.<sup>15</sup>

The affidavit may provide information on age, sex, birth, death, relationship, family history, heirship, names, identities of parties (individual, corporate, partnership, or trust), identity of officers of corporations, membership of partnerships, joint ventures or other incorporated associations, identities of trustees and terms of service, history of organization of corporations, partnerships, joint ventures and trusts, marital status, possession, residence, service in Armed Forces, and conflicts in recorded instruments.<sup>16</sup> The statute further states that the affidavit must include a legal description of the real property affected,<sup>17</sup> and that any person giving a false affidavit would be guilty of perjury and liable for actual and punitive damages.<sup>18</sup>

Since the statute expressly states that an affidavit cannot replace a

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require a judicial proceeding to cure the defect. In such cases, affidavits may be relied upon. For example, where no indication is given in a conveyance of real property as to the marital status of the grantor, an affidavit that the grantor was not married at the time of the conveyance should be relied on for purposes of marketability. On the other hand, an affidavit of heirship cannot take the place of a judicial determination of heirship. Of course, such an affidavit of heirship would give notice of persons purported to be heirs.

History: The standard as stated above was recommended by the Report of the 1986 Title Examination Standards Committee, 57 O.B.A.J. 2677 (1986). It was approved by the Real Property Section, November 19, 1986, and adopted by the House of Delegates, November 20, 1986. For the statement of the standard previously, see 56 O.B.A.J. 2535 (1985).

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

11. *Carter v. Wallace*, 193 Okla. 32, 34, 140 P.2d 1018, 1020 (1943); *Wilson v. Shasta Oil Co.*, 171 Okla. 467, 470, 43 P.2d 769, 772 (1935).

12. OKLA. STAT. tit. 21, § 541 (1981).

13. OKLA. STAT. tit. 16, §§ 82-85 (Supp. 1986) (Marketable Record Title Act).

14. *Id.* § 82.

15. *Id.*

16. *Id.* § 83.

17. *Id.* § 84.

18. *Id.* § 85.

formal proceeding, the impact of the statute is principally: (1) to cloud title by giving notice of outstanding claims, and (2) to preserve factual information that some, but not necessarily all, examiners might choose to rely upon but that is usually lost in the file of an earlier title examiner. Discussions have arisen on an irregular basis within the Section about how to give such filed affidavits some weight, perhaps as a presumption, after being filed of record for a long time, such as ten years. It should be noted that there is no authority in this statute for the filing of an affidavit concerning the homestead or non-homestead nature of a tract of real property.

## 2. Practicalities

The full impact of Standard 3.3 is not yet known. Even without statutory authority, abstracts and county records have contained affidavits covering the same areas as those mentioned in the statute. These affidavits are immensely helpful in the work of a title examiner. An affidavit of death and heirship can tie together breaks in the chain of title and explain the proper ownership percentage that might otherwise require a probate or administration proceeding. Depending on how a title opinion is being used, one client may be willing to rely upon such an affidavit for all purposes. Another client may be willing to rely upon an affidavit of heirship to support the payment of lease bonuses, but may require judicial proceedings before incurring the expense of drilling a well or the risk of disbursing proceeds of production.

Only time will tell whether these statutorily approved affidavits will have more dignity than the ones used previously. However, from a practical standpoint, an affidavit tells a title examiner part of the overall title story regardless of how defectively drafted or recorded the document may be. One practical question the title examiner will have to face in the future is how to handle affidavits that were not properly executed, acknowledged, and recorded, but still are contained in the county records. Another question is how much reliance can be placed on the affidavits since an affidavit is usually self-serving, such as a member of a family explaining the family history and heirship in lieu of a decree of distribution, a property owner stating that she is in possession of property, or a grantor of a deed stating that he was unmarried at the time of execution of the deed. In particular, an oil and gas title examiner reviews many unrecorded affidavits of possession. These are usually self-serving statements of possession by the record owner and often contain the apparent

inconsistency of an out-of-county or out-of-state acknowledgment coupled with a statement that the affiant is in possession of the property.

In summary, Standard 3.3 will not change the way in which a careful title examiner uses affidavits. He or she will explain to the client that an affidavit is only as good as the person behind the affidavit and would be hard to defend if the information is in fact not true.

B. *Standard 4.1. Marketable Title Defined (adopted 1946; last amended 1966)*

All title examinations should be made on the basis of marketability as defined by the Supreme Court, to wit:

"A marketable or merchantable title is synonymous with a perfect title or clear title of record; and is one free from apparent defects, grave doubts and litigious uncertainty, and consists of both legal and equitable title fairly deducible of record."<sup>19</sup>

1. Background

Standard 4.1 creates a common basis for examination of title to both surface and mineral interests. The Standard presents the Oklahoma Supreme Court's definition of marketable or merchantable title and urges that, in the absence of any other express agreement between the parties, all examining attorneys should examine their titles based on this particular level of quality of title. Further, the Standard emphasizes and affirms

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19. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 4.1 state:

Cross References: See Standard 19.1.

Authority: *Pearce v. Freeman*, 122 Okla. 285, 254 P. 719 (1927); *Hausam v. Gray*, 129 Okla. 13, 263 P. 109 (1928); *Campbell v. Harsh*, 31 Okla. 436, 122 P. 127 (1912); *Jennings v. New York Petroleum Royalty Corp.*, 169 Okla. 528, 43 P.2d 762 (1934); *Tull v. Milligan*, 173 Okla. 131, 48 P.2d 835 (1935); *Seyfer v. Robinson*, 93 Okla. 156, 219 P. 902 (1923); *Tucker v. Thaves*, 50 Okla. 691, 151 P. 598 (1915); *Ammerman v. Karnowski*, 109 Okla. 156, 234 P. 774 (1924); *Wilson v. Shasta Oil Co.*, 171 Okla. 467, 43 P.2d 769 (1935); *Empire Gas & Fuel Co. v. Stern*, 15 F.2d 323 (8th Cir. 1926); *Leedy v. Ellis County Fair Ass'n*, 188 Okla. 348, 110 P.2d 1099 (1941); *Hanlon v. McLain*, 206 Okla. 227, 242 P.2d 732 (1952); *Gordon v. Holman*, 207 Okla. 496, 250 P.2d 875 (1952); *Hawkins v. Johnson*, 203 Okla. 398, 222 P.2d 511 (1950); *Koutsy v. Park Nat'l Bank*, 167 Okla. 373, 29 P.2d 962 (1934); *Davidson v. Roberson*, 92 Okla. 161, 218 P. 878 (1923).

History: Adopted as 11, November 16, 1946, 17 O.B.A.J. 1729 (1946), printed, *id.* at 1751-1752; became 1 on renumbering in 1948, 19 O.B.A.J. 223 (1948) at which time the *Leedy* case was added to the cited authority. On November 30, 1960, the last five cases cited were added, 1960 Proceedings of the Annual Meeting of the Oklahoma Bar Association at 20. Cross reference added, December 2, 1965. Resolution No. 2, 1965 Real Property Committee, 36 O.B.A.J. 2094 (1965), *id.* at 2182. Approved by Real Property Section and adopted by House of Delegates, 37 O.B.A.J. 437 (1966).

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

the use of this general definition for the terms "marketable" or "merchantable" title whenever either of these terms is expressly used by the parties.

## 2. Practicalities

Standard 4.1 defines "marketable title" without discussion as to the purpose for which the title examiner is examining title. Practically, "marketable title" may mean different things in oil and gas practice than in the area of residential real estate or commercial lending. However, few oil and gas title examiners would feel comfortable explaining to a client that the title opinion did not include certain comments and requirements that would usually have been made but were omitted because the oil and gas practice requires a "less perfect title." Most examiners have come to the conclusion that an examiner should not make a decision for the client as to the degree of marketability required in an opinion.

While Standard 4.1 is good as a case citation for many authorities defining marketable title, it does not affect the day-to-day examination of title. Once the title has been examined, and all defects and potential defects have been brought to the attention of the client, the Standards may be helpful in determining what curative steps are required given the purpose of the title opinion. A lessee acquiring leases may require less certainty of title than the first purchaser who is disbursing proceeds. This has nothing to do with the marketability of title, but rather with the economics and time involved in acquiring leases in competition with other lessees and with the time constraints in making title considerations.

### C. *Standard 4.2. Oil and Gas Leases (adopted 1947; last amended 1987)*

The recording of a certificate supplied by the Corporation Commission under 17 O.S.A. §§ 167 & 168, reflecting no production and no exceptions, renders a title marketable as against an unreleased oil and gas lease or a mineral or royalty conveyance or reservation for a term of years and as long thereafter as there is production, the primary term of which has expired prior to the date of the certificate, if the certificate covers all of the land described in the lease, mineral or royalty conveyance or reservation, as well as any additional land which may have been spaced or unitized by either the Corporation Commission or by recorded declaration pursuant to the lease or other recorded

instrument as of the date of the expiration of the primary term.<sup>20</sup>

### 1. Background

The purpose of Standard 4.2 is to identify and encourage the use of a reliable means for a title examiner to determine whether an oil and gas lease, a mineral or royalty conveyance, or a reservation of a term of years that would continue beyond its primary term for as long thereafter as

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20. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 4.2 state:

Comment: Said Act originally applied only to oil and gas leases, as did the standard as originally adopted October 1947. The Act was amended in 1951 so as to cover term mineral conveyances, as well as oil and gas leases, and the standard was then amended in November, 1954. By said Act, such certificates constitute *prima facie* evidence that no such oil and gas lease or term mineral conveyance is in force, which, if not refuted, will support a decree for specific performance of a contract to deliver a marketable title. The facts in *Wilson v. Shasta Oil Co.*, 171 Okla. 467, 43 P.2d 769 (1935), disclose that the Court only held that proof to establish marketability cannot be shown by affidavit of nondevelopment. *Beatty v. Baxter*, 208 Okla. 686, 258 P.2d 626 (1953), is deemed not to affect *prima facie* marketability as provided for in the statute.

Note: This standard does not apply to Osage County, where oil and gas operations are not under the control and supervision of the Corporation Commission.

Caveat: The Corporation Commission has been known to issue clear certificates of non-development when, in fact, a well has been drilled and not plugged; therefore, the cautious attorney will also advise his clients to satisfy themselves there is no well nor production upon any of said property and that the lease is not being kept alive by in lieu royalty payments or production not reported to the Corporation Commission. The examiner should also be aware that the documents evidencing spacing or unitization may either be unrecorded or only appear in the records of the Corporation Commission.

History: Adopted as G, October 31, 1947, 18 O.B.A.J. 1750, 1751 (1947); became 10 on renumbering, 19 O.B.A.J. 223, 225 (1948), at which time the Note was added. The standard was amended, November 18, 1954, 1954 Proceedings of the Annual Meeting of the Oklahoma Bar Association at 91-92 (see also 177) by adding the words, "or a mineral or royalty conveyance." The form of the motion did not include amendment to the comment. Therefore, only the two sentences beginning, "By said act," and concluding, "an affidavit of nondevelopment," of the Comment as printed above had been officially adopted prior to 1962.

The 1962 Real Property Committee recommended that the first two sentences and the last sentence of the comment as it appears above also be officially adopted, see Recommendation (7), 33 O.B.A.J. 2157, 2183 (1962). This recommendation was adopted by the Real Property Section and the House of Delegates, see *id.* at 2470.

The 1980 Title Examination Standards Committee of the Real Property Section recommended that the Caveat be added, 51 O.B.A.J. 2726 (1980). The recommendation was approved by the Real Property Section, December 3, 1980, and adopted by the House of Delegates, December 5, 1980.

This standard was further amended December 3, 1982. The amendment was proposed by Report of 1982 Title Examination Standards Committee, 53 O.B.A.J. 2731-32 (1980), approved by Real Property Section, December 2, 1982, and then adopted by the House of Delegates.

The report of the 1987 Title Standards Committee recommended amending the body of the standard and the "Caveat", 58 O.B.A.J. 2839-40 (1987). The Real Property Section approved the recommendation November 12, 1987, and the House of Delegates adopted it on November 13, 1987. The amendment added the words "reflecting no production and no exceptions" to the first sentence of the body of the standard and the words "clear" and "therefore" to the first sentence of the "Caveat". The amendment added the last sentence of the "Caveat" also.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

there is production, has in fact expired. The mechanism is the use of a certification of the fact of non-development of a lease tract by a knowledgeable third party, namely the Corporation Commission. Title 17, Sections 167 and 168 of the Oklahoma Statutes establish that such certificate constitutes *prima facie* evidence of the actual state of production.<sup>21</sup>

## 2. Practicalities

Standard 4.2 is more helpful in curing title than in the initial examination by the title examiner. Usually, not enough information is provided in the abstract to cover the situations most often encountered. An examiner is likely to see many old oil and gas leases whose primary terms have expired in the absence of production. Standard 4.2 can be helpful in determining whether these leases may create a cloud on title. However, caution must be used because many times these leases cover large tracts of lands, requiring the abstracter to include a certificate of non-development for all the lands in the leases and any other lands spaced or unitized with those lands. The abstracter seldom gives enough information for the use of Standard 4.2 with old leases.

In regard to more current oil and gas leases whose primary terms have expired in the absence of production, the cautious approach would be to allow time between the expiration date of the lease and the effective date of the certificate of non-development. Close attention should be paid both to lease terms that would permit the lessee to complete the drilling of a well that was commenced during the primary term and to other lease terms that may excuse delayed drilling. Subsequent top leases may be one excuse for delay of drilling on the original lease.

The practical approach is to provide the client a list comprised of all unreleased oil and gas leases, with complete legal description. It can be a waste of time to chain old oil and gas leases to determine a list of current owners when the client intends to use Standard 4.2 and obtain a certificate of non-development instead of acquiring releases from those current owners. As a practical matter, once it becomes apparent that there are a number of old leases that have not been released, or an inordinate amount of time is being spent on the chaining of their ownership, it may be wise to make one general requirement covering all of these leases, specifying the actual descriptions necessary to be covered by certificates of non-development, cautioning the client that additional lands spaced or unitized must be included.

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21. OKLA. STAT. tit. 17, §§ 167-68 (Supp. 1988).

There is an important caveat to Standard 4.2. The title examiner should advise the client that the Oklahoma Corporation Commission records can be incorrect. Therefore, the client should make inquiry to acquire assurance that there is no production on the lands, no royalty payments being made in lieu of production, and that the possession affidavits of the lands include existing oil and gas wells.

D. *Standard 6.1. Defects in or Omission of Acknowledgments*  
(adopted 1981; last amended 1988)

With respect to instruments relating to interests in real estate:

A. The validity of such instruments as between the parties thereto is not dependent upon acknowledgments, 16 O.S.A. § 15.

B. As against subsequent purchasers for value, in the absence of other notice to such purchasers, such instruments are not valid unless acknowledged and recorded, except as provided in C and D herein, 16 O.S.A. § 15.

C. Such an instrument containing an acknowledgment which is defective in form shall be considered valid notwithstanding such defect, and shall not be deemed to impair marketability, provided such instrument has been recorded for a period of not less than five (5) years, 16 O.S.A. § 39a.

D. Such an instrument which has not been acknowledged or which contains an acknowledgment which is defective in some manner other than in form shall be considered valid notwithstanding such omission or defect, and shall not be deemed to impair marketability, provided such instrument has been recorded for a period of not less than ten (10) years, 16 O.S.A. § 27a.<sup>22</sup>

1. Background

Standard 6.1 summarizes existing statutes concerning acknowledgments. Such statutes declare that acknowledgments are not necessary to the validity of instruments between the parties, and they make instruments with defective or omitted acknowledgments valid for constructive notice purposes after they have been of record for several years. Formerly, the curative periods were five years if the form was defective and ten years if the facts were defective or if the acknowledgment itself was

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22. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 6.1 state: History: Adopted December 4, 1981. Proposed by Report of the 1981 Title Examination Standards Committee, 52 O.B.A.J. 2723, 2724 (1981). Approved by Real Property Section and adopted by House of Delegates, 53 O.B.A.J. 257-58 (1982). The Title Examination Standard which, prior to December 4, 1981, bore the number 6.1 has been renumbered 2.3.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).



omitted in part or in full. As of November 1, 1988, both kinds of defects are cured after the document is of record for five years.<sup>23</sup>

It should be noted that at least a few practicing real property attorneys have taken the position that absent estoppel or other arguments an acknowledgment is necessary to the validity of a corporate conveyance as between the parties. The support for this position is derived from a combination of the language in Sections 15, 92, and 95 of Title 16 of the Oklahoma Statutes and the Oklahoma Supreme Court case of *Bentley v. Zelma Oil Co.*<sup>24</sup> The introductory language of Section 15 states that "[e]xcept as hereinafter provided, no acknowledgment or recording shall be necessary to the validity of any deed."<sup>25</sup> Section 92 provides that every instrument affecting real estate and acknowledged by a corporation shall be valid.<sup>26</sup> Section 95 requires that every deed executed by a corporation must be acknowledged by the officer or person signing for the corporation.<sup>27</sup> In *Bentley v. Zelma Oil Co.*, the court held that a contract from a corporation which affected real estate was invalid because it was not acknowledged in substantial compliance with what is now Section 95.<sup>28</sup>

## 2. Practicalities

Standard 6.1 can save the title examiner time and allows title to

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23. OKLA. STAT. tit. 16, § 15 (1981); OKLA. STAT. tit. 16, § 27a (1981) *amended by* OKLA. STAT. tit. 16, § 27a (Supp. 1988); OKLA. STAT. tit. 16, § 39a (1981).

24. 76 Okla. 116, 184 P. 131 (1919).

25. OKLA. STAT. tit. 16, § 15 (1981). Section 15 states:

*Except as hereinabove provided, no acknowledgment or recording shall be necessary to the validity of any deed, mortgage, or contract relating to real estate as between the parties thereto; but no deed, mortgage, contract, bond, lease or other instrument relating to real estate other than a lease for a period not exceeding one (1) year and accompanied by actual possession, shall be valid as against third persons unless acknowledged and recorded as herein provided.*

*Id.* (emphasis added).

26. OKLA. STAT. tit. 16, § 92 (1981). Section 92 provides:

*Every instrument affecting real estate or authorizing the execution of any deed, mortgage or other instrument relating thereto, executed and acknowledged by a corporation or its attorney-in-fact in substantial compliance with this chapter, shall be valid and binding upon the grantor, notwithstanding any omission or irregularity in the proceedings of such corporation or any of its officers or members, and without reference to any provision in its constitution or bylaws.*

*Id.* (emphasis added).

27. OKLA. STAT. tit. 16, § 95 (1981). Section 95 states:

*Every deed, or other instrument affecting real estate, executed by a corporation, must be acknowledged by the officer or person subscribing the name of the corporation thereto.*

*Id.* (emphasis added).

28. *Bentley v. Zelma Oil Co.*, 76 Okla. 116, 126, 184 P. 131, 141 (1919). See generally A. DURBIN & C. BIXLER, OKLAHOMA REAL ESTATE FORMS - PRACTICE (1987).

improve with the passage of time. From a practical standpoint, defects that occur that are not covered by the Standards are noted and correction instruments are requested. The problem of intervening purchasers must be dealt with on a case-by-case basis, but normally, the practical approach is to assume that the subsequent purchaser accepts as valid the otherwise defectively acknowledged instrument.

E. *Standard 6.2. Omissions and Inconsistencies in Instruments and Acknowledgments (adopted 1947; last amended 1961)*

Omission of the date of execution from a conveyance or other instrument affecting the title does not, in itself, impair marketability. Even if the date of execution is of peculiar significance, an undated instrument will be presumed to have been timely executed if the dates of acknowledgment and recordation, and other circumstances of record, support that presumption.

An acknowledgment taken by a notary public in another state which does not show the expiration of the notary's commission is not invalid for that reason.

Inconsistencies in recitals or indications of dates, as between dates of execution, attestation, acknowledgment or recordation, do not, in themselves, impair marketability. Absent a peculiar significance of one of the dates, a proper sequence of formalities will be presumed notwithstanding such inconsistencies.<sup>29</sup>

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29. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 6.2 state: Authority: R. & C. Patton, Titles §§ 350, 353, 359 & 364 (2d ed. 1957); P. Basye, Clearing Land Titles §§ 233-236 & 247-249 (1953); 26 C.J.S., *Deeds* §§ 22a. & f., & 53a; May v. Archer, 302 P.2d 768 (Okla. 1956); Maynard v. Hustead, 185 Okla. 20, 90 P.2d 30 (1939); Scott v. Scott, 111 Okla. 96, 238 P. 468 (1925).

Vol. 1 C.J.S. *Acknowledgments* § 876; Annot., 29 A.L.R. 980 (1928); Kansas City & S.E. Ry. Co. v. Kansas City & S.W. Ry. Co., 129 Mo. 62, 31 S.W. 451 (1895); Sheridan County v. McKinney, 79 Neb. 220, 112 N.W. 329 (1907); (See also acknowledgment curative statutes).

Comment: An indication of the date of execution is not essential for any purpose. It is a recital, like other recitals; important, if the date is in issue; helpful, in any case; presumptively correct, but subject to rebuttal or explanation. The same is true of the date of attestation and, generally, of acknowledgment. The only crucial date, that of delivery, is not normally found in the instrument. Hence, omission of the date from one of an ordinary series of conveyances may be disregarded. Even though a special importance attaches to the date of execution, as in the case of a power of attorney, a presumption of timely execution (e.g., in proper sequence in relation to other instruments) should be indulged if supported by other dates and circumstances of record.

As recitals of dates may be omitted or explained, are notoriously inaccurate and are more generally in error than are the actual sequences of formalities, inconsistencies in the indicated dates of formalities (e.g., acknowledgment dated prior to execution; execution dated subsequent to indicated date of recordation) should be disregarded. Further, the inconsistency or impossibility of a recited date should not be regarded as vitiating the particular formality involved. An act curative of the formality will eliminate any question as to its date. If, however, under the circumstances indicated by the record, a peculiar significance attaches to any of the dates (e.g., priorities; important presumption), inconsistency or impossibility should not be disregarded.

### 1. Background

In the absence of an expressed delay set out on the face of the document, the date of delivery of a conveyance to the grantee is the effective date of the instrument. As stated in *May v. Archer*, "a deed, in the absence of a contrary statutory position, takes effect from the date of its delivery, not from the time of its record or date, or signing and acknowledgment."<sup>30</sup> Therefore, errors in other dates recited on the face of an instrument, such as the execution or acknowledgment, usually have no effect on the marketability of the title.

### 2. Practicalities

Standard 6.2 provides comfort to the examiner so that he does not get too excited over the sequence of events where it appears an instrument was dated after it was acknowledged. It is not uncommon for a date to have been omitted either on the instrument or the acknowledgment. Standard 6.2 states that even if the date of execution is of peculiar significance, an undated instrument will be presumed to have been timely executed if the date of acknowledgment and recordation support that presumption.

The third paragraph of the Standard involves inconsistencies in the recitals on instruments. Absent a peculiar significance of one of the dates, a proper sequence of formalities will be presumed notwithstanding such inconsistencies.

The comments following the Standard are helpful in putting the "date" issue in proper perspective. The date of execution is seen as a recital and presumptively correct, subject to rebuttal or correction. The same is true of the attestation and the acknowledgment. The only crucial date is the date of delivery, which is never shown on the instrument.

#### F. *Standard 7.1. Marital Interests: Definition, Applicability of Standards; Bar or Presumption of Their Non-Existence* (adopted 1947; last amended 1984)

The term "Marital Interest," as used in this chapter, means the rights and restrictions placed by law upon an individual landowner's

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History: Second paragraph of standard and second paragraph of citations adopted as B, October 31, 1947, 18 O.B.A.J. 1750 (1947); became 6 on renumbering, 19 O.B.A.J. 223, 224 (1948); enlarged and adopted as 6.2, December 2, 1961, 32 O.B.A.J. 2280 (1961); printed, *id.* at 1866-67, 1921-22, 1970-71 & 2030-31; see also *id.* at 1425-26.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

30. *May v. Archer*, 302 P.2d 768, 771 (Okla. 1956) (quoting 26 C.J.S. Deeds § 53(a)).

ability to convey or encumber the homestead and the protections afforded to the landowner's spouse therein.

Severed minerals cannot be impressed with homestead character and therefore, the standards contained in this chapter are inapplicable to instruments relating solely to previously severed mineral interests.

Marketability of title is not impaired by the possibility of an outstanding marital interest in the spouse of any former owner whose title has passed by instrument or instruments which have been of record in the office of the county clerk of the county in which the property is located for not less than ten (10) years after the date of recording, where no legal action shall have been instituted during said ten (10) year period in any court of record having jurisdiction, seeking to cancel, avoid or invalidate such instrument or instruments on the ground or grounds that the property constituted the homestead of the party or parties involved.<sup>31</sup>

The Oklahoma Constitution<sup>32</sup> and Section 4 of Title 16 of the Oklahoma Statutes<sup>33</sup> protect family homestead by restricting the record

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31. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 7.1 state:

Authority: 16 O.S.A. § 4.

Comment: See Title Examination Standard 21.1 as to use of powers of attorney.

History: Adopted as A., October 31, 1947, 18 O.B.A.J. 1750 (1947); became 7 on renumbering in 1948, 19 O.B.A.J. 224 (1948). An amended standard, proposed by the 1970 Real Property Committee's Supplemental Report as Exhibit A, 41 O.B.A.J. 2676 (1970) was approved by the Real Property Section on December 3, 1970, and adopted by the House of Delegates on December 4, 1970, 42 O.B.A.J. 706 (1971). It substantially modifies the previous standard of the same number. The Comment was added on the recommendation of the 1983 Title Examination Standards Committee, see Committee Report, 54 O.B.J. 2379 (1983), approved by the Real Property Section, November 3, 1983, and adopted by the House of Delegates, November 4, 1983.

The first two paragraphs were proposed as additions by the Report of the Title Examination Standards Committee, 55 O.B.A.J. 1871 (1984) and were approved by the Real Property Section, November 1, 1984, and adopted by the House of Delegates, November 2, 1984.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

32. OKLA. CONST. art. XII, § 2. Section 2 provides:

The homestead of the family shall be, and is hereby protected from forced sale for the payments of debts, except for the purchase money therefor or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon; *nor shall the owner, if married, sell the homestead without the consent of his or her spouse, given in such manner as may be prescribed by law; Provided, Nothing in this article shall prohibit any person from mortgaging his homestead, the spouse, if any, joining therein; nor prevent the sale thereof on foreclosure to satisfy any such mortgage.*

*Id.* (emphasis added).

33. Okla. Stat. tit. 16, § 4 (Supp. 1986). Section 4 states:

No deed, mortgage, or conveyance of real estate or any interest in real estate, other than a lease for a period not to exceed one (1) year, shall be valid unless in writing and subscribed by the grantors. *No deed, mortgage, or contract affecting the homestead exempt by law, except a lease for a period not exceeding one (1) year, shall be valid unless in writing and subscribed by both husband and wife, if both are living and not divorced, or legally separated, except as otherwise provided for by law.* Nonjoinder of the spouse shall not invalidate the purchase of a home with mortgage loan insurance furnished by the Veteran's Administration or written contracts and real estate mortgages executed by the spouse of a person

owner's right to convey said homestead. During the first ten years that an instrument is recorded, close attention is given to potential homestead restrictions; after ten years, the problem completely disappears if no legal action has been instituted seeking to cancel, avoid, or invalidate the conveyance. Any instrument which has been recorded less than ten years should be examined closely for the consideration of the marital interest.

If a grantor, mortgagor, or lessor owns a surface interest in the tract of land being conveyed, mortgaged, or leased, the marital status should be noted and the instrument should be executed by the spouse if married. This is true even if the instrument being executed is an oil and gas lease, a mineral deed, or another kind of instrument not directly affecting the surface.

G. *Standard 7.2. Marital Interests and Marketable Title (adopted 1983; last amended 1986)*

Except as otherwise provided in Standard 7.1, no deed, mortgage or other conveyance by an individual grantor shall be approved as sufficient to vest marketable title in the grantee unless:

A. The body of the instrument contains the grantor's recitation to the effect that the individual grantor is unmarried;  
or

B. An affidavit made and recorded pursuant to 16 O.S.A. § 82 recites that the individual grantor was unmarried at the date of such conveyance;  
or

C. The individual grantor's spouse, identified as such in the body of the instrument, subscribes the instrument as a grantor;  
or

D. The grantee is the spouse of the individual grantor and the fact is recited by the grantor in the body of the instrument.<sup>34</sup>

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who is certified by the United States Department of Defense to be a prisoner of war or missing in action. *A deed affecting the homestead shall be valid without the signature of the spouse of the grantor, and the spouse shall be deemed to have consented thereto, when said deed has been recorded in the office of the county clerk of the county in which the real estate is located for a period of ten (10) years prior to a date six (6) months after May 25, 1953, and thereafter when the same shall have been so recorded for a period of ten (10) years, and no action shall have been instituted within said time in any court of record having jurisdiction seeking to cancel, avoid, or invalidate such deed by reason of the alleged homestead character of the real estate at the time of such conveyance.*

*Id.* (emphasis added).

34. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 7.2 state:

Comment: There is no question that an instrument relating to the homestead is void unless subscribed by both husband and wife. The word "void" should be emphasized. *Grenard v. McMahan*, 441 P.2d 950 (Okla. 1968). It is also settled that husband and wife must execute the same instrument, separately executed separate instruments being both void, *Thomas v. James*, 84 Okla. 91, 202 P. 499 (1921). Joinder by husband and wife must

## 1. Background

The Oklahoma Constitution and Statutes<sup>35</sup> clearly prohibit the marital homestead from being conveyed without the joinder of both spouses on the same instrument. In fact, a conveyance without such joinder is void according to case law in Oklahoma.<sup>36</sup>

Since the homestead nature of a tract of land cannot be determined by any recordable means other than a lawsuit, it is necessary to have a recital of marital status and joinder of spouse accompanying every conveyance, except for a conveyance of previously severed minerals. Therefore, from a title examination standpoint, the authority granted under Title 16, Section 13 of the Oklahoma Statutes, which allows a spouse to

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be required in all cases due to the impossibility of ascertaining from the record whether the property was or was not homestead or whether the transaction is one of those specifically permitted by statute, see 16 O.S.A. §§ 4, 6, 7 and Okla. Const. art. XII § 2. It is essential that the distinction between a *valid* conveyance and a conveyance vesting *marketable title* be made when consulting this standard. See Title Examination Standard 4.1.

Another rather settled point is that one may not rely upon recitations, either in the instrument or in a separate affidavit, to the effect that the property was not in fact homestead. Such a recitation by the grantor may be strong evidence when the issue is litigated, but cannot be relied upon for the purpose of establishing marketability, *Hensley v. Fletcher*, 172 Okla. 19, 44 P.2d 63 (1935).

Although the distinction may seem tenuous, the examiner may rely upon the grantor's recitation to the effect that he is unmarried. This may have its foundation in *Payne v. Allen*, 178 Okla. 328, 62 P.2d 1227 (1936), wherein the Court in its syllabus said, "the recitation . . . is conclusive . . . in the absence of proof to the contrary." (Emphasis supplied.) Perhaps the recitation of one's marital status is a recital of that person's identity, see Title Examination Standard 5.3. Or perhaps this recitation must be relied upon due to the lack of any alternative.

Caveat: The recitation may not be relied upon if, upon "proper inquiry," the purchaser could have determined otherwise, *Keel v. Jones*, 413 P.2d 549 (Okla. 1966).

It is not clear whether or not the spouse of the individual owner/grantor must be named in the granting clause as a grantor. Until the matter is clarified, the title examiner must so require. The case of *Melson v. Sneed*, 188 Okla. 388, 109 P.2d 509 (1940), so "assumed" but specifically did not so "decide".

Definitions of the word "subscribe" may be found in various sources, but the cases seem to uphold or invalidate instruments because husband and wife did or did not "sign" or "join", without distinguishing between the two words or reconciling them with the word "subscribe". See *Atkinson v. Barr*, 428 P.2d 316 (Okla. 1967); *Grenard v. McMahan*, 441 P.2d 950 (Okla. 1968).

One may convey to his spouse without the grantee/spouse's joinder as a grantor, but prudence would dictate that the grantor/spouse identify himself in the body of the deed as the spouse of the grantee/spouse. This would appear to be a reliable recital and comparable with a recital by a grantor that he is unmarried. See *Brooks v. Butler*, 184 Okla. 414, 87 P.2d 1092 (1939) and Title Examination Standard 5.3.

History: Adopted, November 4, 1983, by House of Delegates on recommendation of the 1983 Committee on Title Examination Standards, 54 O.B.A.J. 2379-80 (1983), and approval of the Real Property Section, November 3, 1983. Section B added to the standard by recommendation in the Report of the 1986 Title Examination Standards Committee, 57 O.B.A.J. 2677-78 (1986), approval of the Real Property Section, November 20, 1986, and adoption by the House of Delegates, November 21, 1986. See "Comment" to Standard 3.3.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

35. See *supra* notes 32-33 and accompanying text.

36. *Grenard v. McMahan*, 441 P.2d 950 (Okla. 1968).

convey real estate, other than homestead, belonging to him or her without joinder of the other spouse in the conveyance is rendered useless.<sup>37</sup>

The provisions of Title 16, Sections 6 and 7 of the Oklahoma Statutes, which allow conveyance of the homestead by one of the spouses if abandoned for a year or if the non-joining spouse is incapacitated, are similarly useless in the absence of a properly recorded court order.<sup>38</sup>

However, there are three instances where the title examiner may encounter a conveyance without a joinder by both spouses: (1) the grantor is not married (i.e., single, divorced, or widowed); (2) the grantor failed to have the spouse join and the land was not homestead property when conveyed; and (3) the grantee is the "non-joining" spouse. If the grantor is not married, then obviously no spouse can join in the conveyance. While a recital in the conveyance by the grantor that the land is not "homestead" cannot be relied on for marketability purposes,<sup>39</sup> it is generally accepted that there is no alternative to relying on a recital of the grantor that he or she is unmarried. However, any person other than a subsequent innocent purchaser who fails to make reasonable inquiry is charged with notice of a non-joining spouse's claim.<sup>40</sup> If the grantor simply failed to have the other spouse join in the conveyance, a corrective instrument must be executed by both spouses and filed of record. If the grantee is the non-joining spouse, it is self-evident that it would be redundant for the non-joining spouse to join in a conveyance to himself or herself.

Many spouses may not desire to be responsible for a general or limited warranty or other representations made in a conveyance if the title to a parcel of land is owned solely by their spouse. Therefore, it might be appropriate for the language of the conveyance to limit the non-title holder's participation in a conveyance so that it is without representation or warranty but simply conveys their "homestead interest, if any."

## 2. Practicalities

If there is a defect in this execution, it should be emphasized to the client that a correction deed or ratification of the prior instrument itself

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37. OKLA. STAT. tit. 16, § 13 (1981). Section 13 states:

The husband or wife may convey, mortgage or make any contract relating to any real estate, other than the homestead, belonging to him or her, as the case may be, without being joined by the other in such conveyance, mortgage or contract.

*Id.*

38. OKLA. STAT. tit. 16, §§ 6 (1981), 7 (Supp. 1988).

39. *Hensley v. Fletcher*, 172 Okla. 19, 21, 44 P.2d 63, 65 (1935).

40. *Keel v. Jones*, 413 P.2d 549, 552 (Okla. 1966).

will be void unless the husband and wife execute the same instrument to correct the defective instrument.

Types of conveyances which are acceptable include the following: (a) a conveyance executed by husband and wife with a recitation that they are husband and wife; (b) a conveyance executed by John Doe with a recitation that John Doe is single or unmarried; (c) a conveyance executed by John Doe without recitation, followed by an affidavit properly executed and recorded reciting that the individual grantor was unmarried at the date of such conveyance; and (d) a conveyance where the grantee is the spouse of the individual grantor and that fact is recited by the grantor in the body of the instrument.

Particular situations which are not acceptable include the following: (a) a conveyance from "Mary Smith, dealing in her sole and separate property"; (b) a conveyance from "John Doe, a married man"; (c) a conveyance from "John Doe, a married man, dealing in his sole and separate property"; (d) a conveyance from "John Doe," with further recitation that the property is not the homestead of the grantor; and (e) a conveyance from "John Doe and Mary Doe," but it is not recited that they are husband and wife.

The situation that causes the most trouble for title examiners is when the grantor was aware of the possible homestead restriction and has included words on the instrument that the property "is not the homestead property" or "is the grantor's sole and separate property." The requirement that the joinder of the spouse is necessary is usually not believed. However, the comment to Standard 7.2 makes it clear that while such a recitation may be strong evidence when the issue is litigated, it cannot be relied upon for the purpose of establishing marketability.

As a practical matter, attention should be given to the caveat regarding the grantor's recitation that he is unmarried. The caveat states: the recitation may not be relied upon if, upon "proper inquiry," the purchaser could have determined otherwise.<sup>41</sup> If this caveat is cautioning the title examiner to do a "due diligence" inquiry to determine if the grantor is in fact unmarried, subparagraphs A and B of Standard 7.2 will lose their effectiveness. More likely, it means that if the abstract itself includes evidence that the grantor was in fact married on the date of conveyance, or the logical inference from other instruments was that the grantor was married, the examiner may not blindly rely upon an incorrect recitation.

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41. *Id.*



H. *Standard 8.1. Termination of Joint Tenancies and Life Estates*  
(adopted 1981; last amended 1988)

In the event of the death of a life tenant or joint tenant, the death is a fact which must have been established by one of the following methods and such showing in the abstract shall satisfy the rule on marketability.

A. NON-JUDICIAL TERMINATION OF JOINT TENANCY ESTATES.

Where a joint tenancy estate in real property was held only by a husband and wife, the death of one of the joint tenants and the termination of the joint tenancy thereby may have been evidenced, to the extent permitted by statute from time to time from and after August 16, 1974, by the filing, in the office of the county clerk in the county in which the joint tenancy property is located, of an affidavit meeting the requirements of 58 O.S.A. § 912 in effect at the date of such filing.

Prior to November 1, 1988, such affidavit must have been executed by the surviving joint tenant; on or after November 1, 1988, such affidavit must have been executed by either the surviving joint tenant or the personal representative of such surviving joint tenant.

1. Affidavit filed prior to November 1, 1983. In the case of an affidavit filed prior to November 1, 1983, only a single tract of real property, any portion of which was held as homestead by husband and wife as joint tenants, could be the subject of the affidavit and the following must have been filed with the affidavit:

a. A certified copy of the certificate of death of the joint tenant issued by the State Department of Public Health of Oklahoma or the comparable agency of the place of the death of said joint tenant; and

b. Either:

i. Prior to October 1, 1975. Certification by the County Treasurer of the county wherein the property is located that all or a portion of the tract described was claimed as homestead by the affiant and the decedent in the year of decedent's death, and describing such real property and a complete list of all real property owned by decedent; or

ii. On or after October 1, 1975. Certification by the county assessor of the county wherein the property is located, that all or part of the tract described was allowed as homestead to the affiant and the decedent in the year of decedent's death; and

c. Either:

i. Prior to October 1, 1980. In the case of an affidavit filed before October 1, 1980, a waiver or release of the state estate tax lien, unless made unnecessary by the ten (10) year statute of limitations; or

ii. On or after October 1, 1980. In the case of an affidavit filed on or after October 1, 1980, if such property was included in an estate where taxes were due under the provisions of 68 O.S.A. § 804, a waiver

or release of the estate tax lien by the Oklahoma Tax Commission as to such deceased person and property unless made unnecessary by the ten (10) year statute of limitations; provided that, if no such taxes were due, then neither was required and the affidavit must so state, pursuant to 1980 Okla. Sess. Laws, ch. 286, § 2 and 68 O.S.A. § 815(d) effective October 1, 1980.

2. Affidavit filed on or after November 1, 1983, and prior to November 1, 1984. In the case of an affidavit filed on or after November 1, 1983, and prior to November 1, 1984, any real property which was held by husband and wife as joint tenants could be the subject of the affidavit and the following must have been filed with the affidavit:

a. A certified copy of the certificate of death of the joint tenant issued by the State Department of Health of Oklahoma or the comparable agency of the place of the death of said joint tenant; and,

b. If such property was included in an estate where taxes were due under the provisions of 68 O.S.A. § 804, a waiver or release of the estate tax lien by the Oklahoma Tax Commission as to such deceased person and property unless made unnecessary by the ten (10) year statute of limitations; provided that, if such taxes were not due, the affidavit shall so state, pursuant to 1983 Okla. Sess. Laws, ch. 20 § 1, effective November 1, 1983 and 68 O.S.A. § 815(d).

3. Affidavit filed on or after November 1, 1984. In the case of an affidavit filed on or after November 1, 1984, any real property which was held by husband and wife as joint tenants could be the subject of the affidavit and the following must have been filed with the affidavit:

a. Either:

i. For an Affidavit filed prior to November 1, 1986. A certified copy of the certificate of death of the deceased joint tenant issued by the State Department of Health or the comparable agency of the place of death of said joint tenant; or

ii. For an Affidavit filed on or after November 1, 1986. A certified copy of the certificate of death of the joint tenant issued by the State Department of Public Health of Oklahoma or a court clerk as prescribed in 63 O.S.A. § 1-307 or the comparable agency of the place of the death of said joint tenant. 58 O.S.A. § 912(1) as amended, effective November 1, 1986: and

b. Either:

i. Where death occurred prior to November 1, 1984. A waiver or release by the Oklahoma Tax Commission of the estate tax lien must be filed with an affidavit which is *filed* on or after November 1, 1984, with respect to a joint tenant who died *prior* to November 1, 1984, unless such waiver or release is made unnecessary by the ten (10) year statute of limitations, 58 O.S.A. § 912 & 68 O.S.A. § 811(d), both as amended, effective November 1, 1984; or

ii. Where death occurred on or after November 1, 1984. No tax

clearance documentation is required, and no recitation regarding estate tax liability need be contained in the affidavit.

Title 58 O.S.A. § 912 is a procedural statute, and an affidavit filed pursuant thereto may be relied upon as evidence of the death of a joint tenant irrespective of the date of death if such statute is otherwise applicable, even though the death may have occurred prior to the effective date of 58 O.S.A. § 912; *provided* that the merchantability of the title of the surviving spouse may be impaired by the estate tax lien under the circumstances noted in paragraph 3. b. i. above, unless a waiver or release has been filed, if necessary.

#### B. JUDICIAL TERMINATION OF JOINT TENANCY ESTATES AND LIFE ESTATES.

In all other instances, the death is a fact which must be judicially determined by any of the following proceedings:

1. By proceeding in the district court as provided in 58 O.S.A. § 911; or
2. In connection with an action brought in any court of record, where the court makes a valid judicial finding of death of the person having the interest as a life tenant or a joint tenant; or
3. With respect only to joint tenancy estates, if the estate of the decedent was probated on other property, by showing the letters testamentary or of administration, 60 O.S.A. § 74.

A waiver or release of the estate tax lien as to such joint tenant or life tenant must be obtained with any of said proceedings, unless the district court in which the estate of the decedent was probated enters an order pursuant to 58 O.S.A. § 282.1, effective October 1, 1980, adjudicating that there is no estate tax liability, or unless made unnecessary by the ten (10) year statute of limitations or by 68 O.S.A. § 811(d), effective November 1, 1984.<sup>42</sup>

#### 1. Background

At the death of a joint tenant or life tenant, there is not a transfer of title to the survivors or remaindermen. Instead, there is an instantaneous extinguishment of any claim of interest by the deceased or their estate

42. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 8.1:

Comment: 68 O.S.A. § 811(d) was amended effective November 1, 1984. The pertinent amendment provides that no estate tax lien shall attach to any property passing to a surviving spouse, either through the estate of the deceased or by joint tenancy. The text of the statute does not clearly make it retroactive to deaths occurring prior to November 1, 1984, and should not be considered to be retroactive at this time. For this reason, it is necessary to obtain estate tax clearances where the deceased joint tenant died prior to November 1, 1984, even though 58 O.S.A. § 912 as amended effective November 1, 1984, makes no such requirement. Such statute may be utilized on or after November 1, 1984, together with the appropriate tax clearances, to terminate a joint tenancy where the deceased joint tenant died prior to November 1, 1984.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

against the subject interest. If title to the land is held in joint tenancy, or as a life estate, the fact that a joint tenant or life tenant has died can be determined by a court.<sup>43</sup>

In an effort to speed up the determination of death of a joint tenant and to reduce the related expenses, an affidavit process has been established by the state legislature. Under this system, an affidavit from the surviving joint tenant which includes a legal description of the interest is filed of record in the local land records. The affidavit process is not applicable to life tenants.

Since the inception of the system, the allowable uses of affidavits has expanded. Originally affidavits were used only when joint tenants were husband and wife and the one tract of property involved was the homestead. Currently affidavits can cover multiple tracts of homestead and non-homestead property as long as title was held by husband and wife.

The format of Standard 8.1 helps distinguish which requirements must be met over the years. By statute, the affidavit is required to have certain informational documents attached before it constitutes satisfactory evidence of a joint tenant's death. The required attachments have always included a certified copy of the death certificate. For a certain period of time, a certification of the homestead nature of the property by the local county treasurer was required. Additionally, in the past a waiver of estate tax, release of estate tax, or a self-serving recital of no estate tax being due was necessary. However, for deaths occurring on or after November 1, 1984, no estate tax can arise on joint tenancy property and, therefore, no documentation or self-serving recital concerning estate tax liability is needed.

The use of self-serving affidavits to render title marketable is a concept which made several members of the Title Examination Standards Committee of the OBA ("Standards Committee") uncomfortable. However, Standard 8.1 was approved in reliance on the express language of Title 58, Section 912 of the Oklahoma Statutes, which provides: "The filing of such documents shall constitute conclusive evidence of the death of such joint tenant and the termination of said joint tenancy. The title of such real estate shall be deemed merchantable unless otherwise defective."<sup>44</sup>

The question has arisen whether anyone other than the surviving joint tenant can sign the subject affidavit. While there is not any case law

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43. OKLA. STAT. tit. 58, § 911 (1981).

44. OKLA. STAT. tit. 58, § 912 (Supp. 1988).

in Oklahoma on point, until November 1, 1988, the Standards Committee unofficially suggested that the statute should be interpreted literally with the result that an attorney-in-fact and a personal representative of the "surviving" joint tenant could not exercise this right. However, as of November 1, 1988, authority for allowing the "surviving" joint tenant's personal representative to sign the subject affidavit is expressly granted by Title 58, Section 912 of the Oklahoma Statutes.

## 2. Practicalities

Careful attention should be given to the different procedures which apply to non-judicial termination of a joint tenancy. Although it is becoming more common, most abstracts do not include the items covered by Standard 8.1. Generally, there are two questions which occur in connection with the termination of a joint tenancy or life estate, namely: (1) Is the person dead? and (2) Is a tax release necessary? Standard 8.1 covers both of these questions. The oil and gas client will usually be willing to accept much less than is required in the title opinion. This is particularly true at the early stages of the leasing and drilling program where almost any evidence of the death of a joint tenant or life tenant will be relied upon for the payment of lease bonuses and/or the allocation of expenses for the drilling of a well.

### I. *Standard 9.2. Execution Defects (adopted 1957; last amended 1988)*

Any corporation deed, mortgage or other instrument affecting real property which has been on record in the county clerk's office for five (5) years or more and which is defective because of: (1) the failure of the proper corporate officer to sign; (2) the absence of the corporate seal; (3) the lack of an acknowledgment; or (4) any defect in the execution, acknowledgment, recording or certificate of recording, should be accepted without requirement. 16 O.S.A. § 27a.

Such instruments recorded less than five (5) years must have the name of the corporation subscribed thereto either by an Attorney in Fact, or by the President or any Vice-President, and, unless executed by an Attorney in Fact, must be attested by the Secretary, an Assistant Secretary or a Clerk of such corporation, or by the Secretary, an Assistant Secretary, Clerk, Cashier or Assistant Cashier in case of a bank, with the corporate seal attached. 16 O.S.A. §§ 91-94, 6 O.S.A. § 414(F), 6 O.S.A. § 104 and 12 U.S.C.A. § 24 (5) & (6).

The Power of Attorney authorizing an Attorney in Fact to act on behalf of a corporation must be executed and attested in the same manner as a deed or other conveyance, and must be filed in the office of the

County Clerk before the executed instrument becomes effective; provided, however, that any Power of Attorney promulgated by an agency of the Government of the United States shall be deemed sufficiently recorded for purposes of this standard if the promulgation thereof shall be published in the Federal Registry of the Government of the United States and any instrument executed pursuant to said Power of Attorney recites the specific reference to said publication. 16 O.S.A. § 20. A showing of the authority of the board of Directors to execute such instrument is not necessary. 18 O.S.A. §§ 1015, 1016(4) & 1018.

Every Oklahoma corporation has authority to acquire, encumber and sell property subject only to the limitations in Okla. Const. art. XXII, § 2 and 18 O.S.A. § 1020. See 18 O.S.A. § 1016(4).

Any corporation, foreign or domestic, which has conveyed real property by instrument signed, acknowledged, attested and sealed as required in 16 O.S.A. §§ 93-95, and which has received the consideration therefor, cannot assert as a defense its lack of authority to sell said property. 18 O.S.A. § 1018, 16 O.S.A. § 92 and 16 O.S.A. § 11.

An instrument executed by a corporation with its seal attached prior to November 1, 1986, is *prima facie* evidence that such instrument was the act of the corporation, that it was executed and signed by persons who were its officers or agents acting by authority of the board of directors and that the seal is the corporate seal and was affixed by authorized persons. 1947 Okla. Sess. Laws, p. 185, § 242. A corporate instrument executed, attested, sealed and acknowledged in proper form on or after November 1, 1986, should be presumed, in the absence of actual or constructive knowledge to the contrary, to have been duly authorized, signed by authorized officers and affixed with the genuine seal by proper authority, 18 O.S.A. § 1018, R. & C. Patton, Titles §§ 403-404 (2d ed. 1957) and Flick, Abstract and Title Practice § 1292 (2nd ed. 1958).

Such evidence becomes conclusive after five (5) years, 16 O.S.A. § 27a.

A dissolved domestic corporation continues to exist for three (3) years (or a longer period if directed by a district court) for the purpose of winding up its affairs, 18 O.S.A. § 1099.<sup>45</sup>

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45. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 9.2 state:

Comment: It is immaterial from an examiner's standpoint that the corporation acquired real estate by an *ultra vires* act; R. & C. Patton, Titles § 401 (2d ed. 1957).

Comment: The Legislature's repeal in 1986 of 1947 Okla. Sess. Laws, p. 186, § 242 as a part of the complete revision of Title 18 does not appear to have been intended to require thereafter proof of record of corporate and officer authority, etc.

Comment: See Title Examination Standard 6.5 as to documents executed outside the State of Oklahoma.

History: Adopted as 33, December 1959, 30 O.B.A.J. 2091, 2092 (1957). Statutory citation in first group of "Authorities" changed to "6 O.S.A. § 414" from "6 O.S.A. § 108(f)" to reflect statutory amendment, December 3, 1966, Resolution No. 4, 1966 Real Property Committee, 37 O.B.A.J. 2382, 2383 (1966) and adopted by House of Delegates, *id.* at 2538, 2539. Substantial changes in second paragraph of standard recommended by

## 1. Background

If an instrument relating to real property is executed on behalf of a corporation, there are certain formalities which must be observed in order for the conveyance to be valid and recordable. By statute, the instrument must be signed by an attorney-in-fact or by a president or vice-president.<sup>46</sup> Although the practice varies around the state, it is generally agreed that a person holding the title of "Senior Vice-President" or "Executive Vice-President" is the equivalent of a president or vice-president. It is not universally agreed that an "Assistant Vice-President" is the equivalent of a president or vice-president. However, it should be noted that the language of Section 93 of Title 16 of the Oklahoma Statutes was changed from "a vice president" to "any vice president," effective June 24, 1987.<sup>47</sup>

Unless the instrument is executed by an attorney-in-fact, the statute requires an attestation by a secretary, assistant secretary or clerk of the corporation, or in the case of a bank, by a secretary, assistant secretary, clerk, cashier, or assistant cashier. The corporate seal must also be attached.<sup>48</sup>

Some practicing attorneys think that a conveyance by a corporation must be acknowledged for it to be valid between the parties and to be recordable. Since, according to statute, documents cannot be accepted by the county clerk for filing without an acknowledgment, this omission is not likely to occur.<sup>49</sup>

## 2. Practicalities

This is another Standard which allows the title to improve with the passage of time. Certain execution defects for instruments which have

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1983 Title Examination Standards Committee, 54 O.B.A.J. 2379, 2381-82 (1983), approved by Real Property Section, November 3, 1983, and adopted by House of Delegates, November 4, 1983. The final Comment was added by the Real Property Section before its approval.

In 1986, the Oklahoma Legislature revised Title 18. As a result, the 1987 Title Standards Committee recommended changing many of the statutory citations included in this standard. It was also recommended that the fifth (now sixth) paragraph of the body of the standard be amended to reflect the change in significance of the subject matter of that paragraph prior to and after the 1986 amendments, 58 O.B.A.J. 3839, 2842 (1987). These recommendations were approved by the Real Property Section, November 12, 1987, and adopted by the House of Delegates, November 13, 1987.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

46. OKLA. STAT. tit. 16 § 93 (Supp. 1988).

47. *Id.* See generally A. DURBIN & C. BIXLER, OKLAHOMA REAL ESTATE FORMS PRACTICE (1987).

48. OKLA. STAT. tit. 16, § 94 (1981).

49. See *supra* notes 25-27 and accompanying text.

been on record for more than five years can be accepted without requirement. These defects include the failure of the proper corporate officer to sign, the absence of the corporate seal, the lack of acknowledgment or any defect in the execution, acknowledgment, recording, or certificate of recording. If the instrument has been on record for less than five years, it must adhere strictly to the requirements for execution, attestation, and acknowledgment. Instruments which are defective should be corrected and properly recorded.

A special problem occurs with the execution by an attorney-in-fact. First of all, a power of attorney must be executed and attested in the same manner as any other deed or conveyance and filed in the office of the county clerk before the executed instrument becomes effective. There is not a five-year presumption of validity for an instrument executed by an attorney-in-fact where the power of attorney is not recorded in the county records. There is a minority view that not only must the power of attorney be recorded before the executed instrument becomes effective, but it also must be recorded before the executed instrument is recorded. The minority view stands for the proposition that there is no relation back, and the only proper cure is to have the instrument itself recorded again after the power of attorney is recorded. Finally, as previously mentioned, some attorneys believe that a corporate conveyance must be acknowledged for it to be valid even between the parties. The impact of this will affect operating agreements which typically are not executed and acknowledged in the same manner as a corporate deed.

J. *Standard 9.4. Recital of Identity or Successorship (adopted 1980; last amended 1987)*

Absent the recording of the certificate required by 18 O.S.A. § 1144, a recital of identity, contained in a title document of record properly executed, attested and sealed by a corporation whose identity is recited or which recites that it is the successor by merger, corporate change of name, or was formerly known by another name, may be relied upon unless there is some reason disclosed of record to doubt the truth of the recital.<sup>50</sup>

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50. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 9.4 state: Authority: 18 O.S.A. § 1144 (effective November 1, 1987) & § 1088.

Comment: While there seems to be no exact precedent for this standard, it is justified as a parallel to Standard 5.3 and as an extension of Standard 9.1.

History: The standard was recommended by the 1980 Title Examination Standards Committee, 51 O.B.A.J. 2726, 2727 (1980). It was approved by the Real Property Section, December 3, 1980, and adopted by the House of Delegates, December 5, 1980. The Authority was added by the Editor of the Title Examination Standards at the suggestion of



## 1. Background

The Oklahoma General Corporation Act, Section 1088 of Title 18, makes it clear that in the event of merger or consolidation of corporations, all rights and obligations of each corporation shall be vested in the corporation resulting from the merger or consolidation.<sup>51</sup> The language of Section 1088 is substantially the same as its predecessor, Section 1.167, which was repealed upon enactment of the General Corporation Act.<sup>52</sup>

There is no express statutory authority allowing a title examiner to rely on a self-serving recital of successorship in a conveyance. It should be noted that certificates of merger from secretaries of state have often been encountered in abstracts and relied upon by examiners in prior years. However, there is apparently no legal authority allowing an examiner to rely on this certificate giving constructive notice to third parties. However, some authority was granted for the filing of and reliance on certain merger documents, in particular: (1) the affidavit statute was passed in 1985 allowing the filing of affidavits covering the "history of the organization of corporations," and (2) a recent amendment was made, effective November 1, 1987, to the General Corporation Act whereby a certificate of merger or consolidation must be filed in the local land records where the surviving or resulting corporation has title to real property.<sup>53</sup>

## 2. Practicalities

Standard 9.4 is helpful to the examiner in allowing reliance upon the recital of identity of a corporate successor by merger or corporate change of name in dealing with corporate conveyances. The only warning is that it may be relied upon unless there is some reason disclosed of record to

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Richard Cleverdon, Tulsa, the chairman of the 1980 Title Examination Standards Committee.

As a result of the extensive revision of Title 18 effective November 1, 1986, the report of the 1987 Title Standards Committee recommended the amendment of this standard, 58 O.B.A.J. 2839, 2842-43 (1987). The recommendation was approved by the Real Property Section, November 12, 1987, and adopted by the House of Delegates, November 13, 1987.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

51. OKLA. STAT. tit. 18, § 1088 (Supp. 1988). Section 1088 states that, in the event of a merger or consolidation of corporations:

[A]ll and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts . . . belonging to each of such corporations shall be vested in the corporation surviving or resulting from such merger or consolidation; . . . all rights of creditors and all liens upon any property of any said constituent corporations shall be preserved unimpaired. . . .

*Id.*

52. OKLA. STAT. tit. 18, §§ 1001-1144 (Supp. 1988).

53. OKLA. STAT. tit. 18, § 1144 (Supp. 1988).

doubt the truth of the recital. Conveyances which make a recital of identity or successorship can make the opinion less cluttered by a long list of presumptions of corporate identities.

K. *Standard 10.1. Conveyances To and By Partners (adopted 1946; last amended 1966)*

Under the Uniform Partnership Act, enacted by the 1955 Legislature, which became effective on June 3, 1955, a partnership constitutes a separate entity authorized to take, hold and convey real estate, 54 O.S.A. §§ 208-210. H.B. 698, enacted by the 1965 Legislature, amending Sections 208(3) and 210(1), validates conveyances to and from partnerships executed prior to June 3, 1955, unless such conveyances are invalid for reasons other than lack of legal capacity or because the partnership was not at the time a legal entity.

Such conveyances to a partnership using the partnership firm or trade name as grantee of real property or any interest therein, and conveyances by a partnership in the partnership firm or trade name as grantor of real property or any interest therein held in the partnership firm or trade name, should not be rejected or questioned on the basis that a partnership was not a legal entity having capacity to take or convey title to real property or an interest therein.<sup>54</sup>

1. Background

The legislature has the authority to define whether a fictional "person," such as a corporation, can be treated as a real person. Until June 3, 1955, a partnership was not a separate entity but a group of individuals holding title to real property as individual tenants in common.<sup>55</sup> After June 3, 1955, a partnership can and must hold title in the name of the partnership itself. Absent express restrictions filed of record, any partner can be relied on to validly convey or encumber the title as the agent of all the other partners.<sup>56</sup>

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54. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 10.1 state: Authority: 54 O.S.A. §§ 208-210.

History: Adopted as 17, November 16, 1946, 17 O.B.A.J. 1729 (1946), printed, *id.* at 1753; became 19 on renumbering in 1948, 19 O.B.A.J. 223, 226 (1948); amended December 8, 1955, 27 O.B.A.J. 176 (1956). Substantially amended December 2, 1965. Resolution No. 8, 1965 Real Property Committee, 36 O.B.A.J. 2094 & 2182 (1965), and Exhibit E, *id.* at 2098 & 2186. Approved by Real Property Section and adopted by House of Delegates, 37 O.B.A.J. 437, 438 (1966).

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

55. *Sanguin v. Wallace*, 234 P.2d 394, 397 (Okla. 1951) (citing OKLA. STAT. tit. 54, §§ 81, 83 (1941)).

56. OKLA. STAT. tit. 54, §§ 208-10 (1981).

## 2. Practicalities

Standard 10.1 validates any conveyance to a partnership both before and after the effective date of the statute.

### L. *Standard 10.2. Identity of Partners of Fictitious Name Partnership (adopted 1946; last amended 1986)*

Identity of partners of a fictitious name partnership may be established by reference to the latest certificate of fictitious name partnership filed in the office of the county clerk in the county in which the land is located as of the date of conveyance in the partnership name. If the certificate of fictitious name has not been filed in the county where the land is located, a certified copy of the certificate of fictitious name partnership filed in the office of the county clerk of the county of the principal place of business of the partnership, or a copy of the current articles of partnership, should be examined.<sup>57</sup>

#### 1. Background

Since the names of the members of a fictitious name partnership are not disclosed by the name itself, the title examiner is unable to determine whether the person signing and acknowledging a conveyance of partnership real property is a member of the partnership. The acknowledgment for an individual as an individual must be based on "personal knowledge" or "satisfactory evidence" that "the person appearing before the officer and making the acknowledgment is the person whose true signature is on the instrument."<sup>58</sup> However, it is inadequate to know that "Sally Smith" is really "Sally Smith," if the real question is whether "Sally Smith" is a current general partner of "XYZ, a partnership."

Section 81 of Title 54 of the Oklahoma Statutes requires that every

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57. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 10.2 state:

Authority: 54 O.S.A. §§ 81-86.

History: Adopted as 17, November 16, 1946, 17 O.B.A.J. 1729 (1946), printed, *id.* at 1753; became 19 on renumbering in 1948, 19 O.B.A.J. 223, 226 (1948); amended December 8, 1955, 27 O.B.A.J. 176 (1956). Substantially amended December 2, 1965. Resolution No. 8, 1965 Real Property Committee, 36 O.B.A.J. 2094 & 2182 (1965), and Exhibit E, *id.* at 2098 & 2186. Approved by Real Property Section and adopted by House of Delegates, 37 O.B.A.J. 437, 438 (1966). Further amendments proposed by the 1985 Report of the Title Examination Standards Committee, 56 O.B.J. 2537 (1985), proposal amended by Real Property Section, November 14, 1985, and adopted by House of Delegates, as amended by the Section, November 15, 1985, 57 O.B.J. 5 (1986).

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

58. OKLA. STAT. tit. 49, § 113(A) (Supp. 1988).

fictitious name partnership file a certificate giving the full names and addresses of all members of the partnership together with proof of publication in the county clerk's office of its principal place of business.<sup>59</sup> Any fictitious name partnership failing to make such filing and publication cannot maintain any lawsuit concerning an account or contract entered into in the name of the partnership until such filing and publication is completed. If a fictitious name partnership holds title to real property outside the county where its principal place of business is located, and no certificate has been filed in the county where the property is located, the title examiner will need to get a copy of such certificate from the county clerk where the business is located. Alternatively, the title examiner could obtain a copy of the then-current articles of partnership from the partnership itself, identifying the names of the general partners.

## 2. Practicalities

Standard 10.2 is useful in advising the client where to find the identity of the partners of a fictitious name partnership when such identity is important to the marketability of title.

### M. *Standard 12.5. Money Judgments Filed Against an Oil and Gas Leasehold Interest (adopted 1986; no amendments)*

The interest vested in the owner of an oil and gas leasehold estate is not real estate within the meaning of 12 O.S.A. § 706; therefore, a money judgment filed in the office of the county clerk of the county in which the oil and gas leasehold is located does not create a lien on said oil and gas leasehold.<sup>60</sup>

## 1. Background

In *First National Bank v. Dunlap*,<sup>61</sup> the Oklahoma Supreme Court

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59. OKLA. STAT. tit. 54, § 81 (Supp. 1988). Section 81 provides:

[E]very partnership transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file for recording with the county clerk of the county or subdivision in which its principal place of business is stated, a certificate, stating the names in full of all the members of such partnership, and their places of residence, together with proof of publication . . . .

*Id.*

60. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 12.5 state:

Authority: *First National Bank of Healdton v. Dunlap*, 122 Okla. 288 (1927); *Hinds v. Phillips Petroleum Company*, 591 P.2d 697 (Okla. 1979).

History: This standard was recommended by the 1986 Report of the Title Examination Standards Committee, 57 O.B.J. 2677, 2682 (1986). It was approved by the Real Property Section, November 20, 1986, and adopted by the House of Delegates, November 21, 1986.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

61. 122 Okla. 288, 254 P. 729 (1927).

interpreted the term "real estate," used in what is now Title 12, Section 706 of the Oklahoma Statutes,<sup>62</sup> to exclude oil and gas leases. The court held that although an oil and gas lease is an interest or estate in real estate, it is not real estate itself and therefore not included in the judgment creditor's lien under the statute.<sup>63</sup> In 1979, the Oklahoma Supreme Court reaffirmed this position in *Hinds v. Phillips Petroleum Co.*<sup>64</sup> The court summarized *First National Bank v. Dunlap* by stating, "A judgment lien will not attach to an oil and gas lease."<sup>65</sup>

## 2. Practicalities

Standard 12.5, adopted in 1986, brought the cases cited above to the attention of title examiners. It is now well settled that a money judgment filed with the county clerk does not create a lien on an oil and gas leasehold. Therefore, it is not necessary to use the same approach against a leasehold estate as would be used against a surface or mineral interest owner in the property. Until an actual execution is made on the leasehold estate, the estate could be sold to an owner with knowledge of the money judgment prior to the institution of an execution for sale. This is particularly useful in the Purchase Opinion, where a money judgment is filed against the seller's name.

### N. *Standard 13.8. Unenforceable Mortgages and Marketable Title (adopted 1980; last amended 1986)*

A. No mortgage, contract for deed or deed of trust barred under the provisions of 46 O.S.A. § 301 shall constitute a defect in determining marketable record title.

B. A mortgage, contract for deed or deed of trust showing on its

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62. OKLA. STAT. tit. 12, § 706 (Supp. 1987).

63. *First National Bank v. Dunlap*, 122 Okla. 288, 290, 254 P. 729, 732 (1927). The court stated:

But the statute [§ 690 C.O.S. 1921] provides that the judgment creditor shall have a lien upon "real estate" owned by the judgment debtor in the county. The plaintiff in error would have this court go to the extent of holding that all and every kind of estate recognized in the law, which one, individual or corporate, may have in real property is itself real estate within the meaning of said section. While unquestionably such an oil and gas lease creates an interest or an estate in the realty, that interest or estate is not "real estate" in the sense in which the said section 690, supra, uses this terminology. It would unquestionably be within the power of the legislative body to make a judgment a lien upon every conceivable estate recognized by the law as capable of being owned by natural as well as corporate persons. But the statute relied upon as fixing the lien upon the interest of the defendant Dunlap in the realty created by the oil and gas lease does not go to that extent.

*Id.*

64. 591 P.2d 697 (Okla. 1979).

65. *Id.* at 699 n.5.

face that it secures a debt payable on demand shall be deemed to be due on the date of its execution. Thus, the date of execution shall be deemed to be "the date of the last maturing obligation" for the purpose of 46 O.S.A. § 301, unless an extension has been filed of record pursuant to such statute.<sup>66</sup>

### 1. Background

In order to avoid costly legal actions to extinguish ancient unreleased mortgages, the legislature enacted Title 46, Section 301 of the Oklahoma Statutes.<sup>67</sup> Absent contrary notice as provided in the statute, Section 301 allows title examiners to ignore recorded mortgages with expressed maturity dates on their faces if they are over ten years past such maturity date. Recorded mortgages with no expressed maturity date can be ignored if they have been recorded for over thirty years at the time of examination.

A question by a title examiner about the extinguishment date for mortgages relating to "demand notes" under Title 46, Section 301 of the Oklahoma Statutes<sup>68</sup> led to a discussion of what date is "the date of the last maturing obligation" under that statute. Title 12A, Section 3-122(1)(b) of the Oklahoma Statutes provides that in the case of a demand instrument, a cause of action against a maker or acceptor accrues upon its date, or if no date is stated, on the date issued.<sup>69</sup> Therefore, Standard 13.8 was revised to show that a mortgage relating to a demand note is extinguished ten years after its execution date.

### 2. Practicalities

Standard 13.8 is probably more practically useful than any other Standard. A base abstract will normally include a patent, a few deeds, some oil and gas leases, easements, and mortgages and releases with many potential defects in relation thereto. According to Title 46, Section

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66. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 13.8 state: Authority: 12A O.S.A. § 3-122(2).

History: The standard was recommended by the 1980 Title Examination Standards Committee, 51 O.B.J. 2726, 2727 (1980). It was approved by the Real Property Section, December 3, 1980, and adopted by the House of Delegates, December 5, 1980. The second paragraph of the standard was recommended by the Report of the 1986 Title Examination Standards Committee, 57 O.B.J. 2677, 2682 (1986). It was approved by the Real Property Section, November 20, 1986, and adopted by the House of Delegates, November 21, 1986. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

67. OKLA. STAT. tit. 46, § 301 (Supp. 1988).

68. *Id.*

69. OKLA. STAT. tit. 12A, § 3-122(1)(b) (1981).

301 of the Oklahoma Statutes,<sup>70</sup> many of these mortgages will be unenforceable.

However, one cautionary statement is necessary. Old mortgages are usually shown only in abstracted versions without the due date, although it is not stated that the due date is not shown on the actual instrument. For example, if you examine an abstracted version of a 1955 mortgage and no due date is shown by the abstracter, the examiner cannot be sure that the instrument itself actually contained no due date unless the abstracter specifically states such in the abstracted version. If the 1955 mortgage does not contain a due date, the mortgage may be ignored in 1985. If the due date of 1985 appears on the instrument but is not shown by the abstracter, the mortgage cannot be ignored until 1995 unless a copy of the mortgage is acquired and the due date or absence thereof has been determined.

O. *Standards 18.1 - 18.6. Simplification of Land Titles Act (adopted 1962; last amended 1983)*

18.1. REMEDIAL EFFECT

The Simplification of Land Titles Act is remedial in character and should be relied upon with respect to such claims or imperfections of title as fall within its scope.<sup>71</sup>

70. OKLA. STAT. tit. 46, § 301 (Supp. 1988).

71. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 18.1 state: Authority: *Lane v. Travelers Ins. Co.*, 230 Iowa 973, 299 N.W. 553 (1941); *Wichelman v. Messner*, 250 Minn. 88, 83 N.W.2d 800, 71 A.L.R.2d 816 (1957); L. Simes & C. Taylor, *The Improvement of Conveyancing by Legislation* 271 (1960); P. Basye, *Clearing Land Titles* § 374 (1953), & § 182 (1962 Pock. Part); R. & C. Patton, *Titles* § 563 (2d ed. 1957); Ashabranner, *An Introduction to Oklahoma's First Comprehensive Land Title Simplification Law*, 14 Okla. L. Rev. 516 (1961).

Comment: 1. The Simplification of Land Titles Act is similar to a recording statute. It is similar to the marketable title acts adopted in Michigan, Minnesota, Iowa and other states, which have been held constitutional on the grounds that the legislature, which has the power to pass recording statutes originally, can amend or alter those statutes and require recording or the filing of a notice of claim to give notice of existing interests, and can extinguish claims of those who fail to re-record, *Lane v. Travelers Ins. Co.*, 230 Iowa 973, 299 N.W. 553 (1941); *Wichelman v. Messner*, 250 Minn. 88, 83 N.W.2d 800, 71 A.L.R.2d 816 (1957); L. Simes & C. Taylor, *The Improvement of Conveyancing by Legislation*, 271 (1960); P. Basye, *Clearing Land Titles*, § 374 (1953), & § 186 (2d ed. 1970); R. & C. Patton, *Titles* § 563 (2d ed. 1957). In many situations the Simplification Act operates against defects made in the past by parties trying to complete the transaction correctly but who failed to do so in every detail. It will give effect to the intentions of the parties which were bona fide. Usually a full consideration was paid. To this extent the results will be those of a curative statute. A similar curative statute in Oklahoma, 16 O.S.A. § 4, has been held constitutional, *Saak v. Hicks*, 321 P.2d 425 (Okla. 1958). In a few situations the Act will operate against defects considered jurisdictional. In the past, a statute of limitations, with its requirements of adverse possession, followed by a suit to quiet title was considered necessary to eliminate jurisdictional defects. The Simplification Act provides a new and additional method by invalidating the claim and creating marketable title unless claimant

## 18.2. PROTECTION AFFORDED BY THE ACT

The Simplification of Land Titles Act protects any purchaser for value, with or without actual or constructive notice, from one claiming under a conveyance or decree recorded, or entered for ten (10) years or more in the county as against adverse claims arising out of:

A. (1) Conveyances of incompetent persons unless the county or court records reflect a determination of incompetency or the appointment of a guardian, (2) corporate conveyances to an officer without authority, (3) conveyances executed under recorded power of attorney which has terminated for reasons not shown in the county records, (4) nondelivery of a conveyance;

B. Guardian's, executor's, or administrator's conveyances approved or confirmed by the court as against (1) named wards, (2) the State of Oklahoma, or any other person claiming under the estate of a named decedent, the heirs, devisees, representatives, successors, assigns or creditors;

C. Decrees of distribution or partition of a decedent's estate as against the estates of decedents, the heirs, devisees, successors, assigns or creditors. For decrees of distribution or partition which cover land in a county other than the county in which such decrees are entered and recorded, 16 O.S.A. § 62(c)(2) does not require that they also be recorded in the county in which the land is located;

D. (1) Sheriff's or marshal's deeds executed pursuant to an order of court having jurisdiction over the land, (2) final judgments of courts determining and adjudicating ownership of land or partitioning same, (3) receiver's conveyances executed pursuant to an order of any court having jurisdiction, (4) trustee's conveyances referring to a trust agreement or named beneficiaries or indicating a trust where the agreement is not of record, (5) certificate tax deeds or resale tax deeds executed by the county treasurer, as against any person or the heirs, devisees, personal representatives, successors or assigns named as a defendant in the judgment preceding the sheriff's or marshal's deed, or

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files notice of claim within the time provided in the act (or is in actual possession of the land). Since the Act protects the rights of claimants in actual possession as against a purchaser, the reasoning in *Williams v. Bailey* 268 P.2d 868 (Okla. 1954), reading a requirement for adverse possession into the tax recording statute, is not applicable.

2. Where a seller does not have a marketable title due to defects for which the Act affords protection to a "purchaser for value," and no notice has been filed as required by the Act, the attorney for the purchaser may advise the purchaser that a purchase for value will afford protection of the Act and that such a purchaser will acquire a valid and marketable title, provided no one is in possession claiming adversely to the seller.

History: The 1962 Real Property Committee Report recommended the adoption of this standard, see Recommendation (2), 33 O.B.A.J. 2157 (1962) and Exhibit B, *id.* at 2162. Approved by Real Property Section and House of Delegates, *id.* at 2469, November 29, 1962.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).



determining and adjudicating ownership of or partitioning land, or settlor, trustee or beneficiary of a trust, and owners or claimants of land subject to tax deeds, unless claimant is in possession of the land, either personally or by a tenant, or files a notice of claim prior to such purchase, or within "one year from October 27, 1961, the effective date of 16 O.S.A. §§ 61-66 or from October 1, 1973, the effective date of 16 O.S.A. § 62 as amended in 1973." The State of Oklahoma and its political subdivisions or a public service corporation or transmission company with facilities installed in, over, across or under the land are deemed to be in possession.<sup>72</sup>

### 18.3. PURCHASER FOR VALUE

"Purchaser for value" within the meaning of the Simplification of Land Titles Act, refers to one who has paid value in money or money's worth. It does not refer to a gift or transfer involving a nominal consideration.<sup>73</sup>

### 18.4. CONVEYANCE OF RECORD

"Conveyance of record" within the meaning of the Simplification of Land Titles Act includes a recorded warranty deed, deed, quitclaim deed, mineral deed, mortgage, lease, oil and gas lease, contract of sale, easement, or right-of-way deed or agreement.<sup>74</sup>

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72. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 18.2 state: Authority: 16 O.S.A. §§ 62 & 66.

History: The 1962 Real Property Committee Report recommended the adoption of this standard, see Recommendation (2), 33 O.B.A.J. 2157 (1962) and Exhibit B, *id.* at 2163. Approved by Real Property Section and House of Delegates, *id.* at 2469, November 29, 1962.

The 1980 Title Examination Standards Committee recommended changes in the standard to reflect the broadening effect made in legislative changes of 1973 and 16 O.S.A. § 62, 51 O.B.J. 2726, 2728. The Real Property Section, on December 3, 1980, made some changes in style but also deleted the word "county" before "court records" in "A.(1)" and added the last sentence in "C." As amended, the standard was approved by the Real Property Section, December 3, 1980, and adopted by the House of Delegates, December 5, 1980.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

73. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 18.3 state:

Authority: *Noe v. Smith*, 67 Okla. 211, 169 P. 1108, L.R.A. 1918C, 435 (1917); *Exchange Bank of Perry v. Nichols*, 196 Okla. 283, 164 P.2d 867 (1945).

Comment: The title acquired by a "purchaser for value" within the meaning of the Simplification of Land Titles Act will descend or may be devised or transferred without involving "value" and without loss of the benefits of the act.

History: The 1962 Real Property Committee Report recommended the adoption of this standard, see Recommendation (2), 33 O.B.A.J. 2157 (1962) and Exhibit B, *id.* at 2164. Approved by Real Property Section and House of Delegates, *id.* at 2469, November 29, 1962.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

74. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 18.4 state:

Authority: 16 O.S.A. § 62(a).

Comment: The definition of a conveyance of record should not be less than the definition of an interest in real estate in 16 O.S.A. § 62(a).

History: The 1962 Real Property Committee Report recommended the adoption of this

### 18.5. EFFECTIVE DATE OF THE ACT

The Simplification of Land Titles Act became effective October 27, 1961. Notices under the Act required to be filed within one (1) year from the effective date of the act must be filed for record in the county clerk's office in the county or counties where the land is situated on or before October 26, 1962.<sup>75</sup>

### 18.6. ABSTRACTING

Abstracting relating to court proceedings under the Simplification of Land Titles Act, 16 O.S.A. § 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, executors or administrators, 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.A. § 912(3) or 68 O.S.A. § 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.

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 on partition, and any court order directing the delivery thereof.

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 18."<sup>76</sup>

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standard, see Recommendation (2), 33 O.B.A.J. 2157 (1962) and Exhibit B, *id.* at 2162. Approved by Real Property Section and House of Delegates, *id.* at 2469, November 29, 1962.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

75. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 18.5 state:

Authority: 16 O.S.A. §§ 62 & 63.

Comment: An adverse claimant may avoid the effects of the act by being in possession of the land, either personally or by tenant, or by filing the notice of claim required in Section 63, within ten years of the recording of the conveyance, or entry (or recording) of the decree under which the claim of valid and marketable title is to be made, or within one year of the effective date of the Act, whichever date occurs last. The filing of the notice of claim takes the interest or claim out from under the operation of the Act.

History: The 1962 Real Property Committee Report recommended the adoption of this standard, see Recommendation (2), 33 O.B.A.J. 2157 (1962) and Exhibit B, *id.* at 2164. Approved by Real Property Section and House of Delegates, *id.* at 2469, November 29, 1962.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

76. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 18.6 state:

## 1. Background

The Simplification of Land Titles Act allows the title examiner to ignore certain record title defects if they have been of record at least ten years. The Act protects any purchaser for value (not a person who acquired the land as a gift or for a nominal consideration) even with actual or constructive notice of any defect listed in Standard 18.2 above.

The applicability of the Act to severed mineral interests was discussed but not decided by the Oklahoma Court of Appeals in *Clark v. Powell*.<sup>77</sup> *Clark* involved the application of the Act to validating a 1937 probate decree and a 1938 quiet title suit which covered both the surface and all minerals. A previous deed leading to the probate decree reserved a one-third mineral interest in one of three children. In its modification of the decision, the court of appeals held that although the judgments relied upon would ordinarily qualify for protection under the Act, the Act did not apply to the facts of the case.<sup>78</sup>

The facts which disqualified the judgments from protection were that the one-third mineral interest was a severed mineral interest and thereby free of the operation of the Act, the probate court had no jurisdiction over interests not held by the deceased at the time of death, and the quiet title suit court had no jurisdiction over the owner of the one-

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Authority: 16 O.S.A. § 62(a), (c) & (d).

Comments: The foregoing will disclose all showing needed under the applicable statutory provisions and the standards in this chapter.

Caveat: If the final decree is incomplete, uncertain, vague or ambiguous, the same is subject to judicial interpretation, notwithstanding the rule that a decree of distribution made by the court having jurisdiction of the settlement of a testator's estate, entered after due notice and hearing, is conclusive, in the absence of fraud, mistake or collusion, as to the rights of parties interested in the estate to all portions of the estate thereby ordered, and capable of being then distributed under, the Will, unless reversed or modified on appeal and that such decree is not subject to collateral attack. In case the final decree is incomplete, uncertain, vague or ambiguous, the title examiner is justified in requiring a full transcript of such proceedings.

History: Adopted, December, 1964. Printed as Proposal No. 5 of the 1964 Real Property Committee, 35 O.B.A.J. 2045 (1964) and see Exhibit E, *id.* at 2050-51. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). As a result of a proposal by the 1970 Real Property Committee's Supplemental Report, printed as Exhibit C, 41 O.B.A.J. 2676-77 (1970), approved by the Real Property Section on December 3, 1970, and adopted by the House of Delegates on December 4, 1970, 42 O.B.A.J. 706 (1971), a short paragraph was dropped from "Comments". Its sense was carried over and expanded into the "Caveat" which was added by the same action. The 1983 Report of the Title Examination Standards Committee recommended substantial change in "B." of the standard, 54 O.B.J. 2379, 2383 (1983). The recommendation was approved by the Real Property Section, November 3, 1983, and adopted by the House of Delegates November 4, 1983.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

77. *Clark v. Powell*, 52 OKLA. B.J. 2584 (Okla. Ct. App. 1981), modified 53 OKLA. B.J. 738 (Okla. Ct. App. 1982), withdrawn 53 OKLA. B.J. 879 (Okla. Ct. App. 1982).

78. *Clark*, 53 OKLA. B.J. at 739.

third severed mineral interest because it was a default judgment and no allegations of adverse possession of the minerals were made.

The court of appeals also said, in regard to the parties attempting to rely on the Act, "None are 'purchasers for value' within the meaning of the Act."<sup>79</sup> The opinion was allowed to stand but was subsequently withdrawn from publication. This suggests that the Oklahoma Supreme Court agreed with the result but not necessarily the reasoning. Therefore, one can conclude that before this Act can apply to surface or minerals, severed or not, there must be an intervening "purchaser for value."

## 2. Practicalities

The most practical use of this Standard involves final decrees or decrees of distribution that have been recorded for more than ten years. If a final decree is recorded for less than ten years, full probate or administration proceedings should be examined before relying on the final decree. At the anniversary of the tenth year of recordation, Standard 18 allows the examiner to rely on the validity of the final decree assuming other aspects of the statutes are met.

One ironic implication is that the oil and gas lessee may be protected although the lessor is not protected if that lessor is not a purchaser for value. In this case, a lessee who asserts the marketability of the lease may then suspend the payment of proceeds to the lessor of that lease.

Standard 18 is also useful in examining other court decrees that have been recorded more than ten years. The title examiner must be careful that the adverse claimant is a named defendant to the court action and that there is an intervening purchaser for value.

### P. *Standards 19.1 - 19.13. Marketable Record Title Act (adopted 1964; last amended 1988)*

#### 19.1. REMEDIAL EFFECT

The Marketable Record Title Act is remedial in character and should be relied upon as a cure or remedy for such imperfections of title as fall within its scope.<sup>80</sup>

79. *Id.* at 740.

80. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.1 state: Authority: Marketable Record Title Act, 16 O.S.A. §§ 71-80; L. Simes & C. Taylor, *Model Title Standards*, Standard 4.1 at 24 (1960); P. Basye, *Clearing Land Titles* §§ 186 & 374 (2d ed. 1970); R. & C. Patton, *Titles* § 563 (2d ed. 1957); L. Simes & C. Taylor, *The Improvement of Conveyancing by Legislation* 253 (1960); L. Simes, *The Improvement of Conveyancing: Recent Developments*, 34 O.B.A.J. 2357 (1963), *l.c.p.* 2363; "Comment,"

## 19.2. REQUISITES OF MARKETABLE RECORD TITLE

A Marketable Record Title under the Marketable Record Title Act exists only where (1) A person has an unbroken chain of title of record extending back at least thirty (30) years; and (2) Nothing appears of record purporting to divest such person of title.<sup>81</sup>

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Oklahoma Title Standard, 18.1. The following cases sustain the constitutionality of marketable title acts: *Lane v. Travelers Ins. Co.*, 230 Iowa 973, 299 N.W. 553 (1941); *Wichelman v. Messner*, 250 Minn. 88, 83 N.W.2d 800 (1957); Annot., "Marketable Title Statutes", 71 A.L.R.2d 846 (1960); Opinion No. 67-444 of the Attorney General of Oklahoma, dated March 21, 1968, 39 O.B.A.J. 593-595 (1968).

Similar standards: Ill., 22; Iowa, 10.1; Mich., 1.1; Minn. 61; Nebr., 42; N.D. 1.13; S.D. 34; Wis., 4.

Caveat: Whether or not the provisions of the Marketable Record Title Act may be relied upon to cure or remedy such imperfections of title as fall within its scope, which imperfections occurred or arose during the time title to the land was in a tribe of Indians or held in trust by the United States for a tribe of Indians or a member or members thereof, or was restricted against alienation by treaty or by act of Congress, is a matter for determination by Congress or by a federal court in a case to which the United States is properly made a party. Until such determination, the Marketable Record Title Act should not be relied upon to cure or remedy such imperfections. See: Section 1, Oklahoma Enabling Act, § 134 Stat. 267 (1906); Okla. Const., art. 1, § 3; W. Semple, *Oklahoma Indian Land Titles* § 53 (1952). However, it is possible that the federal courts will consider the Marketable Title Act to be a statute of limitations within the meaning of the Act of April 12, 1926, with respect to the Five Civilized Tribes.

History: Adopted, December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2052. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). Last sentence of "Caveat" added December 2, 1965. Resolution No. 3, 1965 Real Property Committee, 36 O.B.A.J. 2094 & 2182 (1965). Approved by Real Property Section and adopted by House of Delegates, 37 O.B.A.J. 437 (1966). A.L.R. citation added to Authorities, December 3, 1966. Resolution No. 3, 1966 Real Property Committee, 37 O.B.A.J. 2382, 2383 (1966) and adopted by House of Delegates, 37 O.B.A.J. 2538, 2539 (1966). Opinion of Attorney General added December 1968 on recommendation of Real Property Committee, Resolution (2) printed at 39 O.B.A.J. 2308 (1968); adopted House of Delegates, 40 O.B.A.J. 585 (1969). Citation of Act amended by Editor, 1978, to agree with repeal of § 81, 1970 Okla. Sess. Laws, ch. 92, § 5, see Minutes of House of Delegates for 1977, at 93-96.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

81. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.2 state:

Note: See next two standards for a further statement regarding these two requirements.

Authority: 16 O.S.A. §§ 71 & 72; L. Simes & C. Taylor, *Model Title Standards*, Standard 4.2, at 24 (1960). See 16 O.S.A. §§ 71, 72, 74 & 78 as to law which became effective on July 1, 1972.

Similar Standard: Mich., 1.2.

History: Adopted, December, 1964. Printed as a part of Proposal No. 12 or 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2052. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). As a result of a proposal by the 1970 Real Property Committee's Supplemental Report, printed as Exhibit D, 41 O.B.A.J. 2676, 2677 (1970), approved by the Real Property Section on December 3, 1970, and adopted by the House of Delegates on December 4, 1970 the last sentence of the standard calling attention to the amendment shortening the period to thirty years was added. Pertinent statutory authority, relating to the amendment has been added by the editor pursuant to the directive in the Committee's Supplemental Report, 41 O.B.A.J. 2676, 2679 (1970). The 1975 Report of the Real Property Section recommended change from "forty" to "thirty" and the deletion of the former last sentence of the standard which referred to the amendment of the Marketable Title Act changing the period from forty to thirty years, 46 O.B.A.J. 2131, 2183, 2241 & 2317

### 19.3. UNBROKEN CHAIN OF TITLE OF RECORD

"An unbroken chain of title of record", within the meaning of the Marketable Record Title Act, may consist of (1) A single conveyance or other title transaction which purports to create an interest and which has been a matter of public record for at least thirty (30) years; or (2) A connected series of conveyances or other title transactions of public record in which the root of title has been a matter of public record for at least thirty (30) years.<sup>82</sup>

### 19.4. MATTERS PURPORTING TO DIVEST

Matters "purporting to divest" within the meaning of the Marketable Record Title Act are those matters appearing of record which, if taken at face value, warrant the inference that the interest has been divested.<sup>83</sup>

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(1975). Recommendation adopted by House of Delegates, Minutes of House, December 5, 1975, at 50.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

82. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.3 state:

Authority: 16 O.S.A. § 71(a) & (b); L. Simes & C. Taylor, Model Title Standards, Standard 4.3, at 25 (1960).

Similar Standard: Mich., 1.3.

Comment: Assume A is the grantee in a deed recorded in 1915 and that nothing affecting the described land has been recorded since then. In 1945 A has an "unbroken chain of title of record." Instead of a conveyance, the title transaction may be a decree of a district court or court of general jurisdiction, which was entered in the court records in 1915. Likewise, in 1945, A has an "unbroken chain of title of record."

Instead of having only a single link, A's chain of title may contain two or more links. Thus, suppose X is the grantee in a deed recorded in 1915; and X conveyed to Y by deed recorded in 1925; Y conveyed to A by deed recorded in 1940. In 1945 A has an "unbroken chain of title of record." Any or all of these links may consist of decrees of a district court or court of general jurisdiction instead of deeds of conveyance.

The significant time from which the thirty-year record title begins is not the delivery of the instrument, but the date of its recording. Suppose the deed to A is delivered in 1915 but recorded in 1925. A will not have an "unbroken chain of title of record" until 1955.

Decrees of a court in a county other than where the land lies do not constitute a root of title until recorded in the county in which the land lies.

For a definition of "root of title" see Marketable Record Title Act, 16 O.S.A. § 78(e).

History: Adopted, December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2053. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). As a result of a proposal of the 1970 Real Property Committee's Supplemental Report printed as Exhibit E, 41 O.B.A.J. 2676, 2678 (1970). Approved by the Real Property Section on December 3, 1970 and adopted by the House of Delegates on December 4, 1970, 42 O.B.A.J. 706 (1971), the last sentence of the standard shortening the period to thirty years was added. Pertinent statutory authority, relating to the amendment, has been added by the editor pursuant to the directive in the Committee's Supplemental Report, 41 O.B.A.J. 2676, 2679 (1970). All references to prior 40-year period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30-year period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

83. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.4 state:

Authority: 16 O.S.A. § 72(d); L. Simes & C. Taylor, Model Title Standards, Standard 4.4, at 26-27 (1960).

### 19.5. INTERESTS OR DEFECTS IN THE THIRTY-YEAR CHAIN

If the recorded title transaction which constitutes the root of title, or any subsequent instrument in the chain of record title required for a marketable record title under the terms of the act, creates interests in third parties or creates defects in the record chain of title, then the

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Similar Standard: Mich., 1.4.

Comment: The obvious case of a recorded instrument purporting to divest is a conveyance to another person. A is the grantee in a deed recorded in 1915. The record shows a conveyance of the same tract by A to B in 1925. Then B deeds to X in 1957. Although B had a thirty-year record chain of title in 1945, the deed to X purports to divest it, and B thereafter does not have a title.

A recorded instrument may also purport to divest even though there is not a complete chain of record title connecting the grantee in the divesting instrument with the thirty-year chain. Suppose A is the last grantee in a recorded chain of title, the last deed of which was recorded in 1915. A deed of the same land was recorded in 1925, from X to Y, which recites that A died intestate in 1921 and that X is his only heir. The deed recorded in 1925 is one "purporting to divest" within the terms of the Act. This is the conclusion to be reached whether the recital of heirship is true or not.

Or suppose, again, that A is the last grantee in a chain of title, the last deed of which was recorded in 1915. A deed to the same land from X to Y was recorded in 1925, which contains the following recital: "being the same land heretofore conveyed to me by A." There is no instrument on record from A to X. This instrument is nevertheless one "purporting to divest" within the terms of the Act.

Suppose that in 1915, A was the last grantee in a recorded chain of title, the deed to him being recorded in that year. A deed of the same land was recorded in 1925, signed: "A by B, attorney-in-fact." Even though there is no power of attorney on record, and even though the recital is untrue, the instrument is one "purporting to divest" within the terms of the Act.

Suppose that A is the last grantee in a recorded chain of title, the last deed of which was recorded in 1915. In 1955 there was recorded a deed to Y from X, a stranger to the title, which recited that X and his predecessors have been "in continuous, open, notorious and adverse possession of said land as against all the world for the preceding thirty years." This is an instrument "purporting to divest" A of his interest, within the terms of the Act.

On the other hand, an inconsistent deed on record, is not one "purporting to divest" within the terms of the Act, if nothing on the record purports to connect it with the thirty-year chain of title. The following fact situations illustrate this.

A is the last grantee in a recorded chain of title, the last deed of which was recorded in 1915. A warranty deed of the same land from X to Y was recorded in 1925. The latter deed is not one "purporting to divest" within the terms of the Act.

A is the last grantee in a recorded chain of title, the last deed of which was recorded in 1915. A mortgage from X to Y of the same land, containing covenants of warranty, is recorded in 1925. The mortgage is not an instrument "purporting to divest" within the terms of the Act.

Although the recorded instruments in the last two illustrations are not instruments "purporting to divest" the thirty-year title, they are not necessarily nullities. The marketable record title can be subject to interests, if any, arising from such instruments, 16 O.S.A. § 72(d).

History: Adopted, December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2053-54. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). All references to prior 40-year period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30-year period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

marketable record title is subject to such interests and defects.<sup>84</sup>

#### 19.6. FILING OF NOTICE

A marketable record title is subject to any interest preserved by filing a notice of claim in accordance with the terms of Section 74 and 75 of the Marketable Record Title Act.<sup>85</sup>

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84. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.5 state: Authority: 16 O.S.A. § 72(a) & (d); L. Simes & C. Taylor, Model Title Standards, Standard 4.6, at 28-29 (1960).

Similar Standard: Mich., 1.8.

Comment: This standard is explainable by the following illustrations:

1. In 1915, a deed was recorded conveying land from A, the owner in fee simple absolute, to "B and his heirs so long as the land is used for residence purposes," thus creating a determinable fee in B and reserving a possibility of reverter in A. In 1925, a deed was recorded from B to C and his heirs "so long as the land is used for residence purposes, this conveyance being subject to a possibility of reverter in A." In 1945, C has a marketable record title, to a determinable fee, which is subject to A's possibility of reverter.

2. Suppose, however, that, in 1915, a deed was recorded conveying a certain tract of land from A, the owner in fee simple absolute, to "B and his heirs so long as the land is used for residence purposes"; and suppose, also, that in 1918 a deed was recorded by B to C and his heirs, conveying the same tract in fee simple absolute, in which no mention was made of any special limitation or of A's possibility of reverter. There being no other instruments of record in 1948, C has a marketable record title in fee simple absolute. His root of title is the deed from B to C and not the deed from A to B; and there are no interests in third parties or defects created by the "muniments of which such chain of record title is formed."

A general reference to interests prior to the root of title is not sufficient unless specific identification is made to a recorded title transaction, 16 O.S.A. § 72(a).

History: Adopted December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2054-55. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). All references to prior 40-year period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30-year period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

85. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.6 state:

Authority: 16 O.S.A. §§ 74 & 75; L. Simes & C. Taylor, Model Title Standards, Standard 4.7, at 29-30 (1960).

Comment: Suppose A was the grantee in a chain of record title of a tract of land, a deed to which was recorded in 1900. In 1902, a mortgage of the same land from A to X was recorded. In 1906, a mortgage of the same land from A to Y was recorded. In 1918, a deed of the same land from A to B in fee simple absolute was recorded, which made no mention of the mortgages. In 1947, Y recorded a notice of his mortgage, as provided in Sections 74 and 75 of the Act. X did not record any notice. In 1948, B had a marketable record title, which is subject to Y's mortgage, but not to X's mortgage. B's root of title is the 1918 deed. Therefore X and Y had until 1948 to record a notice for the purpose of preserving their interests. If X had filed a notice after 1948, it would have been a nullity, since his interest was already extinguished.

The filing of a notice may be a nullity not only because it comes too late, but also because it concerns a subject matter not within the scope of the statute. Thus, recorded notices of real estate commissions claimed or other charges which do not constitute liens on the property have no effect under the Act, 16 O.S.A. § 72(b).

History: Adopted December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2055-56. Approved, upon recommendation of Real Property Section, by House of Delegates, 36



### 19.7. THIRTY-YEAR POSSESSION IN LIEU OF FILING NOTICE

If an owner of a possessory interest in land under a recorded title transaction (1) has been in possession of such land for a period of thirty (30) years or more after the recording of such instrument, and (2) such owner is still in possession of the land, any Marketable Record Title, based upon an independent chain of title, is subject to the title of such possessory owner, even though such possessory owner has failed to record any notice of his claim.<sup>86</sup>

### 19.8. EFFECT OF ADVERSE POSSESSION

A marketable record title is subject to any title by adverse possession which accrues at any time subsequent to the effective date of the root of title, but not to any title by adverse possession which accrued prior to the effective date of the root of title.<sup>87</sup>

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O.B.A.J. 179, 182 (1965). All references to prior 40-year period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30-year period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

86. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.7 state:

Authority: 16 O.S.A. §§ 72(d) & 74(b); L. Simes & C. Taylor, Model Title Standards, Standard 4.8, at 30-31 (1960).

Comment: The kind of situation which gives rise to this standard is suggested by the following illustration. A was the last grantee in a chain of record title to a tract of land, by a deed recorded in 1915. There were no subsequent instruments of record in this chain of title. A has been in possession of the land since 1915 and continues in possession, but has never filed any notice as provided in Section 74 of the Marketable Record Title Act. A deed of the same land, unconnected with A's chain of title, from X to Y, was recorded in 1916; no other instruments with respect to this land appearing of title. On the other hand, A had a marketable record title in 1945, but in 1946, according to Section 72(d), it is subject to Y's marketable record title. Thus, the relative rights of A and of Y are determined independently of the Act, since the interest of each is subject to the other's deed. A's interest being prior in time, and Y's deed being merely a "wild deed," under common law principles A's title should prevail.

Under 16 O.S.A. § 74(b), possession cannot be "tacked" to eliminate the necessity of recording a notice of claim.

History: Adopted December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2056. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). As a result of a proposal by the 1970 Real Property Committee's Supplemental Report, printed as Exhibit F, 41 O.B.A.J. 2676, 2678 (1970), approved by the Real Property Section on Dec. 3, 1970 and adopted by the House of Delegates on December 4, 1970, 42 O.B.A.J. 706 (1971), the last sentence of the standard in its previous form calling attention to the amendment shortening the period to thirty years was added. Pertinent statutory authority, relating to the amendment, has been added by the editor pursuant to the directive in the Committee's Supplemental Report, Exhibit I, 41 O.B.A.J. 2676, 2679 (1970). Subsequently all references to prior 40-year period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30-year period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

87. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.8 state:

Authority: 16 O.S.A. §§ 72(c) & 73; L. Simes & C. Taylor, Model Title Standards, Standard 4.9, at 31 (1960).

Comment: (Assume the period for title by adverse possession is 15 years.)

### 19.9. EFFECT OF RECORDING TITLE TRANSACTION DURING THIRTY-YEAR PERIOD

The recording of a title transaction subsequent to the effective date of the root of title has the same effect in preserving any interest conveyed as the filing of the notice provided for in Section 74 of the Act.<sup>88</sup>

1. A is the grantee of a tract of land in a deed which was recorded in 1900. In the same year, X entered into possession, claiming adversely to all the world, and continued such adverse possession until 1916. In 1917, a deed conveying the same land from A to B was recorded. No other instruments concerning the land appearing of record, B has a marketable record title in 1947, which extinguished X's title by adverse possession acquired in 1915.

2. Suppose A is the grantee of a tract of land in a deed which was recorded in 1915. In 1941, X entered into possession, claiming adversely to all the world, and continued such adverse possession until the present time. No other instruments concerning the land appearing of record in 1945, A had a marketable record title, but it was subject to X's adverse possession and when his period for title by adverse possession was completed in 1956, A's title was subject to X's title by adverse possession.

History: Adopted December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2056-57. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). All references to prior 40-year period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30-year period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

88. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.9 state:

Authority: 16 O.S.A. §§ 72(d); L. Simes & C. Taylor, Model Title Standards, Standard 4.10, at 32-33 (1960).

Comment: This standard is operative both where there are claims under a single chain of title and where there are two or more independent chains of title. The following illustrations show how it operates.

1. Suppose A is the grantee of a tract of land in a deed which was recorded in 1900. A mortgage of this land executed by A to X was recorded in 1905. In 1910, a deed conveying the land from A to B was recorded, this deed making no reference to the mortgage to X. In 1939, an instrument assigning X's mortgage to Y was recorded. In 1940, B had a marketable record title. But it was subject to the mortgage held by Y because the assignment of the mortgage was recorded less than thirty years after the effective date of B's root of title. If, however, Y had recorded the assignment in 1941 the mortgage would already have been extinguished in 1940 by B's marketable title; and recording the assignment in 1941 would not revive it.

2. Suppose a tract of land was conveyed to A, B and C as tenants in common, the deed being recorded in 1900. Then in 1905, A and B conveyed the entire tract in fee simple to D and the deed was at once recorded. In 1925, D conveyed to E in fee simple, and the deed was at once recorded. No mention of C's interest was made in either the 1905 or 1925 deeds. Nothing further appearing of record, E had a marketable record title to the entire tract in 1935. This extinguished C's undivided one-third interest.

3. Suppose the same facts, but assume also that in 1936, C conveyed his one-third interest to X in fee simple, the deed being at once recorded. This does not help him any. His interest, being extinguished in 1935, is not revived by this conveyance.

4. Suppose A, being the grantee in a regular chain of record title, conveyed to B in fee simple in 1900, the deed being at once recorded. Then, in 1905, X, a stranger to the title, conveyed to Y in fee simple, and the deed was at once recorded. In 1925, Y conveyed to Z in fee simple and the deed was at once recorded. Then suppose in 1927, B conveyed to C in fee simple, the deed being at once recorded. In 1935, Z and C each have marketable record

#### 19.10. QUITCLAIM DEED OR TESTAMENTARY RESIDUARY CLAUSE IN THIRTY-YEAR CHAIN

A recorded quitclaim deed or residuary clause in probated will can be a root of title or a link in a chain of title, for purposes of a thirty-year record title under the Marketable Record Title Act.<sup>89</sup>

titles, but each is subject to the other. Hence neither extinguishes the other, and the relative rights of the parties are determined independently of the Act. C's title, therefore, should prevail.

5. Suppose, however, that the facts were the same except that B conveyed to C in 1937 instead of 1927. In that case, Z's marketable record title extinguished B's title in 1935, thirty years after the effective date of his root of title, and it is not revived by the conveyance in 1937.

History: Adopted December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2057-58. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). All references to prior 40-year period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30-year period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

89. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.10 state:

Authority: 16 O.S.A. §§ 71 & 78(e) & (f); L. Simes & C. Taylor, Model Title Standards, Standard 4.11, at 33-34 (1960).

Related Standards: Mich., 1.3; Neb., 52.

Comment: The Marketable Record Title Act defines "root of title" as a title transaction "purporting to create the interest claimed." See section 78(e). "Title transaction" is defined to include a variety of transactions, among which are title by quitclaim deed, by will and by descent. See Section 78(f).

A quitclaim deed can be a root of title to the interest it purports to create. Suppose there is a break in the chain of title, and the first instrument after the break is a quitclaim deed. Assume that the first recorded instrument in the chain of title is a patent from the United States to A, recorded in 1890, and that the next is a warranty deed from A to B in fee simple, recorded in 1910. Then, in 1915, there is a quitclaim deed from C to D purporting to convey "the above described land" to D in fee simple. Further assume that there are no other recorded title transactions or notices after this deed, and that D is in possession, claiming to be the owner in fee simple. Under the Marketable Record Title Act, the 1915 deed is the root of title and purports to create a fee simple in D. Therefore, in 1945, D has a good title in fee simple.

Clearly the quitclaim deed can be a link in a chain of record title under the provisions of the Act. See sections 71 and 78(f). If it can be an effective link, it must necessarily follow that it can be an effective "root" to the interest it purports to create.

History: Adopted December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 and see Exhibit H, *id.* at 2058. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182. As a result of a proposal by the 1970 Real Property Committee's Supplemental Report, printed as Exhibit G, 41 O.B.A.J. 2676, 2678 (1970), approved by the Real Property Section on Dec. 3, 1970 and adopted by the House of Delegates on December 4, 1970, 42 O.B.A.J. 706 (1971), the last sentence of the standard in its previous form calling attention to the amendment shortening the period to thirty years was added. Pertinent statutory authority, relating to the amendment, has been added by the editor pursuant to the directive in the Committee's Supplemental Report, Exhibit I, 41 O.B.A.J. 2676, 2679 (1970). All references to prior 40-year period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30-year period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

## 19.11. THIRTY-YEAR ABSTRACT

The Marketable Record Title Act has not eliminated the necessity of furnishing an abstract of title for a period in excess of thirty (30) years.<sup>90</sup>

## 19.12. EFFECTIVE DATE OF THE ACT

The Marketable Record Title Act became effective September 13, 1963. The two year period for filing notices of claim under Section 74 expired September 13, 1965. The Act was amended March 27, 1970, by reducing the forty (40) year period to thirty (30) years, effective July 1, 1972. If the thirty (30) year period expired prior to March 27, 1970, such period was extended to July 1, 1972 and notices of claim could be filed to and including that date.<sup>91</sup>

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90. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.11 state: Authority: 16 O.S.A. § 76; L. Simes & C. Taylor, Model Title Standards, Standard 4.12, at 35 (1960).

Similar Standard: Nebr., 44.

Comment: Section 76 of the act names several interests which are not barred by the Act, to-wit: the interest of a lessor as a reversioner; mineral or royalty interests; easements created by a written instrument; subdivision agreements; interests of the U.S., etc. These record interests may not be determined by an examination of the abstract for a period of no more than thirty (30) years.

Furthermore, in all cases, the abstract must go back to the conveyance or other title transaction which is the "root of title"; and it will rarely occur that this instrument was recorded precisely thirty years prior to the present time. In nearly every case the period, from the recording of the "root of title" to the present, will be somewhat more than thirty years.

History: Adopted December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2058-59. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). As a result of a proposal by the 1970 Real Property Committee's Supplemental Report, printed as Exhibit H, 41 O.B.A.J. 2676, 2678 (1970), approved by the Real Property Section on Dec. 3, 1970 and adopted by the House of Delegates on December 4, 1970, 42 O.B.A.J. 706, the last sentence of the standard making it clear that the amendment to the Marketable Record Title Act will not eliminate the necessity of furnishing an abstract of title in excess of thirty years after July 1, 1972 was added. Pertinent statutory authority, relating to the amendment, has been added by the editor pursuant to the directive in the Committee's Supplemental Report, Exhibit I, 41 O.B.A.J. 2676, 2679 (1970). All references to prior 40-year period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30-year period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

91. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.12 state:

Authority: As to the original "forty years" statute, 1963 Okla. Sess. Laws, ch. 31, §§ 4, 5 & 11. As to the present "thirty years" statute, 16 O.S.A. §§ 74 & 75 and 1970 Okla. Sess. Laws, ch. 92, § 7.

Comment: Remainders, long term mortgages and other non-possessory interests prior to the root of title should be reviewed to see if a notice of claim is required. Also, if the owner is out of possession and he has recorded no instruments or other title transactions during the preceding thirty (30) years, consideration should be given to filing a notice of claim.

Prior non-possessory interests may be preserved by reference in an instrument or other title transaction recorded subsequent to the root of title. But the reference must specifically identify a recorded transaction. A general reference is not sufficient. 16 O.S.A. § 72(a).

History: Adopted December, 1964. Printed as a part of Proposal No. 12 of 1964 Real

## 19.13. ABSTRACTING

Abstracting under the Marketable Record Title Act shall be sufficient when the following is shown in the abstract:

A. The patent, grant or other conveyance from the government.

B. The following title transactions occurring prior to the first conveyance or other title transaction in "C." below: easements or interests in the nature of an easement; unreleased leases with indefinite terms such as oil and gas leases; unreleased leases with terms which have not expired; instruments or proceedings pertaining to bankruptcies; use restrictions or area agreements which are part of a plan for subdivision development; any right, title or interest of the United States.

C. The conveyance or other title transaction constituting the root of title to the interest claimed, together with all conveyances and other title transactions of any character subsequent to said conveyance or other title transaction; or if there be a mineral severance prior to said conveyance or other title transaction, then the first conveyance or other title transaction prior to said mineral severance, together with all conveyances and other title transactions of any character subsequent to said conveyance or other title transaction.

D. Conveyances, title transactions and other instruments recorded prior to the conveyance or other title transaction in "C." which are specifically identified in said conveyance or other title transaction or any subsequent instrument shown in the abstract.

E. Any deed imposing restrictions upon alienation without prior consent of the Secretary of the Interior or a federal agency, for example, a Carney Lacher deed.

F. Where title stems from a tribe of Indians or from a patent where the United States holds title in trust for an Indian the abstract shall contain all recorded instruments from inception of title other than treaties except (1) where there is an Unallotted Land Deed or where a patent is to a Freedman or Inter-Married White member of the Five Civilized Tribes, in which event only the patent and the material under "B.", "C.", "D." and "E." need be shown; and (2) where a

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Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2059. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). As a result of a proposal by the 1970 Real Property Committee's Supplemental Report, printed as Exhibit I, 41 O.B.A.J. 2676, 2679 (1970). Approved by the Real Property Section on Dec. 3, 1970 and adopted by the House of Delegates on December 4, 1970, 42 O.B.A.J. 706 (1971), this standard was modified to reflect the amendment shortening the period to thirty years. Pertinent statutory authority, relating to the amendment, has been added by the editor pursuant to the directive in the Committee's Supplemental Report, Exhibit I, 41 O.B.A.J. 2676, 2679 (1970). Tense of verbs in last clause of third sentence changed by Editor, 1978; "Authority" amended to indicate where prior and current statutes may be found by Editor, 1978, see Minutes of House of Delegates for 1977, at 93-96.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

patent is from the Osage Nation to an individual and there is of record a conveyance from the allottee and a Certificate of Competency, only the patent, the conveyance from the allottee, the Certificate of Competency, certificate as to degree of blood of the allottee and the material under "B.", "C.", "D.", and "E." need be shown.

The abstractor shall state on the caption page and in the certificate of an abstract compiled under this standard:

"This abstract is compiled in accordance with Oklahoma Title Standard No. 19.13 under 16 O.S.A. §§ 71-80."<sup>92</sup>

### 1. Background

The Act underlying these Standards is an extinguishment statute that destroys most claims or defects of title before the root of title.<sup>93</sup> The root of title is an instrument "purporting to divest" that is in a chain of title and that has been of record for at least thirty years.

A title examiner must look for and review the following instruments prior to a root of title: (a) patent, grant, or other conveyance from the government; (b) easements or interests in the nature of an easement;

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92. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.13 state: Authority: 16 O.S.A. §§ 71-80, 46 O.S.A. § 203, and Oklahoma Title Examination Standard 13.7.

Comments: 1. The purpose of this standard is to simplify title examination and reduce the size of abstracts.

2. Deeds, mortgages, affidavits, caveats, notices, estoppel agreements, powers of attorney, tax liens, mechanic liens, judgments and foreign executions recorded prior to the first conveyance or other title transaction in "C." and not referred to therein or subsequent thereto and also probate, divorce, foreclosure, partition and quiet title actions concluded prior to the first conveyance or other title transaction in "C." are to be omitted from the abstract.

3. Interests and defects prior to the first conveyance or other title transaction in "C." are not to be shown unless specifically identified. The book and page of the recording of a prior mortgage is required to be in any subsequent deed or mortgage to give notice of such prior mortgage, 46 O.S.A. § 203 and Title Standard 13.7. Specific identification of other instruments requires either the book and page of recording or the date and place of recording or such other information as will enable the abstractor to locate the instrument of record.

4. Abstracting under this standard should also be in conformity with Title Standard 18.6.

History: Adopted December 5, 1969. Resolution No. 1, 1969 Real Property Committee 40 O.B.A.J. 2405 (1969) and Exhibit A, *id.* at 2406-2407. Approved by Real Property Section and adopted by House of Delegates, 41 O.B.A.J. 287 (1970). Citation of act amended by Editor, 1978, to agree with repeal of § 81, 1970 Okla. Sess. Laws, Ch. 92, § 5, reference to prior 40-year period deleted and 30 years substituted, see Minutes of House of Delegates for 1977, pages 93-96.

Amended December 3, 1982. Amendment proposed by Report of 1982 Title Examination Standards Committee, 53 O.B.A.J. 2731, 2734-35 (1982). Proposal amended by Real Property Section, December 2, 1982, and approved as amended. Adopted as amended by House of Delegates.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

93. *Mobbs v. City of Lehigh*, 655 P.2d 547 (Okla. 1982).

(c) unreleased leases with indefinite terms, such as oil and gas leases; (d) unreleased leases with terms that have not expired; (e) instruments or proceedings pertaining to bankruptcies; (f) use restrictions or area agreements which are part of a plan for subdivision development; (g) any right, title, or interest of the United States; (h) severed mineral and royalty interests; (i) instruments expressly identified in other instruments falling within a chain of title back to and including the root of title; and (j) instruments relating to Indian titles.

In *Anderson v. Pickering*, the Oklahoma Court of Appeals stated that there is no authority for requiring a vendee to purchase real property when title is defective. The court further explained that although the Merchantable Title Act, really the Marketable Record Title Act, provides a statutory method for quieting title, it is not self-executing nor a perfect remedy applicable in every case.<sup>94</sup> However, as one article has noted, it appears that the *Anderson* decision is premised on the fact that the sellers were trying to force the buyers to accept title based on adverse possession and not on marketable title created under the Act.<sup>95</sup>

A later decision of the Oklahoma Supreme Court, *Mobbs v. City of Lehigh*, expressly assumed the Act was constitutional, but the court also stated that "[w]e intimate no view on the constitutionality of the Act because its validity was not framed as an issue in the trial court."<sup>96</sup> *Mobbs* held that under the operation of the Act, a void tax deed could be a valid root of title because its defective nature was not "inherent" but rather was a "transmission" problem.<sup>97</sup>

As mentioned above, the constitutionality of this Act has not been directly challenged. There is general Oklahoma case law to the effect that every statute is presumed to be valid, constitutional, and binding on all parties as of the effective date of each statute, and that such a presumption continues until there is a determination to the contrary.<sup>98</sup>

It was hoped that the applicability of this Act to Indian land would be upheld if it were determined to be a statute of limitations and not an extinguishment statute. However, the *Mobbs* decision<sup>99</sup> ended this possibility.

94. *Anderson v. Pickering*, 541 P.2d 1361, 1364 (Okla. Ct. App. 1975).

95. Blair & Rheinberger, *Anderson v. Pickering and the Marketable Record Title Act*, 51 OKLA. B.J. 2517, 2518 (1980).

96. *Mobbs*, 655 P.2d at 547.

97. *Id.* at 549.

98. See Standard 2.3, OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

99. *Mobbs*, 655 P.2d at 550-51.

As an oil and gas title examiner, one must be especially cautious to look behind the root of title first to determine title ownership to any mineral or royalty interest which has been severed, and second to identify unreleased leases with indefinite or unexpired terms. Therefore, the Act is only helpful to the extent that a surface and mineral estate remain together and unsevered.

Standard 19.13 allows and encourages abstracters to prepare thirty-year root of title abstracts conforming to the Act. A proposal to repeal Standard 19.13 was presented by the Standards Committee to the Real Property Section in 1986 at the Section's annual meeting, but the repeal proposal was defeated. Repeal of this Standard would not have affected the statute, but would have discouraged abstracters and examiners from making and relying on such "short" abstracts.

## 2. Practicalities

The following discussion does not address all the examples accompanying Standard 19, but includes some general comments concerning the applicability of the Act as well as some situations where the Act and the Standards are useful.

The examiner should not examine the title backwards from the most recent instrument to attempt to find a root of title recorded for more than thirty years. Every abstract or county record should be examined from inception forward. Only after full consideration of all the instruments should the examiner apply the Act to a certain sequence. Most examiners have never seen an abstract prepared pursuant to Standard 19.13 and might feel uncomfortable if such an abstract were presented to them for examination. The examiner should not question the constitutionality of the Act even though the issue of constitutionality has not been determined by the Oklahoma Supreme Court. An examiner should not rely on the Act without advising the client that such reliance has been made and further advising that there is some case authority that the statute is not self-executing, but must be accompanied by a quiet title action. The Act cannot be used in dealing with severed minerals. The Act should not be relied upon without mentioning it is subject to the rights of persons in possession of the property.

The following are five situations in which the Act and Standards are very useful. The first situation is when a record owner has an interest which is the subject of a mortgage foreclosure followed by a sheriff's deed which has been recorded more than thirty years. This situation is



also reinforced by reliance on the Simplification of Land Titles Act previously discussed. Second, the Act comes into play when a patent from the Commissioners of the Land Office is issued after the extinguishment of a prior certificate of purchase. It is not unusual to see a certificate of purchase issued to one party, followed by another certificate of purchase issued to another party together with a Commissioners of the Land Office patent that has been recorded more than thirty years. The Act can then be relied upon, and no further inquiry into the proper extinguishment of the certificate of purchase is necessary.

Third, in regard to tax deeds, the case of *Mobbs v. City of Lehigh*,<sup>100</sup> is authority for the proposition that a tax deed can be relied upon as a valid root of title without inquiring into the validity of the proceedings leading to the tax deed. Fourth, an examiner can rely upon deeds recorded more than thirty years in which the grantors purport to be the sole heirs of the record owner. And fifth, relying on dicta in the *Mobbs* case, an examiner should be fairly comfortable with a "stray" or "wild" deed which has been of record more than thirty years.<sup>101</sup>

#### IV. CONCLUSION

This article is by its nature only an analysis of the current status of title examination practice in the state of Oklahoma. The continuing enactment of new statutes, deciding of new cases, and drafting of new title standards dictates that this area of the law changes almost on a daily basis. All practitioners in this area must, therefore, actively seek to keep their knowledge up-to-date.

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100. *Id.*

101. *Id.*