

**OKLAHOMA REAL PROPERTY TITLE CURATIVE ACTS AS REFLECTED IN
SELECTED TITLE EXAMINATION STANDARDS**

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Table of Contents

I. Introduction	5
A. Quality of Title.....	5
1. Examining for Marketable Title.....	5
2. Examining for Surface Title.....	5
3. Examining for Mineral Title.....	6
B. Liability of Title Examiners to Non-Clients.....	7
C. Statute of Limitations on Title Opinions.....	9
II. Understanding Standards.....	11
A. Background and Authority of Standards.....	11
B. Impetus for Standards: Problems with Seeking Perfect Title.....	13
C. Title Examination Expectations	14
1. 1.1 Marketable Title Defined.....	15
2. 1.3 Reference to Title Standards.....	15
3. 1.4 Remedial Effect of curative Legislation	15
III. Curative Title Examination Standards	16
A. Curative Act: Marketable Record Title Act	16
30.1 Remedial Effect	16
30.2 Requisites of Marketable Record Title	17
30.3 Unbroken Chain of Title of Record	17
30.4 Matters Purporting to Divest.....	18
30.6 Filing of Notice.....	20
30.7 Thirty-year Possession in Lieu of Filing Notice	20
30.8 Effect of Adverse Possession.....	21
30.9 Effect of Recording Title Transaction During Thirty-Year Period.....	21
30.10 Quitclaim Deed or Testamentary Residuary Clause in Thirty-Year Chain.....	23
30.11 Thirty-Year Abstract.....	23
30.12 Effective Date of the Act	23
30.13 Abstracting.....	24
30.14 Federal Court Proceedings	26
B. Simplification of Land Titles Act - Title Examination Standard: Chapter 29.....	26
29.1 Remedial Effect	27
29.2 Protection Afforded By the Act.....	28
29.2.1 Reliance on Certificate Tax Deed or Resale Tax Deed.....	29
29.3 Purchaser for Value	29
29.4 Conveyance of Record.....	29
29.5 Effective Date of the Act	30
29.6 Abstracting.....	30

C.	Marital Status Waiver	31
7.1	Marital Interests: Definition; Applicability of Standards; Bar or Presumption of Their Non-Existence.....	31
7.2	Marital Interests and Marketable Title.....	31
D.	Acknowledgements Waiver	32
6.1	Defects in or Omission of Acknowledgments in Instruments of Record.....	32
E.	Power of Attorney Waiver	33
6.7	Validity of Instruments Executed by Attorneys-in-Fact	33
F.	Mortgage Release Waiver.....	34
24.8	Unenforceable Mortgages and Marketable Title	34
G.	Affidavits and Recitals.....	35
3.2	Affidavits and Recitals.....	35
H.	Abbreviations and Idem Sonans	35
5.1	Abbreviations and Idem Sonans	35
I.	Variance In Names.....	36
5.2	Variance Between Signature of Body of Deed and Acknowledgment	36
J.	Recital of Identity	37
5.3	Recital of Identity	37
K.	Omissions and Inconsistencies	37
6.2	Omissions and Inconsistencies in Instruments and Acknowledgments.....	37
L.	Delivery	38
6.4	Delivery; Delay in Recording.....	38
M.	Rebuttable Presumptions	39
12.2	Rebuttable Presumptions Concerning Corporate Instruments Executed in Proper Form	39
N.	Conclusive Presumptions.....	40
12.3	Conclusive Presumptions Concerning Instruments Recorded for More Than Five Years.....	40
O.	Recital of Successorship	40
12.4	Recital of Identity, Successorship, or Conversion	40
P.	Powers of Trustee	41
15.1	Power of Trustee.....	41
IV.	Oklahoma Severed Minerals Affidavit of Heirship.....	41
A.	Statute: 16 O.S. Section 67	41
B.	Title Examination Standard	43
3.2	Affidavits and Recitals.....	43
V.	Author's Selected Oil and Gas Articles	46

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*"The Need for a Federal District Court Certificate in All Title Examinations: A
Reconsideration", 83 OBJ 2367 (Nov. 3, 2012)*
*"The Real Estate Mortgage Follows the Promissory Note Automatically Without an
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I. INTRODUCTION

A. QUALITY OF TITLE

1. EXAMINING FOR MARKETABLE TITLE

Whether providing an opinion of title covering either surface or mineral title, the standard for the quality of title that the title examiner is typically seeking is "marketable title". According to the Oklahoma Title Examination Standards, which apply equally to surface and mineral title, with limited exceptions, marketable title is:

1.1 MARKETABLE TITLE DEFINED

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

2. EXAMINING FOR SURFACE TITLE

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

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

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

Your second question raises the issue of whether the title examination for purposes of issuing a title policy must be done by a licensed attorney. A previous opinion of the Attorney General held:

"All such examinations of abstract . . . shall be conducted by a licensed attorney prior to issuance of the policy of title insurance." A.G. Opin. No. 78-151 (June 6, 1978).

This opinion was based on the assertion that a title insurance policy "expresses an opinion as to the marketability of title." A.G. Opin. No. 78-151, supra. In reality, title insurance simply insures the policyholder against defects in the title. It does not express an opinion that the title is marketable. Land Title Company of Alabama v. State ex rel. Porter, 299 So.2d 289,295 (Ala.1974). While the rationale of the previous opinion is incorrect, we adhere to the conclusion expressed in that opinion that the examination of the abstract pursuant to 36 O.S. 5001(C) (1981) must be done by a licensed attorney. We reach this conclusion because the examination required by statute would only be useful if the examiner expressed an opinion on the marketability of the title. This constitutes the practice of law by the examiner. Land Title Company of Alabama v. State ex rel . Porter, supra at 295; Kentucky State Bar Association v. First Federal Savings & Loan, 342 S.W.2d 397 (Ky.App. 1961). The theory that the corporation is actually examining the title for itself through an agent or employee and thus not engaged in the practice of law is invalid since laypersons or nonprofessionals cannot perform legal services for their employers. Kentucky State Bar Association v. Tussey, 476 S.W.2d 177 (Ky.App. 1972). There is no prohibition, however, against licensed staff attorneys furnishing title opinions for the company as long as these opinions are not sold or given to third parties. The Florida Bar v. McPhee, 195 So.2d 552 (Fla. 1967); Steer v. Land Title Guarantee & Trust Co., 113 N.E.2d 763 (Ohio Com.Pl. 1953). (underlining added)

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

3. EXAMINING FOR MINERAL TITLE

If proceeds from the sale of oil or gas production are being held up due to an allegedly unmarketable title the Production Revenue Standards Act (52 O.S. §§570.1 to 570.15) is applicable and provides:

D. 1. Except as otherwise provided in paragraph 2 of this subsection, where proceeds from the sale of oil or gas production or some portion of such proceeds are not paid prior to the end of the applicable time periods provided in this section, that portion not timely paid shall earn interest at the rate of twelve percent (12%) per annum to be compounded annually, calculated from the end of the month in which such production is sold until the day paid.

2. a. Where such proceeds are not paid because the title thereto is not marketable, such proceeds shall earn interest at the rate of six percent (6%) per annum to be compounded annually, calculated from the end of the month in which such production was sold until such time as the title to such interest becomes marketable. Marketability of title shall be determined in accordance with the then current title examination standards of the Oklahoma Bar Association.

b. Where marketability has remained uncured for a period of one hundred twenty (120) days from the date payment is due under this section, any person claiming to own the right to receive proceeds which have not been paid because of unmarketable title may require the holder of such proceeds to interplead the proceeds and all accrued interest into court for a determination of the persons legally entitled thereto. Upon payment into court the holder of such proceeds shall be relieved of any further liability for the proper payment of such proceeds and interest thereon.

Also see: Hull, et al. v. Sun Refining, 789 P.2d 1272 (Okla. 1990) ("Marketable title is determined under §540 [now §570.10] pursuant to the Oklahoma Bar Association's title examination standards.").

Consequently, in order to help determine whether there will be a double penalty on withheld proceeds, the examiner will have the duty to evaluate title based on whether there is "marketable title".

[See: Article #274 at www.eppersonlaw.com: "'Defensible Title' When Examining Oil and Gas Interests: An Overview of the Law In Oklahoma, AND Oklahoma Severed Mineral Minerals Affidavit of Heirship"]

B. LIABILITY OF TITLE EXAMINERS TO NON-CLIENTS

While there is no foolproof way to avoid liability to non-clients, it is usually a good

practice to have both the inside address of the title opinion (i.e., the addressee) and some clear limiting language, elsewhere in the opinion, expressly designate the sole person or company expected to rely on the opinion.

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

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

The Oklahoma Supreme Court replied that the pledgee's complaints stated a cause of action under Oklahoma law. Privity of contract does not apply to tort actions under Oklahoma law. See Keel v. Titan Constr. Corp., 639 P.2d 1228, 1232 (Okla. 1981). The Bradford court stated that to determine an attorney's negligence the jury must determine whether the attorney's conduct was "the conduct of an ordinarily prudent man based upon the dangers he should reasonably foresee TO THE PLAINTIFF OR ONE IN HIS POSITION in view of all the circumstances of the case such as to bring the plaintiff within the orbit of defendant's liability." Id. at 191 (emphasis in original).

In our view a contract for legal services is a contract for services giving rise to the duty of workmanlike performance. The record in this case reveals extensive communications between the attorneys [for the lender], Martin and Morgan, and the purchaser, Vanguard [the borrower], concerning the [lender's] title opinion. The record also shows that all parties, including Martin, Morgan, [the borrower] Vanguard, and [the lender] Glenfed, were concerned about the Texas Rose Petroleum suit. Thus, we find that an ordinarily prudent attorney in the position of the defendants would reasonably have apprehended that [the borrower] Vanguard was among the class of nonclients which, as a natural and probable consequence of the attorneys' actions in preparing the title opinion for Glenfed, could be injured. Thus, we hold that the defendants owed a duty of ordinary care, Bradford, 653 P.2d at 190, and workmanlike performance, Keel, 639 P.2d at 1231, to Vanguard in the performance of their contract for legal services with

Glenfed. We stress that our holding only addresses the question of the duty of the defendants owed to Vanguard and not the question of whether Martin's, Morgan's and Ames, Ashabranner's acts were the proximate cause of Vanguard's injuries. See Bradford, 653 P.2d at 190-91; Keel, 639 P.2d at 1232. (underlining added)

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

The message in these two cases appears to be that a party that conducts either the examination or insures the title, can be held liable for an error in such effort to a third party. This is true even where the title examiner and title insurer had not expressly entered into any contractual relationship with such third party. Based upon these two cases, it appears that this

liability might arise even where the attorney or insurer specifically directed his opinion or policy to only one of the multiple participants in the transaction.

C. STATUTE OF LIMITATIONS ON TITLE OPINIONS

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

In Oklahoma, an action for malpractice, whether medical or legal, though based on a contract of employment, is an action in tort and is governed by the two-year statute of limitations at 12 O.S.A. 1981, § 95 Third. (Seanor v. Browne, 154 Okl. 222, 7 P.2d 627 (1932)). This limitation period begins to run from the date the negligent act occurred or from the date the plaintiff should have known of the act complained of. (McCarroll v. Doctors General Hospital, 664 P.2d 382 (Okl. 1983)). The period may be tolled, however, by concealment by the attorney of the negligent acts which injured the client. This Court has previously held, in Kansas City Life Insurance Co. v. Nipper, 174 Okl. 634, 51 P.2d 741 (1935) that:

One relying on fraudulent concealment to toll the statute of limitation must not only show that he did not know facts constituting a cause of action, but that he exercised reasonable diligence to ascertain such facts.

(underlining added)

(Funnell v. Jones, 1985 OK 73, 737 P.2d 105

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

Appellees argue the instant case should be controlled by Funnell v. Jones, 737 P.2d 105 (Okla. 1985), cert. denied, 484 U.S. 853, 108 S.Ct. 158, 98 L.Ed.2d 113 (1987), a case where we applied the two year tort limitation period to a legal malpractice case. Appellees' reliance on Funnell is misplaced. The opinion in Funnell gives no indication a separate contract theory was alleged there or that the plaintiffs there attempted to rely on the three year limitation period for oral contracts. Thus, our statement in Funnell to the effect an action for malpractice,

whether legal or medical, though based on a contract of employment, is an action in tort, must be taken in the context it was made, to wit: determining whether the two year limitation for torts was tolled based on allegations of fraudulent concealment on the part of defendant attorneys and that no acts alleged against defendants occurred within the two years immediately preceding filing of the lawsuit. Id. at 107-108. We did not decide in Funnell a proceeding against a lawyer or law firm is limited only to a proceeding based in tort no matter what the allegations of a petition brought against the lawyer or law firm. We have never so held and, in fact, to so rule would be tantamount to treating lawyers differently than we have treated other professions, something we refuse to do.

We have held a party may bring a claim based in both tort and contract against a professional and that such action may arise from the same set of facts. Flint Ridge Development Company, Inc. v. Benham-Blair and Affiliates, Inc., 775 P.2d 797, 799-801 (Okla. 1989) (architectural, engineering and construction supervision services). In essence, the holding of Flint Ridge is if the alleged contract of employment merely incorporates by reference or by implication a general standard of skill or care which a defendant would be bound independent of the contract a tort case is presented governed by the tort limitation period. Id. at 799-801. However, where the parties have spelled out the performance promised by defendant and defendant commits to the performance without reference to and irrespective of any general standard, a contract theory would be viable, regardless of any negligence on the part of a professional defendant. Id. As pertinent here, the specific promise alleged or reasonably inferred from the petition and documents attached thereto was to search the records of the County Clerk for an approximate nine (9) year period and report those records on file affecting the title for loan purposes. Simply, if this was the promised obligation a contractual theory of liability is appropriate which is governed by the three year limitation period applicable to oral contracts. (underlining added)

(Great Plains Federal Savings & Loan v. Dabney, 1993 OK 4, 846 P.2d 1088)

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

II. UNDERSTANDING STANDARDS

A. BACKGROUND AND AUTHORITY OF STANDARDS

The first set of Statewide Standards was adopted in 1938 by the Connecticut Bar Association. On November 16, 1946 the General Assembly and House of Delegates of the

Oklahoma Bar Association ("OBA") approved 21 Title Examination Standards ("Standards") for the first time in state history. 17 O.B.J. 1751. Of these 21, there were 10 without any specific citation of authority expressly listed. There are currently over 100 Standards in Oklahoma, and about 13 of these have no specific citation of authority (i.e., no citation of supporting Oklahoma statutes or case law).

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

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

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

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

Knowles v. Freeman, 1982 OK 89, 649 P.2d 532

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

B. IMPETUS FOR STANDARDS: PROBLEMS WITH SEEKING PERFECT TITLE

In the title examination process the necessary negative approach of looking for a defect, whether substantive or merely a technical one, can cause the system to bog down. If there is more than a single title examiner within a community, there is also the possibility of there being a wide range of examination attitudes resulting in differing conclusions as to the adequacy of the title.

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

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

(John C. Payne, "The Why, What and How of Uniform Title Standards", 7

Ala.L.Rev. 25 (1954) (herein "The Why of Standards")).

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

Examiners themselves are human and will react in different ways to the same factual situation. Some are more conservative than others. Even though one examiner feels that a given irregularity will not affect the marketability of a title as a practical matter, he is hesitant to express his opinion of marketability when he knows that another examiner in the same community may have occasion to pass upon the title at a later time and would undoubtedly be more conservative and hold it to be unmarketable. Under these circumstances he is inclined to be more conservative himself and declare the title to be unmarketable. People do not like to be required to incur expense and effort to correct defects which do not in a practical sense jeopardize a title when they have already been advised that their title is marketable. The public becomes impatient with a system that permits such conservative attitudes.

If the same examiner passed judgment upon all title transactions, this situation would remain dormant. Unfortunately such is not the case. Or if all examiners would hold the same opinion as to specific irregularities in titles, this complication would not arise. But this also is not the case. The result in many communities has been greatly depressive, sometimes tragic. (underlining added)

(Bayse: §7. Real Estate Standards)

Over the years, since 1938, a total of 31 States have adopted statewide sets of Standards. Of these, there are currently 19 States which have sets of Standards which have been updated in the last 5 years. In the not too distant past, 4 States have adopted their first sets of Standards including: Vermont (1995), Arkansas (1995), Texas (1997) and Louisiana (2001).

[See the National Title Examination Standards Resource Center Report, and my web site at www.eppersonlaw.com for more details on the status of Standards in other States.]

C. TITLE EXAMINATION EXPECTATIONS

The following Oklahoma title examination standards show the expected attitudes and goals of an attorney examining titles to real property.

1. 1.1 MARKETABLE TITLE DEFINED

A marketable title is one free from apparent defects, grave doubts and litigious uncertainty, and consists of both legal and equitable title fairly deducible of record.

Cross Reference: See Standard 30.1.

Authority: *Pearce v. Freeman*, 122 Okla. 285, 254 P. 719 (1927); *Campbell v. Harsh*, 31 Okla. 436, 122 P. 127 (1912); *Empire Gas & Fuel Co. v. Stern*, 15 F.2d 323 (8th Cir. 1926); *Sipe v. Greenfield*, 116 Okla. 241, 244 P. 424 (1926); *McCubbins v. Simpson*, 186 Okla. 417, 98 P.2d 49 (1939); *Hawkins v. Wright*, 204 Okla. 955, 226 P.2d 957 (1951).

Comment: Marketable title is a title free of adverse claims, liens and defects that are apparent from the record. Any objections should be reasonable and not based on speculation. For purposes of this definition, words describing the quality of title such as perfect, merchantable, marketable and good, mean one and the same thing.

2. 1.3 REFERENCE TO TITLE STANDARDS

It is often practicable and highly desirable that, in substance, the following language be included in contracts for a sale of real estate: "It is mutually understood and agreed that no matter shall be construed as an encumbrance or defect in title so long as the same is not so construed under the real estate title examination standards of the Oklahoma Bar Association where applicable."

3. 1.4 REMEDIAL EFFECT OF CURATIVE LEGISLATION

Statutes enacted for the purpose of curing irregularities or defects in titles are valid and effective from the effective date of each statute; and in particular:

A. Every statute is presumed to be valid and constitutional and binding on all parties as of the effective date of each statute. This presumption continues until there is a judicial determination to the contrary.

Authority: 16 C.J.S. Constitutional Law § 99; *Tate v. Logan*, 362 P.2d 670 (Okla. 1961); *Swanda v. Swanda*, 207 Okla. 186, 248 P.2d 575 (1952).

B. Curative statutes that complete imperfect transactions, and statutes of limitation and adverse possession that bar stale demands or ancient rights, are also presumed to be

constitutional.

Authority: 53 C.J.S. Limitation of Actions § 2; Shanks v. Sullivan, 202 Okla. 71, 210 P.2d 361 (1949).

- C. The presumption of constitutionality extends to and includes the Simplification of Land Titles Act, the Marketable Record Title Act, the Limitations on Power of Foreclosure Act and legislation of like purpose.

Authority: 16 O.S. §§ 61-63, 66, 71-80; 46 O.S. § 301; Okla. Atty. Gen. Op., No. 67-444 (March 21, 1968), reprinted 39 O.B.A.J. 593 (1968); L. Simes, The Improvement of Conveyancing: Recent Developments, 34 O.B.A.J. 2357 (1963)

III. CURATIVE TITLE EXAMINATION STANDARDS

A. CURATIVE ACT: MARKETABLE RECORD TITLE ACT

TITLE EXAMINATION STANDARD:
CHAPTER 30. MARKETABLE RECORD TITLE ACT

30.1 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.

Authority: Marketable Record Title Act, 16 O.S. §§ 71-80; L. Simes & C. Taylor, Model Title Standards, Standard 4.1 at 24 (1960); P. Basye, Clearing Land Titles §§ 186 & 574 (2d ed. 1970); J. Palomar, Patton & Palomar on Land Titles § 563 (3d ed. 2003); 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); “Comment,” Oklahoma Title Standard, 29.1. The following cases sustain the constitutionality of marketable title acts: Bennett v. Whitehouse, 690 F. Supp. 955 (W.D. Okla.1988) (MRTA is constitutional and self executing; rejecting Anderson v. Pickering, 541 P.2d 1361 (Okla. App. 1975)); Presbytery of Southeast Iowa v. Harris, 226 N.W. 2d 232 (Iowa 1975), certiorari denied 423 U.S. 830, 96 S. Ct. 50, 46 L.Ed.2d 48 (1975) (statute does not unconstitutionally deprive vested rights); Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957) (Marketable Title Act constitutional; notice and quiet title action not required to invoke the statute); Lane v. Travelers Ins. Co., 230 Iowa 973, 299 N.W. 553 (1941); 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: A previous caveat to this standard expressed the possibility that the federal courts might consider the Marketable Record Title Act to be a statute of limitations within the meaning of § 2 of the Act of April 12, 1926, 44 Stat. 239. If those courts should so hold, then the Marketable Record Title Act's provisions could be relied upon to have barred remedies to protect interests held by restricted Indians of the Five Civilized Tribes.

The Oklahoma Supreme Court held in *Mobbs v. City of Lehigh*, 655 P.2d 547, 551 (Okla. 1982) that the Marketable Record Title Act was not a statute of limitations. The Court said that, unlike a statute of limitations which barred the remedy, the Marketable Record Title Act had as its target the right itself.

30.2 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.

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

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

Similar Standard: Mich., 1.2.

30.3 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.

Authority: 16 O.S. § 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 1975 and that nothing affecting the described land has been recorded since then. In 2005 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 1975. Likewise, in 2005, 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 1975; and X conveyed to Y by deed recorded in 1985; Y conveyed to A by deed recorded in 2000. In 2005 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 1975 but recorded in 1985. A will not have an “unbroken chain of title of record” until 2015. 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. § 78(e).

30.4 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.

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

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 1965. The record shows a conveyance of the same tract by A to B in 1975. Then B deeds to X in 2007. Although B had a thirty-year record chain of title in 1995, 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 1975. A deed of the same land was recorded in 1985, from X to Y, which recites that A died intestate in 1981 and that X is A's only heir. There is nothing else on record indicating that X is A's heir. The deed recorded in 1985 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 1965. A deed to the same land from X to Y was recorded in 1975,

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 1975, A was the last grantee in a recorded chain of title, the deed to A being recorded in that year. A deed of the same land was recorded in 1985, 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 1935. In 1975 there was recorded a deed to Y from X, a stranger to the title, which recited that X and X's 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 A's 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 1965. A warranty deed of the same land from X to Y was recorded in 1975. 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 1965. A mortgage from X to Y of the same land, containing covenants of warranty, is recorded in 1975. 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. § 72(d).

Authority: 16 O.S. § 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 1975, a deed was recorded conveying land from A, the owner in fee simple absolute, to “B and B's 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 1985, a deed was recorded from B to C and C's heirs “so long as the land is used for residence purposes, this conveyance being subject to a possibility of reverter in A.” In 2005, C has

a marketable record title to a determinable fee which is subject to A's possibility of reverter.

2. Suppose, however, that, in 1975, a deed was recorded conveying a certain tract of land from A, the owner in fee simple absolute, to "B and B's heirs so long as the land is used for residence purposes"; and suppose, also, that in 1978 a deed was recorded by B to C and C's 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 2008, C has a marketable record title in fee simple absolute. C's 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. § 72(a).

30.6 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 Sections 74 and 75 of the Marketable Record Title Act.

Authority: 16 O.S. §§ 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 1960. In 1962, a mortgage of the same land from A to X was recorded. In 1966, a mortgage of the same land from A to Y was recorded. In 1978, a deed of the same land from A to B in fee simple absolute was recorded, which made no mention of the mortgages. In 2007, Y recorded a notice of Y's mortgage, as provided in Sections 74 and 75 of the Act. X did not record any notice. In 2008, 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 1978 deed. Therefore, X and Y had until 2008 to record a notice for the purpose of preserving their interests. If X had filed a notice after 2008, it would have been a nullity, since X's 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. § 72(b).

30.7 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 such possessory owner's claim.

Authority: 16 O.S. §§ 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 1975. There were no subsequent instruments of record in this chain of title. A has been in possession of the land since 1975 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 1976; no other instruments with respect to this land appearing of title. On the other hand, A had a marketable record title in 2005, but in 2006, 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. § 74(b), possession cannot be "tacked" to eliminate the necessity of recording a notice of claim.

30.8 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.

Authority: 16 O.S. §§ 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.)

1. A is the grantee of a tract of land in a deed which was recorded in 1950. In the same year, X entered into possession claiming adversely to all the world and continued such adverse possession until 1966. In 1967, 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 1997, which extinguished X's title by adverse possession acquired in 1965.

2. Suppose A is the grantee of a tract of land in a deed which was recorded in 1965. In 1991, 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 1995, A had a marketable record title, but it was subject to X's adverse possession and when X's period for title by adverse possession

was completed in 2006, A's title was subject to X's title by adverse possession.

30.9 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.

Authority: 16 O.S. § 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 1960. A mortgage of this land executed by A to X was recorded in 1965. In 1970, a deed conveying the land from A to B was recorded, this deed making no reference to the mortgage to X. In 1999, an instrument assigning X's mortgage to Y was recorded. In 2000, 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 2001 the mortgage would already have been extinguished in 2000 by B's marketable title; and recording the assignment in 2001 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 1960. Then in 1965, A and B conveyed the entire tract in fee simple to D and the deed was at once recorded. In 1985, 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 1965 or 1985 deeds. Nothing further appearing of record, E had a marketable record title to the entire tract in

1995. This extinguished C's undivided one-third interest.

3. Suppose the same facts, but assume also that, in 1996, C conveyed C's one-third interest to X in fee simple, the deed being at once recorded. This does not help C any. C's interest, having been extinguished in 1995, 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 1960, the deed being at once recorded. Then, in 1965, X, a stranger to the title, conveyed to Y in fee simple, and the deed was at once recorded. In 1985, Y conveyed to Z in fee simple, and the deed was at once recorded. Then suppose in 1987 B conveyed to C in fee simple, the deed being at once recorded. In 1995, Z and C each has a marketable record title, 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 1997 instead of 1987. In that case, Z's marketable record title extinguished B's title in 1995, thirty years after the effective date of Z's root of title, and B's title is not revived by the conveyance in 1997.

30.10 QUITCLAIM DEED OR TESTAMENTARY RESIDUARY CLAUSE IN THIRTY-YEAR CHAIN

A recorded quitclaim deed or residuary clause in a 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.

Authority: 16 O.S. §§ 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 1940. Then, in 1975, 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 1975 deed is the root of title and purports to create a fee simple in D. Therefore, in 2005, 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.

30.11 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.

Authority: 16 O.S. § 76; L. Simes & C. Taylor, Model Title Standards, Standard 4.12, at 35 (1960).

Similar Standard: Neb., 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 (30) years.

30.12 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.

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. §§ 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 the owner 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. § 72(a).

30.13 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 Carny 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 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. 30.13 under 16 O.S. §§ 71-80."

G. On September 18, 1996 the State Auditor and Inspector issued Declaratory Ruling 96-1, which prohibits abstractors from preparing abstracts under this standard after May 1, 1996. Abstracts, compiled and certified on or before May 1, 1996, may still be used as a base abstract when a separate supplemental abstract has been prepared.

Authority: 16 O.S. §§ 71-80, 46 O.S. § 203, and Oklahoma Title Examination Standard 24.7.

Comment:

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. § 203 and Title Standard 24.7. 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 29.6.

30.14 FEDERAL COURT PROCEEDINGS

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

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

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

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

Authority: 12 O.S. §2004.2: (A); 16 O.S. §76(A); 28 U.S.C.A. §1964; Guaranty State Bank of Okmulgee v. Pratt, 1919 OK 120, 180 P. 376; Orton v. Citizens State Bank, 1929 OK 332, 291 P.15; Bowman v. Bowman, 1949 OK 70, 206 P.2d 582; Hart v. Pharoh, 1961 OK 45, 359 P.2d 1074; Mobbs v. City of Lehigh, 1982 OK 149, 655 P.2d 547; McClaskey v. Barr, 48 F. 130, 7 Ohio F. Dec. 55, (November 10, 1891); Stewart v. Wheeling & Lake Erie Ry., 53 Ohio St. 151, 41 N.E. 247 (1895); City of Mankato v. Barber Asphalt Paving Co., 142 F. 329 (Eighth Cir. 1905); United States v. Calcasieu Timber Co., 236 F. 196 (5th Cir. 1916); Wilkin v. Shell Oil Company, 197 F. 2d 42 (10 Cir. 1951); Tilton v. Cofield, 93 U.S. 163 (1876); Erie R.R. v. Thompkins, 304 U.S. 64 (1938); Astle, Dale L., 32 Oklahoma Law Review 812 (1979), “An Analysis of the

Evolution of Oklahoma Real Property Law Relating to Lis Pendens and Judgment Liens.”

B. SIMPLIFICATION OF LAND TITLES ACT

TITLE EXAMINATION STANDARD: CHAPTER 29. SIMPLIFICATION OF LAND TITLES ACT

29.1 REMEDIAL EFFECT

The Simplification of Land Titles Act, 16 O.S. §§ 61-63, 66 (§§ 64-65 repealed effective April 10, 1980), is remedial in character and should be relied upon with respect to such claims or imperfections of title as fall within its scope.

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); *Patton & Palomar on Titles* § 563 (3d ed. 2003); *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); J. Palomar, *Patton & Palomar on Titles* § 563 (3d ed. 2002). 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. § 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 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.

29.2 PROTECTION AFFORDED BY THE ACT

The Simplification of Land Titles Act, 16 O.S. §§ 61-63, 66 (§§ 64-65 repealed effective April 10, 1980), 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 or personal representative'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. § 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 of such person, who was named as a defendant in the judgment preceding the sheriff's or marshal's deed, or 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. §§ 61-66 or from October 1, 1973, the effective date of 16 O.S. § 62 as amended in 1973.” The State of Oklahoma and its political subdivisions or a public service corporation or transmission company with

facilities installed on, over, across or under the land are deemed to be in possession.

Authority: 16 O.S. §§ 62 & 66.

29.2.1 RELIANCE ON CERTIFICATE TAX DEED OR RESALE TAX DEED

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

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

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

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

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

Authority: 16 O.S. § 62(d).

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

29.3 PURCHASER FOR VALUE

“Purchaser for value” within the meaning of the Simplification of Land Titles Act, 16 O.S. §§ 61-63, 66 (§§ 64-65 repealed effective April 10, 1980), 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.

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.

29.4 CONVEYANCE OF RECORD

“Conveyance of record” within the meaning of the Simplification of Land Titles Act, 16 O.S. §§ 61-63, 66 §§ 64-65 repealed effective April 10, 1980), 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.

Authority: 16 O.S. § 61(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. § 61(a).

29.5 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.

Authority: 16 O.S. §§ 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 (10) 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 (1) 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.

29.6 ABSTRACTING

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

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

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

C. In general jurisdiction court sales under execution the judgment, the deed, the court order directing the delivery thereof and proof of service of the notice of the pendency of such action on the Superintendent of the Five Civilized Tribes, now Area Director of the Five Civilized Tribes and Election Not to Remove, if any.

D. In general jurisdiction court partitions, or adjudications of ownership, the final judgment, any deed of partition, any court order directing the delivery thereof and proof of service of the notice of the pendency of such action on the Superintendent of the Five Civilized Tribes, now Area Director of the Five Civilized Tribes and Election Not to Remove, if any.

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

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

C. MARITAL STATUS WAIVER

TITLE EXAMINATION STANDARD:

7.1 MARITAL INTERESTS: DEFINITION; APPLICABILITY OF STANDARDS; BAR OR PRESUMPTION OF THEIR NON-EXISTENCE

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

Authority: 16 O.S. § 4.

Comment: See Title Examination Standard 6.7 as to use of powers of attorney.

7.2 MARITAL INTERESTS AND MARKETABLE TITLE

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. The individual grantor's spouse, identified as such in the body of the instrument, subscribes the instrument as a grantor; or
- C. The grantee is the spouse of the individual grantor and that fact is recited by the grantor in the body of the instrument.

Comments:

1. There is no question that an instrument relating to the homestead is void unless both husband and wife subscribe it. *Grenard v. McMahan*, 1968 OK 75, 441 P.2d 950, *Atkinson v. Barr*, 1967 OK 103, 428 p.2D 316, but also see *Hill v. Discover Bank*, 2008 OK CIV APP.111, 213 P.3d 835. It is also settled that husband and wife must execute the same instrument, as separately executed instruments will both be void, *Thomas v. James*, 1921 OK 412, 204 P. 284. It is essential to make the distinction between a valid conveyance and a conveyance vesting marketable title when consulting this standard.

2. While 16 O.S. § 13 states that “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,” joinder by husband and wife must 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. §§ 4 and 6 and Okla. Const. Art. XII, §2. A well-settled point is that one may not rely upon recitations, either in the instrument or in a separate affidavit, to the effect that property was not the homestead. Such a recitation by the grantor may be strong evidence when the issue is litigated, but it cannot be relied upon for the purpose of establishing marketability. *Hensley v. Fletcher*, 1935 OK 458, 44 P.2d 63.

3. If an individual grantor is unmarried and the grantor's marital status is inadvertently omitted from an instrument, or if two grantors are married to each other and the grantors' marital status is inadvertently omitted from an instrument, a title examiner may rely on an affidavit executed and recorded pursuant to 16 O.S. § 82 which recites that the individual grantor was unmarried or that the two grantors were married to each other at the date of such conveyance. Caveat: These recitations may not be relied upon if, upon “proper inquiry,” the purchaser could have determined otherwise. *Keel v. Jones*, 1966 OK 73, 413 P.2d 549.

4. A non-owner spouse may join in a conveyance as part of a special phrase placed after the habendum clause, yet be omitted from the grantor line of a deed, and still be considered a grantor to satisfy paragraph B. of this title standard. *Melton v. Sneed*, 188 Okla. 388, 109 P.2d 509 (1940).

D. ACKNOWLEDGEMENT WAIVER

TITLE EXAMINATION STANDARD:

6.1 DEFECTS IN OR OMISSION OF ACKNOWLEDGMENTS IN INSTRUMENTS OF RECORD

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 acknowledgment, 16 O.S. § 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 Paragraph C herein, 16 O.S. § 15.

C. Such an instrument which has not been acknowledged or which contains a defective acknowledgment 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 five (5) years, 16 O.S. §§ 27a & 39a.

E. POWER OF ATTORNEY WAIVER

TITLE EXAMINATION STANDARD:

6.7 VALIDITY OF INSTRUMENTS EXECUTED BY ATTORNEYS-IN-FACT

A. An instrument affecting title to real estate executed by an attorney-in-fact duly appointed and empowered, and not subject to the provisions of paragraphs B or C below, is acceptable to vest marketable title in the grantee, if:

1. the power of attorney, other than a durable power of attorney, was executed, acknowledged and recorded in the manner required by law; or

2. the power of attorney is a durable power of attorney recorded in the manner required by law and:

a. executed after November 1, 1988 under the Uniform Durable Power of Attorney Act (58 O.S. §§ 1071-1077); or

b. executed between June 16, 1965 and September 1, 1992, under the provisions of the Special Power of Attorney Act (58 O.S. §§ 1051-1062); or

c. executed after November 1, 1998, under the provisions of the Uniform Statutory Power of Attorney Act (15 O.S. §§ 1001 - 1020).

3. Notwithstanding the foregoing, an instrument executed by an attorney in fact that has been recorded for at least five (5) years is valid even though no power of attorney was recorded in the office of the county clerk of the county in which the property is located.

B. An instrument that otherwise conforms with the provisions of paragraph A above fails to vest title in the grantee if a revocation of the power of attorney by either

1. the principal, or
2. a conservator, guardian or other fiduciary of the principal appointed by a court of the principal's domicile,

has been recorded in the same office in which the instrument containing the power of attorney was recorded.

C. An instrument that otherwise conforms with the provisions of paragraph A above fails to vest title in the grantee if the power of attorney has otherwise terminated by law, and such termination either appears in the abstract or is within the personal knowledge of the examiner.

Authority: 15 O.S. §§ 1001 - 1020; 16 O.S. §§ 3, 20, 21, 27a and 53; 58 O.S. §§ 1071 et seq.

Comment: The death, disability or incapacity of a principal who has previously executed a written power of attorney, whether durable or otherwise, does not revoke or terminate the agency as to the attorney-in-fact who, without actual knowledge of the death, disability or incapacity of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and successors in interest, 58 O.S. § 1075.

A power of attorney executed in another state shall be considered valid for purposes of the Uniform Durable Power of Attorney Act if the power of attorney and the execution of the power of attorney substantially comply with the requirements of the Uniform Durable Power of Attorney Act (58 O.S. §§ 1071-1077) or the Uniform Statutory Power of Attorney Act (15 O.S. §§ 1001 - 1020).

F. MORTGAGE RELEASE WAIVER

TITLE EXAMINATION STANDARD:

24.8 UNENFORCEABLE MORTGAGES AND MARKETABLE TITLE

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

Authority: 46 O.S. § 301.

Caveat: The examiner should be aware that the above Standard may not apply to mortgages, which are part of a nationwide federal program, in which the United States Government, or one of its agencies, is the mortgagee. See *United States v. Ward*, 985 F.2d 500 (10th Cir. 1993).

Comment: As a result of the repeal of 12A O.S. § 3-122, paragraph B of this standard was repealed in 1995. It provided that, for a debt payable on demand, the due date of the last maturing obligation for the purposes of 46 O.S. § 301 was the date of execution of the mortgage.

Comment: 46 O.S. § 301.B states that if enough information is provided on the face of the mortgage, contract for deed or deed of trust to calculate the final due date of the last maturing obligation of the instrument, even if the final due date is not specifically stated, the lien is unenforceable after the expiration of seven (7) years from the date of the last maturing obligation.

G. AFFIDAVITS AND RECITALS

TITLE EXAMINATION STANDARD:

3.2 AFFIDAVITS AND RECITALS

A. Recorded affidavits and recitals should cover the matters set forth in 16 O.S. § 83; they cannot substitute for a conveyance or probate of a will.

B. Affidavits and recitals should state facts rather than conclusions and should reveal the basis of the maker's knowledge. The value of an affidavit or recital is not reduced if the maker is interested in the title.

Authority: 16 O.S. §§ 53, 67, 82, 83.

Comment: This Standard does not supplant other Standards or statutes providing for use of affidavits, such as 16 O.S. § 67 or 58 O.S. § 912.

H. ABBREVIATIONS AND IDEM SONANS

TITLE EXAMINATION STANDARD:

5.1 ABBREVIATIONS AND IDEM SONANS

Identity of parties should be accepted as sufficiently established in the following cases:

A. Where there are used common abbreviations, derivatives or nicknames for Christian names, such as "Geo." for George, "Jon." for John, "Chas." for Charles, "Alex." for Alexander, "Bob" for Robert, "Eliza" or "Liza" for Elizabeth, "Jos." for Joseph, "Thos." for Thomas, "Wm." for William, "Susan" for Suzanna, "Ellen" for Eleanor, "Rich" for Richard, "Mc" for Mac (as prefix to a name);

B. Names within the rule of the generally accepted doctrine of idem sonans; and

C. In all instruments or court proceedings where in one instance a Christian name or names of a person is or are used, and in another instance the initial letter or letters only of any such Christian name or names is or are used but the surnames are the same or idem sonans, and in one instance a Christian name or initial letter is used, and in another instance is omitted, but in both instances the other Christian names or initial letters correspond and the surnames are the same or idem sonans. A greater degree of liberality should be indulged with the greater lapse of time and in the absence of circumstances appearing in the abstract to raise reasonable doubt as to the identity of the parties.

Authority: 16 O.S. § 53; Patton & Palomar on Land Titles §§ 73-78 (3d ed. 2003); King v. Slepka, 194 Okla. 11, 146 P.2d 1002 (1944); Collingsworth v. Hutchinson, 185 Okla. 101, 90 P.2d 416 (1939); Maine v. Edmonds, 58 Okla. 645, 160 P. 483 (1916); Annot., 57 A.L.R. 1478 (1928). West Digest System, Century Digest, Names, Key Number 4; Decennials, 4 and 5, Deeds, Key Number 31.

I. VARIANCE IN NAMES

TITLE EXAMINATION STANDARD:

5.2 VARIANCE BETWEEN SIGNATURE OF BODY OF DEED AND ACKNOWLEDGMENT

Where the given name or names, or the initials, as used in a grantor's signature on a deed vary from the grantor's name as it appears in the body of the deed, but the grantor's name as given in the certificate of acknowledgment agrees with either the signature or the body of the deed, the certificate of acknowledgment should be accepted as providing adequate identification.

Authority: 16 O.S. § 33; Patton and Palomar on Land Titles §§ 79 & 80 (3d ed. 2003); Basye, Clearing Land Titles § 36 (1953); 1 C.J.S. Acknowledgments § 92(3); Woodward v. McCollum, 16 N.D. 42, 111 N.W. 623 (1907) (Henry S. Woodward and Harry S. Woodward); Blomberg v. Montgomery, 69 Minn. 149, 72 N.W. 56 (1897) (Isabella A. Dern and Isabella Dern, Myrtie B. Thorp and Myrtie Thorp, and George B. Conwell, Sr., and G.B. Conwell, Sr.); Paxton v. Ross, 89 Iowa 661, 57 N.W. 428 (1894) (Michael Thompson and M. Thompson); Rupert v. Penner, 35 Neb. 587, 53 N.W. 598, 17 L.R.A. 824 (1892) (Archibald T. Finn and Arch T. Finn); Gardner v. City of McAlester, 198 Okla. 547, 179 P.2d 894 (1946); O'Banion v. Morris Plan Industrial Bank, 201 Okla. 256, 204 P.2d 872 (1948); L. Simes & C. Taylor, Model Title Standards, p. 38 (1960).

Comment: The Oklahoma form of acknowledgment for individuals provides that the official taking the acknowledgment shall certify that the person named was known to the official to be the identical person who executed the instrument. This is similar to the

acknowledgment forms in most other states and is sufficient to create a presumption of identity when the signature differs from the body of the deed but the acknowledgment agrees with one or the other.

The cases from North Dakota, Minnesota, Iowa and Nebraska, cited above, support this rule and are typical of the many cases on the subject. No Oklahoma cases directly in point have been found. However, in the Gardner and O'Banion cases, supra, the Court held the acknowledgments sufficient to identify the persons executing the instruments although the names were omitted from the acknowledgments. This indicates the rule will be sustained in Oklahoma, if and when the point is raised.

J. RECITAL OF IDENTITY

TITLE EXAMINATION STANDARD:

5.3 RECITAL OF IDENTITY

A recital of identity, contained in a conveyance executed by the person whose identity is recited, may be relied upon unless there is some reason to doubt the truth of the recital.

Authority: 16 O.S. § 53; Basye, *Clearing Land Titles* § 36 (1953); Patton & Palomar on Land Titles § 79 (3d ed. 2003); L. Simes & C. Taylor, *Model Title Standards*, Standard 5.4 at 37 (1960).

Comment: This standard concerns statements of identity such as that Alfred E. Jones and A. E. Jones are the same person. It is not intended to apply where names differ in substantial and material ways.

K. OMISSIONS AND INCONSISTENCIES

TITLE EXAMINATION STANDARD:

6.2 OMISSIONS AND INCONSISTENCIES IN INSTRUMENTS AND ACKNOWLEDGMENTS

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.

Authority: Patton and Palomar on Land Titles §§ 353, 356, 362 & 366 (3d ed. 2003); 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. Husted, 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.

L. DELIVERY

TITLE EXAMINATION STANDARD:

6.4 DELIVERY; DELAY IN RECORDING

Delivery of instruments acknowledged and recorded is presumed in all cases. It is also presumed that delivery occurred on the date of the instrument's execution. Delay in recording, with or without record evidence of the intervening death of the grantor, does not end the presumption or create an unmarketable title. However, as an added

exceptional protection to their clients, examiners may satisfy themselves as to the facts by inquiry outside the record title.

Authority: *Watkins v. Musselman*, 205 Okla. 514, 239 P.2d 418 (1951); *Fisher v. Pugh*, 261 P.2d 181 (Okla. 1953); *State, ex rel. Comm'rs of Land Office v. Leecraft*, 279 P.2d 323 (Okla. 1955); *Wasson v. Collett*, 204 Okla. 360, 230 P.2d 258 (1951); *Hamburg v. Doak*, 207 Okla. 517, 251 P.2d 510 (1952); *McKeever v. Parker*, 204 Okla. 1, 226 P.2d 425 (1950); 12 O.S. §§ 2902 & 3005; P. Basye, *Clearing Land Titles* § 13 (1970); Powell on Real Property, § 898(2) (1997); 26A C.J.S. Deeds. §§ 185, 187 & 204g; L. Simes & C. Taylor, *Model Title Standards*, Standard 6.3, at 43-45 (1960).

Comment: The presumption of delivery of recorded instruments inheres in our system of proving titles by public records. This is the law in Oklahoma. The presumption is strengthened by our statute creating a rebuttable presumption of delivery, 16 O.S. § 53(3), and by statutes making certified copies of recorded instruments affecting real estate prima facie evidence in all courts without further authentication. The presumption is not overcome by inferences to the contrary drawn from the record. When the record shows a long delay in recording or the death of the grantor prior to the recording of the instrument, the following procedures are suggested: (1) if the instrument has been recorded longer than fifteen years, do not inquire; (2) if the abstract or records or convenient inquiries do not reveal the death of the grantor, do not inquire further; and (3) if death occurred between the dates of execution and recording, inquire but appraise the situation realistically with a view to the probability of a claim of non-delivery. Affidavits resulting from such inquiry may be recorded. However, recording is unnecessary and may create more doubts than previously existed. It should be emphasized that delay in recording and post-mortem recordation are in themselves unobjectionable and do not render a title unmarketable. The actual risk inherent in non-delivery is easily over-emphasized. By use of presumptions, estoppel and other legal theories, courts properly display an almost insurmountable hostility to claims against innocent purchasers of apparently clear titles.

M. REBUTTABLE PRESUMPTIONS

TITLE EXAMINATION STANDARD:

12.2 REBUTTABLE PRESUMPTIONS CONCERNING CORPORATE INSTRUMENTS EXECUTED IN PROPER FORM

If a recorded instrument from a corporation is executed and acknowledged in proper form, the title examiner may presume that:

- A. the persons executing the instrument were the officers they purported to be,
- B. the officers were authorized to execute the instrument on behalf of the corporation,
- C. the corporation was authorized to acquire and sell the property affected by the recorded instrument, and

D. the corporation was legally in existence when the instrument was executed.

From and after September 1, 1994, recorded instruments must be signed on behalf of a domestic corporation by a president, vice president, chairman or vice chairman of the board of directors. A corporate instrument executed in another state may be accepted if it is executed either by the proper officers under

Oklahoma law or by the proper officers under the laws of the state where the instrument was executed. Before September 1, 1994, corporate instruments were required to be executed by a corporate president or vice president, attested by a corporate secretary or assistant secretary, and impressed with the corporate seal. Instruments from banks could be attested by a cashier or assistant cashier.

Authority: 16 O.S. §§ 53, 93.

N. CONCLUSIVE PRESUMPTIONS

TITLE EXAMINATION STANDARD:

12.3 CONCLUSIVE PRESUMPTIONS CONCERNING INSTRUMENTS RECORDED FOR MORE THAN FIVE YEARS

The following defects may be disregarded after an instrument from a legal entity has been recorded for five years:

- A. the instrument has not been signed by the proper representative of the legal entity,
- B. the representative is not authorized to execute the instrument on behalf of the legal entity,
- C. the instrument is not acknowledged, and
- D. any defect in the execution, acknowledgment, recording or certificate of recording the same.

Authority: 16 O.S. §§ 1 & 27a.

O. RECITAL OF SUCCESSORSHIP

TITLE EXAMINATION STANDARD:

12.4 RECITAL OF IDENTITY, SUCCESSORSHIP, OR CONVERSION.

Unless there is some reason disclosed of record to doubt the truth of the recital (e.g., the recordation of a conflicting certificate prepared pursuant to 18 O.S. § 1144 or § 1090.2), then:

A. A recital of succession by corporate merger or corporate name change (e.g., the corporation was formerly known by another name) may be relied upon if contained in a recorded title document properly executed by the surviving or resulting corporation.

B. After September 1, 1990, a recital of succession by merger or consolidation of one or more corporations with one or more limited partnerships may be relied upon if contained in a recorded title document properly executed by the surviving or resulting entity.

C. On or after November 1, 1998, a recital of succession by merger or consolidation of one or more corporations with one or more business entities, as defined in 18 O.S. § 1090.2(A), may be relied upon if contained in a recorded title document properly executed by the surviving or resulting entity.

D. On or after January 1, 2010, a recital by a business entity, as defined in 18 O.S. § 2054.1(A), of a conversion to a domestic limited liability company may be relied upon if contained in a recorded title document properly executed by the domestic limited liability company.

Authority: 18 O.S. § 1144 (effective November 1, 1987), 1088 (effective November 1, 1986), 1090.2 (effective November 1, 1998) and 2054.1 (effective January 1, 2010).

P. POWERS OF TRUSTEE

TITLE EXAMINATION STANDARD:

15.1 POWERS OF TRUSTEE

The trustee of an express trust has the power to grant, deed, convey, lease, grant easements upon, otherwise encumber and execute assignments or releases with respect to the real property or interest therein which is subject to the trust. A trustee's act is binding upon the trust and all beneficiaries thereof, in favor of all purchasers or encumbrances without actual knowledge of restrictions or limitations upon the trustee's powers by the terms of the trust, and without constructive knowledge imposed by the trust instrument containing restrictions and limitations having been recorded in the county where the real estate is located.

Authority: 60 O.S. §§ 171 et seq., 175.7 & 175.45; and see 60 O.S. § 175.24 for a listing of the extensive powers which a trustee has unless they have been denied to the trustee by the trust agreement or a subsequent order of a court.

Comment: In a declaration of legislative intent enacted as part of the legislation, it is said that trusts are private instruments and therefore need not be recorded unless the trustor desires to put the public on notice of restriction on the trustee's powers.

IV. OKLAHOMA SEVERED MINERALS AFFIDAVIT OF HEIRSHIP

A. STATUTE: 16 O.S. Section 67

 **Oklahoma Statutes Citationized**

 **Title 16. Conveyances**

 **Chapter 1 - General Provisions**

 **Section 67 - Acquiring a Severed Mineral Interest from Decedent - Establishing Marketable Title**

Cite as: 16 O.S. § 67, ___ ___

A. After the date of death of a person who was an owner of a severed mineral interest in real estate, a person who claims such interest, immediately or remotely, through an affidavit of death and heirship recorded pursuant to Sections 82 and 83 of this title, shall acquire a valid and marketable title to such interest as against any person claiming adversely to such recorded affidavit on the conditions set forth in subsection C of this section.

B. Any purchaser for value acquiring a severed mineral interest in real estate from a person who claims such interest, immediately or remotely, through a recorded affidavit of death and heirship or a recital of death and heirship in a recorded title transaction, as that term is defined in Section 78 of Title 16 of the Oklahoma Statutes, shall acquire a valid and marketable title to such interest as against any person claiming adversely to such recorded affidavit or recital on the conditions set forth in subsection C of this section.

C. In order to establish marketable title pursuant to this section:

1. The affidavit or recital must state that the decedent died without a will, or if the decedent had a will, that the will was never probated in Oklahoma and a copy of the will is attached to the affidavit or recital, or if the will was probated that the severed mineral interest was omitted from the final decree of the decedent and a copy of the will and final decree is attached to the affidavit or recital;

2. The affidavit or recital must list the names of the decedent's heirs and their relationship to the decedent;

3. The affidavit or recital must state that the maker is related to the decedent or otherwise has personal knowledge of the facts stated therein;

4. The affidavit or the title transaction that contains the recital must have been recorded for at least ten (10) years in the office of the county clerk in the county in which the real property is located; and

5. During the ten-year period following the recording of the affidavit or the title transaction that contains the recital, no instrument inconsistent with the heirship alleged in the affidavit or recital was filed in the office of the county clerk in the county in which the real property is located.

This section shall apply to affidavits recorded before November 1, 1999, as well as to those recorded thereafter, except that, with respect to those recorded before such date, the ten-year period specified above shall not expire until one (1) year after November 1, 1999. This section

shall not apply as against any person in possession of the land, by occupancy or by occupancy of a tenant, at the time such purchaser acquires an interest in such land.

Historical Data

Added by Laws 1999, HB 1817, c. 84, § 2, eff. November 1, 1999; Amended by Laws 2010, HB 1319, c. 223, § 1, emerg. eff. May 10, 2010

B. TITLE EXAMINATION STANDARD: No. 3.2 (adopted November 15, 2013)

3.2 AFFIDAVITS AND RECITALS

A. Recorded affidavits and recitals should cover the matters set forth in 16 O.S. §§ 82

and 83. They cannot substitute for a conveyance or probate of a will.

B. Affidavits and recitals should state facts rather than conclusions and should reveal

the basis of the maker's knowledge. The value of an affidavit or recital is not reduced if the maker is interested in the title.

C. Oklahoma statutes have authorized the use of affidavits to affect title to real

property for several purposes. The specific statute should be consulted and the requirements of the statute should be followed carefully.

D. Special attention should be given to the provisions of 16 O.S. § 67 – Acquiring

Severed Mineral Interests from Decedent – Establishing Marketable Title:

1. In part, 16 O.S. § 67 provides that a person who claims a severed mineral interest, through an affidavit of death and heirship recorded pursuant to 16 O.S. §§ 82 and 83, shall acquire a marketable title ten years after the recording of the affidavit by following the five specific steps set forth in part C of Section 67. The act applies only to severed minerals, not leasehold interests. Section 82 provides that such an affidavit creates a rebuttable presumption that the facts stated in the recorded affidavit are true as they relate to the severed minerals.

2. Although not specifically required by 16 O.S. § 67, it is recommended that the affidavit contain sufficient factual information to make a proper determination of heirship. Such information includes the date of death of the decedent, a copy of the death certificate, marital history of the decedent, names and dates of death of all spouses, a listing of all

children of the decedent including any adopted children, identity of the other parent of all children of the decedent, the date of death of any deceased children and the identity of the deceased child's spouse and issue, if any. During the ten year period of 16 O.S. § 67, if an affidavit fails to include factual information necessary to make a proper determination of heirship, the examiner should call for a new affidavit that contains the additional facts necessary for a proper determination of heirship. If a new or corrected affidavit is filed, the statutory ten-year period would run from the date of recordation of the new or corrected affidavit

3. Title 16 O.S. § 67 is unclear when an unprobated will is attached, whether title passes to the intestate heirs or to the devisees under the will. Oklahoma cases have held that until a will is admitted to probate, it is wholly ineffectual to pass title to real property, including any mineral or leasehold interest and a devisee has no rights to enforce under the will. 3 A foreign will that has not been probated in Oklahoma is ineffective to establish any interest or title in the persons claiming thereunder. If the decedent died with a will, strong consideration should be given to a probate of the estate.

4. If the decedent died intestate, strong consideration should be given to an administration of the estate or a judicial determination of death and heirship during the ten year period before the title becomes marketable by a properly prepared 16 O.S. §67 affidavit.

Comment 1: Affidavits affecting real property include: Affidavits to Terminate Joint Tenancy or Life Estates (58 O.S. § 912); Multi Subject Information Affidavit (16 O.S. §§ 82-83); Memorandum of Trust (60 O.S. § 175.6a).

Affidavits to Terminate Joint Tenancy or Life Estates under 58 O.S. § 912 may be recorded with only a jurat or only an acknowledgment, or both. Since this provision is specific to §912, prudence dictates that an affidavit which is not prepared under 912 contain both a jurat and acknowledgment. See 16 O.S. § 26.

Comment 2: Before the affidavit or unprobated will has been of record for ten years, it is not uncommon for the title examiner to recommend to the party paying royalty owners to consider assuming the business risk of waiving the requirements of marketable title, which might include a probate administration, or judicial determination of death and heirship, and assume the business risk of relying upon the affidavit called for in Section 67.

Comment 3: Yeldell v. Moore, 1954 OK 260; 275 P.2d 281. Oklahoma cases discuss the “factum” of a will: whether the will is legally executed in statutory form; legal capacity of the testator; the absence of undue influence, fraud and duress, Ferguson v. Paterson, 191 F.2d 584 (10th Cir. 1951); Matter of the Estate of Snead, 1998 OK 8, 953 P.2d 1111; Foote v. Carter, 1960 OK 234, 357 P.2d 1000. In Oklahoma the district court determines the validity of a will, interprets the will and determines the heirs. A probate proceeding is necessary to determine if there are pretermitted heirs, allow for spousal elections, determine if there is any marital property, and confirm the absence of liens for taxes and debts.

Comment 4: Smith v. Reneau, 1941 OK 99; 2112 P.2d 160. The decree of the court administering the estate is conclusive as to the legatees, devisees and heirs of the decedent, Wells v. Helms, 105 F.2d 402 (10th Cir. 1939).

Comment 5: The use of (non-judicial) heirship affidavits under 16 O.S. § 67 may also be suspect in the context of restricted citizens (members) of the Five Civilized Tribes in light of the Act of June 14, 1918, 40 Stat. 606 (25 U.S.C. 375) and Section 3 of the Act of August 4, 1947, 61 Stat.731 which confers exclusive jurisdiction upon the courts of Oklahoma to judicially determine such heirship in accordance with the Oklahoma probate code.

V. **AUTHOR'S SELECTED OIL AND GAS ARTICLES**

(See www.eppersonlaw.com for all of my articles.)

OIL & GAS ISSUES

272. "'Defensible Title' When Examining Oil and Gas Interests: An Overview of the Law In Oklahoma", TAPL, Tulsa, Ok (February 20, 2014)
265. "Oil and Gas Title Examination Basic Terms", Oil and Gas Title Examination, OBA, Tulsa (September 12, 2013), Oklahoma City (September 13, 2013)
239. **"Oklahoma's Marketable Record Title Act: An Argument for its Application to Chains of Title to Severed Minerals after *Rocket Oil and Gas Co. v. Donabar*"**, 82 The Oklahoma Bar Journal 622 (March 12, 2011)
232. "Oil and Gas Title Examination Basic Terms", Energy Law Basics, The National Business Institute, Oklahoma City, Oklahoma (November 18, 2010)
222. "'Defensible Title' When Examining Oil and Gas Interests: An Overview of the Law in Oklahoma", The Real Property Tract, The Annual Oklahoma Bar Association Meeting Continuing Legal Education Program, Oklahoma City, Oklahoma (November 4, 2009)
215. "Well Site Safety Zone Act: New life for Act", The Oklahoma City Mineral Lawyers Society (May 21, 2009)
214. **"Well Site Safety Zone Act: New life for Act"**, 80 The Oklahoma Bar Journal 1061 (May 9, 2009)
194. "Marketable Title: What is it? And Why Should Mineral Title Examiners Care?", The 2007 Rock Mountain Mineral Law Foundation Institute, Westminster, Colorado (September 13, 2007) 44. "Oil and Gas Title Examination Standards Update," 1990 Practical Oil and Gas Seminar (with David D. Morgan), Oklahoma City Petroleum Landmen's Association and Oklahoma City University Law School, Fountainhead Resort Hotel, Oklahoma (June 1-2, 1990)
41. "Title Examination Standards Relevant to Oil and Gas Leases," (with Don Laudick David Morgan) Tulsa County Bar Association Mineral Law Section, Tulsa, Oklahoma (December 13, 1989)
38. "Title Examination Standards Relevant to Oil and Gas Leases," Back to Basics-A New Look at Fundamental Oil and Gas Issues, Joint Oklahoma Bar Association and OBA Mineral Law

- Section, Tulsa, Oklahoma (September 29, 1989) and Oklahoma City, Oklahoma (October 6, 1989)
37. **"Oklahoma Title Examination Standards and Curative Acts Relating to Oil and Gas Interests,"** 24 Tulsa L.J. 548 (1989) (with David D. Morgan)
 30. "The Application of the Title Examination Standards to Oil and Gas Opinions," (with Don Laudick and David D. Morgan) Tulsa County Bar Association Mineral Law Section, Tulsa, Oklahoma (October 12, 1988)
 28. "The Application of the Title Examination Standards to Oil and Gas Title Opinions" (with David Morgan), Presented to: Oklahoma City Association of Petroleum Landmen, Oklahoma City, Oklahoma (April 21, 1988)
 25. "The Application of the Title Examination Standards to Oil and Gas Opinions," (with David Morgan) Mineral Lawyers Society of Oklahoma, Oklahoma City, Oklahoma (November 19, 1987)
 23. "Oklahoma Title Examination Standards and Curative Acts Relating to Oil and Gas Interests," Oil and Gas Problems and Solutions, Oklahoma City University Law School, Oklahoma City, Oklahoma (October 2, 1987)
 3. **"Lenders Mineral Title Insurance: A Mini-Primer,"** 53 Oklahoma Bar Journal 3089 (December 1982)
 2. "Lender's Mineral Title Insurance," The Troubled Oil Venture, Oklahoma City University Law School, Oklahoma City, Oklahoma (August 20, 1982)