

**2017 REPORT OF THE TITLE EXAMINATION STANDARDS COMMITTEE  
OF THE REAL PROPERTY LAW SECTION**

*Proposed Amendments to Title Standards for 2018, to be presented for approval by the House of Delegates, Oklahoma Bar Association at the Annual Meeting, November 3, 2017. Additions are underlined, deletions are indicated by ~~strikeout~~.*

The Title Examination Standards Sub-Committee of the Real Property Law Section proposes the following revisions and additions to the Title Standards for action by the Real Property Law Section at its annual meeting in Oklahoma City on Thursday, November 2, 2017.

Proposals approved by the Section will be presented to the House of Delegates at the OBA Annual Meeting on Friday, November 3, 2017. Proposals adopted by the House of Delegates become effective immediately.

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

**PROPOSAL NO. 1**

*The Committee proposes to add a Comment to Standard 7.1, to amend the Comments to Standard 7.2 and to amend Standard 13.7 E in order to reflect results in the holdings of Bishop v. Smith, 760 F.3d 1070 (10<sup>th</sup> Cir. 2014) and Obergefell v. Hodges 576 U.S. \_\_\_\_ (2015) as to same sex marriages.*

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

**Comment 2:** Following the decisions of the Court of Appeals for the Tenth Circuit in *Bishop v. Smith* and the United States Supreme Court in *Obergefell v. Hodges*, same sex marriages are legal in Oklahoma. All standards that refer to a Marital Interest are equally applicable to same sex married couples. Any references to husband and wife, spouses, or married couples should be read to apply to all legal marriages.

**Authority:** *Bishop v. Smith*, 760 F.3d 1070 (10<sup>th</sup> Cir. 2014); *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015)

**7.2 MARITAL INTERESTS AND MARKETABLE TITLE**

**Comment 1:** There is no question that an instrument relating to the homestead is void unless ~~husband and wife~~ both spouses 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~~ both spouses must execute the same instrument, as separately executed instruments will be void. Thomas v. James , 1921 OK

414, 202 P. 499. It is essential to make the distinction between a valid conveyance and a conveyance vesting marketable title when consulting this standard. This distinction is important because the impossibility of determining from the record whether or not the land is homestead, requires the examiner, for marketable title purposes, to (1) assume that all real property is homestead, and (2) consequently, always require joinder of both spouses on all conveyances. Although a deed of non-homestead real property, signed by a title-holding married person without the joinder of their spouse, will be valid as between the parties to the deed, it cannot confer marketable record title.

**Comment 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~~ both spouses 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 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*, 172 Okla. 19, 44 P.2d 63 (1935).

### 13.7 CONVEYANCES TO AND BY JOINT VENTURES

E. Due to the fact that homestead or other marital rights may attach to the interests in real property held in the name of an individual joint venturer (or held in the name of two or more joint venturers as tenants-in-common), a deed, mortgage or other instrument of record for less than ten (10) years which is executed by a married joint venturer should also be executed by the spouse of such joint venturer and should contain a recitation of the fact that such persons are ~~husband and wife~~ married to each other. In the event an individual joint venturer is single, a recitation of that fact should appear within such deed, mortgage or other instrument.

#### PROPOSAL NO. 2

*The Committee recommends amendments to Title Standards 8.1 C, and 25.5 to reflect new legislation concerning the attachment, duration and release of Oklahoma Estate Tax Liens on deaths occurring prior to January 1, 2010.*

### 8.1 TERMINATION OF JOINT TENANCY ESTATES AND LIFE ESTATES

C. A waiver or release of the Oklahoma estate tax lien for the joint tenant or life tenant must be obtained unless:

1. A district court has ruled pursuant to 58 O.S. § 282.1 that there is no estate tax liability;
2. The sole surviving joint tenant or remainder interest holder is the surviving spouse of

the deceased joint tenant or sole life tenant;

3. The death of the joint tenant is on or after January 1, 2010; or

4. The Oklahoma estate tax lien has otherwise been released by operation of law. See the Caveat at TES 25.5.

## 25.5 OKLAHOMA ESTATE TAX LIEN

**Caveat:** Generally, the Oklahoma estate tax was repealed for deaths occurring on or after January 1, 2010. No estate tax lien attaches to real property passing from the decedents dying January 1, 2010, and after, and no estate tax release is required to render such real property marketable under these title standards. 68 O.S. § 804.1.

Oklahoma estate tax lien obligations for decedents dying prior to January 1, 2010, remain in effect but are extinguished ten (10) years after the date of death. 68 O.S. § 804.1.

The Oklahoma estate tax survives for deaths occurring subsequent to January 1, 2010, to the extent the Oklahoma estate tax may be imposed due to the interaction of the Oklahoma statutes and the computed Federal estate tax credit for state estate and inheritances allowable in the computation of Federal estate taxes on the Federal estate tax return. 68 O.S. § 804. Pursuant to 68 O.S. § 804.1, no Oklahoma estate tax lien attaches to any property for deaths occurring on or after January 1, 2010.

~~Prior to the repeal effective January 1, 2010, Oklahoma statutes (former 68 O.S. § 815 C) provided that "no assessment of inheritance, estate or transfer tax shall be made subsequent to the lapse of ten (10) years after the date of the death of any decedent." Oklahoma Tax Commission Regulation OAC 710:35-3-9 provides that the Oklahoma estate tax lien is extinguished upon the expiration of ten (10) years from the date of the death of the decedent unless a tax warrant is filed. However, former 68 O.S. § 815 C was repealed in its entirety effective January 1, 2010, and there appears to be no other statutory authority for the extinguishment of estate tax liens ten (10) years after death.~~

~~Upon written request, the Oklahoma Tax Commission continues to issue the ten (10) year letter which certifies that there are no unpaid assessments of Oklahoma estate or transfer taxes for a specific decedent deceased more than ten (10) years. The ten (10) year OTC letter cites the now repealed 68 O.S. § 815 as authority.~~

~~The issue is under continuing review.~~

**PROPOSAL NO. 3** *The Committee recommends an amendment to Standard 14.10 to reflect new legislation allowing a Series in a limited liability company with series to hold title to the Series' name.*

## 14.10 LIMITED LIABILITY COMPANY WITH SERIES

**A.** Prior to November 1, 2017, title to real property which is to be held under a properly created limited liability company with established series, domestic or foreign, must be acquired, held and

conveyed in the name of the limited liability company, with appropriate indication that such title is held for the benefit of the specific series.

B. Beginning November 1, 2017, unless otherwise provided in the operating agreement, a series established in accordance with subsection B of 18 O.S. §2054.4 (with the exception of the business of a domestic insurer) shall have the power and capacity to, in its own name, hold title to assets including real property.

Comment 1: Prior to November 1, 2017, because a series is merely an attribute of the LLC, the series may not hold title in its own name independent of the LLC. Examples of acceptable designations of the grantor or grantee in an instrument conveying title to real property to or from a particular series would be one of the following:

- A) Master, LLC, an Oklahoma limited liability company, as Nominee for its Series ABC;
- B) XYZ, LLC, a Texas limited liability company, on behalf of its Series ABC;
- C) DEF, LLC, a Delaware limited liability company, for the benefit of its Series 2016-A.

In the event an LLC, which has merely provided for the establishment of series, acquires property prior to the actual establishment of such series or otherwise acquires property in the name of the LLC, the LLC shall evidence such transfer of interest from the LLC itself to the LLC for the benefit of the series, by appropriate conveyance.

This standard does not address the situation of real property held by a wholly owned subsidiary LLC, which is an entity capable of acquiring, holding and conveying real property in its own name.

Comment 2: Beginning November 1, 2017, to ensure the Series has not been prohibited from holding title to real property in its own name, title examiner may rely upon an affidavit of the LLC Manager properly recorded in the land records of the county where the real property is located, stating the Series at the time it acquired title to the real property, had the power and capacity to hold title to real estate.

**Authority:** 18 O.S. §2054.4.B. and 2054.4.C.

#### **PROPOSAL NO. 4**

*The Committee recommends a new Title Standard 24.15 as a method of establishing marketable title where there is a missing assignment in a chain of mortgage assignments and the mortgage has been properly released.*

#### **24.15 MISSING ASSIGNMENTS OF MORTGAGES**

A recorded affidavit, based on the affiant's personal knowledge, containing the following information shall be deemed sufficient to evidence the assignment of a mortgage in a circumstance in which a valid, recordable assignment of the mortgage is not recorded:

A. Identifying information for the mortgage, including the date of the mortgage, recording information, including book and page or document number, as applicable, and the legal description contained in the mortgage, and

B. A photocopy of the promissory note or notes which evidence the indebtedness secured by the mortgage, and

C. A photocopy of proper indorsement of the promissory note or notes in sufficient form to document the transfer of such note(s) by and between the parties who would otherwise appear on the missing assignment of the mortgage, and

D. A statement by the affiant that the promissory note(s) attached to the affidavit are true and correct copies of the promissory note(s) secured by the mortgage, and

E. A statement by the affiant that the person or entity shown on the indorsement as the current indorsee/holder on the promissory note(s) is in possession of the note(s) and that such note(s) is either payable to bearer or to such identified person or entity, or, that such person or entity is in possession of the note(s) which has not been indorsed either by special indorsement or blank indorsement, and

F. A statement by the affiant that an assignment of the mortgage by and between the parties to the promissory note(s) referenced in Paragraph E above is not recorded.

**Authority:**

*Deutsche Bank National Trust Company v. Byrams*, 2012 OK 4

*Engle v. Federal National Mortgage Association* 1956 OK 176; Title 16 O.S. § 82, et. seq.

**PROPOSAL NO. 5**

*The Committee proposes to amend Standard 30.10 to clarify that it is a Judicial Decree and not simply a residuary clause in a probated will that can be a root or link in a chain of title.*

**30.10 QUIT CLAIM DEED OR Judicial Decree~~Testamentary Residuary Clause~~ IN THIRTY-YEAR CHAIN**

A recorded quit claim deed or a recorded judiciary decree ~~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); 16 O.S. §31; L. Simes & C. Taylor, Model Title Standards, Standard 4.11, at 33-34 (1960).